

Conceptions of Harm in the Canadian Constitutional Adjudication of Religious Freedom

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I, Ashleigh Keall, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

My research examines the constitutional protection of religious freedom in Canada under section 2(a) of the *Canadian Charter of Rights and Freedoms*. In particular, it considers how courts understand and apply the concept of harm in negotiating the boundaries of the right and in settling conflicts with other rights and social goals. The concept of harm is frequently invoked but rarely acknowledged by courts deciding constitutional religion cases, and is under-theorized in the academic work on religious freedom in Canada. I maintain that harm performs a crucial role at each stage of the constitutional analysis, both explicitly and implicitly, and that judges' recourse to harm is often unthinking and reflexive. My research explores both this functional role that harm plays in the judgments, which I break down into its legitimating, jurisdictional and normative functions, and the particular conceptions of harm that are adopted by courts deciding on the reach of the section 2(a) rights provision. I consider harm's function and meaning through the lens of critical approaches to the concept of harm developed in critical and feminist legal theory. I argue that despite the many challenges that can and should be levied against the use of harm as a legal construct, harm is so deeply embedded in the culture, doctrine and structure of Canadian constitutional law's protection of religious freedom that it can be neither disregarded nor dismissed. It falls to courts to adopt a more critical and reflective approach to harm that works with rather than against the powerful pull to harm in religious freedom cases.

Impact statement

The primary contribution this thesis makes is to the academic literature on law and religion, Canadian constitutional law and theory, and critical theories of harm. Religion is increasingly finding itself before the courts as both emergent and established religions jostle for space in the public sphere. As such, academic research on law's engagement with religion is gaining visibility and urgency worldwide. My work has made three original contributions to research in this field. First, I have provided new insights into how Canadian courts understand and apply the concept of harm in religious freedom claims, shining new light on familiar cases and showing the influence of underlying assumptions and intuitions about harm. Second, I have provided a synthesis of critical and feminist perspectives on harm in constitutional decision-making. These can be helpfully applied in a wide range of legal and theoretical contexts. Finally, I have produced an innovative account of how courts grapple with expressive harm in Canadian constitutional law. Each of these lays a foundation for future research.

Outside of academia, my research will be of use to lawyers and judges faced with disputes over the constitutional protection of religious freedom. As my thesis shows, it is common for courts and advocates to view questions about the limits to religious freedom through the lens of harm, but harm is a highly indeterminate and contested concept. My analysis of how and why courts use harm, and of which harms 'count' in law, provides a new clarity to the constitutional adjudication of religious freedom. This clarity will be valuable for courts and advocates when they invariably encounter challenging questions about the nature, degree, and proof of harm in religious freedom cases.

Although this project focuses on Canadian law, its conclusions reach beyond Canada. Legal systems in western constitutional democracies are also grappling with the difficult questions of law and religion that I explore in this thesis. My analysis of Canadian section 2(a) decisions provides a case study that opens up avenues for international comparative research, using the concept of harm as a common theme linking different jurisdictions and legal systems. The theoretical critiques of harm I develop and apply in the thesis are also applicable everywhere, providing scholars and jurists with a new synthesis of a diverse literature.

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1 Introduction

1.1 The context

I was recently granted UK citizenship, for which I was required to affirm my allegiance to Queen Elizabeth II at a citizenship ceremony in Southwark, London. In his welcome address, former mayor of Southwark Charlie Smith had this to say about Britain's approach to religious freedom: 'We have the right to speak our minds and practice our own religions, and the responsibility of doing so in a way that does not cause social harm.' In this one simple statement, the mayor gave voice to an assumption that underpins popular, academic, and judicial approaches to religious freedom: that religious freedom is not limitless, and that those limits are set by the harm one's religion causes to others.

The idea that we are free to practice our religion only up to the point at which it harms others is an intuitive, reflexive, and seemingly uncontroversial response to the challenges presented by the right to religious freedom in a democratic, pluralist society. When a Quebec judge refused to hear the case of Rania el-Alloul because she was wearing a hijab, el-Alloul retorted in a news interview: 'I'm not making harm for anybody because of my hijab, for anybody, and this is a freedom to me'.¹ The Quebec Court of Appeal concurred, repeatedly stating that litigants such as el-Alloul were permitted to wear religious clothing in courtrooms provided it did not harm an overriding public interest.² Likewise, when several provincial law societies refused to accredit a new law school at an evangelical Christian university because it prohibited students and staff from acts of sexual intimacy between same-sex partners, news reports stated with certainty that the religious freedom of the university members could only legally be curtailed with evidence of harm to others.³ Supporters of the university were quick to point out the harms to their community of denying accreditation, while its opponents retorted with a litany of individual and social harms flowing from accreditation in the face of the conduct requirement.⁴

¹ 'I don't think my hijab is harming anybody – el-Alloul' *CTV News Montreal* (29.02.15) <<https://montreal.ctvnews.ca/video?clipId=560595&playlistId=1.2257501&binId=1.1332485&playlistPageNum=1>> accessed 16.02.20.

² *El-Alloul c Procureure Générale du Québec*, 2018 QCCA 1611. Since this case was decided, the province of Quebec passed Bill 21, which bars certain public sector workers from wearing religious symbols in the course of their employment and requires that people accessing public services do so with their faces uncovered: *Loi sur la laïcité de l'État*, SQ 2019, c12.

³ Bramham, 'TWU's law school debated' *Vancouver Sun* (10.04.14) <<https://vancouver.sun.com/news/staff-blogs/twus-law-school-debated>> accessed 16.02.20.

⁴ Compare, for instance, Trinity Western University's *Factum of the Appellants: Trinity Western University v Law Society of Upper Canada*, paras 162-65, to Lesbians, Gays, Bisexuals, and Trans People of the University of Toronto (LGBTOUT), *Factum of the Intervener: Trinity Western University*

This is not a new idea. Expounding on the limits of the state's ability to regulate religion, American founding father Thomas Jefferson famously wrote: 'The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg'.⁵ Centuries later, US Supreme Court Justice Ruth Bader Ginsburg invoked both the spirit of Jefferson and another well-known corporeal adage in her powerful dissent in *Burwell v Hobby Lobby Stores*, stating that '[y]our right to swing your arms ends just where the other man's nose begins'.⁶ It is only when the exercise of one's religion causes harm – a broken nose, a picked pocket – that the state can justifiably limit religious freedom. These are, at their core, versions of John Stuart Mill's famous 'principle of liberty,' which came to be known as the harm principle. Mill wrote that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.⁷

Harm provides an air of certainty and promise in disputes arising when the conditions of pluralism – the acknowledgement of more than one 'right' way to live one's life – run up against dominant values in western, liberal democracies. The need to prevent harm to others is taken to represent a unifying moral principle that cuts across different conceptions of the good,⁸ with harm providing a 'shared language' around which diverse people can coalesce.⁹ Many academics and theorists writing on law and religion thereby seize on harm as a principled limit to religious freedom.¹⁰ They maintain that courts and legislatures should be guided, either primarily or in part, by considerations of harm in deciding when religious rights should yield to other rights or social goals.

v Law Society of Upper Canada, both online: <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37209>> accessed 16.02.20.

⁵ Thomas Jefferson, 'Notes on the State of Virginia' in Jefferson, *Writings (1743-1826)* (Viking 1984) 285.

⁶ *Burwell v Hobby Lobby Stores*, 134 S Ct 2751, 2791 (2014), quoting Zachariah Chafee, 'Freedom of Speech in War Time' (1919) 32 HarvLRev 932, 957. See Smith, 'Is the Harm Principle Illiberal?' (2006) 51 AmJJuris 1, 9-11 on what he calls the 'somebody else's nose adage' and how it contributes to the harm principle's resonance and rhetorical power.

⁷ Mill, *On Liberty and Other Essays* (OUP 2008, 1859).

⁸ Stanton-Ife, 'The Limits of Law' (*The Stanford Encyclopedia of Philosophy*, Winter 2014) <<http://plato.stanford.edu/archives/win2014/entries/law-limits/>> accessed 16.02.20, citing Barry, *Justice as Impartiality* (Clarendon 1995) 87-88 and Scanlon, 'Preference and Urgency' (1975) 72 JPhil 655, 655-59.

⁹ Plant, 'Religion in a Liberal State' in D'Costa, Evans, Modood and Rivers (eds), *Religion in a Liberal State* (CUP 2013) 9; Malik, 'Religion and Sexual Orientation' in D'Costa, Evans, Modood and Rivers (same volume) 67.

¹⁰ Hamilton, *God vs The Gavel* (CUP 2005); Plant (n9); Malik (n9); Wintemute, 'Accommodating Religious Beliefs' (2014) 77(2) MLR 223; Chemerinsky and Goodwin, 'Religion is Not a Basis for Harming Others' (2016) 104 GeoLJ 1111; Tebbe, *Religious Freedom in an Egalitarian Age* (HUP 2017).

The language of harm is also suggestive of the progressive realisation of rights and protections for people on the margins of society. The power of the concept of harm derives from what it is held *not* to be: harm is not moralism, or offense, or social convention. The turn to harm was, for a time, synonymous with the rejection of damaging, socially conservative movements to limit individual freedoms for the wrong reasons.¹¹ From the 1960s onward, the emphasis on harm in liberal and popular discourse has been a means of emphasizing the actual social effects of laws and policies, and of promoting the idea of our bounded, private selves protected by rights discourse, particularly when it comes to the regulation of contentious social activity such as drug use, sex work, and pornography. Labelling something a ‘harm’ affirms the real injuries suffered by a person or group and renders their pain legible in law: consider, for example, how feminists so often call attention to gendered harms, many of which were and continue to be insufficiently recognized in legal and political spheres.¹²

However, it is often the simplest concepts that present the greatest difficulty. Harm is a vague and highly contested concept; what counts as ‘harm’ will depend on the context in which it arises and the perspective of the person judging it. This can result in the exclusion of legitimate forms of harm based on ‘unthinking assumptions about what sorts of events harm us and what sorts of events don’t’.¹³ It has been described as ‘slippery’¹⁴ and ‘capacious’, a ‘veritable joker card’ capable of immense manipulation to different and often incommensurate ends.¹⁵ And as we move further from the types of clear physical or material harms that attract wider consensus, it becomes even more challenging to articulate and understand the meaning of harm and the role that it should play in setting principled limits on the right.

We should perhaps be even more suspicious of claims to harm in the context of law and religion, given the subjective nature of religious belief and the tendency for hegemonic understandings of harm to exclude and punish unfamiliar practices,¹⁶ a tension I address throughout this thesis. And yet, it is in religious freedom cases that one sees an abundance of harm-based reasoning. In *R v Big M Drug Mart*, the Supreme Court’s first religious freedom decision issued after the *Canadian Charter of Rights and Freedoms*¹⁷ (hereinafter ‘the Charter’) came into force in 1982, Chief Justice Dickson held that people must be free to believe whatever their conscience dictates and to act on those beliefs, ‘provided *inter alia* only

¹¹ Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *JCrimL&Criminology* 109. See eg Hart, *Law, Liberty and Morality* (OUP 1963).

¹² See eg MacKinnon, *Feminism Unmodified* (HUP 1987); West, *Caring for Justice* (NYU 1997); Craig, *Putting Trials on Trial* (McGill-Queen’s 2018) 9-11.

¹³ West (n12) 95-100.

¹⁴ Conaghan, ‘Law, Harm and Redress’ (2002) 22 *LS* 320, 322.

¹⁵ Valverde, ‘The Harms of Sex and the Risk of Breasts’ (1999) 8 *S&LS* 181, 191, 184.

¹⁶ Beaman, *Defining Harm* (UBC 2008).

¹⁷ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

that such manifestations do not injure his or her neighbours ...'.¹⁸ Subsequent Charter cases on religious freedom have followed this dictum like a mantra, frequently reverting to the language of harm in articulating where the limits to religious freedom lie. Consider the following statements made by Canadian courts:

A secular state does not – and cannot – interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.¹⁹

[T]his secular state of Canada simply leaves conscience and religion quite alone, with one exception, founded on pure reason. The exception requires the state to intervene to prevent the practice or expression of conscience and religion from causing harm to others physically or mentally, or from violating the constitutionally guaranteed rights of others.²⁰

However, our jurisprudence does not allow individuals to do absolutely anything in the name of [religious] freedom. ... Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected.²¹

Despite the discursive prevalence of ‘harm’ in constitutional religion cases, courts devote little (if any) attention to the complex questions raised by a harm analysis. There is no mention of the critical work on harm that has developed in other areas of law, no careful scrutiny of the concept and what it entails. Courts hearing constitutional religious freedom claims adopt harm, wholesale, as a principled boundary to the right without questioning the assumptions and beliefs underpinning their identification and elaboration of the relevant harms in the case. Harm has simply become part of the furniture of a religious freedom Charter claim, its function and its meaning not questioned but assumed. This thesis sets out to look more closely at what harm entails in the religion cases, how it is deployed, and what issues it raises in light of the critical work on harm that has developed in other contexts.

I was drawn to the study of harm and its role in the constitutional religion cases in part from this seeming absence of critical reflection, but also for another reason, which stems from my time spent working as a clerk at the Supreme Court of Canada in 2009-10. I was in the courtroom when the members of the Hutterian Brethren of Wilson Colony, who had travelled from Alberta, arrived with their supporters to make their case before the court. They were there to challenge the constitutionality of a provincial regulation requiring that all holders of a driver’s license in Alberta be photographed for inclusion in a databank to prevent identity fraud. The Wilson Colony members believed that it was a sin to be photographed; however,

¹⁸ *R v Big M Drug Mart*, [1985] 1 SCR 295 [123].

¹⁹ *Loyola High School v Quebec*, 2015 SCC 12 [43] (Abella J).

²⁰ *O’Sullivan v Canada* (1991), 45 FTR 284 (FCTD) [32]; see also [45] (Muldoon J).

²¹ *Syndicat Northcrest v Amselem*, 2004 SCC 47 [62] (Iacobucci J).

they also required drivers' licenses to sustain their traditional way of life rooted in farming, collective work, and self-sufficiency. The majority of the court concluded that although the regulation infringed their religious freedom, the violation was justified, Justices Abella, LeBel and Fish dissenting.²² I have always felt that the majority reasons missed something important in this case. The majority was dismissive of the harm claimed by the community members – harm to their ability to live as they had done for centuries, to their spiritual integrity, to their communal traditions. These forms of harm sit less comfortably within the terms of liberal constitutionalism and seemed to slip through the majority's grasp.²³ I was struck by how tempting it is to fall into the comfortable embrace of an 'objective' harm test to decide difficult matters of morality and justice, and yet how difficult it is to get the harm analysis right. It was clear that there was work to do on understanding and configuring the relationship between law, harm, and religious freedom in Canada.

1.2 Research question and argument

My research examines how Canadian courts understand and apply the concept of harm in constitutional decisions on religious freedom. It answers three research questions which fall under this umbrella: (1) What 'counts' as harm in decisions made under section 2(a) of the Charter? (2) What work is the concept of harm doing in these cases? (3) What issues arise from this use of harm in religious freedom Charter decisions, and how can the critical approaches to harm developed in the literature help us to understand these challenges?

The terms of law's engagement with religion in Canada are largely set by section 2(a) of the Charter, which states simply that every person has a right to freedom of religion and conscience.²⁴ Courts interpreting this broadly worded provision apply a simple doctrinal test for determining a rights violation: a person's religious freedom is breached if a law or practice interferes with her sincere religious belief in a non-trivial manner.²⁵ The breach can nonetheless stand if the government can prove that the limit on the right is reasonable and demonstrably justified in a free and democratic society under section 1 of the Charter.²⁶ Courts

²² *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

²³ As LeBel J wrote, 'We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations' (ibid [182]).

²⁴ Charter (n17), s2(a).

²⁵ *Amselem* (n21). Although cases that involve alleged breaches of state neutrality employ the *Amselem* test, the Supreme Court recently held that in such cases a court should ask whether the state has favoured or hindered any particular religious belief system which could result in a 'distinction, exclusion [or] preference based on religion': *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [120]; see also [72]-[78].

²⁶ Charter (n17), s1. The Charter's two-prong approach to religious rights adjudication closely resembles that of the UK Human Rights Act 1998 and art 9 of the European Convention on Human Rights.

assess the government's justification through the prism of the 'Oakes test,' which requires that the limiting measure be rationally connected to the government's pressing and substantial objective, be minimally impairing of the right, and be proportionate in its effects.²⁷ When the alleged violation stems not from a law but from state conduct, such as a decision made by a state actor or tribunal, then courts will follow the administrative law approach from *Doré v Barreau du Québec* to assess whether the decision-maker reasonably balanced the Charter value(s) at stake and the severity of the interference against the decision-maker's statutory mandate.²⁸ This project focuses on cases where the right to religious freedom was analyzed under s2(a) of the Charter, regardless of whether it arose in the constitutional or administrative law context.

In deciding these cases, courts draw upon familiar narratives of state neutrality, religious accommodation, secularism, equality, and multiculturalism. But these deceptively simple principles obscure their difficult application to religious rights: the meaning of secularism and the specific demands it makes on the state, for one, are far from clear. Likewise, the nature of the equality right and the terms on which it must bend to or resist claims of religiosity is a matter of fierce debate in public life and in the courts.

As I noted above, one way in which courts deal with the complexities and uncertainties of religious freedom cases is to invoke the language of harm. This move is particularly prevalent in cases involving religious claims that appear to challenge the normative foundations of the liberal constitutional order, such as those concerning the practices of polygamy and face veiling – here we see courts take off on a 'vigorous flight to the language of harm'.²⁹ In a reference decision upholding the criminal ban on polygamy, for instance, the judge declared that the case was 'essentially about harm' and proceeded to use the word harm over three hundred times in the judgment.³⁰

I argue in this thesis that the concept of harm is deeply embedded in the structure, doctrine and culture of Canadian constitutional law. It is not only called upon when courts are uncomfortable articulating the underlying values and normative assumptions guiding their

²⁷ *R v Oakes*, [1986] 1 SCR 103; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713.

²⁸ *Doré v Barreau du Québec*, 2012 SCC 12 [7], [55]-[58] [*Doré*]. The *Oakes* test is not used in these cases because of the 'awkward fit' of a section 1 analysis with administrative decisions: *Doré* [4]-[5], [37]-[42]; *Loyola* (n19) [40] (Abella J).

²⁹ Berger, 'Moral Judgment, Criminal Law and the Constitutional Protection of Religion' (2008) 41 SCLR (2d) 1, 29; see also Beaman, 'Introduction' in Calder and Beaman (eds), *Polygamy's Rights and Wrongs* (UBC Press 2014) 1.

³⁰ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [5] [*Polygamy Reference*]. In fairness, the reasons for judgment run to 357 pages, but a rate of nearly one harm reference per page is still impressive. For a harm-based approach in the context of face veiling see *R v NS*, 2012 SCC 72.

judgment, such as in *Polygamy Reference*. Nor is it only cited through off-hand references to cases like *Big M* which centre the concept of harm in the s2(a) analysis. To the contrary, the concept of harm does explicit and implicit work at all stages of the analysis; it shapes the court's judgment and it structures the questions judges ask. It is used to justify state intervention in contentious activity like hate speech, distinguishing legitimate from illegitimate exercises of state power. It provides a conceptual demarcation of the boundary around the individual right to religious freedom and forms the basis of the court's exercise of jurisdiction over the matter. And it performs serious normative work, serving as a vehicle for a host of assumptions and values that inform the decision and reasoning adopted by the court.

Given harm's central role in the s2(a) inquiry, it demands further investigation. In particular, we need to ask what judges mean by the term 'harm.' Which harms matter in the constitutional inquiry, and which do not? Which types of harm are more likely to prevail when competing harms are pitted against each other? And how do differing conceptions of harm relate to the social world from which they arise? This project is an attempt to answer these questions, and to draw attention to sites of slippage in harm's use in the religion cases. If harm is a boundary protecting a zone of personal freedom, it is a highly porous one; notions of harm do not and cannot act as constant or fixed jurisdictional markers. Certain types of harm, such as harms of coercion or physical harm, carry more weight than others, while courts seem barely able to comprehend harms that lie on the periphery of liberal constitutionalism. An open-ended concept like symbolic or expressive harm is especially prone to contestation, sometimes serving as an important vehicle for concerns about social justice and equality but with the capacity to entrench hegemonic interests or values, thereby undermining its more progressive potential.

Despite these critiques, I have concluded that there is little point in trying to dislodge harm from its pedestal in the religion cases. There are several potential explanations for the judicial turn to harm in the adjudication of religious freedom. Discursive emphasis on harm can be a product of deliberate choice, but it can also arise from the deep-seated, intuitive and reflexive role harm plays in guiding the way judges think about difficult moral questions, including those questions that arise in constitutional decision-making around religion. Put simply, harm is here to stay. It thus becomes necessary to consider whether there is any way of working *with* harm and *within* its functions noted above, to use it as a prompt for thoughtfulness,³¹ and to call attention to the evidence and the social context in which the case arose. This cannot be done without first engaging in critical reflection on harm and its function

³¹ Waldron, 'Human Dignity – A Pervasive Value' (*Foundational Concepts in Constitutional Theory*, UCL Laws, London, July 2019) 16-17.

and meaning in the adjudication of religious freedom claims under the Charter. It is my hope that this project can help advocates, judges and academics to engage in this reflective process.

My research focuses on Canada because it presents an interesting case study in law's treatment of religion. On the one hand, Canada has a constitutionally entrenched commitment to multiculturalism and a written constitution that grants courts strong powers of judicial review to protect human rights. However, recent political events indicate Canadians' increased willingness to challenge the dominant national narrative of religious accommodation and pluralism. The province of Quebec, for instance, recently enacted legislation banning public servants in positions of authority such as teachers, police officers and provincial lawyers from wearing religious symbols in the exercise of their duties.³² Although this move has met with substantial resistance,³³ a recent poll found that a majority of Quebecers (and over 40% of Canadians in other provinces) support the law.³⁴ This comes on the heels of Quebec's prior attempt to prohibit women from wearing niqabs when accessing or delivering public services,³⁵ and the (failed) efforts of the former federal government under PM Stephen Harper to ban niqabs in citizenship ceremonies.³⁶ The controversy over events such as these reveal a difficult tension in Canadian responses to religious freedom, a tension one also sees in the US, in Europe, and around the globe. My conclusions thus apply more broadly to other western constitutional democracies that struggle to articulate principled limits to religious freedom. They, too, run up against explicit and implicit notions of harm in that effort, and thus the questions I raise in this thesis bear asking in these other jurisdictions as well.

Some scholars of law and religion have addressed the question of harm, however tangentially. As I noted above, some advocate a prominent role for harm in the adjudication of religious freedom.³⁷ Others are more critical, arguing that courts deploy the language of harm as a diversionary tactic³⁸ or, less deliberately, as a form of 'proxy debate' through which courts can maintain a fiction that their constitutional analysis is removed from cultural

³² *Loi sur la laïcité de l'État* (n2). An application for interlocutory injunction has been rejected (*Hak v Procureure générale du Québec*, 2019 QCCA 2145), leave to appeal to SCC filed, decision pending.

³³ Boshra, 'Protests against Bill 21 will be held across Quebec this weekend' *CTV News* (04.10.19) <<https://montreal.ctvnews.ca/protests-against-bill-21-will-be-held-across-quebec-this-weekend-1.4623981>> accessed 16.02.20; Malhotra, 'McGill students strike against Bill 21' *The Bull & Bear* (26.01.20) <<http://bullandbearmcgill.com/mcgill-students-strike-in-outpour-against-bill-21/>> accessed 16.02.20.

³⁴ Authier, 'Majority of Canadians disapprove of Bill 21 but Quebecers are in favour' *Montreal Gazette* (06.08.19) <<https://montrealgazette.com/news/quebec/majority-of-canadians-disapprove-of-bill-21-but-quebecers-are-in-favour-poll>> accessed 16.02.20.

³⁵ *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, SQ 2017, c 19.

³⁶ *Minister of Citizenship and Immigration v Zunera Ishaq*, 2015 FCA 194.

³⁷ Text to n8-n10, this chapter.

³⁸ Calder, 'Conclusion' in Calder and Beaman (n29) 215; Beaman (n16).

constraints.³⁹ Lori Beaman, Professor at University of Ottawa's department of classics and religious studies, has squarely addressed the interplay of harm and religious freedom. Her 2008 book, *Defining Harm: Religious Freedom and the Limits of the Law*, applies a Foucauldian critique of harm to the case of Bethany Hughes, a mature minor of the Jehovah's Witness faith who was administered a blood transfusion against her will.⁴⁰ In her book Beaman explores the ways in which courts regulate religious freedom through the discursive construction of the 'reasonable' religious claimant. She explains that 'reasonableness' is constituted through the concept of harm, itself a product of the notions of excess and consent: that which is excessive or violative of free will signals a risk of harm which prompts the courts to limit the person's freedom to act according to her beliefs. In this way the limits of religious freedom are set by particular conceptions of harm which reflect hegemonic value systems embedded in the discourses of law and, in Bethany's case, social work and medicine.

Beaman's work has been an important jumping off point for my own research. However, her work does not cover the field when it comes to judicial reliance on harm in religious freedom cases. As she states herself, '[d]espite its use of case law as a site for analysis, *Defining Harm* is not a legal analysis'.⁴¹ Instead she adopts a 'critical socio-legal' perspective that operates outside the boundaries of law, writing that her 'concern is not with precedent but with power'.⁴² My concern in this thesis is with both precedent *and* power. I credit Beaman with unveiling the ways in which law's governing authority acts to restrict and inhibit heterodox religious claims, demonstrating the powerful, normative force of constructions of harm. But there is more to say about how the discourse of harm shapes and influences the decisions of Canadian courts as they mediate the interaction of religion and constitutional law. Unlike Beaman, my gaze is trained on court judgments and doctrinal developments but, like Beaman and other critical legal scholars, I read and interpret those judgments through a wider lens.

1.3 Definitional issues

In this thesis I refer to both the *concept* of harm and to particular *conceptions* of harm. For this distinction I rely on the work of Ronald Dworkin.⁴³ The concept of harm is contested – though I hesitate to describe it as one of Gallie's 'essentially contested concepts'⁴⁴ – in that

³⁹ Berger, 'Moral Judgment' (n29); Berger, *Law's Religion* (UTP 2015) 164-66 [LR].

⁴⁰ Beaman (n16).

⁴¹ *ibid* 3.

⁴² *ibid*.

⁴³ Dworkin, *Law's Empire* (HUP 1988).

⁴⁴ Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167. I hesitate mainly because I do not want to jump on the 'essentially contested concept' bandwagon (see

it attracts different and often incommensurate interpretations. For a libertarian legal scholar, the ‘harm’ to be prevented in the harm principle might include physical force and fraud, and nothing more.⁴⁵ Others may adopt the more egalitarian perspective of Joel Feinberg, for instance, who defines harm as any wrongful setback to interests – a sufficiently wide definition to capture environmental and public interest harms.⁴⁶ Those differing interpretations of the concept of harm are what I mean when I speak of ‘conceptions’ of harm.⁴⁷ Likewise, I refer to the harm principle in the singular, rather than follow the lead of James Edwards who emphasizes that there are a number of distinct ‘harm principles,’ from Mill’s ‘harm prevention principle’ to Feinberg’s permissive, instrumental version.⁴⁸ Whilst acknowledging the variability of approaches to the harm principle, I believe it is capable of bearing the weight of those multiple interpretations. The fact of variance – that there are different, competing conceptions of what ‘the harm principle’ requires – does not make it necessary to speak of there being more than one principle, as we can instead speak of its different conceptions.

Some might object that I am playing fast and loose with the label ‘constitutional law’ given that I analyse several cases that arose outside of the constitutional framework. However, it is common for constitutional concerns to bleed into other areas of law, such as administrative law; administrative decision-makers are in fact required to take Charter values into account.⁴⁹ When law and religion meet, even outside the constitutional context, courts will draw on the section 2(a) Charter jurisprudence as an interpretive aid in their analysis of themes such as secularism, state neutrality, and religious freedom. For these reasons I am willing to draw constitutional conclusions from cases that are not strictly constitutional in nature.

1.4 Methodological approach

The theoretical orientation of my research builds on two schools of thought: feminist legal theory and law in context.

Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21(2) *Law&Phil* 137, 148-49), though I suspect that ‘harm’ would meet Gallie’s criteria.

⁴⁵ Epstein, ‘The Harm Principle – And How it Grew’ (1995) 45 *UTLJ* 369.

⁴⁶ Feinberg, *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (OUP 1984) 36.

⁴⁷ One could also describe the concept of harm as a ‘cluster concept’: a concept without a single, fixed meaning but that encompasses a cluster of meanings that bear some similarity or relationship to each other. Wittgenstein used the term ‘family resemblance’ to describe the commonalities between different meanings of a single term: *Philosophical Investigations* (tran. Anscombe, Blackwell 1953, 1972) paras 66-67, 77. See Naffine, *Law’s Meaning of Life* (Hart 2009) 40, 46-47.

⁴⁸ Edwards, ‘Harm Principles’ (2014) 20 *LT* 253; Edwards, ‘Theories of Criminal Law’ (*The Stanford Encyclopedia of Philosophy*, Fall 2018) <<https://plato.stanford.edu/archives/fall2018/entries/criminal-law/>> accessed 16.02.20.

⁴⁹ *Doré* (n28). See also Berger, *LR* (n39) 96 (defending his constitutional analysis of administrative law cases).

1.4.1 Feminist legal theory

Feminist legal theory influences how I understand both religious freedom and harm. On religion, a feminist perspective acknowledges the potential conflict between the aims of substantive equality for women and oppressed groups, and the capacity for harms to be incurred by those very groups through the extension of religious rights or exemptions.⁵⁰ It encourages a critical stance toward state action taken in the name of ‘protecting’ women and marginalized communities.⁵¹ It also leads me to question dominant understandings of fundamental concepts that recur in law and religion cases and theory, such as agency,⁵² equality⁵³ and, most notably for this thesis, harm. The concept of harm demands a feminist critique given the ways in which law’s conceptions of harm are so often gendered, excluding or only partially addressing harms more likely to be suffered by (racialized) women and obscuring their normative basis within claims to objectivity and universality.⁵⁴ Feminist theory does not relate solely to issues affecting women; feminist critiques of the public/private divide and of claims to liberal neutrality, for instance, are resonant in law and religion circles and encourage a critical stance more generally.

My research is situated within feminist constitutional scholarship that sees the Charter as a tool that can be harnessed to achieve social change, and that judges Charter decisions against that standard.⁵⁵ Some feminist and critical legal theorists are skeptical of legal research that confines itself to a progressive ‘internal’ critique of constitutional rights, and have exposed the inadequacies of purely legal responses to complex social problems.⁵⁶ However, religious adherents and people affected by the religiously motivated actions of others are increasingly turning to the courts to resolve their conflicts. As such, judicial decisions are playing a vital role in the regulation of religion and equality in Canadian society and demand critical attention. The Charter has an important instrumental function, holding the unjust exercise of

⁵⁰ Cohen, Howard, and Nussbaum (eds), *Is Multiculturalism Bad for Women?* (Princeton 1999); Deckha, ‘Gender, Difference, and Anti-Essentialism’ in Eisenberg (ed), *Diversity and Equality* (UBC 2006) 114; Hélie and Ashe, ‘Multiculturalist Liberalism and Harms to Women’ (2012) 19(1) *UCDavis JIntL&Policy* 1.

⁵¹ Mahmood, *Politics of Piety* (Princeton 2005); Fernando, ‘Reconfiguring Freedom’ (2010) 37(1) *AmEthnologist* 19; Laborde, ‘State Paternalism and Religious Dress Codes’ (2012) 10(2) *I-CON* 398.

⁵² Particularly regarding non-hegemonic religious practices like veiling and polygamy; see eg Mahmood’s feminist reconceptualization of agency among Egyptian Muslim women involved in the piety movement (n51); Beaman (n16).

⁵³ Smart, *Feminism and the Power of Law* (Routledge 1989); Munro, *Law and Politics at the Perimeter* (Hart 2007) 131-50.

⁵⁴ Smith, *Feminist Jurisprudence* (OUP 1993); West (n12) 11; Conaghan (n14).

⁵⁵ Nedelsky, ‘Reconceiving Rights as Relationship’ (1993) 1 *RevConstStud* 1; Jhappan (ed), *Women’s Legal Strategies in Canada* (UTP 1999); Young, ‘Social Justice and the Charter’ (2013) 50 *OsgoodeHallLJ* 669.

⁵⁶ Brown and Halley (eds), *Left Legalism/Left Critique* (Duke 2002); Smart (n53); Bakan, *Just Words* (Routledge 1997).

state power to account and generating wider public debate about rights and state responsibility; it also has an expressive dimension, each Charter judgment sending a message that affects how we understand our relationship to one other and to the state. Both of these roles suggest that the Charter is a powerful tool for social change.⁵⁷ My research aims to restore some faith in the Charter guarantee of religious freedom by demonstrating how it and its peculiar reliance on the concept of harm can better serve the goal of social justice in Canadian society.

In some respects, my project does a disservice to the feminist project of centering female or minority voices to reshape the traditional way of asking and answering legal questions.⁵⁸ In Chapter 2, for instance, I structure my review of the philosophical roots of the harm principle around the traditional canon of (male) authors, such as John Locke, Mill, HLA Hart, and Feinberg. Feminist critiques of harm are discussed subsequently – a choice made in the interest of clarity, but which may re-inscribe gendered, hierarchical ideas about legal authority.

Despite such challenges, feminist thought has informed my research from start to finish. Sara Ahmed describes how feminism ‘can feel like a switch that is turned on,’ adding that ‘[f]eminist consciousness is when the on button is the default position’.⁵⁹ Feminism is my intuitive starting point when approaching legal questions. It is always in the background, prompting me to search for the subject erased by legal language, encouraging me to push back against hegemonic assumptions and norms, and informing how I receive, process and present information. Finally, this is a project in which intersectional feminism is taken as a given.⁶⁰ Intersectionality entails recognition of the ways in which power operates across multiple axes and social divisions.⁶¹ It seeks to make the interstices between gender, race, class, ethnicity, religion, and sexuality visible. Where I have failed to do so, I hope my inattention will be brought to my attention by others so that my intuitive turn to feminism becomes an intuitive turn to intersectional feminism.

1.4.2 Law in context

I also situate my research within the ‘law in context’ movement, which shares many features and normative underpinnings with feminist legal theory. It starts from the assumption that law both constructs and is a product of the social norms and relations in which it is embedded. Under this approach, law is ‘not something to be considered separately from

⁵⁷ Young (n55) 670-71.

⁵⁸ Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ (1989) UChiLForum 139; Munro (n53) 13.

⁵⁹ Ahmed, *Living a Feminist Life* (Duke 2017) 31.

⁶⁰ As Ahmed says, citing Dzodan, ‘feminism will be intersectional “or it will be bullshit”’ (ibid 5).

⁶¹ Collins and Bilge, *Intersectionality* (Polity 2018).

society’ – rather, ‘it is “in” society’.⁶² In order to properly understand and assess judicial decisions on constitutional rights, then, the law in context approach requires consideration of the wider social, political and cultural context in which Charter rights are adjudicated.⁶³

There are two specific lessons from the law in context approach that inform this thesis, which also reflect feminist perspectives. The first is that it is necessary to look beyond positive law – the rules and judgments of a legal system – to the assumptions, techniques and norms that inform the development and operation of law.⁶⁴ Law cannot be artificially divided from its animating principles and the culture in which it is situated, so to properly understand law we need to identify these underlying assumptions and subject them to critique.⁶⁵ A law in context approach thus requires a degree of comfort with ‘blurred boundaries’ – between law and morality, law and culture, law and social movements – and, conversely, a skepticism toward the idea of a bright line between legal norms and other (moral, religious, intellectual) forms of authority.⁶⁶ Positive law and the principles that give it meaning cannot be separated and must be examined together.

The second, related lesson concerns the need to resist the ‘lure of absolutes’.⁶⁷ In the quest for easy answers it is a mistake to aim for generalisable, universal principles that cut across all cases and contexts. Instead we must acknowledge law’s shifting terrain and its necessary contradictions, a product of the way in which the law’s constitutive principles and culture allow for differing results in different contexts. A rejection of absolutism and formalism does not mean there is no role for theorizing from principles; as Selznick writes, a contextual approach suggests that we look to principles as opportunities ‘to realize relevant ideals in the context at hand’.⁶⁸ A law in context approach can help to better understand and protect rights, such as religious freedom, by being attentive to their real-world constraints and to the space between rights that emerges when they converge or conflict.

Both of these theoretical orientations – law in context and feminist legal theory – support the animating assumption of this project, which is that when judges adjudicate religious freedom cases under section 2(a) of the Charter, they are doing far more than logically and rationally applying rules to the facts of the case. Religious freedom entails

⁶² Selznick, “‘Law in Context’ Revisited” (2003) 30(2) JLS 177, 179.

⁶³ Eisenberg, ‘Introduction’ in Eisenberg (n50) 2; Samuels, ‘Feminizing Human Rights Adjudication’ (2012) 21 Fem LS 39, 40.

⁶⁴ Selznick (n62) 177-80.

⁶⁵ Twining, *Law in Context* (OUP 1997) 44; see also Berger, *LR* (n39).

⁶⁶ Selznick (n62) 177-78.

⁶⁷ *ibid* 183.

⁶⁸ Selznick (n62) 184.

political, ethical, and moral judgments, and a simple resort to the concept of harm does not dispense with these judgments; to the contrary, it brings them to the fore.

1.4.3 Methods of case analysis

My research is a mixed theoretical-doxtrinal examination of cases decided under section 2(a) of the Charter (hereinafter ‘s2(a)’). I draw heavily on theoretical literature on harm and the harm principle, religious freedom and secularism, and Canadian constitutional law. I apply the insights gained from this theoretical work to a selection of s2(a) religious freedom decisions. The intuitive position I started with and which guided my case analysis was that courts rely on harm in judging religious freedom disputes under s2(a), that their reliance on harm is generally unacknowledged, and that harm’s deployment in these cases warrants closer examination. I wanted to better understand the assumptions informing the courts’ use of the concept of harm and to examine whether and to what extent those assumptions trouble social fault lines, exacerbating social inequality and divisions.

My case analysis was conducted in two stages. First, I collected all Canadian court decisions on religious freedom decided under s2(a) of the Charter that explicitly used the word ‘harm’ in the judgment.⁶⁹ After rejecting those cases that did not demonstrate sufficient engagement with the s2(a) right, I ended up with 102 decisions which I read and analyzed in an open-ended manner. The focus at this stage was on generating ideas about courts’ explicit and implicit use of harm, noting the role harm plays within the Charter’s doctrinal tests. My general findings at this stage laid the foundation for the second stage of my research, in which I conducted a closer, more careful analysis of 18 important s2(a) cases decided in the last fifteen years. These cases were chosen regardless of whether the word ‘harm’ was used in the judgment.⁷⁰ The majority (15) are Supreme Court of Canada decisions.⁷¹ These comprise all Supreme Court cases decided since 2004 that engage with s2(a) of the Charter in a more than cursory manner. I focused this second stage of my research on Supreme Court judgments

⁶⁹ I used the Westlaw International database of ‘Canadian constitutional cases,’ chosen for ease of use and breadth of content. The date range I used was from 17.04.82 (when the Charter came into force) to 30.06.18.

⁷⁰ Only five of the 18 cases analysed in my second round were not in my original sample of 102.

⁷¹ The Supreme Court cases are: *Amselem* (n21); *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, [2004] 2 SCR 650; *Reference re Same-Sex Marriage*, 2004 SCC 79; *Multani v Commission scolaire Marguerite-Bougeoy*s, 2006 SCC 6; *Bruker v Marcovitz*, 2007 SCC 54; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30; *Hutterian Brethren* (n22); *R v NS* (n30); *SL v Commission scolaire des Chênes*, 2012 SCC 7; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11; *Loyola High School v Quebec*, 2015 SCC 12; *Mouvement laïque* (n25); *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54; *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. I selected these cases using the Supreme Court’s online database: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/nav_date.do>.

because they tend to demonstrate a deeper engagement with the theoretical issues surrounding religious freedom. My sample also includes three provincial court decisions that settle important issues of law and religion or whose treatment of harm was otherwise relevant to my research.⁷²

I narrowed my focus to cases decided in the past fifteen years for three reasons. First, I wish to provide an up-to-date picture of the ways in which Canadian courts approach issues of law and religion. The past fifteen years have seen a surge in religious freedom issues being brought before the courts,⁷³ and I wanted to capture this trend. Second, I am interested in the role harm plays within the doctrinal test developed by the Supreme Court in *Syndicat Northcrest v Amselem* (hereinafter ‘the *Amselem* test’).⁷⁴ This test is used to adjudicate claims of religious freedom under s2(a), and I wanted to analyze all Supreme Court religious freedom cases that have applied that test since its inception in 2004. Finally, I thought it would be useful to analyze cases decided after the Supreme Court’s 2003 decision in *R v Malmo-Levine*, which includes an in-depth analysis of the harm principle and its status as a legal principle.⁷⁵ I hypothesized that the invocation of harm in *Malmo-Levine* (and later in *R v Labaye*⁷⁶) might prompt greater theorizing on harm amongst advocates and jurists.

In this second stage I analyzed the cases through the lens of the research questions I stated above, namely: what ‘counts’ as harm in the court’s analysis?⁷⁷ At what stage in the analysis do courts turn to harm? What work is harm doing in the religious freedom cases? And finally, how do the critical approaches to harm developed in the literature map onto the judicial use of harm in these cases? I was looking for both explicit and implicit references to harm. The results of my case analysis form the bulk of Chapters 4 through 6 of this thesis. Although my analysis in those chapters tends to focus on the smaller subset of 18 cases which I subjected to a deeper reading, I still draw on other s2(a) Charter cases where relevant. Many such

⁷² *Polygamy Reference* (n30); *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3; *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [CMDs]. Note that although CMDs was released after my cut-off date of 30.06.18, the lower court judgment of the Ontario Superior Court (2018 ONSC 579) was already in my sample. My analysis focuses on the Court of Appeal judgment.

⁷³ Berger describes this period as the ‘renaissance in the law of religious freedom’ in ‘Religious Diversity, Education, and the “Crisis” in State Neutrality’ (2014) 29(1) *CanJL& Society* 103, 109.

⁷⁴ *Amselem* (n21).

⁷⁵ *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74.

⁷⁶ *R v Labaye*, 2005 SCC 80.

⁷⁷ I developed a taxonomy of harms and tracked the courts’ references to each type of harm. I grouped them into individual harms (physical, psychological, dignitary, identity-based, democratic, coercive, spiritual, reputational, individually associative); social harms (expressive, collectively associative, egalitarian, institutional, harm to values) and other (aesthetic/property-based, economic, and environmental).

decisions formed part of my first sample of 102 cases⁷⁸ while others are so enmeshed in the case law and literature in this field that some reference to them is inevitable.⁷⁹

1.5 Thesis structure

The first substantive chapter of this thesis situates my research within the existing theoretical work on harm and the harm principle. It begins with a brief historical review of the development of the harm principle in liberal theory, drawing primarily on the work of Mill whose foundational thoughts on harm continue to resound in theory and jurisprudence. I then consider Feinberg's efforts to revitalize and defend the harm principle, along with a more limited offense principle, as the only appropriate justifications for criminal sanction. Mill and Feinberg's work must be understood in the context of their opponents, the legal moralists, and so I consider the work of Patrick Devlin and modern moralists who maintain that the legal enforcement of morality is legitimate and just. I seek not only to demonstrate the deep roots and enduring presence of the harm principle in western liberal legalism, but also to argue that concepts like harm, offense, moralism, and paternalism are not water-tight categories. I then turn to how the harm principle has fared in Canadian law and conclude, after a review of two landmark Supreme Court cases, that harm is playing an increasingly important role in setting constitutional limits on the state's power to punish or regulate socially divisive conduct. Concerns about this role and about the courts' ability to adjudicate harm animate the final part of this chapter, in which I explore critical perspectives on harm. Drawing from a wide variety of academic literature, I have developed four substantial critiques of harm which are relevant to the constitutional adjudication of religious freedom, and which I draw upon in the remaining chapters of the thesis.

Chapter 3 shifts the focus from harm to religious freedom, and queries why it is that courts and advocates seem so ready to use the language of harm to resolve constitutional religious disputes. I propose that the discursive emphasis on harm in the religion cases emerges from a combination of conceptual, cultural, phenomenological and pragmatic reasons. Some of these reasons suggest that the turn to harm is deliberate, while others point to more deeply rooted, intuitive reasons for the turn to harm. Different rationales will predominate in different cases. The aim is not to isolate which of these many rationales is most relevant or determinative, but to demonstrate that the very fact of a multiplicity of

⁷⁸ Eg *Big M* (n18), *Edwards Books and Art Ltd* (n27); *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825; *Trinity Western University v College of Teachers*, 2001 SCC 31.

⁷⁹ Eg *Chamberlain v Surrey School District No 36*, 2002 SCC 86.

explanations for harm's discursive resonance suggests that it is likely to continue to exert its influence in the constitutional adjudication of religion.

In Chapters 4 through 6, I explore the results of my case analysis whose methodology I outlined above. The aim of my analysis was to track and analyse judicial approaches to harm in s2(a) cases: to find patterns and themes in how courts use the concept of harm to inform or frame their analysis of the right to religious freedom, and to subject those to critique.

Chapter 4 draws on these cases to explore the role harm plays within s2(a) Charter decisions on religious freedom. I maintain that, overall, harm has three functions in this body of case law: first, it performs a legitimating function. This occurs in cases where courts proclaim that the government action or the court's decision itself is justifiable because it is in the service of harm prevention. Here we see harm being used to differentiate the case at hand from the regulation of both personal offense and morals. Next, harm performs an important jurisdictional role in the religion cases: it serves as a discursive marker of the boundaries around the right. At each stage of the doctrinal tests under s2(a), risk of harm to others sees the religious practice or conduct slipping outside the bounds of law's protection while, conversely, insufficient proof of harm to the claimant means law will not exercise jurisdiction over the matter, and the claimant is left without a remedy. Finally, harm exercises a normative function in the cases. The designation of particular harms as relevant (or not), and the identification of particular practices or individuals as posing a risk of harm (or not) are powerful expressions of the values and norms informing law's protection of religious freedom. Overall, this chapter demonstrates that the concept of harm does substantial work in the religion cases in order to show, in light of the multiple rationales for judicial resort to harm explored in the previous chapter, how deeply embedded harm is in the structure and methods of constitutional reasoning under s2(a) of the Charter.

Chapter 5 focuses on the meaning of harm, by considering which harms are prioritized under s2(a) and how they are understood by the courts. I conclude that Canadian courts adopt a hierarchical ordering of harms in the religion cases. Drawing on Ben Berger's work on law's cultural rendering of religion under s2(a), I maintain that it is harms that fit most neatly within liberal constitutionalism's guiding commitments that sit at the top of the hierarchy: harms of coercion and physical harm. Psychological harm, associational harm, and harm to one's religious or cultural identity are also of concern to courts, but in partial and tenuous ways. At the bottom lie economic, aesthetic, and – most notably – spiritual harms, whose imprint on the cases threatens law's claimed distance from religious doctrine and which merit little judicial attention accordingly. All of these harms are mediated through the lens of the court's over-arching commitment to preventing harms to the state in the form of its legal institutions

and public or constitutional values. I demonstrate throughout the chapter how these dominant conceptions of harm lead at times to unduly narrow and restrictive readings of the injury at stake. However, I also explore the many ways in which attempts to fix the concept of harm with any stable meaning remain elusive.

Chapter 6 takes a closer look at a particularly challenging form of harm, which is symbolic or expressive in nature. I use the concept of expressive harm to illustrate how harm-based arguments can be deployed for very different reasons, to uncertain and sometimes conflicting ends. First, I argue that the concept of expressive harm, though potentially difficult to conceptualize and apply in law, has an important egalitarian dimension. The expressive effect of state action can have a deeply harmful influence on the social world, proclaiming some people as less than full and equal citizens and contributing to their social subordination. When used to highlight these ‘invisible’ forms of injury, the concept of expressive harm is a powerful and valuable construct in law’s adjudication of religious freedom. But the slippery quality of expressive harm means it can also be used to less egalitarian ends. I explore both of these dimensions to expressive harm in this chapter and point the way forward to ensuring that it is not deployed in ways that undercut the reasons that best justify it in the first instance.

I conclude in Chapter 7 on a somewhat optimistic note. The critical challenges to the use of harm as a legal concept in the s2(a) religion cases cannot be ignored or disputed. However, there is little sense in urging courts away from the discourse of harm. Harm is too deeply entrenched in the doctrinal and theoretical approaches to the constitutional adjudication of religious freedom, and judges are too much inclined to resort to harm unthinkingly and unknowingly. I propose new ways of conceiving of and responding to harm’s persistent presence in the religion cases that respond to these critiques.

2 The concept of harm: Philosophical, judicial, and critical approaches

2.1 Introduction

The harm principle has a rich and complex history that has shaped the discourse of law, philosophy and politics. It emerged from a deeply humanist, utilitarian compulsion to protect the individual from the repressive forces of modern society. Over time it started to lose its critical edge, to the point that now it is so prevalent, so intuitive and so seemingly beyond reproach that it appears to have lost much of its conceptual force. It is thus useful to go back and examine what it is, exactly, that the harm principle purports to do, and how it is relevant to law. This chapter thus starts by reviewing the historical development of the harm principle. I start with the work of early classical liberal thinkers like John Locke and John Stuart Mill, followed by the more modern iteration of the harm principle developed by Joel Feinberg. I contrast the harm principle to Feinberg's 'offense principle' and to legal moralism and paternalism, referencing the famous debate between HLA Hart and Patrick Devlin. I argue that these concepts are difficult to tease apart in practice, a point exemplified in the second part of the chapter where I turn to how the harm principle has informed Canadian law. Here I focus on two of the harm principle's more notable legal appearances, one concerning the constitutionality of criminal prohibitions on marijuana and the other the criminal law of indecency. I demonstrate that despite lack of clarity on its precise meaning or scope, the concept of harm is increasingly serving as a discursive constraint on law's regulation of sexuality morality and, more generally, in drawing legal limits around people's freedom to engage in contentious conduct. I conclude the chapter by examining critical perspectives on harm, drawing on the work of feminist and critical legal scholars who question courts' reliance on harm and the particular conceptions of harm they employ. These critiques are brought to bear on the constitutional adjudication of religious freedom throughout the rest of this thesis.

2.2 The Philosophers: Origins and development of the harm principle

2.2.1 Preliminary issues

The harm principle has largely developed with reference to criminal law theory, with harm proposed as a principled limit on the state's power to punish wrongdoing by criminal sanction. Feinberg's work, in particular, is focused on how the 'ideal legislature in a democratic country' would craft its criminal laws, rather than on how the 'ideal Supreme

Court' would decide constitutional cases.¹ His goal was to define harm in a way that would best meet the demands put on the harm principle by the criminal law.² However, this body of work is still highly relevant to a project on constitutional law and religious freedom.

First, the theoretical work on the harm principle explored below provides important insights about the concept of harm. Whether defending or critiquing the harm principle, these theorists have first had to grapple with the concept of harm, asking themselves what ought to count as harm and whether harm is still 'harm' if it is indirect, self-regarding, or collective. They have considered the relationship between harm, offense, and moralism, and developed ways of measuring and weighing harms against each other. They have thus provided a rich fount of knowledge about harm, their insights extending beyond the criminal law to other contexts, such as constitutional law. What we can take away from Feinberg's work on the moral limits of criminal law is thus not the particular *application* of his principles to justify criminal laws, but the principles themselves and the way in which he understands harm.

The second point is that the harm principle, for all its relevance to criminal law, is more broadly about the limits of individual freedom. This makes it an important site of inquiry in a project concerned with the constitutional limits to religious freedom. When Mill argues that the state's coercive powers should be limited to punishing or preventing harm to others, he is making a general statement about the permitted reach of personal freedom: that one is free to do as one likes up to the point at which it harms others. In Mill's words: 'the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we don't attempt to deprive others of theirs, or impede their efforts to obtain it'.³ Understood as a tool for delimiting individual freedoms, the harm principle can be used to map the boundaries of civil liberties and human rights (albeit loosely), which are the purview of constitutional law.

Third, the harm principle is relevant not only to the state's criminal law function but also, in theory, to all coercive state action. Mill's aim in *On Liberty* was to explore more generally 'the nature and limits of the power which can be legitimately exercised by society over the individual'.⁴ State coercion can take many forms, ranging from the relatively benign (imposing a fine, revoking a license) to acts that severely impair individual liberty (imprisonment, forced hospitalisation, deportation). Mill intended the harm principle to extend

¹ Feinberg, *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (OUP 1984) 4-5 [*Harm*].

² *ibid* 32.

³ Mill, *On Liberty and Other Essays* (OUP 2008, 1859) 17.

⁴ *ibid* 5.

to *all* of the state's 'authoritative' or coercive functions.⁵ The state's criminal law power is perhaps the most potent expression of its authoritative function, but it is certainly not the only one. Joseph Raz's version of the harm principle, for instance, extends to many forms of state coercion short of criminal prohibitions. For Raz, even acts of state coercion that consist in trivial interferences with personal freedom are subject to the limits of the harm principle because of the expressive harm conveyed through coercion.⁶ One can conclude that as the particular instance of state coercion moves down the scale from severe to minor interference, the threshold of necessary harm would shift accordingly.⁷

Finally, the harm principle can be used if nothing else as an interpretive aid for constitutional law. Certainly, the interpretation of constitutional rights should not be subject to the blunt application of the harm principle.⁸ Feinberg explains that what is morally legitimate may not be constitutional, and *vice versa*.⁹ However, he clarifies that although his focus is on the moral legitimacy of criminal laws and not their constitutionality, there is some overlap between the two criteria, the extent of which is the subject of disagreement between different jurisprudential schools of thought. A natural law theorist might believe that Feinberg's conclusions on the moral legitimacy of laws are applicable to the interpretation of all laws, including constitutional law, since the constitution 'embodies...all relevant sound moral principles'.¹⁰ A positivist would disagree, given her belief in the separate spheres of legal validity and morality, and would keep constitutional interpretation at some distance from Feinberg's conclusions on moral legitimacy. But even a positivist would agree, suggests Feinberg, that open-ended constitutional rights demand the application of *some* moral standards: that 'some judicial discretion is moral discretion'.¹¹ When a court is tasked with deciding whether a particular state act was reasonable, cruel, or excessive, as per the language of the constitution, then it will engage in moral reasoning to determine the relevant standards of conduct and whether they have been breached. Indeed, Feinberg's assumption leads him to occasionally stray into constitutional law doctrine in addressing issues of obscenity and privacy.¹² Moral principles such as the need to prevent harm to others do inform Canadian

⁵ Mill (n3) 13-14; Gray, 'Introduction' in Mill (n3) vii, xxii. In fact, Mill intended the harm principle to apply not only to the *state's* coercive functions (in the form of 'legal penalties') but also to *social* coercion, or 'the moral coercion of public opinion' (14). He described 'social tyranny' as 'more formidable than many kinds of political oppression' as it risked 'enslaving the soul itself' (8-9).

⁶ Raz, *The Morality of Freedom* (Clarendon 1986) 378.

⁷ Given the significant liberty interest at stake in criminal law, the threshold for conduct that constitutes 'harm to others' to justify criminal prohibition would almost certainly be higher than in other contexts; Feinberg, *Harm* (n1) 22-24.

⁸ Baker, 'Constitutionalizing the Harm Principle' (2008) *CrimJustEthics* 3, 9.

⁹ Feinberg, *Harm* (n1) 5.

¹⁰ *ibid* 5; see also 166-67 for an example regarding the constitutionality of prohibitions on pornography.

¹¹ *ibid* 5.

¹² *ibid* 5 (see eg Feinberg, *The Moral Limits of the Criminal Law Vol 2: Offense to Others* (OUP 1985) 165-89 [*Offense*]).

courts' constitutional assessments under the Charter. I share Feinberg's conviction that theories about the moral legitimacy of state action can apply equally to legislatures and courts, even if the overlap in their application is imperfect.

For these reasons, theoretical reflections on the harm principle are relevant to constitutional law despite the fact that their primary focus is often the criminal law. This interplay of the harm principle and constitutional law will be examined in greater detail in the second part of this chapter, in which I examine how judges have considered the harm principle in both criminal and constitutional cases.

2.2.2 Early articulations of the harm principle: Locke and Mill

John Locke set the groundwork for the harm principle in *Two Treatises of Government*, his 17th century exposition on political power.¹³ Locke's early harm principle is rooted in natural law and is based on two principles. The first is that all men are born free to order their actions and affairs bound only by the law of nature – or, reason, which rules all equal men and instructs them not to harm another person 'in his Life, Health, Liberty, or Possessions'.¹⁴ Second, all men are born equal to one another barring any 'manifest declaration' of God's will to the contrary.¹⁵ It is thus equality that justifies freedom from harm, for as people are not inherently subordinate to one another, they are not 'authorize[d]...to destroy one another'.¹⁶ This is an early articulation of the notion of human rights; Locke's 'men' had a right to not be harmed, and to enforce that prohibition through law.¹⁷ In his work on religious toleration, Locke also uses harm as a limit on the civic power to prohibit religious observance or customs. While a magistrate could legitimately forbid acts that harm others, such as the sacrifice of infants for religious purposes, he could not forbid the religious slaughter of a calf, '[f]or no injury is thereby done to any one, no prejudice to another man's goods'.¹⁸ Thus the notion of harm both brings a person's actions under the remit of civic government and acts as a brake on individual freedom.

¹³ (2nd ed, CUP 1967, 1690). Some authors cite Hobbes' *Leviathan* (Penguin 1968, 1651) for another early reference to the harm principle, though surely in an attenuated and less explicit form: '*Liberty, or Freedome, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion)*' (Hobbes 261); see Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *JCrimL&Criminology* 109, 120, fn27; van Mill, *Liberty, Rationality, and Agency in Hobbes' Leviathan* (SUofNYP 2001) 155. Likewise, Finnis claims that the writings of St Thomas Aquinas reflect the idea that state control should only serve to prevent harm to others: Finnis, *Aquinas* (OUP 1998) 228.

¹⁴ Locke (n13) 289.

¹⁵ *ibid* 287.

¹⁶ *ibid* 289.

¹⁷ *ibid* 289-90; Freeman, 'The Problem of Secularism in Human Rights Theory' (2004) 26(2) *HumRtsQ* 375, 388.

¹⁸ Locke, *A Letter Concerning Toleration* (Eighteenth Century Collections Online, Crowther 1800, 1689) 71.

The early harm principle dovetailed with the development of ideas about human rights and civil liberties throughout the 18th century. The 1789 French *Declaration of the Rights of Man and the Citizen*, for instance, states that ‘liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights...’.¹⁹ The *Declaration* positions harm not only as a limit to man’s natural liberty, but also as a limit to the law: ‘the law has the right to forbid only actions harmful to society...’.²⁰ Advocates of individual rights, such as revolutionary writer Thomas Paine, readily acknowledged that rights may be universal but were not limitless. In his essay ‘Rights of Man’, Paine wrote:

Natural rights are those which pertain to man in right of his existence. Of this kind are ... all those rights of acting as an individual for his own comfort and happiness, *which are not injurious to the natural rights of others*...consequently religion is one of those rights’.²¹

However, Mill was the first theorist to write at length about the concept of harm and its role in delimiting both individual freedom and the state’s coercive power. It is worth citing in full the seminal statement from his 1859 work *On Liberty*:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.²²

For Mill, the concept of harm to others demarcates the boundaries of a person’s zone of individual freedom. A person can legitimately be coerced only on the grounds that her actions are damaging to others, not to the self: society has no role in regulating ‘the part which merely concerns himself... Over himself, over his own body and mind, the individual is sovereign’.²³ Mill’s protected zone of ‘self-regarding conduct’ includes one’s freedom of conscience, of tastes and pursuits, and of association.²⁴ Protecting this zone from interference ensures that a person has the liberty to engage in autonomous, and therefore fulfilling,

¹⁹ (26 August 1789), art 4.

²⁰ *ibid*, art 5.

²¹ Paine, *The Thomas Paine Reader* (Wilder 2007, 1791) 201-02, emphasis added.

²² Mill (n3) 13-14.

²³ *ibid* 14. Mill’s theory is anti-paternalist, though of an arguably weak variety: Gray, *Mill on Liberty* (Routledge 1996, 1983) 91-92.

²⁴ Mill (n3) 17, 93.

behaviour in the quest for happiness. Thus, it is *utility* which underpins Mill's harm principle: the reason for drawing the line at harm is to ensure that all people have the chance to flourish.²⁵

Mill was aware that (to reference John Donne) 'no man is an island' and that self-regarding actions could be said to affect others, possibly causing them harm. A father who squanders the family's money on his own 'intemperance or extravagance' deserves to be punished, 'but it is for the breach of duty to his family or creditors, not for the extravagance'.²⁶ Thus a specific duty must be breached in order for otherwise purely self-regarding conduct to warrant moral or legal sanction.²⁷ In contrast, 'other-regarding conduct' can be punished only when it causes harm to others, with 'harm' understood as a violation of another person's interests.²⁸ The violation of interests that resemble *rights* warrants legal or social sanction.²⁹ Some interests will fall short of this standard, such as competitive losses: a person's rights are not breached by a failure to succeed in an exam or to be accepted in an 'overcrowded profession,' for example.³⁰ Only acts that violate another's rights can be punished.

Mill's notion of harm excludes both offense to others and harm to morals. Offensive conduct lies within the individual's zone of liberty provided it does no actual damage to others.³¹ Although an offended person may *feel* injured by conduct she finds distasteful, this distaste is usually rooted in violations of social rules of conduct, backed not by reason but by the morality of the dominant classes.³² Mill argues that law must not regulate morality, but rather should protect the individual from the 'engines of moral repression' that threaten a person's liberty of thought and expression.³³ Again, Mill's utilitarianism informs his thinking on moralism: a slavish obedience to custom prevents the free exchange of ideas and thereby impairs human flourishing and advancement.³⁴

²⁵ Mill (n3) 15; Mill, *Utilitarianism* (OUP 1998, 1863); Gray, 'Introduction' (n5) ix-xvi; Harcourt (n13) 188.

²⁶ Mill, *On Liberty* (n3) 90.

²⁷ *ibid* 90.

²⁸ *ibid* 83.

²⁹ *ibid* 83. Whether an interest is a 'right' depends on whether human welfare would be promoted by its regulation (84-85). This is a utilitarian conception of rights: Wolff, 'Mill, Indecency and the Liberty Principle' (1998) 10(1) *Utilitas* 1, 8-9.

³⁰ Mill (n3) 104-05.

³¹ *ibid* 59-60. Mill's position on offense is not stated clearly in *On Liberty* and is subject to debate. His brief comments on indecency (108-09) suggest a limited tolerance for the criminalisation of offensive acts: Harcourt (n13) 129, fn66; Wolff (n29) 7-13 (reading Mill's seemingly inconsistent stance on public offense as a function of his utilitarianism and commitment to human experimentation).

³² Mill (n3) 9-11, 93.

³³ *ibid* 18.

³⁴ *ibid* 78.

2.2.3 The modern harm and offense principles

Mill's principle of liberty has been charged with ambiguity, incoherence, and futility.³⁵ Indeed, the central problem of determining what actually constitutes harm and how different conceptions of harm fit into Mill's utilitarian calculus is a major obstacle for his theory. Liberal philosopher Joel Feinberg addressed this challenge and aimed to vindicate Mill's principle in his four-volume treatise *The Moral Limits of the Criminal Law*.³⁶ Feinberg has done more than perhaps any other liberal thinker to push forward our understanding of harm and thus his work provides a useful vantage point from which to examine the harm principle and its relevance to constitutional law.

He begins, like Mill, with the presumption of liberty: the conviction that legislators, when given the choice between imposing a legal sanction or preserving individual liberty, should opt for liberty, provided there are no valid reasons ('liberty-limiting principles') that outweigh the liberty interest in that case.³⁷ The most common candidates for these principles are harm to others, offense to others, legal moralism and legal paternalism.³⁸ Feinberg adopts the harm principle as a legitimate and morally relevant reason for limiting individual liberty, writing that 'the need to prevent harm (public or private) to parties other than the actor is always an appropriate reason for legal coercion'.³⁹ He rejects the view that legal moralism or paternalism can ever justify incursions on liberty. Unlike Mill,⁴⁰ however, Feinberg also endorses the offense principle.⁴¹ Feinberg stipulates that harm and offense are neither necessary⁴² nor sufficient conditions for state coercion; there may be times when, although potential harm or offense to others *could* justify state coercion, other considerations might render coercive sanctions unsuitable – for instance, they might impose undue strain on court resources or cause overcrowding of prisons. Harm and offense will always have some weight, but perhaps not enough weight, and they might not be the only considerations relevant in that instance.⁴³

³⁵ See eg Gray, *Mill on Liberty* (n23) 135-47; Gray, 'Introduction' (n5) xxvi-xxix.

³⁶ Feinberg, *Harm* (n1) 15.

³⁷ *ibid* 8-9.

³⁸ *ibid* 16-17.

³⁹ *ibid* 11.

⁴⁰ As noted above (n31), Mill shows some support for criminalising offence: Mill (n3) 108-09; Feinberg, *Harm* (n1) 14.

⁴¹ *Harm* (n1) 14-15. I address Feinberg's position on offense below.

⁴² To be sure, *either* offense *or* harm is a necessary condition for criminalization. But one cannot say that harm is a necessary condition *per se* when the conduct could be criminalized on the grounds of the offense principle. Feinberg goes back and forth in describing harm as a necessary and unnecessary condition of criminalization, but it simply depends on whether one is considering the harm principle in isolation or in conjunction with the offense principle. See Feinberg, *The Moral Limits of the Criminal Law Vol 4: Harmless Wrongdoing* (OUP 1990) 323 [*Moralism*]; Harcourt (n13) 114.

⁴³ *Harm* (n1) 9-10.

Starting with his views on harm, Feinberg acknowledges that the harm principle lacks clarity and that the concept of harm is ‘ambiguous’ and ‘vague’.⁴⁴ He provides some initial constraints on the principle by stipulating that limits on freedom must be ‘reasonably necessary’ to prevent serious harm that is both ‘avoidable and substantial’,⁴⁵ but this is no great help. Thus, he sets out to provide a ‘systematic conception’ of what counts as harm to others, by exploring the meaning of harm and developing a way to rank conflicting interests and grade harms in terms of their seriousness.⁴⁶ He winds up with a rather loose meaning of harm that serves above all as a ‘useful peg’ from which to hang a complex idea: his goal is simply to imbue harm with the meaning it needs to have in order to satisfy the harm principle.⁴⁷

Feinberg starts by defining harm as a wrongful setback to interests. A person has an ‘interest’ in something if she has a stake in it and ‘stands to gain or lose depending on the nature or condition’ of it.⁴⁸ Feinberg is concerned only with the thwarting of interests by another person; while an earthquake can cause harm in the ordinary sense of the word, the legal meaning of harm is narrower.⁴⁹ At the lesser end of the range of human interests are ‘instrumental wants’, things that people want in order to facilitate another more stable goal.⁵⁰ Next are a person’s ‘welfare interests’ in those things that allow a person to live a reasonably good life, such as health, emotional stability, and the absence of pain.⁵¹ Welfare interests form the building blocks for a person’s ultimate aspirations, or ‘ulterior interests’, such as financial success and the formation of a loving family.⁵² People can have interests in other people, too, and be vicariously harmed by acts that injure them.⁵³ Our general interest in public peace and efficient tax collection belong not so much to individuals as to the community or government; these are properly called ‘public interests’.⁵⁴ Feinberg distinguishes all of these interests from passing desires, hurts or offended states of mind. A person who desires an ice cream cone does not have an *interest* in a cone, as its procurement would not allow her to advance any other,

⁴⁴ *Harm* (n1) 32.

⁴⁵ *ibid* 11-12.

⁴⁶ *ibid* 26.

⁴⁷ *ibid* 32.

⁴⁸ *ibid* 34. Feinberg’s is a ‘want-regarding’ rather than ‘ideal-regarding’ theory: one’s interests are analysed according to what a person actually desires, rather than what would be best for her (*ibid* 67).

⁴⁹ *ibid* 34.

⁵⁰ *ibid* 57.

⁵¹ *ibid* 37, 57-59.

⁵² *ibid* 59-60. Feinberg notes that the law does not tend to protect people’s ulterior interests in and of themselves, but through the protection of people’s welfare interests (62).

⁵³ *ibid* 70-78.

⁵⁴ *ibid* 63; see also 11, 221-25.

more profound goal in which she has a stake.⁵⁵ An interest capable of constituting a harm when thwarted must meet a minimal level of ‘ulteriority, stability and permanence’.⁵⁶

For Feinberg, only those setbacks to interests that are without justification or excuse (that are ‘wrongful’) count as harms. To wrong someone is to treat her unjustly, or in a morally indefensible fashion.⁵⁷ Many setbacks to interests are not wrongful, such as legitimate competitive losses or conduct to which the victim has consented.⁵⁸ The converse, a wrongful act that does not set back a person’s interest, is rare; even in the case of a ‘harmless’ trespass on land, there is a setback to the landowner’s liberty interest.⁵⁹ Feinberg explains that a wrong occurs when someone’s rights are violated, defining a right as ‘a valid claim against another’s conduct’ that is backed by relevant, cogent and decisive reasons.⁶⁰ His emphasis on wrongfulness ensures that the harm principle justifies sanctions for only that conduct which can be thought of as morally blameworthy.

Feinberg admits that his conception of the harm principle, while plausible, fails to provide practical direction to legislators faced with decisions that involve conflicting rights or harms of varying degree or nature. He thus introduces a set of ‘mediating maxims’ to provide specificity to the application of the harm principle in tough cases by imbuing it with normative content.⁶¹ His detailed list of maxims includes the following principles:

The greater the *gravity* of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatens to produce it;

the greater the *probability* of harm, the less grave the harm need be to justify coercion;

the more *valuable* (useful) the dangerous conduct, both to the actor and to others, the more reasonable it is to take the risk of harmful consequences [...]; and

the more *reasonable* the risk of harm (the danger), the weaker is the case for prohibiting the conduct that creates it.⁶²

⁵⁵ *Harm* (n1) 55.

⁵⁶ *ibid* 55. Malicious, wicked or morbid interests are not protected by the harm principle (215).

⁵⁷ *ibid* 107-08. Feinberg uses ‘moral indefensibility’ to refer to an act’s blameworthiness or lack of justification (108-09). He clarifies that the notion of moral rights implicit in his theory of interests need not ‘presuppose a ... complete moral system’ (111).

⁵⁸ *ibid* 36, 113-17.

⁵⁹ *ibid* 34-35; cf Ripstein, ‘Beyond the Harm Principle’ (2006) 34 *Phil&PubAff* 216 (the harm principle is not capable of justifying prohibitions on harmless trespass).

⁶⁰ *Harm* (n1) 215.

⁶¹ *ibid* 187, 245.

⁶² *ibid* 216.

He also explains that legislators ought to defer to those interests that are most *important*. Importance is a function of vitality (how crucial the interest is to the possessor), of the extent to which it is reinforced by other interests, and of its ‘inherent moral quality’.⁶³ In tallying up the respective interests on each side, legislators must also recall that a person’s liberty will form part of the sum of interests on the scales. The relative weight of that liberty interest will depend on its *fecundity* – that is, on the extent to which freedom in one area opens up subsequent options or creates further opportunities for a person.⁶⁴

The clear need for supplementary principles of justice and morality to guide the application of the harm principle does detract somewhat from its intuitive appeal. Feinberg admits that the mediating maxims provide the harm principle with greater practicality and applicability (‘it begins to lose its character as a merely vacuous ideal’), but at the cost of its ‘factual simplicity’ and ‘normative neutrality’.⁶⁵

As noted above, Feinberg’s harm principle excludes offense. Though some offense can cause harm if sufficiently serious and prolonged,⁶⁶ Feinberg is careful to distinguish the two states and subject them to different legal standards. In general, he maintains that offense involves a less serious interference with one’s interests than harm.⁶⁷ Offended states can range from sensory affronts to disgust, anxiety or shock.⁶⁸ The common element in these states is the feeling of unpleasantness they evoke in the victim and their character as something akin to nuisance; offensive acts or displays are those not easily avoided without unreasonable inconvenience.⁶⁹ Feinberg distinguishes those more nuisance-like offenses from ‘profound offense,’ which has a deeper, more serious experiential element to it. A person who is profoundly offended will not be able to avoid the offense by merely closing her eyes or stepping away, as the offense stems from a conviction that the offensive behaviour is morally wrong.⁷⁰ It also has an impersonal element: a person might not feel *individually* aggrieved by the offensive act, though the offense cuts deep.⁷¹

⁶³ *Harm* (n1) 204; see also 202-6, 217. He refines the idea of importance in *Moralism* (n42) 60-63.

⁶⁴ *Harm* (n1) 208.

⁶⁵ *Offense* (n12) xii. See Smith, ‘Is the Harm Principle Illiberal?’ (2006) 51 *AmJJuris* 1 on how Feinberg’s technical definition of harm and use of supplementary maxims sacrifices the harm principle’s simplicity and resonance, both of which are what give the principle its rhetorical power.

⁶⁶ *Offense* (n12) 3, 5. A bad smell, for instance, might wrongly set back a person’s interests if it is sufficiently strong and long-lasting to prevent a person from sleeping at night: *Harm* (n1) 46; see also 280.

⁶⁷ *Offense* (n12) xii.

⁶⁸ *ibid* 14-21.

⁶⁹ *ibid* 5-10, 21-22.

⁷⁰ *ibid* 50-60. She may even feel offended by the bare knowledge that the certain conduct is occurring without witnessing it herself. However, Feinberg believes these ‘bare knowledge’ offenses can never be legitimately prohibited (60-71, 162-64). Thus, ‘John Stuart Mill can rest secure’ (69).

⁷¹ *ibid* 57-59.

Unlike many liberal thinkers, Feinberg concedes that it can be legitimate to limit a person's freedom to prevent offense, as the victims of offense are 'determinate victims with genuine grievances and a right to complain against determinate wrongdoers'.⁷² However, his offense principle is heavily qualified. First, the offense must be wrongful. As with the harm principle, wrongfulness is established by a lack of justification or excuse (such as consent) for the offense.⁷³ It does not depend on a personal sense of grievance or of having been wronged; it is 'necessary that there *be* a wrong, but not that the victim *feel* wronged'.⁷⁴ Second, the offense principle is mediated through a balancing test, which in practice would disqualify most offensive conduct from criminal prohibition. It requires the seriousness of the offense to be balanced against the reasonableness of the offending conduct. One judges seriousness with reference to its intensity, duration and extent (its magnitude); its reasonable avoidability (the harder it is to avoid, the more serious the offense); the *volenti* maxim (offense voluntarily incurred will not count as 'offense'); and by discounting offense caused by 'abnormal susceptibilities'.⁷⁵ On the other side of the equation, the reasonableness of the offending conduct includes the personal value of the conduct to the actor, its social value (including a presumption that free expression of opinion is of the highest social importance), whether the actor can reasonably engage in the conduct at another time or place, whether it has a malicious motive, and the nature of the locale in which the conduct occurs.⁷⁶ This test will prevent the offense principle from standing in for the mistaken view that people have an unqualified right not to be offended.⁷⁷ Feinberg emphasizes that the offense principle is to be applied with extreme caution, given the illegitimate uses to which offense arguments can be directed.

It is these illegitimate uses that attract most objections to the legal regulation of offense – many say it represents too great an incursion on free expression and risks creating a 'chilling effect' in political, artistic or academic spheres. For Mill, the risk of inadvertently curbing free expression by prohibiting offense is simply too great: human advancement would be impaired if the ruling classes could punish conduct they simply did not like.⁷⁸ Although other liberal thinkers do support some limited regulation of offensive behaviour,⁷⁹ a recurring

⁷² *Offense* (n12) 25.

⁷³ *ibid* 2, 32-33.

⁷⁴ *ibid* 2. Simester and von Hirsch note, however, that the wrongfulness criterion seems to disappear from the rest of Feinberg's analysis: 'Rethinking the Offense Principle' (2002) 8 LEG 269, 273-75.

⁷⁵ *Offense* (n12) 33; see also 27-35.

⁷⁶ *ibid* 37-44.

⁷⁷ *ibid* 49.

⁷⁸ Mill (n3) 93-94.

⁷⁹ See eg Hart, *Law, Liberty and Morality* (OUP 1963) 41-46 (endorsing a limited offense principle); Raz (n6) 421 (in 'extreme cases' offense can cause harm by diminishing autonomy and can thus be prohibited under the harm principle, but he does not support an independent offense principle); Nussbaum, *From Disgust to Humanity* (OUP 2010) 57-58, 171-75 (treating offense as nuisance). See also Simester and von Hirsch (n74) (adopting a more restrictive version of Feinberg's offense

theme is the dread of what Andrew Simester and Andrew von Hirsch call ‘aesthetic majoritarianism’: the enforcement of conventional sensibility.⁸⁰ Because the nature of what we consider to be ‘offensive’ ultimately derives from social conventions of behaviour and propriety,⁸¹ the offense principle is susceptible to a collapse into legal moralism.

2.2.4 Harm, legal moralism, and paternalism

Legal moralism rests on the belief that the state can legitimately use coercion to prohibit certain acts on the basis of their immorality, even in the absence of harm or offense to others. Feinberg rejects this principle in his fourth and final volume on the moral limits of criminal law,⁸² as do all other avowedly liberal theorists.⁸³

The case against legal moralism developed with reference to the infamous Hart-Devlin debate that arose in late 1950s Britain following the publication of the Report of the Committee on Homosexual Offences and Prostitution, or ‘the Wolfenden Report’. The Committee recommended (among other things) repealing the criminal ban on consensual gay sex.⁸⁴ In so doing it invoked Mill’s harm principle, concluding that the lack of harm or offense caused by gay sex meant there was no justifiable basis for its criminalisation, famously stating that ‘there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business’.⁸⁵ Patrick Devlin, then UK High Court Judge, opposed the Wolfenden recommendations on the grounds that the law *should* be concerned with ‘the suppression of vice’.⁸⁶ His argument was premised on the idea that society is sustained by its shared morality – that morality is as essential to a society’s existence as responsible government.⁸⁷ The ‘loosening of moral bonds’ is the first step toward social disintegration,

principle); Tadros, ‘Harm, Sovereignty, and Prohibition’ (2011) 17 LEG 35, 38-44 (characterising much offensive conduct as harm).

⁸⁰ Simester and von Hirsch (n74) 274.

⁸¹ *ibid*, 273-77; Feinberg, *Offense* (n12) 190-217. Simester and von Hirsch believe that breach of social convention alone is not constitutive of the ‘wrong’ in an offensive act. Rather, the social convention has usually evolved to address some valid, underlying reason for taking offense: ‘the convention is primarily of instrumental rather than intrinsic value...lying behind it are the interests of people...’ (*ibid* 277). Breaches of social conventions that are themselves objectionable, such as one that fails to respect human rights, cannot legitimately underpin a finding of offense (278-79).

⁸² Feinberg, *Moralism* (n42).

⁸³ Feinberg understands liberalism in terms of its opposition to legal moralism (‘...we can define liberalism...as the view that the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions’: *Harm*, n1, 14-15); see also Dyzenhaus, ‘Regulating Free Speech’ (1991) 23 *OttawaLRev* 289, 301. Occasionally, self-professed liberals defend legal moralism: Moore, ‘Legal Moralism Revisited’ (2017) 54(2) *SanD LRev* 441.

⁸⁴ *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (CMD 247) 1957.

⁸⁵ *ibid* 24.

⁸⁶ Devlin, *The Enforcement of Morals* (OUP 1965) 13.

⁸⁷ *ibid* 10.

and the state must do what is necessary to protect itself from ruin.⁸⁸ Morality is to be determined by reference to the reasonable or ‘right-minded man’ on the Clapham omnibus or in the juror’s box; if he honestly believes that a practice is immoral and that no rational person could think otherwise, then it is immoral.⁸⁹ It is not enough that he dislike it; his feelings must rise to ‘[i]ntolerance, indignation and disgust’ which ‘are the forces behind the moral law’.⁹⁰ This makes the question of morality one of fact, to be determined by the law-maker.

Three main arguments have been made against Devlin’s thesis. First, it rests on a flawed conception of morality. In his celebrated rejoinder to Devlin, HLA Hart drew a distinction between positive morality (those moral beliefs accepted and shared by members of a social group) and critical morality (‘the general moral principles used in the criticism of actual social institutions including positive morality’).⁹¹ A law based exclusively on positive morality cannot be justified when it fails to comply with the demands of critical morality. Devlin, however, conflates the two.⁹² Second, Devlin contends that a society is justified in enforcing morals legislation to preserve itself from dissolution through vice. However, if a society’s positive morality is oppressive, then perhaps it does not deserve to survive in its current form.⁹³ Finally, there is a serious empirical problem with Devlin’s thesis. It rests on the assumption that permitting people to engage in practices of which the reasonable man disapproves would in fact weaken the common bonds of morality that hold society together. But is a changed morality really a weakened morality? And is a weakened morality really a precursor to social disintegration? Devlin presents no evidence (and indeed would have been hard-pressed to find any) for the claim that social change does damage to society.⁹⁴ Hart

⁸⁸ Devlin (n86) 11-13. In deciding whether to prohibit an immoral act, the legislature must balance the right of the individual against the needs of society; in most (but not all) instances, society will win: 15-16, 22.

⁸⁹ *ibid* 15, 22-23.

⁹⁰ *ibid* 17. Devlin explains that if these feelings ‘are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice’ (137). Dworkin notes that the inverse of this statement means that if these feelings are strong enough, Devlin’s careful balancing act becomes mere rhetoric: the social value afforded to them will always justify the incursion on individual liberty, and there is no more need to undertake a balancing act: Dworkin, *Taking Rights Seriously* (Bloomsbury 1977) 243.

⁹¹ Hart (n79) 20. For a critical take on Hart’s conception of critical morality see Arneson, ‘The Enforcement of Morals Revisited’ (2013) 7 *CrimLaw&Philo* 435, 438-39, 453.

⁹² Dworkin adds that some characterizations of ‘immoral’ conduct stem not from moral arguments, but from prejudice, false rationalisations, mere emotion or parroting: (n90) 249-50, 254-55. See also Feinberg, *Moralism* (n42) 140-42; Nussbaum (n79) (disgust-based regulation is used to stigmatize minority groups).

⁹³ Hart (n79) writes that the disintegration of a society dedicated to ‘the cruel persecution of a racial or religious minority ... would be ‘morally better than its continued existence, and steps ought not to be taken to preserve it’ (19).

⁹⁴ For more on this point see Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1966) 75 *YaleLJ* 986, 993; Hart, ‘Social Solidarity and the Enforcement of Morality’ (1967) 35 *UChiLRev* 1, 13. Had Devlin argued that change *itself* is an evil, then arguably he would need no evidence for the tendency of vice to weaken society’s moral bonds. Feinberg examines the ‘social change as evil’ argument, which

counters that, in fact, the opposite is true: deviations in positive morality can strengthen a society.⁹⁵ Feinberg too notes that a society does not have to share *all* its moral beliefs to qualify as ‘a society’,⁹⁶ contrary to Devlin’s view that a rift in society’s moral beliefs about a singular issue inexorably leads to its dissolution.

Devlin’s argument can be characterised as consequentialist, or ‘impure’⁹⁷ in that it actually looks to the social *harm* caused by immorality. Other legal moralists present a simpler, purer thesis: that immoral acts are wicked in themselves and ought to be criminalised on that basis alone. Hart calls this the ‘extreme thesis’ and considers James Fitzjames Stephen its leading proponent.⁹⁸ Stephen believed that there were some acts which were ‘acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender’.⁹⁹ For him, criminal punishment sears the offender with society’s stamp of disapproval, ratifying the public’s legitimate outrage over immoral offences.¹⁰⁰ It is not necessary to examine Hart’s response to Stephen at length,¹⁰¹ but rather to point to one conviction that underlies his arguments against moralism: that the serious harms of state coercion cannot be offset by any gains to society from a ‘stable’, legally enforced morality. Hart writes that deprivations of liberty inflict ‘a special sort of suffering – often very acute – on those whose desires are frustrated by the fear of punishment,’ which can only be justified by the harm or offense principles, or a limited form of legal paternalism.¹⁰² In this sense debates around legal moralism often come down to a conflict between the rights of one and of many. For all of Devlin’s rhetoric about striking a balance between society and the individual, he and Stephen err unflinchingly on the side of society and afford little value to the individual right to liberty, while Hart, Mill and Feinberg are unwilling to see individual rights sacrificed for the sake of enforcing conformity to a common morality.

Arguments in favour of legal moralism continue to be made today, some of which highlight the difficulty of fully disentangling the harm principle from moralism. Much conduct

he terms ‘moral conservatism’ (*Moralism*, n42, 39-80), and concludes that social change is at most a ‘free-floating evil’ that cannot form the basis of a personal grievance as it causes no harm, offense, hurt or unfairness to any person. As such it can never be a sufficient reason for legal coercion (80). See also Hart’s refutation of moral conservatism (n79, 69-76).

⁹⁵ Hart (n79) 52; see also 72; Green, ‘Should Law Improve Morality?’ (2013) 7 *CrimLaw&Phil* 473,481 (there are other ‘common bonds’ holding a society together).

⁹⁶ Feinberg, *Moralism* (n42) 141.

⁹⁷ *ibid* 8-10. Hart believes that Devlin falls somewhere between impure and pure moralism (or in Hart’s words between the ‘moderate’ and ‘extreme’ theses): (n79) 53-60.

⁹⁸ *Liberty, Equality, Fraternity* (SmithElder&Co 1874) 49, 53-60. Stephen engaged Mill in heated debate, mirroring the subsequent Hart-Devlin debate a century later.

⁹⁹ *ibid* 162.

¹⁰⁰ *ibid* 165; Hart (n79) 64.

¹⁰¹ See Hart (n79) 57, 66-75.

¹⁰² *ibid* 22, 41-46, and 32 respectively.

is both harmful and immoral: the moralist is satisfied because vices such as murder and rape are criminalised, while for the liberal these are quintessential harms. The expressive function of the criminal law draws these concepts even closer together: criminal punishment marks people as having done wrong and sends a message that certain harmful conduct is not morally acceptable in that society,¹⁰³ recalling Stephen's arguments about denunciation. Decisions about what count as interests worth protecting under the harm principle and how to apply Feinberg's mediating maxims also necessarily involve moral reasoning.¹⁰⁴

Moreover, some contemporary thinkers maintain that liberal theorists like Hart and Feinberg fail to make a strong enough case against more challenging examples of legal moralism.¹⁰⁵ They maintain that arguments based on preventing harm or offense do not capture the real reason for banning activities such as incest, bestiality,¹⁰⁶ and corpse desecration.¹⁰⁷ These are held up as examples of existing criminal prohibitions which most people intuitively believe are justified, but which can only be defended by resort to legal moralism. Feinberg himself struggles with a few particularly difficult cases, such as consensual gladiatorial contests, and ends up concluding rather weakly that sometimes 'harmless' immorality *is* a relevant or even good reason for criminal punishment, albeit rarely.¹⁰⁸ In fact, it is often said that the application of the harm principle itself consists in the legal enforcement of morality: it legitimises coercion based on the moral principle that it is wrong to cause harm to others.¹⁰⁹ Thus Raz asks, 'if coercive interventions are justified on this ground then ... why stop with the prevention of harm? Why not enforce the rest of morality?'. He responds that the government in fact *should* promote morality in the sense of promoting the well-being or 'moral quality' of its citizens' lives, thus seeming to endorse legal moralism.¹¹⁰ However, Raz explains that the state may only promote morality *coercively* to

¹⁰³ Feinberg, 'The Expressive Function of Punishment' (1963) 49(3) *Monist* 397; MacCormick, *Legal Right and Social Democracy* (Clarendon 1982) 30-33.

¹⁰⁴ MacCormick (n103) 28-30; Greenawalt, 'Legal Enforcement of Morality' (1995) 85(3) *JCrimL&Criminology* 710, 724. Feinberg concedes this point in *Moralism* (n42) 11-12.

¹⁰⁵ See eg G Dworkin, 'Devlin was Right' (1999) 40 *Wm& Mary LRev* 927, 941-42; Duff, 'Harms and Wrongs' (2001) 5(1) *BuffCrimLR* 13; Arneson (n91) 450-54.

¹⁰⁶ Greenawalt (n104) notes the 'sense of objective immorality' that influences people's opinions on legislation restricting activities such as bear-fighting and bestiality (723).

¹⁰⁷ Scoccia, 'In Defense of "Pure" Legal Moralism' (2013) 7 *CrimLaw&Philo* 513.

¹⁰⁸ Feinberg, *Moralism* (n42) 32-33, 38, 321-24 (though he claims that this is a 'true', not 'conventional,' morality, mirroring Hart's distinction between critical and positive morality: 124, 173). For his examination of the gladiatorial contest see *Moralism* (n42) 128-33, 328-31.

¹⁰⁹ Nagel, 'The Enforcement of Morals' (1968) 28(3) *Humanist* 19; MacCormick (n103) 28; Raz (n6) 415; Greenawalt (n104) 711-13; G Dworkin (n105) 929-31. Feinberg concedes that the harm principle is itself a moral principle, though 'it still does not follow that the harm principle permits the criminal law to proscribe any and all kinds of wrongdoing, or any and all kinds of evil' (*Moralism*, n42, 13; see also 11-13, 153, 146-54).

¹¹⁰ Raz (n6) 415.

prevent harm to others (or to oneself).¹¹¹ He grounds his understanding of harm firmly in the principle of autonomy:¹¹² coercion in the name of harm prevention is autonomy-enhancing and therefore legitimate, whereas coercion to prevent ‘harmless’ immorality does unjustifiable damage to autonomy.¹¹³ Raz’s harm principle thus imposes constraints on *how* the state should enforce morality, rather than serving to oust morality from government’s domain.

A few words on paternalism are in order at this point. Mill strongly rejects paternalism as legitimate grounds for criminalisation: a person ‘cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right’.¹¹⁴ Feinberg, too, refuses to concede the legitimacy of criminal prohibitions intended to prevent harm to the actor herself.¹¹⁵ More accurately, it should be said that he rejects ‘hard paternalism’, the idea that the state can legitimately coerce competent adults against their will to protect them from the harm caused by their voluntary actions.¹¹⁶ Both Mill and Feinberg see paternalist legislation as posing too great an incursion on an individual’s freedom to make autonomous choices, even those that are not in her best interests.¹¹⁷ Other liberal thinkers like Hart and Raz are more forgiving of paternalistic legislation – Hart on the grounds that people are not always the best judges of their own interests,¹¹⁸ Raz because in some instances paternalist policies will have no real impact on autonomy.¹¹⁹ Many existing paternalist policies enjoy widespread support for their promotion of the individual and collective good, such as seatbelt and motorcycle helmet laws, gambling restrictions, and laws against child labour. Paternalism thus attracts

¹¹¹ Raz (n6) 415-19.

¹¹² Raz’s theory of freedom is underpinned by the duty to secure autonomy for all people: (n6) 415, 369-429. Raz understands autonomy as a person’s ability to independently choose from an adequate range of valuable options (369-78).

¹¹³ *ibid* 418-19. See Stanton-Ife, ‘The Limits of Law’ (*The Stanford Encyclopedia of Philosophy*, Winter 2014) <<http://plato.stanford.edu/entries/law-limits/>> accessed 16.02.20 for an excellent overview of Raz’s reformulation of the harm principle.

¹¹⁴ Mill (n3) 14.

¹¹⁵ Feinberg, *The Moral Limits of the Criminal Law Vol 3: Harm to Self* (OUP 1986) 4 [*Paternalism*].

¹¹⁶ *ibid* 12. He does not oppose ‘soft paternalism’, the principle that the state can legitimately interfere with self-regarding conduct that is non-voluntary or when coercion is necessary to establish whether the actor does in fact consent to it; this is not really paternalism at all and presents no challenge to liberalism (12-16). Mill can also be read to endorse soft paternalism of this sort: Gray, *Mill on Liberty* (n23) 91-92; Oh, ‘Mill on Paternalism’ (Fall 2016) *JPolInquiry* 1, 4-8.

¹¹⁷ Mill believes that ‘to be able to choose is a good that is independent of the wisdom of what is chosen’ (G Dworkin, ‘Paternalism’ (1972) 56(1) *Monist* 64, 75).

¹¹⁸ Hart (n79) 31-34. Hart states that Mill’s extreme stance against paternalism ‘may now appear to us fantastic’, and attributes society’s growing acceptance of paternalistic legislation to ‘the wane of *laissez faire* since Mill’s day’ (32). He also characterizes Mill’s understanding of human psychology as naïve: people’s choices are not as fixed or as impermeable to outside influences as Mill supposes (33).

¹¹⁹ Raz (n6) 413, 422-23. He explains that paternalism’s impact on autonomy will vary, and thus it is ‘senseless’ to take an absolute stance on its legitimacy (422). Simester and von Hirsch support a limited paternalist principle for similar reasons: *Crimes, Harms and Wrongs* (Hart 2011) 143.

considerably less liberal ire than legal moralism.

However, the two principles often occupy similar ground. In fact, Feinberg notes that moralism and paternalism converge sufficiently often that there is an additional liberty-limiting principle (which, to be sure, he rejects) of ‘moralistic legal paternalism.’ This principle justifies the prevention of ‘moral harm’ to the actor herself,¹²⁰ making her morally better off by preventing her from engaging in a given activity.¹²¹ But even considered separately, paternalism and moralism have a mutually reinforcing tendency. Some scholars argue that accepting the legitimacy of paternalism, as Hart did, risks ceding too much ground to moralism. In the words of Heta Häyry, ‘moralism seems to enter through the back door the minute someone opens the front door to paternalism’.¹²² The reasoning is that if (paternalist) legislators are entitled to presume to know what is best for people in terms of protecting them from physical harm, then there is no real bar to them also striving to protect people from moral harm; this would see them promoting a particular set of moral principles, and thus enforcing morality.¹²³ Moreover, there is only a tenuous distinction between arguments that activities like drug use, assisted suicide and sex work should be prohibited because it is morally wrong for people to engage in them (moralism), or because those activities are bad for the people involved (paternalism): one reason they are considered bad for the people involved is because of their supposedly immoral nature.¹²⁴ The two principles thus bleed into one another with surprising ease.

In fact, it is in the regulation of these contentious activities that one sees all four principles (harm, offense, paternalism and moralism) in play, an issue I explore below in the context of Canadian constitutional law. Feinberg explains that American judicial approaches to pornography, for instance, have seen courts vacillating between all of the liberty-limiting principles, ‘applying now a liberal offense principle mediated by balancing tests and later a thinly disguised moralism, here flirting with paternalism, there sniffing for subtle public harms, and never quite distinguishing with any clarity among them’.¹²⁵

¹²⁰ Feinberg, *Harm* (n1) 12-13, 65-70 (moral harm is degradation of a person’s character).

¹²¹ G Dworkin, ‘Paternalism’ (n117) 307. This reasoning is reflected in some judicial approaches to pornography: Feinberg, *Offense* (n12) 172; Sumner, *The Hateful and the Obscene* (UTP 2004) 37-38. Until the early 1960s, the judicial precedent for obscenity law in Canada was the UK case of *R v Hicklin*, which asked whether the allegedly obscene material would tend ‘to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication of this sort is likely to fall’: (1868), 3 LRQB 360 (UK), 373 (Cockburn CJ).

¹²² Häyry, ‘Legal Paternalism and Legal Moralism’ (1992) 5(2) *RatioJuris* 191, 196-97; see also Arneson (n91) 443-45.

¹²³ Feinberg, *Moralism* (n42) 16; Häyry (n122) 196-97.

¹²⁴ Arneson (n91) 444.

¹²⁵ Feinberg, *Offense* (n12) 166.

These same blurred lines between harm, offense, paternalism and moralism often mark public debates and judicial decisions on religious freedom. It is not always clear which of the four liberty-limiting principles explored above is doing the work in justifying restrictions on religious freedom, particularly regarding contentious practices such as Muslim veiling, polygamy, and religious discrimination against sexual minorities. For instance, attempts to justify niqab bans often draw on a mix of all four principles: the niqab is said to offend, to cause social harm, to harm the veiled women themselves, or to violate social taboos and moral norms. At times, all of these arguments are considered under the rubric of ‘harm’. The difficulty in disentangling them means that debates over the state’s proper role in regulating these activities often trip up over disagreements about the legitimate limits to the state’s coercive power. One must think critically about the justifications for such restrictions and be wary of one principle masquerading for another.

2.3 The Judges: The harm principle in Canadian courts

As I noted at the start of this chapter, Feinberg’s work on the harm principle was intended not so much as a guide for judges deciding constitutional cases, but for legislators developing criminal laws. That said, the courts have at times been tasked with considering how the harm principle might serve as a legal or constitutional tool for constraining the state’s coercive powers and protecting individual rights and freedoms. My aim in this section is to provide a brief overview of how Canadian courts have answered this question, drawing primarily on two landmark Supreme Court cases concerning drug offences and criminal indecency. I use these cases to provide a snapshot of the courts’ general shift away from moralist and paternalist justifications for restrictions on individual liberty, toward a greater emphasis on harm.¹²⁶ The evolution of the courts’ approach to harm has been gradual and cautious, as reflected in McLachlin CJ’s statement in the Montreal swingers’ case, *R v Labaye*:

Developing a workable theory of harm is not a task for a single case. In the tradition of the common law, its full articulation will come only as judges consider diverse situations and render decisions on them. Moreover, the difficulty of the task should not be under-estimated. We must proceed incrementally, step by cautious step.¹²⁷

Though the outward shift toward harm may simply mask the influence of other liberty-limiting principles in the regulation of socially contentious behaviour, an issue I explore at more length

¹²⁶ The courts in these cases do not tend to engage with the offense principle. Acts that Feinberg and others would typically understand in terms of offense, such as obscenity and indecency, are more likely to be viewed through the lens of either moralism, paternalism, or harm.

¹²⁷ *R v Labaye*, 2005 SCC 80 [26].

in the final section of this chapter, it also demonstrates the enduring appeal of the harm principle and the promise it appears to hold as a principled limit to state coercion.

2.3.1 The harm principle: Not a constitutional constraint on criminal law power

The perfect testing ground for the vitality of the harm principle in Canadian law lies in constitutional challenges to allegedly ‘harmless’ or ‘victimless’ offences, such as the possession of small amounts of drugs for personal use. This question was directly before the Supreme Court in *R v Malmo-Levine*, an unsuccessful challenge to Canada’s (now repealed) prohibition on marijuana possession.¹²⁸ Up to this point, the Supreme Court’s position on whether the harm principle was a fundamental principle of Canadian law was arguably inconsistent and uncertain.¹²⁹ The court took the opportunity in *Malmo-Levine* to articulate what role the harm principle ought to play in Canadian law.

The appellants in *Malmo-Levine* had argued that Parliament cannot punish conduct that poses no risk of harm to anyone but the perpetrator without violating section 7 of the Charter, which protects a person’s right to life, liberty and security of the person. Deprivations of liberty such as imprisonment, which was a possibility under the offences charged, must be in accordance with the principles of fundamental justice (hereinafter ‘PFJs’). The appellants argued that the harm principle was one such principle and that, since drug possession causes no harm to others, the offences were therefore unconstitutional.¹³⁰ The majority rejected this argument, holding that the harm principle does not serve as a hard limit on Parliament’s criminal law power.

Writing for the majority, Gonthier and Binnie JJ applied the three criteria for establishing PFJs¹³¹ to the harm principle and concluded that it did not fulfil any one of them, demonstrating the challenges in integrating the harm principle and the concept of harm more generally into Canadian law. First, they held that the harm principle did not qualify as a *legal* principle. At most, the avoidance of harm to others was an ‘important state interest’ that

¹²⁸ *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74; reasons in companion case *R v Clay*, 2003 SCC 75 released concurrently.

¹²⁹ Levine, ‘In Harm’s Way’ (2004) 24 SCLR (2d) 195. In *R v Butler*, [1992] 1 SCR 452 and *Sauvé v Canada*, 2002 SCC 68 the Supreme Court majority attempted to circumscribe the state’s ability to legislate solely on the basis of social values or morals; it did the reverse in *R v Rodriguez*, [1993] 3 SCR 519 (upholding laws against euthanasia with reference to ‘sanctity of life’ arguments) and *Re ss 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123, 1142 (Dickson CJ) (upholding solicitation laws on the grounds that Parliament can legislate to reflect ‘society’s disapprobation’ of sex work).

¹³⁰ *Malmo-Levine* (n128) [40], [102]-[103].

¹³¹ *ibid* [112]-[113]. The PFJs under s7 are to be derived from ‘the basic tenets of the legal system’: *Re BC Motor Vehicle Reference*, [1985] 2 SCR 486. They include the principles against arbitrariness, overbreadth and gross disproportionality. The criteria for establishing PFJs were developed in *Rodriguez* (n129).

Parliament was entitled to act upon in crafting its laws.¹³² Second, the majority held that there was no societal consensus that the harm principle was a requirement of criminal justice. To the contrary, Parliament can and does penalize acts that offend against ‘deeply held social values,’ such as cannibalism, bestiality, and consensual incest, and that cause only harm to the perpetrator: seatbelt and motorcycle helmet laws, for instance. The existence of these laws suggests there is no pervasive public opinion that criminal laws can only serve the purpose of harm prevention rather than paternalism or moralism.¹³³ Finally, the harm principle was not capable of being defined with sufficient precision to serve as a standard for judging a law’s constitutionality. With neither an agreed upon definition of harm nor a known metric for determining compliance, the harm principle could not fulfil its function. Because harm can take many forms, ‘allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue’.¹³⁴ The harm principle itself provides no guide to resolving these conflicts; in the majority’s words, ‘it does no more than open a gateway to the debate’.¹³⁵ The profligacy of harm arguments has rendered the harm principle impractical as a constitutional guide.

Having thus rejected the harm principle as a constitutional constraint on state power, the majority upheld the offence on primarily paternalist grounds. It held that possession of marijuana was not a harmless or victimless crime but, rather, posed a non-trivial risk of harm to certain vulnerable users.¹³⁶ Justice Arbour, dissenting, was less skeptical of the harm principle and recognized it as a PFJ, clarifying that it applied not to the threshold question of whether Parliament could exercise its broad criminal law power but, rather, whether it could resort to *imprisonment* to punish particular offences.¹³⁷ Moreover, she noted the problem with the majority’s paternalist approach: that the ban caused serious harm to the very people the majority sought to protect (vulnerable users), whereas marijuana use posed no real risk of

¹³² *Malmo-Levine* (n128) [114]. Citing *Rodriguez* (n129), the majority explained that if a law is in furtherance of a valid state interest (such as the avoidance of harm to others) then it will not be arbitrary [130]-[132]. In this case there was a ‘reasonable apprehension of harm’ posed by marijuana use which was rationally connected to the ban, so the offence was not arbitrary, irrational or grossly disproportionate [135]-[136], [174].

¹³³ *Malmo-Levine* (n128) [115]-[126]. The majority held that those moral values which can legitimately be enforced are not ‘conventional standards of propriety’ but rather ‘societal values beyond the simply prurient or prudish’, citing *Butler* (n129) [77].

¹³⁴ *Malmo-Levine* (n128) [127]; see also [128]-[129].

¹³⁵ *ibid* [127].

¹³⁶ *ibid* [46]-[61], [134]-[135], [166]. Note that it also described the marijuana prohibition as an expression of ‘society’s collective disapproval’ of marijuana use which Parliament is entitled to prohibit, which smacks of legal moralism ([136]).

¹³⁷ *ibid* [215]-[217].

harm to others.¹³⁸ Arbour J held that it was not constitutional for a person to be made to suffer the sanction of imprisonment without causing harm to others or society.¹³⁹

The majority's conclusion in *Malmo-Levine* that the harm principle cannot serve as a constitutional limit on Parliament's power to punish criminal acts showed an admirable engagement with some of the theoretical and practical issues that arise when the harm principle is treated as a juridical concept. But where does this leave legal moralism and paternalism? The majority's uncritical acceptance of these principles was based primarily on the existence of current laws against cannibalism and the like, which undercut claims of 'societal consensus' on the primacy of the harm principle in Canadian law and point instead to social beliefs that some acts which do not harm others still merit criminalization. Unfortunately, the majority in *Malmo-Levine* failed to question the legitimacy of paternalist and moralist offences and instead simply used them to detract from arguments about the primacy of harm. It would fall to courts in subsequent cases, such as *Labaye* which I explore below, to circumscribe the range of ethical or social values that can legitimately underpin coercive criminal laws.

2.3.2 The shift toward harm in Canadian law

In the fifteen years since *Malmo-Levine*, Canadian law and society have seen major changes with respect to the regulation of socially contentious activity. Alongside legislative changes such as the repeal of the cannabis prohibition in 2018,¹⁴⁰ Canadian courts have upheld progressive drug policy programs such as safe-injection sites¹⁴¹ and struck down legislation restricting sex work¹⁴² and physician-assisted suicide.¹⁴³ Throughout this period the courts have been moving away from *Malmo-Levine*'s skepticism of the harm principle, increasingly rejecting moralist and paternalist justifications for limits on individual freedom and carving out a greater role for the harm principle in law.

¹³⁸ *Malmo-Levine* (n128) [254]-[258], [262]-[266]. See also [280] (LeBel J, dissenting, emphasized the significant harms of criminalization, compared to the 'rather mild' harm caused by marijuana use).

¹³⁹ *ibid* [246].

¹⁴⁰ Parliament legalized the possession of cannabis for personal consumption in 2018 under the *Cannabis Act*, SC 2018, c16.

¹⁴¹ *Canada v PHS Community Services Society*, 2011 SCC 44 (SCC declared federal government's refusal to issue constitutional exemption to Vancouver-based safe injection site contrary to s7 of the Charter). On the public policy shift toward harm reduction strategies for socially contested phenomena, see Klein, 'Criminal Law and the Counter-Hegemonic Potential of Harm Reduction' (2015) 38 DalLJ 447, 450.

¹⁴² *Canada v Bedford*, 2013 SCC 72. The government replaced the unconstitutional provisions with legislation that loosely adopts the 'Nordic model' of regulating sex work by punishing those who seek the services of sex workers but not the sex workers themselves: *Protection of Communities and Exploited Persons Act*, SC 2014, c25, currently subject to constitutional challenge.

¹⁴³ *Carter v Canada*, 2015 SCC 5.

The courts' shift toward harm is exemplified in *Labaye*, a Supreme Court decision on Canada's indecency laws handed down only two years after *Malmo-Levine*. The majority in *Labaye* overturned the indecency conviction for the owner of a Montreal swingers' club in which members could engage in group sex acts.¹⁴⁴ In the process it replaced the much-maligned 'community standard of tolerance' test from *Butler*, which I address below, with a modern harm-based test for interpreting the indecency provisions in the *Criminal Code*. In so doing it situated the criminal prohibitions on obscenity and indecency, considered by theorists such as Feinberg to be primarily a question of offense¹⁴⁵ and interpreted by prior courts primarily through the lens of moralism or paternalism, squarely under the rubric of harm.

Although the mechanics of a harm-based test for indecency are not directly relevant to the constitutional protection of religious freedom, the role that the court carves out for harm as a legal construct and its reflections on the nature and degree of harm sufficient to justify coercive state measures are highly instructive to this project, particularly in light of the primacy of harm in religious freedom cases. Indeed, recent research on Canadian judicial references to *Labaye* suggests that the harm test it ushered in has been applied in a wide variety of contexts, from indecency and obscenity cases (as one might expect) to those concerning publication bans, the right to privacy, and freedom of expression.¹⁴⁶ As such it is worth looking at how *Labaye*'s risk of harm test operates and what it might signal about the role of harm in the constitutional adjudication of religious freedom.

McLachlin CJ, writing for the majority, explained that the impugned conduct will only be 'indecent' if it causes harm of a particular nature and degree. Starting from the nature of the harm, only harm that is contrary to society's fundamental laws is capable of grounding a conviction. It is therefore not sufficient to say that the conduct is harmful because it is in bad taste, violates one's strongly held moral or religious beliefs, or would incur community disapproval: there must be a risk of actual harm that corresponds to formally entrenched Canadian values such as dignity, equality, and autonomy.¹⁴⁷ The requirement of formal recognition is meant to protect the test from subjectivity and to ensure that the judges' own predilections or beliefs do not stand in for the values of Canadian society as reflected in its fundamental laws.¹⁴⁸ The majority offered three examples of harm that would meet this

¹⁴⁴ *Labaye* (n127). The club owner was convicted under s210(1) of the *Criminal Code*, which prohibits the keeping of a 'common bawdy-house' for 'the practice of acts of indecency.' Indecency relates to sexual conduct such as stripping, lap-dancing and activities in sex clubs (s173(1)). *Labaye* was heard alongside a companion case, *R v Kouri*, 2005 SCC 81.

¹⁴⁵ Public sex acts are the quintessential example of offensive acts in Feinberg, *Offense* (n12).

¹⁴⁶ For a review of all judicial applications of *Labaye* from 2005-2017 see Jochelson and Gacek, 'Reconstitutions of Harm' (2019) 56(4) *AltaLRev* 991.

¹⁴⁷ *Labaye* (n127) [29]-[37]. Fundamental laws include the constitution and bills of rights: [33].

¹⁴⁸ *ibid.*

criteria. The first was harm caused by the restriction of a person’s autonomy or liberty when confronted with inappropriate conduct.¹⁴⁹ McLachlin CJ warned against trivializing this harm, emphasizing that it must relate to ‘only serious and deeply offensive moral assaults’, the avoidance of which would significantly interfere with one’s liberty to live and move about in the public sphere.¹⁵⁰ This nuisance-like form of harm recalls Feinberg’s characterisation of serious offense and his criterion of ‘reasonable avoidability’.¹⁵¹ The second type of harm is that caused by pre-disposing people to anti-social behaviour or the mistreatment of others (‘attitudinal harm’).¹⁵² In some respects this takes us back to Devlin’s territory: protecting society from breakdown caused by attitudinal shifts and subsequent ‘bad’ behaviour. However, unlike Devlin, the majority required evidence that establishes a clear link between the allegedly indecent act and subsequent harmful actions that undermine constitutional values, such as acts of violence against women.¹⁵³ Finally, sexual activity that poses a risk of physical or psychological harm to participants may be sufficient to render it indecent.¹⁵⁴ Here the majority may appear to stray from both Mill and Feinberg by evoking a paternalist principle. However, McLachlin CJ indicated that the full and free consent of participants was relevant to the determination of harm.¹⁵⁵ If such consent could not be established, then this criterion would fall within the terms of the harm principle.

Once harm of this nature is established, a court must then determine whether the harm is of sufficient *magnitude* to justify a conviction. Magnitude is also an important mediating factor in Feinberg’s harm and offense principles.¹⁵⁶ The majority employed a high threshold: the harm must be sufficiently serious that it is actually incompatible with society’s proper functioning.¹⁵⁷ It acknowledged that decisions about whether the harm meets this standard will

¹⁴⁹ *Labaye* (n127) [40]-[44].

¹⁵⁰ *ibid* [41].

¹⁵¹ Feinberg, *Offense* (n12) 32. He writes that the harder it is to avoid the offensive act or display without inconvenience to oneself, the stronger the case for prohibition. This is why he considers ‘bare knowledge’ offense insufficient to ever justify prohibition: it is reasonably avoidable (60-71).

¹⁵² *Labaye* (n127) [45]-[47].

¹⁵³ *ibid* [58] (‘Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice’). See also Feinberg, *Offense* (n12) 149-57 (questioning the causal link between pornography and violence toward women and suggesting that only concrete evidence of harm would suffice to justify a ban).

¹⁵⁴ *Labaye* (n127) [48]-[51]. This addresses one of the main critiques of the obscenity jurisprudence pre-*Labaye*, which is that it unjustly disregarded the harm to participants: see *R v Mara*, [1997] 2 SCR 630 [37]; Acorn, ‘Harm, Community Tolerance and the Indecent’ (1997-1998) 36 *AltaLRev* 258, 265-66.

¹⁵⁵ *Labaye* (n127) [49].

¹⁵⁶ Feinberg, *Harm* (n1) 188-90; *Offense* (n12) 27, 35. In terms of judging the seriousness of offensive acts, he explains that the magnitude of the offense is ‘a function of its intensity, duration, and extent’ (*Offense*, n12, 35).

¹⁵⁷ *Labaye* (n127) [29], [52]. This is a far more demanding standard than Feinberg’s. But of course, the SCC is setting limits on when a court can enter a conviction, not on whether the legislature is entitled to prohibit the activity in question. On the latter point, the SCC has held that Parliament is entitled to act upon a ‘reasoned apprehension of harm’: *Butler* (n129) 503 (Sopinka J); *Thomson Newspapers v*

inevitably require the court to make value judgments. However, it maintained that by making themselves aware of the dangers of deciding cases based on their own prejudices and values, by fully considering the evidential record and the context of the case, and by ‘carefully weigh[ing] and articulat[ing] the factors that produce the value judgments’, judges can guard against subjectivity and arbitrariness.¹⁵⁸ In all but the most obvious cases, expert evidence will be required to establish the existence of actual harm that is incompatible with society’s proper functioning; courts cannot simply infer a causal link where the evidence does not support one.¹⁵⁹ If the evidence indicates a risk of harm rather than actual harm, then the risk must be significant. As the nature of the harm becomes more extreme, the risk of harm required to justify a conviction will decrease.¹⁶⁰

In the end, the majority concluded that the sexual acts performed in the club did not cause harm of a nature to attract criminal sanction; even if they had, it would not rise anywhere near the level of impairing the proper functioning of society. As McLachlin CJ wrote, echoing the sentiment of the Wolfenden Report, ‘[c]onsensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society’.¹⁶¹

Labaye represents the culmination of a century and a half of obscenity and indecency regulation in which courts have struggled to articulate principled limits to individual sexual freedom. In its early form, the obscenity test was both moralistic and paternalist: the operative question was whether the material would ‘deprave and corrupt’ people vulnerable to its immoral influences.¹⁶² This developed into a test of community standards when the first statutory definition of obscenity was introduced in 1959. Canadian courts then asked whether the material was characterised by the ‘undue exploitation of sex’ in the eyes of the community, who would have ‘a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty’.¹⁶³ Thus on top of the *Hicklin* criteria of moral corruption and

Canada, [1998] 1 SCR 877 [87]-[91], [112]-[117] (Bastarache J); *Harper v Canada* (2004) 1 SCR 827 [77]-[88] (Bastarache J).

¹⁵⁸ *Labaye* (n127) [54]. It is interesting that the majority did not make this concession in the context of the first stage of the inquiry, in determining the existence of harm.

¹⁵⁹ *ibid* [56]-[60]. Under the previous test for obscenity and indecency from *Butler* (n129), examined below, courts could infer harm from evidence of degradation or objectification; see also *Mara* (n154) 641, 651.

¹⁶⁰ *Labaye* (n127) [61]. Here the majority (unwittingly) adopts one of Feinberg’s mediating maxims (see text to n61-n65, this chapter).

¹⁶¹ *Labaye* (n127) [71].

¹⁶² *Hicklin* (n121). Jochelson and Kramar argue that courts were primarily concerned about the influence of obscene materials on poor, working class people: ‘Governing through Precaution to Protect Equality and Freedom’ (2011) 36(4) *CanJ Sociology* 283, 291.

¹⁶³ *Brody, Dansky, Rubin v the Queen*, [1962] SCR 681, 705-08, citing *R v Close*, [1948] VLR 445, 465; Jochelson and Kramar (n162) 291-93.

depravity, the court would also consider whether the public would find the material offensive or shocking.¹⁶⁴ A combination of offense, moralism and paternalism prevailed.

The Supreme Court finally broke with this approach in *Butler*, where it confirmed that obscenity would be judged against the community's tolerance for harm.¹⁶⁵ It held that it was indefensible in the Charter era to advance a majoritarian conception of morality through the nation's obscenity laws. Allegedly obscene material would be examined for the risk of harm it posed to someone exposed to it: the greater the risk, the less likely the community would tolerate it.¹⁶⁶ Sopinka J (writing for the majority) clarified, however, that the state was entitled to legislate on the basis of moral disapproval, provided it was consistent with Charter values: the state could enforce 'some fundamental conception of morality'.¹⁶⁷ In the end the majority did not rely on this reasoning, as it concluded that the purpose of the law was not to advance a particular conception of morality but to protect society from risk of harm.¹⁶⁸ But of course, under the *Butler* test, materials would be deemed obscene not because they actually caused harm, but because they were 'perceived by public opinion' to cause harm, rendering their claim to leave moralism behind rather tenuous.¹⁶⁹ The court's approach to morals-based legislation has been described as 'famously muddled',¹⁷⁰ and yet these views continue to exert some influence in Canadian constitutional law, which I return to throughout this thesis. One sees a shift here toward Devlin's territory, despite the court's attempt to root its judgment in critical rather than conventional morality. But as noted in the previous section, liberalism's defences against legal moralism are weakened when it is admitted, as Gonthier J did,¹⁷¹ that the prevention of harm to others is itself a moral position that is legitimately enforced by law.

Although *Labaye* represents a departure from *Butler*, it builds on the latter's legacy. It, too, confirmed that social values may be relevant in setting limits on individual freedom, but not any values – only those that are constitutionally entrenched or flow from fundamental laws, such as equality, human dignity, freedom, and autonomy.¹⁷² A person should not be

¹⁶⁴ *Brody* (n163) 708.

¹⁶⁵ *Butler* (n129); see also *R v Towne Cinema Theatres* [1985] 1 SCR 494 which set the stage for the shift to harm; Jochelson and Kramar (n162) 293-97.

¹⁶⁶ *Butler* (n129) was a constitutional s2(b) challenge to the obscenity provision in s159 (now s163) of the *Criminal Code*. The majority held that the provisions were only constitutional insofar as they sought to prevent harm.

¹⁶⁷ *Butler* (n129) 493; see also 497. In concurring reasons, Gonthier J (with L'Heureux-Dubé J) agreed that morality could serve as a legitimate state constraint on individual freedom, provided the moral claim in question was 'grounded' and commanded support amongst people who hold different conceptions of the good: 522-24, referencing Dworkin (n90).

¹⁶⁸ *Butler* (n129) 495.

¹⁶⁹ *ibid* 467, 492 (Sopinka J). Critiques of *Butler*'s supposed turn to harm are examined in the final part of this chapter.

¹⁷⁰ Miller, 'Morals Laws in an Age of Rights' (2010) 55 *AmJJuris* 79, 79.

¹⁷¹ *Butler* (n129) 524-25.

¹⁷² *Labaye* (n127) [29]-[38] (McLachlin CJ); Craig, 'Laws of Desire' (2009) 54 *McGillLJ* 355.

convicted based on ‘individual notions of harm [or] on the teachings of a particular ideology,’ nor with regard to what the community would perceive to be harmful. So although ‘harm’ can include harm to values, risk of harm is to be judged against the objective standards set by constitutional rules and norms.¹⁷³

Dissenting in *Labaye*, Bastarache and LeBel JJ lamented the demise of the community standards test, maintaining that it was perfectly legitimate to judge acts of criminal indecency and obscenity against the prevailing moral standards of the Canadian community.¹⁷⁴ Unlike the majority, they did not expect those values or moral principles to be reflected in constitutional law. To the contrary, they believed that judges should make informed judgments about what the community would tolerate others doing (even without an audience¹⁷⁵) through expert evidence and consideration of regular legislative enactments that reflect society’s dominant morality.¹⁷⁶ They did not require those moral beliefs to be independently justifiable (ie consistent with the demands of critical morality) as well as widely shared. The majority, however, required that the concept of harm be rooted in critical morality in order to defeat baseless appeals to positive morality.

It may seem difficult to reconcile *Labaye*’s emphasis on harm and *Malmo-Levine*’s rejection of it. Indeed, it is surprising that the majority in *Labaye* could so easily conclude, given its prior stance in *Malmo-Levine*, that its risk of harm test ‘brings this area of the law into step with the vast majority of criminal offences, which are based on the need to protect society from harm’.¹⁷⁷ This shift might suggest the court’s increased willingness to mandate the relative degree of harm we are willing to put up with in society, something it had previously cast as firmly within the role of Parliament.¹⁷⁸ Perhaps *Malmo-Levine* is best considered as a mere aberration from the generally pro-Millian stance adopted by Canadian courts.¹⁷⁹ Or the two cases may simply consider the harm principle from different angles. The court in *Malmo-Levine* refused to consider the harm principle as a hard, constitutional limit on the state’s ability to legislate criminal offences but embraced it in *Labaye* as an interpretive

¹⁷³ *Labaye* (n127) [33].

¹⁷⁴ *ibid* [75]-[76].

¹⁷⁵ *ibid* [100]-[101], [107].

¹⁷⁶ For instance, they held that the court could discern Canadian values on sexual morality by considering the existence of laws prohibiting sex work and sexual violence: *ibid* [86]-[88], [109].

¹⁷⁷ *ibid* [24].

¹⁷⁸ Hughes, ‘Restraint and Proliferation in Criminal Law’ (2010-11) 15 *RevConstStud* 117, 145 (referring to the court’s consistent position that Parliament’s criminal law power is broad, plenary and its exercise not to be micro-managed by courts).

¹⁷⁹ *Levine* (n129). She adds that although the *Malmo-Levine* majority rejects the harm principle as a PFJ, its judgment is ‘replete with harm-speak’ (208). For instance, the harm principle sneaks in through the court’s interpretation of the tests of arbitrariness, disproportionality and overbreadth (207-08).

tool with which to guard contested concepts such as indecency from the creep of legal moralism.¹⁸⁰

If nothing else, *Labaye* signals Canadian courts' increasing refusal to justify state coercion by recourse to abstract values and social norms. This shift is reflected in recent landmark cases such as *Bedford*, in which the Supreme Court declared that the criminal sex work provisions violated the constitutional right to personal security of sex workers.¹⁸¹ The court was not persuaded by arguments concerning the inherent immorality or offensiveness of sex work.¹⁸² Instead it focused on harm – this time following the lead of Arbour J in *Malmo-Levine* by considering not just the alleged harm of the criminal conduct but also the harms caused by criminalization itself.¹⁸³ Likewise, the Supreme Court in *PHS* refused to allow society's collective disapproval of drug use to justify punitive measures that caused harm to users,¹⁸⁴ while its decision to invalidate the criminal prohibition on physician-assisted suicide in *Carter* is indicative of a move toward criminal law minimalism in matters pertaining to private morality.¹⁸⁵ All of these cases show an increased recognition that individual freedom should be limited not by recourse to community standards or popular morality, but by the more trenchant demands of political morality, such as the need to prove harm to others.

2.4 The Critics

The risk of harm test from *Labaye* is not without its critics. Some suggest that the Supreme Court simply introduced a new normative vision of society through its harm test, giving courts too much leeway to accept questionable instances of harm to justify criminal punishment.¹⁸⁶ This is not surprising; it is arguably impossible to propose an objective theory of harm without attracting critique. Despite Feinberg's widely respected efforts to salvage

¹⁸⁰ Craig, 'Re-interpreting the Criminal Regulation of Sex Work in Light of *R. c. Labaye*' (2008) 12(3) *CanCrimLRev* 327, 346.

¹⁸¹ *Bedford* (n142).

¹⁸² See eg Christian Legal Fellowship, Catholic Civil Rights League and REAL Women of Canada, *Factum of the Intervener: Canada v Bedford* <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=34788>> accessed 16.02.20, paras 2, 12; Bunch, 'Communicating for the Purposes of Human Rights' (2014) 3 *CJHumRts* 39. The court's rejection of paternalist and moralist interpretations of the sex work provisions is consistent with the lower court judgment in *Bedford v Canada* (2010), 327 DLR (4th) 52 (Ont SCJ) (Himel J); Stewart, '*Bedford v Canada*' (2011) 57 *CLQ* 197, 200-206.

¹⁸³ *Bedford* (n142); see eg [134]-[136], [148]-[159].

¹⁸⁴ Klein (n141) 460 (the court 'de-emphasized moral disapprobation as a legitimate basis for criminalization in favour of empirical examination of both the damage that the criminal law can do and its effectiveness in serving its purposes').

¹⁸⁵ McMorrow, 'MAiD in Canada' (2018) 44(1) *QueensLJ* 69; Gourlay, 'Less is More: Chief Justice McLachlin and Criminal Law Minimalism' (*Reflecting on the Legacy of Chief Justice McLachlin*, UOttawa, April 2018, copy on file).

¹⁸⁶ Jochelson and Kramar (n162).

Mill's harm principle, for instance, objections to it continue to proliferate.¹⁸⁷ It is not my aim to comprehensively review these objections as I do not situate my work in the schools of moral philosophy or criminal law theory. I focus less on the terms upon which the harm principle may or may not fulfil its aim as a liberty-limiting principle within liberal theory, and more on feminist and other critical responses to the concept of harm as it is applied and embedded in legal discourse. To that end, I surveyed a wide field of academic literature and pulled out recurring themes and perspectives on harm that are most relevant to the adjudication of religious freedom in constitutional law. I synthesized those disparate perspective into four stand-alone critiques.

I begin this part by setting out three shared assumptions about harm and the harm principle that form the basis of the critiques to follow: that because the concept of harm has no settled content, the harm principle is inherently indeterminate; that notions of harm are culturally contingent; and that law's characterisation of an injury as a 'harm' grants it legitimacy. Critical perspectives on harm tend to take these premises as a given. It should be noted that the three premises are not themselves *critiques*; rather, they are facets of harm that, in some contexts, may even be considered strengths.

2.4.1 Three premises or shared assumptions

2.4.1.1 *The harm principle is 'an empty receptacle'*

The concept of 'harm' is broad enough to include most forms of injury or detriment. Some narrowing occurs by differentiating everyday meaning of the term from its legal meaning, the latter being narrower than the former. But even in legal dress it is a vague, amorphous term. Feinberg attempted a legal definition of harm that has perhaps stuck more than any other (though not all agree with it).¹⁸⁸ His definition of harm as a wrongful setback to interests provides important constraints on the harm principle but does not imbue harm with fixed meaning. What constitutes a 'wrong', a 'setback' or an 'interest' is up for debate. As Feinberg concedes, without recourse to supplementary criteria such as his mediating maxims, the harm principle 'is a mere empty receptacle, awaiting the provision of normative content before it can be of any use'.¹⁸⁹ That normative content, in turn, is derived from the particular moral theory in which the concept of harm is embedded.¹⁹⁰ Indeed, Bernard Harcourt argues in his masterful genealogy of the harm principle that it is normative principles such as the prevention

¹⁸⁷ Dripps, 'The Liberal Critique of the Harm Principle' (1998) 7 *CrimJustEthics* 3; Smith, 'The Hollowness of the Harm Principle' (2004) USanDLS Research Paper (05-07); Ripstein (n59); Duff, *Answering for Crime* (Hart 2008); Tadros (n79); Moore (n83).

¹⁸⁸ See eg Shiffrin, 'Harm and its Moral Significance' (2012) 18 *LEG* 357.

¹⁸⁹ Feinberg, *Harm* (n1) 245.

¹⁹⁰ Raz (n6) 414.

of human suffering (Hart), the promotion of human flourishing (Mill), and the values of consistency and equality (Feinberg) that are actually doing the work in the great defences of the harm principle, and not some objective, free-standing notion of harm.¹⁹¹

As a result of the inherent abstraction of the concept of harm, the harm principle becomes difficult to apply. John Gray explains that even with Feinberg's revisions, the harm principle suffers from 'disabling indeterminacies' that render it ineffectual without resort to these other principles and values.¹⁹² Since it is not possible to settle on a conception of harm that is neutral across all moral views, the harm principle is not capable of doing the work it sets out to do: that of 'settling issues about restraint of liberty that arise between people of different moral outlooks'.¹⁹³ Different moral outlooks will lead to the prioritisation of different forms of harm. The use of additional principles such as Feinberg's maxims does not save the harm principle from this problem; questions about the relative 'importance' or 'value' of the conduct in question,¹⁹⁴ for instance, must be answered with resort to other normative assumptions. Because the concept of harm is so open-ended and the harm principle so indeterminate, it does not provide a clear and simple means of fixing morally legitimate limits to freedom.

At the same time, harm's lack of fixed meaning is considered one of the harm principle's great virtues: it is sufficiently open-ended to apply to a wide range of situations. Its flexibility provides legislators, academics and judges with sufficient theoretical space to think creatively and broadly about issues of risk, injury, and protection that arise in a variety of contexts.

2.4.1.2 Harm is culturally contingent and socially constructed

I noted above that conceptions of harm vary across different moral outlooks. In fact, the notion of harm depends on more than subjective moral convictions; it is an open-textured concept whose very meaning is determined by context, culture, and social convention.

To start, harm's plasticity means that different conceptions of harm can be imagined in different situations. John Gardner suggests that part of the frustration associated with trying to fix 'intelligible limits' on the concept of harm stems from the fact that our understanding of harm is 'context-relative': we may describe harm as only extending to physical injuries in one instance, while in the next include 'intense irritations, demoralizations, emotional manipulations and so on'.¹⁹⁵ Our understanding of harm depends on the cultural or social

¹⁹¹ Harcourt (n13) 186-92.

¹⁹² Gray, *Mill on Liberty* (n23) 139-40; Gray, 'Introduction' (n5) xviii.

¹⁹³ Gray, *Mill on Liberty* (n23) 140.

¹⁹⁴ Feinberg, *Harm* (n1) 216-17.

¹⁹⁵ Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 OJLS 1; Smith (ed), *Feminist Jurisprudence* (OUP 1993) 137.

context in which it arises. Harm does not have independent meaning that transcends all these contexts but must be interpreted and evaluated through social and cultural norms.¹⁹⁶ András Sajó illustrates this point using examples of physical harm. Male circumcision, which bears all the usual hallmarks of ‘harm’, is not typically considered harmful because of the social norms that transcribe this act into a culturally legitimate practice. A figurative ‘observer without culture’ not bound by a pre-existing cultural frame may view the cutting of flesh in circumcision as abhorrent – just as that same person might recoil from the sight of a medically necessary surgery or experiments using cadavers. These raw experiences are refracted through the lens of culture and become classified as harmful (or not).¹⁹⁷ It is this process of meaning-making to which Patricia Smith refers when she observes that recognizing a harm is ‘not like recognizing a tree or a rock; it is not an observable fact presented to us by nature; instead, it requires judgment’.¹⁹⁸

We should, then, view harm as a social construct. It is not a natural event (unlike, as Smith says, a rock or tree) but is, rather, a result of social meaning-making. The determination of what counts as harm will be influenced by a wide range of social processes, including religious, moral, political, and legal norms.¹⁹⁹ As Joanne Conaghan explains in her feminist examination of harm, harm is invariably a social concept, because our understanding of it ‘is a product of our social relations and the meanings they generate’.²⁰⁰ And as these norms and social meanings change, our notions of harm change too. Forty years ago it was not considered harmful to make unwelcome sexual advances to female colleagues or employees; now this is rightly considered a harm (sexual harassment),²⁰¹ though even its outer boundaries are still in flux – viz. the #MeToo movement. By virtue of its social derivation the concept of harm as it is socially and legally understood will necessarily always be changing, shifting, and contested.²⁰² Although the socially and culturally contingent nature of harm underpins all four critiques I examine in the final part of this chapter, it also points to one of harm’s strengths. Harm is not a static concept and is thus capable of adapting to social change. As with the sexual harassment example, one need not adhere to rigid conceptions of harm that no longer

¹⁹⁶ Sajó, ‘Emotions in Constitutional Design’ (2010) 8(3) I-CON 354, 369; Bloom, Engel and McCann, ‘Introduction’ in Bloom, Engel and McCann (eds), *Injury and Injustice* (CUP 2018) (the perception, classification, understanding of and resistance to forms of injury are all cultural processes).

¹⁹⁷ Sajó (n196) 369-70.

¹⁹⁸ Smith (n195) 138.

¹⁹⁹ Ewick and Silbey, *The Common Place of Law* (UChiPress 1998); Bloom, Engel and McCann (n196) 3-4.

²⁰⁰ Conaghan, ‘Law, Harm and Redress’ (2002) 22(3) LS 319, 322.

²⁰¹ MacKinnon, ‘Sexual Harassment’ in MacKinnon, *Feminism Unmodified* (HUP 1987) 103-16.

²⁰² Conaghan (n200) 322; Bloom, Engel and McCann (n196) 5-6.

reflect social reality. Arguments for revising or expanding orthodox understandings of harm are thus one way of pursuing social justice and equality in a changing world.

2.4.1.3 *Law's recognition of harm grants the injury legitimacy*

Law is implicated in the social construction of particular forms of injury as harms. The involvement of law is in fact 'a key signifier that harm has been incurred', for law is not concerned with trifles: *de minimis non curat lex*.²⁰³ It is the possibility of legal redress – law's taking of an injury seriously – that grants it legitimacy as a publicly acknowledged harm. For instance, it was at least in part due to the success of feminist efforts to have sexual harassment recognized in law as an actionable claim that enabled its widespread social acceptance as a harm.²⁰⁴ Although public discourse tends to focus on criminal prohibitions, law renders injuries visible and legitimate in all of its manifestations, from regulatory law to administrative and constitutional law. Thus calls for particular harms to be recognised as such in law need not fall prey to the dangers of 'carceral feminism': achieving feminist goals like the eradication of sexual violence through increased use of the criminal justice system.²⁰⁵ Feminist activists have long sought to entrench legal recognition of gendered harms as a vital step toward sex equality and social justice not just in the criminal realm.²⁰⁶ Whatever the forum, law's discursive power acts to render certain harms legitimate and visible in the social world; it turns the personal into the political.

A useful example can be found in Brenda Cossman's analysis of how law's power to act as the arbiter of harm plays out in the #MeToo movement.²⁰⁷ Cossman explains how one site of conflict over #MeToo concerns the role of law: the movement was effectively borne of law's spectacular failure to punish and prevent sexual harms, and presents a direct challenge to the idea that those harms are only legitimate if recognized as such by law. One response from #MeToo's detractors has been to denounce the lack of 'due process' granted to those accused of sexual wrongs. Of course, as Cossman explains, these men are not being tried for their misdeeds by the state and so procedural justice does not inhere. But because law is so

²⁰³ Conaghan (n200) 322; Feinberg, *Harm* (n1) 189.

²⁰⁴ Though on some accounts, cultural forces propelled legal change: see Backhouse, 'Sexual Harassment' (2012) 24 *CanJWomen&L* 275.

²⁰⁵ On carceral feminism see Bernstein, 'The Sexual Politics of the "New Abolitionism"' (2007) 18(3) *differences* 128; Press, '#MeToo must avoid "carceral feminism"' *Vox* (01.02.18) <<https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism>> accessed 16.02.20.

²⁰⁶ See eg Howe, 'The Problem of Privatized Injuries' in Fineman and Thomadsen (eds), *At the Boundaries of Law* (Routledge 1991) 148; MacKinnon (n201) 104 ('In point of fact, I would prefer not to have to spend all this energy getting the law to recognize wrongs to women as wrong. But it seems to be necessary to legitimize our injuries as injuries in order to delegitimize our victimization by them, without which it would be difficult to move in more positive ways').

²⁰⁷ Cossman, '#MeToo, Sex Wars 2.0 and the Power of Law' 29(3) *AsianYbkHR&HL* 19, 33-36.

firmly embedded in our cultural consciousness as the exclusive arbiter of sexual harm, it feels impossible to conceive of sexual harm without law, and thus without procedural justice.²⁰⁸ Likewise, she notes how critics have taken aim at #MeToo accusations against people like comic Aziz Ansari²⁰⁹ for committing acts of ‘sexual misconduct’ that occupy the liminal space between affirmative, consensual sex, and sexual assault. These claims are thought to over-reach because they are not legally actionable and are thus not *real* harms. Even the author of the Ansari piece questioned whether what she endured was merely an ‘awkward sexual experience’ or qualified as a sexual assault, the suggestion being that only its designation as sexual assault would confer validation on her experience of harm. Cossman concludes that ‘law’s power to define sexual harm makes this claim [sexual misconduct] almost impossible to hear. If there is no legally actionable harm, then there must not be a harm’.²¹⁰ Thus we see how law’s involvement in defining and legitimating harm can be seen in both a positive and a more critical light.

These trends play out beyond the arena of sexual harm. As socio-legal scholars Anne Bloom, David Engel and Michael McCann point out, it is hard to even talk about injury or harm without invoking ‘the legal interest it has impaired’.²¹¹ Law serves both as a means of validating harm and as the prism through which harm is conceptualized. Law and harm are deeply intertwined.

2.4.2 Four critiques

The preceding three points have set the groundwork for the critical perspectives to follow. The critiques below proceed on the assumption that the concept of harm is normatively empty, culturally and socially constructed, and closely tied to law’s normative project. From this starting point they engage with some of the trickier aspects of harm and its deployment in law: its tendency to smuggle in moralistic concerns, its self-defeating malleability, its alignment with unequal power relations, and its unduly abstract quality.

2.4.2.1 The harm principle is legal moralism in disguise

The remedy prescribed for the old Victorian disease of judicial subjectivism and moralism – the combination of the ‘risk of harm’ test and ‘community standards’ – turns out to be remarkably similar to the illness itself.²¹²

²⁰⁸ Cossman ‘#MeToo’ (n207) 34.

²⁰⁹ Way, ‘I went on a date with Aziz Ansari. It turned into the worst night of my life’ *Babe.net* (13.01.18) <<https://babe.net/2018/01/13/aziz-ansari-28355>> accessed 16.02.20.

²¹⁰ Cossman ‘#MeToo’ (n207) 35; see also West, *Caring for Justice* (NYUP 1997) 151-52.

²¹¹ Bloom, Engel and McCann (n196) 1.

²¹² Valverde, ‘Harms of Sex and Risk of Breasts’ (1999) 8 S&LS 181, 194.

One of the most pervasive critiques levelled against the harm principle is that it bleeds too easily into legal moralism.²¹³ This occurs not necessarily through deliberate judicial sleight of hand but simply by virtue of the capaciousness of the concept of harm. Harm is such an open-ended, indeterminate concept that it can feasibly stand in for instances of immorality or breaches of conventional standards of propriety, provided they are framed as some sort of injury to individual or collective interests (which is not a difficult task). Even adopting a relatively tight conception of harm such as Feinberg's, evaluations of harm necessarily depend on moral judgments about what constitutes a person's interests and whether they have been wronged, as I noted above.²¹⁴ Moreover, once harm is untethered from narrow definitions limited only to, say, physical and liberty-based harms, and once it is understood that harm can be experienced at both the individual and social level, then intangible social harm can be used as a proxy for violations of the community's conventional social mores. The ease with which harm arguments can be made enables moralistic concerns to masquerade as harm.

The most enduring example of this problem can be found in *Butler*, in the majority's restatement of obscenity laws as serving not to punish moral infractions but to prevent harm to women and society.²¹⁵ The court clarified that material would be obscene if it were degrading or dehumanizing, to be judged according to what the community would tolerate others being exposed to on the basis of the harm that could flow from exposure.²¹⁶ Critics of the decision maintain that this test is nothing more than 'sexual morality in drag'.²¹⁷ The community standards for harm test concealed a prevailing conservative morality that inscribed particular distinctions of 'good' or 'bad' sex and that relied on monist, essentialist, negative, and hierarchical understandings of sexual experience.²¹⁸ This became even clearer in subsequent obscenity cases applying *Butler*. Critics noted that since no evidence of harm was required to prove obscenity, courts were falling back on prevailing standards of sexual morality to determine whether the materials were sufficiently degrading and objectifying to cause social harm.²¹⁹ In deciding that 'the community' would tolerate a club's live sexual

²¹³ Of course, it is also difficult to disentangle claims of harm from those of offense and paternalism, but their legal enforcement is generally taken to be less serious than the enforcement of morals, given the tendency for moralistic laws to impair the rights of minority groups (which I address in the next section).

²¹⁴ See eg McCormick (n103); Gray, *Mill on Liberty* (n23) 139-40; Miller (n170) 92.

²¹⁵ *Butler* (n129). The court repeatedly emphasized the harm/morality distinction, though not without tying itself in knots: Cossman, 'Feminist Fashion or Morality in Drag?' in Cossman, Bell, Gottell and Ross (eds), *Bad Attitude/s on Trial* (UofT 1997) 107, 120. See Sopinka J's statement in *Butler* (n129) that 'it is moral corruption of a certain kind which leads to the detrimental effect on society' (494), which undermines the majority's attempts to interpret obscenity solely through the lens of harm.

²¹⁶ *Butler* (n129) 466-67, 470 (Sopinka J).

²¹⁷ Cossman, 'Feminist Fashion' (n215) 108.

²¹⁸ *ibid* 107, 111-12, 115-16, 127.

²¹⁹ See eg Cossman, 'Disciplining the Unruly' (2003) 36 *UBCLR* 77; Craig, 'Re-interpreting' (n180) 333-35; Boyce, 'Obscenity and Community Standards' (2008) 33 *Yale JInt'lL* 299, 303, 333-34.

displays that included masturbation in *R v Tremblay*, for instance, the Supreme Court afforded significant weight to the evidence of an expert sexologist who reassured the court that masturbation is a ‘normal’ practice engaged in by the majority of Canadians.²²⁰ The court judged indecency not according to actual harm but by relying on calculations of the prevalence and propriety of particular sexual practices.²²¹ The impossible analytic vagueness of the test left ample room for judges to simply ask themselves the same types of questions they had asked in the *Hicklin* era under the ‘depravity and corruption’ test, but cloaked in the language of harm.

Even the new risk of harm test in *Labaye* has come under fire for allowing the regulation of indecency based on conventional morality. Although the result in *Labaye* (setting aside the indecency conviction for a private sex club operator) could suggest otherwise, perhaps it is the case that prevailing sexual mores are simply in flux and now reflect a greater toleration of diverse sexual practices (such as swinging). Moreover, in research on subsequent applications of *Labaye*, Jochelson and Gacek found that courts continued to make findings of harm based on little more than ‘moral value judgments’, often by means of open-ended, abstract appeals to the risk of harm to the public or to political values.²²² Although *Labaye* should be applauded for its considered and critical attempt to treat harm as a stable, legal construct, it could not fully shrug off the mantle of the harm principle’s tendency to refract and enforce dominant values and moral judgments.

2.4.2.2 Harm’s malleability and the problem of competing harms

The very simplicity of the harm principle may explain why harm became universal and how the struggle over the meaning of harm eventually collapsed the harm principle.²²³

The first premise stated above was that harm is an inherently ambiguous, open-textured concept: it has no pre-defined content but, rather, can mean different things in different social, cultural or linguistic contexts. It is a ‘multi-faceted concept with shifting interpretations’.²²⁴ Post-structuralist critic Mariana Valverde builds on this idea and locates the problem with cases such as *Butler* not so much in terms of how ‘harm’ serves to disguise moralism, but rather in how risk of harm is implicated in the ‘hybridity of governance’.²²⁵ She

²²⁰ [1993] 2 SCR 932 [71]; Craig, ‘Re-interpreting’ (n180) 335. Although *Tremblay* concerned the bawdy house/indecency offence, the community standards test from *Butler* applied.

²²¹ See also critiques of the *Butler* test in the context of LGBTQ+ pornography: Cossman ‘Feminist Fashion’ (n215) 128-43; Cossman ‘Disciplining’ (n219).

²²² Jochelson and Gacek (n146) 993-94, 1014-26.

²²³ Harcourt (n13) 192.

²²⁴ Beaman, *Defining Harm* (UBC 2008) 67.

²²⁵ Valverde (n212) 182. Although she agrees on some level with Cossman et al who make the former argument, she problematizes ‘an ontology that privileges the ‘deep’ level over the ‘surface’’ (182).

explains that harm's malleability means it can serve as a 'veritable joker card', used on all sides in the service of competing and incommensurable goals.²²⁶ In *Butler*, for instance, the court's use of harm could be a proxy for any one of the competing visions of harm put before the court: it could incorporate both radical feminist and conservative Christian harm arguments, blending those with functionalist concerns about the smooth running of society and institutional concerns about harm to the Charter itself.²²⁷ Governance strategies based on harm thus 'have very different rationales and produce extremely varied results'.²²⁸ Harm is so stretchy a concept that it is capable of standing for both too little and too much, of being moulded and formed into whatever shape the particular argument demands of it.

So many competing demands are now made on harm that it has long ceased to provide any convincing dispute resolution function. This was one reason for the majority's refusal to grant a constitutional role to the harm principle in *Malmo-Levine*.²²⁹ Harcourt, in charting the rise and fall of the harm principle, illustrates how harm's capaciousness has been compounded by its privileged status in political, legal and public discourse to render the harm principle analytically useless.²³⁰ Harcourt begins by looking at how the language of harm came to dominate the terms upon which activities once considered 'vices' were debated in the 1960s, especially following Hart's perceived victory over Devlin and the gradual loosening of morals legislation in western democracies. By the 1990s, however, advocates of legal enforcement and prohibition had shed the mantle of moralism and instead began to frame their arguments in terms of harm.²³¹ Harcourt describes the transition from legal moralism to harm in the conservatives' arsenal of rhetorical tools, which they used to justify the legal regulation of pornography, sex work, disorderly conduct, gay sex, alcohol and drug consumption, and sex outside marriage. Importantly, these conservative harm arguments were (and continue to be) met by countervailing harm arguments deployed by liberal progressives. In drug policy, for instance, arguments for the 'war on drugs' started relying on evidence of the harms caused by drug use. In return, the anti-prohibition camp cleverly reframed its previous policy stance (legalization) into a different harm argument: one of harm reduction, shifting the focus to the harms caused not by drugs themselves but by the criminal regulation of drug use.²³² We have

²²⁶ Valverde (n212) 184, 187-91. An analogy can be drawn between this understanding of harm and Wendy Brown's critical approach to tolerance. Brown describes tolerance as a discourse of governmentality whose character is eminently variable and multi-faceted. She notes that tolerance is discursively deployed by people on opposite ends of the political spectrum, its usefulness 'bound to its very plasticity – to when, where, and how far it will stretch': Brown, *Regulating Aversion* (Princeton 2008) 11-12; see also 4-6.

²²⁷ Valverde (n212) 189-91.

²²⁸ *ibid* 187; Beaman (n224) 85-86.

²²⁹ *Malmo-Levine* (n128) [127]-[128].

²³⁰ Harcourt (n13).

²³¹ *ibid* 139-40.

²³² *ibid* 112-13, 172-76.

seen this trend in the recent successes of anti-prohibitionists at the Supreme Court in decisions on supervised injection sites, physician-assisted suicide, and sex work.²³³ But in response, conservative harm arguments have only become louder. The proliferation of harm arguments means that nearly every ‘morals’ offence is now framed in terms of harm,²³⁴ few advocates or judges choosing to stick their necks out and claim that the state should be in the business of legislating morality.

As a result, the harm principle has effectively degenerated into a ‘harm free-for-all’ wherein one set of harms is pitted against another without any clear way to decide between them.²³⁵ The harm principle itself provides no guide to judging the relative importance of harms.²³⁶ One could follow Feinberg’s suggestion by considering how vital the interest is to the possessor, the extent to which it is reinforced by other interests, and the interest’s ‘inherent moral quality’, but to assess interests along these lines will require resort to other values or principles such as equality, autonomy and identity whose meaning is equally contested.²³⁷ Harcourt explains that one winds up engaging in ‘harm decisionism,’ simply considering the harms on both sides of the equation and deciding which are more compelling.²³⁸ This utilitarian totting-up opens the door to those very vices which Mill was so keen to exclude: ‘the greatest demagoguery, mass public appeal, and social pressure’.²³⁹ Thus the very capaciousness of the concept of harm – its ability to shelter non-trivial claims of injury on both sides of a debate – has produced a situation in which harm arguments are simply met by further harm arguments, *ad nauseam*, with no resolution in sight.

2.4.2.3 Law’s recognition of harm is unequal, unjust, and entrenches social divisions of power

Injuries are produced amidst unequal, hierarchical power relationships. ... Consequently, it is essential to recognize that neither injuries nor the mechanisms of personal injury law, or any domains of law for that matter, are neutral and removed from those relationships of power.²⁴⁰

Harm does not fall evenly on society. The authors of the quotation above explain that although harm is a universal experience, its distribution is unequal: the least privileged people

²³³ *PHS* (n141), *Carter* (n143) and *Bedford* (n142), respectively.

²³⁴ Harcourt (n13) 114. He argues in a recent follow-up piece that little has changed in the years since his first piece on harm was published: Harcourt, ‘Mill’s *On Liberty* and the Modern “Harm to Others” Principle’ in Drubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014) 163.

²³⁵ Harcourt (n13) 119.

²³⁶ On the question of how to decide between competing harms, ‘the harm principle is silent’: Harcourt (n13) 113-14; 181-83.

²³⁷ Feinberg, *Harm* (n1) 217, 204-06; Harcourt (n13) 182-83.

²³⁸ Harcourt, ‘Modern’ (n234) 179.

²³⁹ *ibid* 181.

²⁴⁰ Bloom, Engel and McCann (n196) 16.

in society are the most likely to suffer harm and the least likely to obtain redress.²⁴¹ Social and legal designations of harm tend to exclude marginalized forms of suffering. Law's mis/recognition of harm thus builds on and entrenches the inequalities suffered by disadvantaged social groups.

American legal scholar Mary Anne Franks refers to the exaggeration of harms suffered by those in positions of privilege and the trivialization of harms to vulnerable people as 'injury inequality'.²⁴² The presence of injury inequality in social and legal systems results in distorted perceptions of what is harmful and what is not, channels resources away from those in need, and breeds indifference to the harm suffered by marginalized people – leading to the justification of those harms in the name of protecting privileged interests.²⁴³ For instance, concerns over the reputational harm to men accused of sexual assault are often afforded more weight than the harm suffered by the victims. Likewise, American laws of self-defence and gun rights prioritize the risk of harm to people in positions of power (white, male homeowners) over harms to Black people, women, or the mentally ill.²⁴⁴

Injury inequality is a pervasive theme in feminist, critical race and queer perspectives on law. It is a problem thoroughly embedded in liberal legalism: law's patriarchal, heteronormative foundations have consistently operated to exclude legitimate forms of harm experienced by subaltern groups. Its 'conceit of neutrality'²⁴⁵ conceals a firmly embedded liberal prioritization of the rational, abstract, individual male subject.²⁴⁶ Focusing on gender, Robin West explains that, as a result, 'the rights and remedies universally available to both women and men are for those harms, and for the most part only those harms which, historically, have been suffered by, recognized by, and taken seriously by, men'.²⁴⁷ To take just one example, violent physical harm is widely understood as the prototypical legal harm, enshrined in criminal, civil and constitutional law. And yet, not all physical harm is punished equally. We are still reckoning, for example, with the effects of law's prior authorization of

²⁴¹ Bloom, Engel and McCann (n196) 3, 18-19 ('To be poor is to lack the power to avoid' harm: 18).

²⁴² Franks, 'Injury Inequality' in Bloom, Engel and McCann (n196) 231.

²⁴³ *ibid* 231-32.

²⁴⁴ *ibid* 240, 235. She also argues that many free speech defenders view the harms caused by racist, homophobic, and sexist speech as less serious than both other speech harms (such as those affecting business interests) and the abstract harms to society caused by regulating such speech: 238-40.

²⁴⁵ I borrow this phrase from Brown's discussion of tolerance: tolerance 'operates from a conceit of neutrality that is actually thick with bourgeois Protestant norms': (n226) 7.

²⁴⁶ See eg Mossman, 'Feminism and Legal Method' (1987) 3 *WisWomen'sLJ* 147; Brown, *States of Injury* (Princeton 1995) 145-49; Graycar and Morgan, *The Hidden Gender of Law* (Federation 2002); Naffine, *Law's Meaning of Life* (Hart 2009) 155; Hunter, 'Consent in Violent Relationships' in Hunter and Cowan (eds), *Choice and Consent* (Routledge 2009) 158-61.

²⁴⁷ West (n210) 97; see also Stimpson, 'A Feminist Analysis of the Harm Principle' (2013) 38(2) *AltLJ* 103, 105-07 (the harm principle's reliance on the public/private divide excludes and de-legitimizes gendered harms).

the infliction of physical violence on slaves, women, and children; the forced sterilization of racialized and disabled women; and the severe physical and sexual abuse perpetrated against Indigenous children in residential schools. Harms of sexual violence such as spousal or ‘date’ rape have a spotty legal record, while rape and forced marriage were only recently acknowledged as international crimes.²⁴⁸ The boundaries of risk and harm are determined from within the social axes of power in which they are embedded.²⁴⁹

Broader legal and social recognition of subaltern harms such as the harms of hate speech, discrimination, or sexual harassment tends to provoke backlash and resistance. Many people claim that the concept of harm has been stretched too far²⁵⁰ and now shelters too much trivial injury, hence concerns about society’s current ‘victim culture’ and the disparagement of millennials as hyper-sensitive ‘snowflakes’.²⁵¹ These claims are often made in the context of disputes over freedom of expression and reactions against safe spaces and ‘no-platforming’ campaigns on university campuses.²⁵² In essence these disputes come down to harm: critics on one side stating that claims of harm have been taken too far, met by opposing claims that traditional conceptions of harm simply reflect a conservative and unjust *status quo* that disregards the role of historic social injustice in legitimizing certain forms of harm over others. The boundaries of harm thus continue to be sites of disagreement and contestation that further trouble social fault lines.

2.4.2.4 The harm principle is an abstraction that ignores social realities

To argue at the level of abstraction proves nothing and clouds our vision... We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out this side of the veil, however indelicate that may be.²⁵³

²⁴⁸ Buss, ‘Performing Legal Order’ (2011) 11 IntCLR 409, 412-15; Ni Aolain, ‘Gendered Harms and their Interface with International Criminal Law’ (2014) 16(4) Intl Fem JPol 622.

²⁴⁹ Beaman (n224) 86.

²⁵⁰ See eg Epstein, ‘The Harm Principle And How it Grew’ (1995) 45 UTLJ 369 (expanding the concept of harm beyond fraud, force and commercial monopoly – eg to include discrimination – has turned the harm principle into an ‘engine of social control’ (371). He writes: ‘No theory of freedom can survive such an extended definition of harm’ (413).

²⁵¹ Many of these critics cite Nick Haslam’s work on ‘concept creep’. Haslam argues that phenomena such as bullying, trauma, and addiction have come to contain a greater number of qualitatively different phenomena within them, while the criteria to establish their occurrence have been watered down. Though he concedes that concept creep can signify moral progress, he emphasises its damaging effects: the creation of ‘victimhood culture,’ trivialisation of phenomena, and conceptual confusion: Haslam, ‘Concept Creep’ (2016) 27(1) PsychInquiry 1.

²⁵² See eg Haidt, ‘Campuses are places for open minds, not where debate is closed down’ *The Guardian* (10.04.16) <<https://www.theguardian.com/commentisfree/2016/apr/10/students-censorship-safe-places-platforming-free-speech>> accessed 16.02.20.

²⁵³ Matsuda, ‘Liberal Jurisprudence and Abstracted Visions of Human Nature’ (1986) 16 NMLRev 613, 624 (references omitted). Matsuda’s reference to ‘the veil’ is of course a reference to John Rawls’ ‘veil of ignorance’ in his theory of justice as fairness in Rawls, *A Theory of Justice* (HUP 1971). Rawls’ theory has attracted feminist critique for its reliance on abstraction and its conceit of universality.

There is a fundamental mismatch between the harm principle and the lived reality of harm. The harm principle operates at the level of abstract theory; it is universal, applicable to all. Specificity is sacrificed for generality. The theorist steps back from a focus on a particular individual in order to make wider, more generally applicable statements about all individuals. While this can be of great value, something important can be lost in the process. Existing social structures of power and domination are not reflected in abstract liberal theories like the harm principle, and risk being eclipsed when those theories find their way into legal doctrine and theory.²⁵⁴ These are important features of social life that require interrogation and attention. Indeed, a central tenet of feminist legal theory is the idea of contextualisation: that legal reasoning ought to proceed from the context and reality of people's experiences, rather than from abstract principles,²⁵⁵ to account for power imbalances and the perspectives of powerless or vulnerable people.²⁵⁶ A contextual approach also helps to guard against essentialism, by disrupting the fixed meanings attached to legal and social categories and by accounting for their more complex and mutable character.²⁵⁷

Moreover, harm ought to be understood as a 'thoroughly social' concept: as noted in the section above, harms are incurred along axes of social power, and are often experienced at the level of the group rather than the individual.²⁵⁸ Harm is not something that can be easily abstracted from social reality as its meaning depends on the social relations and understandings in which it is embedded. Proper attention to harm requires that one be attuned to the particular, rather than rely on abstract conceptions of harm that merely reflect the normative commitments of liberal legalism.

The call to guard against undue abstraction should not be interpreted in such a way as to lead to individuation or depoliticization. Depoliticization entails a frame of reference that strips a problem or phenomenon of its structural aspects, its history, and the relations of power that sustain it. It occurs, for instance, when social injustice is framed as personal prejudice or when political problems are cast as individual and localized issues.²⁵⁹ It is at play when injuries are treated as isolated events and not part of a wider economic, cultural, or legal system.²⁶⁰ Ben Berger explains that in terms of law's engagement with religion, depoliticization occurs

²⁵⁴ See eg Young, *Justice and the Politics of Difference* (Princeton 1990); Munro, *Law and Politics at the Perimeter* (Hart 2007) 47-49; Stimpson (n247) 106.

²⁵⁵ Bartlett, 'Feminist Legal Methods' (1990) 103(4) *HarvLRev* 829; Hunter, McGlynn and Rackley (eds), *Feminist Judgments* (Hart 2010) 35, 38.

²⁵⁶ Bartlett (n255) 849.

²⁵⁷ Hunter, McGlynn and Rackley (n255) 41-42.

²⁵⁸ Conaghan (n200) 322; see also Howe (n206); MacKinnon (n201) 15; Ni Aolain, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen'sLJ* 219.

²⁵⁹ Brown (n 226) 13-24.

²⁶⁰ Jain, 'Injury Fields' in Bloom, Engel and McCann (n196) 154.

when conflicts over religious difference are viewed as ‘the product of private struggles with neutral law rather than an instance of social and cultural conflict that calls for political analysis and responses’.²⁶¹ What is needed is an approach to harm that takes account of its political, historical, and social placement – thus not operating at the level of abstract appeals to principle – but that does not zoom in so closely to the particular that this wider context is lost.

2.5 Conclusion

Our experiences of and understanding of harm are culturally rooted; what we perceive as harmful is a function of complex social norms and processes. But law, too, can be understood as a cultural form.²⁶² Law’s conceptions of harm will necessarily be shaped by those normative and cultural assumptions that underpin it, which leaves it ill-equipped to understand claims of harm from marginalized social groups.²⁶³ Lori Beaman suggests that when courts assess questions of religious difference, for instance, non-hegemonic beliefs and practices that sit less comfortably within law’s foundational assumptions are disproportionately construed as harmful, their limitation more easily justified.²⁶⁴ This tendency can impede the road to social justice and equality for people of minority faiths whose rights claims lie on the margins (or completely outside) of constitutional culture.

It therefore matters how law construes harm. Unduly narrow or rigid conceptions of harm risk doing further damage to marginalized groups, who already bear the brunt of society’s injuries and who are not reflected in law’s image. And yet what I have tried to show in this chapter is that the concept of harm is itself notoriously unstable and slippery. The problem is not merely that harm may contain too little, but that it may simultaneously contain too much, such as when harm is alleged to include moral corruption, or offense to community standards of decency or morality, as in *Butler*. We are left with a concept that is pushed and pulled from all directions, losing any sense of coherence or stability, and being deployed by parties on all sides of a dispute to support opposing viewpoints. Now that Canadian courts are increasingly turning to the language of harm to resolve constitutional disputes over socially divisive conduct, the problems with treating harm as a legal category, so clearly articulated by the majority in *Malmo-Levine*, are even more pressing. Does liberalism provide us with the answer to this conundrum? Feinberg believes it can, but critics have pointed to the troublesome normative terms upon which his theory of harm depends: interests, wrongs, and set-backs, and mediating principles which require consideration of the *gravity* of harm, the

²⁶¹ Berger, *Law’s Religion* (UTP 2015) 151.

²⁶² Bloom, Engel and McCann (n196) 1-3; Berger, *ibid*.

²⁶³ Bloom, Engel and McCann (n196) 12; Berger, *ibid*.

²⁶⁴ Beaman (n224) 67.

importance of one's interests, and the *value* of the dangerous conduct. This is only a problem insofar as the harm principle is expected to set principled limits on individual freedom without resort to any one moral conception of 'the good life' – another demand made of harm that it simply cannot fulfil.

Critical perspectives on harm, such as the feminist critiques explored in the preceding section, are necessary to ensure that judicial conceptions of harm are able to account for its contingent, changeable character and to prevent its deployment from further entrenching social divisions and inequalities. 'Step by cautious step',²⁶⁵ to borrow from McLachlin CJ's reasons in *Labaye*, the courts are moving away from doctrinal tests that justify state coercion on the basis of majoritarian social mores and toward an approach that requires evidence of harm grounded in society's fundamental, constitutional norms. Though it remains to be seen whether this approach is capable of resisting some of harm's more problematic dimensions, I return to the central themes and challenges raised in *Labaye* throughout this thesis. Harm's roots in liberal legalism are deep and wide; it is to be hoped that the strengths and not the weaknesses of a harm-based approach can be harnessed by courts given its enduring relationship with law.

²⁶⁵ *Labaye* (n127) [26].

3 The turn to harm in religious freedom cases: Explanations, justifications, possibilities

3.1 Introduction

In this chapter I retain a focus on the concept of harm but consider it in light of the Charter right to religious freedom. I noted in the Introduction to this thesis that people instinctively turn to harm as a principled limit to religious freedom. This chapter sets out to explore some of the reasons for this tendency to judge the limits of religious freedom against the standard of harm, with a focus on courts and their adjudication of religious freedom under the Charter.¹ I argue that there is not one single operative factor driving the turn to harm but, rather, a number of possible explanations, some of which point to a reflexive or instinctive preference for harm and others to a more deliberate choice. These factors may play out in different ways depending on the particular judge hearing the case and the context in which the dispute arose. I have grouped the substantive rationales for what I call the ‘harm habit’ in religion cases into four categories: conceptual, cultural, phenomenological and pragmatic. The chapter is structured around these categories and considers them in turn.

The fact that there are so many potential explanations for the turn to harm in the religion cases attests to harm’s tenacity. I maintain that with so many independent rationales for judges’ explicit and implicit recourse to harm, the trend is likely to continue. Harm is a powerful organizing principle in the religion cases and is likely to remain as such, no matter how many critiques it attracts or sustains.

As a preliminary matter, there is one very simple reason why we see references to harm in the religion cases that belies any special link between them. Many religious freedom cases decided under section 2(a) of the Charter (hereinafter ‘s2(a) cases’) employ the term ‘harm’ because of references to harm in other statutory and doctrinal tests that have little to do with religion *per se*. For example, two of the three steps for determining whether to grant an interlocutory injunction involve a harm inquiry.² Thus we see extensive references to ‘harm’ in religion cases that happen to involve injunction proceedings, such as when an injunction

¹ In the next chapter I provide support for the starting assumption that Canadian courts do, indeed, turn to harm in resolving religious freedom disputes under the Charter. In some ways this approach may appear to be ordered back-to-front, but I believe that it is useful to provide a firm foundation for the link between religious freedom and harm in law, from which I can then explore how that relationship is engaged and demonstrated in s2(a) cases.

² The second step asks whether the applicant would suffer ‘irreparable harm’ if the injunction were not granted, and the third directs a court to consider the balance of harms in granting or refusing the injunction: *RJR-MacDonald Inc v Canada* (1994), 111 DLR (4th) 385, 400.

was granted against a Catholic school board that had forbidden a student from attending prom with his same sex partner,³ and when the request to stay provisions of Quebec’s recent religious neutrality law, prohibiting certain public sector workers from wearing religious symbols while carrying out their duties, was refused.⁴ Although the pairing of harm and religion in these cases is more coincidental than contingent, the cases may still have something to tell us about how courts understand and apply the concept of harm in religious freedom cases. In fact, the discursive prompt in the doctrinal or statutory test often opens the door to interesting and fruitful theorizing on harm.

3.2 A conceptual reason for harm: The principle of autonomy

The first reason for the predominance of harm in constitutional theorizing on religion is that the harm principle and the concept of religious freedom mutually rely on the value of autonomy. Both delimit a zone of personal liberty in which a person can make autonomous choices (such as those in matters of religion or conscience) free from state coercion.

To start, autonomy is the fundamental value underpinning the harm principle. As I explained in Chapter 2, JS Mill theorized that a person’s freedom to pursue her goals autonomously without state interference could only be limited by the harm her actions cause to others. In Mill’s words, ‘the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we don’t attempt to deprive others of theirs, or impede their efforts to obtain it’.⁵ Feinberg’s modern take on the harm principle builds explicitly on a commitment to autonomy, which he understands as akin to personal sovereignty – a zone of freedom over which a person exerts full control and determination:

The life that a person threatens by his own rashness is after all his life; it belongs to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—what is to be done with it in that private realm where the interests of others are not directly involved.⁶

³ *Hall v Powers* (2002), 59 OR (3d) 423 (Sup CtJ); see also *Dansereau v North West Catholic School Division*, 2000 SKQB 14 (injunction sought by parents objecting to board’s decision to implement sex education course was dismissed).

⁴ *Hak v Procureure générale du Québec*, 2019 QCCA 2145. In contrast, the operative provision of Quebec’s previous legislative attempt to ban the receipt and delivery of public services with one’s face covered was stayed: *National Council of Canadian Muslims v Quebec*, 2018 QCCS 2766.

⁵ Mill, *On Liberty and Other Essays* (OUP 2008, 1859) 17.

⁶ Feinberg, *The Moral Limits of the Criminal Law, Vol 3: Harm to Self* (OUP 1986) 59 [*Paternalism*]. For critical perspectives on this vision of one’s life as belonging ‘to him and to no one else’, see eg Sandel, ‘Religious Liberty’ in Bhargava (ed), *Secularism and its Critics* (OUP 1998) 73; Nedelsky, ‘Law, Boundaries, and the Bounded Self’ (1990) 30 *Representations* 162.

His interest-based theory of harm prioritizes a person's freedom to pursue projects and goals as autonomous agent of her own life. Indeed, he writes that the overall aim of the harm and offense principles as he has theorized them is to 'respect personal autonomy and protect human rights'.⁷ Likewise, his rejection of legal paternalism is based on the fact that the principal value of autonomy is so significant as to effectively function as a 'moral trump card' overriding the intuitive and common-sense case to be made for paternalism.⁸

Joseph Raz strengthens the link between the harm principle and the concept of autonomy, revising the harm principle to accommodate his perfectionist account of freedom. He maintains that the state can legitimately coerce not only to prevent harm to others in the strictly Millian sense but also to secure the conditions of autonomy for others. The principle of autonomy requires that a person have a range of valuable options from which to choose; to deprive a person of opportunities or place her in a worse position than she was or is entitled to be is to harm her.⁹ The government is thus morally justified in exercising coercive control to ensure that people have these choices available to them.¹⁰ By collapsing the latter aim into the concept of harm, Raz develops a theory of the harm principle that is explicitly autonomy-promoting. Both Raz and Feinberg thus see a person as being harmed by actions that undermine her ability to pursue her own projects, relationships, and goals.

Turning to law and religion, it is often said that a commitment to autonomy best explains and justifies domestic and international legal protections for religious freedom. Carolyn Evans surveys the work of prominent liberal thinkers who share this belief.¹¹ John Rawls, for instance, treats religious freedom as a fundamental aspect of a person's self-definition; he maintains that a just society will provide the freedom for a person to examine her own religious beliefs and will take her convictions seriously by not imposing preferences or penalties on membership in religious bodies.¹² Ronald Dworkin, too, writes that people should be able to choose freely in determining their own conception of the good life. A state that interferes with people's autonomy without good reason, for instance by curtailing their right to religious freedom, would fail to show those people equal concern and respect.¹³ She also cites Raz, whose commitment to value pluralism and personal autonomy provide a strong

⁷ Feinberg, *The Moral Limits of the Criminal Law Vol 4: Harmless Wrongdoing* (OUP 1990) 12 [Moralism].

⁸ Feinberg, *Paternalism* (n6) 26.

⁹ Raz, *Morality of Freedom* (Clarendon 1986) 413-14. This duty is both negative (preventing autonomy loss) and positive (creating the conditions of autonomy).

¹⁰ *ibid* 416-19.

¹¹ Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 29-32.

¹² *ibid* 31, citing Rawls, *A Theory of Justice* (1972) 207-212.

¹³ *ibid* 30, citing Dworkin, *Taking Rights Seriously* (1977) 199-200.

rationale for law's protection of religious freedom.¹⁴ These thinkers all acknowledge the importance of religious freedom to autonomy and, conversely, the value of autonomy in justifying the legal protection of religious freedom.

Whatever the limitations of an autonomy-based rationale for religious freedom,¹⁵ the theoretical ideal of individual autonomy is indissociable from the legal framework protecting the human right to religious freedom. Evans' work, above, focuses on the European Court of Human Rights (ECtHR), which interprets the Article 9 right to religious freedom largely in terms of its impact on a person's autonomy.¹⁶ In the seminal Article 9 case *Kokkinakis v Greece*, the ECtHR explained that freedom of religion deserves to be protected as it is 'one of the most vital elements that go to make up the identity of believers and their conception of life'.¹⁷ This autonomy-based conception of religious freedom fits within the overarching human rights framework of post-war Europe and its broad commitment to the value of individual autonomy.¹⁸

The influence of liberalism's prior commitment to autonomy can also be seen in the constitutional protection for religious freedom in Canada. Canadian courts treat autonomy as a foundational Charter value that should inform the interpretation of all Charter rights.¹⁹ The s2(a) right is particularly likely to be interpreted in accordance with the value of autonomy; Ben Berger skillfully demonstrates how courts tend to understand and protect religious freedom according to the interpretive constraints of law's own cultural commitments, such as autonomy.²⁰ In *Syndicat Northcrest v Amselem*, for instance, the Supreme Court confirmed that its understanding of religious freedom 'is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right'.²¹ Likewise, a majority of the Supreme Court denied the s2(a) claim of a Hutterite community on the grounds that the state action complained above did not sufficiently interfere with their ability to exercise a 'meaningful choice to follow [their] religious beliefs

¹⁴ Evans (n11) 29, citing Raz, *Morality of Freedom* (n9).

¹⁵ See eg Dorfman, 'Freedom of Religion' (2008) 21 CJLJ 279, 285-87 (autonomy justification is over-inclusive); McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 111-15; Berger, *Law's Religion* (UTP 2015) [LR].

¹⁶ Evans (n11).

¹⁷ App no 14307/88 (ECtHR, May 1993).

¹⁸ McCrea (n15) 110.

¹⁹ Berger (n15) 80. See eg *R v Labaye*, 2005 SCC 80 [33] (McLachlin CJ) and *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [81].

²⁰ Berger (n15) 80-91.

²¹ 2004 SCC 47 [42] (Iacobucci J) [*Amselem*].

and practices’ – later described as ‘the choice that lies at the heart of freedom of religion’.²² Berger suggests that since the early days of the Charter,

...the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice. Indeed ... choice and autonomy have evolved from the tacit logical foundation for analyzing religion to the overriding barometer for constitutional claims about religion.²³

Despite the presence of other narratives that work to inform the scope and meaning of the s2(a) right,²⁴ the courts’ discursive framing of religion as a matter of individual choice remains a deeply rooted part of Canadian jurisprudence.

In fact, the right to religious freedom could be understood as an analogue to the harm principle. The way that courts typically describe the right to religious freedom mirrors the logical structure of the harm principle: a person is free to exercise his or her (religious) choices and pursue her own good (religious convictions) up to the point at which they cause harm to others. With the harm principle and the right to religious freedom overlaid in this way, one can see the animating feature of autonomy structuring and framing both principles. Risk of harm divides warranted from unwarranted incursions on a person’s religious beliefs, practices, and affiliations, all of which are aspects of her freely choosing, autonomous self. The natural analytic kinship of the harm principle and the right to religious freedom thus suggests an inevitability to their pairing in the jurisprudence.

3.3 Cultural reasons for harm: Liberalism and constitutional culture

A second driving force for the harm habit, which is suggestive of a more reflexive, unthinking turn to harm, concerns the vitality of the harm principle as a legal construct within the liberal culture of constitutional law.

There is no doubt that the harm principle has left a strong imprint on the western liberal tradition. In Chapter 2, I noted Bernard Harcourt’s work on how the harm principle came to dominate the field in legal philosophy. Harcourt explains how Devlin’s failure to articulate a persuasive account of moral conservatism and his reliance on social harm arguments led to the fragmentation of the conservative argument and to the overall predominance of the harm

²² *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [88], [99] [*Hutterian*].

²³ Berger (n15) 82.

²⁴ Moon suggests that courts are increasingly viewing the s2(a) right through the lens of equality (*Freedom of Conscience and Religion* (Irwin 2014) 18-21); cf Berger (n15) 84-89.

principle.²⁵ Harm became the ‘dominant discursive principle used to draw the line between law and morality’ from the 1960s onwards by legal philosophers as well as criminal law theorists, who began to routinely deploy harm in textbooks and model penal codes to set limits on offences previously justified on the grounds of morality (eg obscenity and indecency).²⁶ The triumph of the harm principle has had a profound and lasting effect on the way in which moral and political issues are framed, debated, and judged in the public sphere.

The harm principle’s cultural dominance means it also finds a comfortable home in Canadian constitutional culture. ‘Constitutional culture’ can be understood in several ways; the point I make in this section is consistent with two different definitions.

The first is defended by David Schneiderman, who understands constitutional culture to refer to ‘widely shared and dominant understandings of the fundamental norms that guide relations between citizens and states...’.²⁷ It is formed of that set of claims which can be “‘plausibly argued and forcibly maintained’” in the public sphere’.²⁸ Schneiderman’s notion of constitutional culture is pluralist, in that it extends beyond constitutional texts and doctrines and is shaped by political and cultural forces such as media organizations, government and social movements.²⁹ Moreover, its content is shaped by structures of power, as ‘[n]ot all participants in a constitutional order...will have equal access to defining its content’.³⁰ Selective rendering of constitutional norms will favour the most powerful claims and discourses. Harcourt’s account of the influence of the harm principle in western liberal thought would suggest that the ‘dominant understandings’ (in Schneiderman’s words) of Canadian constitutional culture have been influenced by the progressive rhetorical, political and legal shift toward harm.

Schneiderman explains that constitutional culture informs the work of Canadian courts. In his study of judicial decisions on the equality guarantee in section 15 of the Charter, for instance, Schneiderman argues that ‘middle class’ values have come to inform Canada’s constitutional culture and that this dominant understanding has influenced the courts in their particular interpretation of section 15 as it relates to social welfare programs.³¹ Claims that a benefit scheme is discriminatory are more likely to succeed when the scheme in question is

²⁵ Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *JCrimL&Criminology* 109 118, 125-34. It is now taken as given that Hart prevailed over Devlin, and that legal moralism is all but indefensible.

²⁶ *ibid* 134-38.

²⁷ Schneiderman, ‘Canadian Constitutional Culture’ in Oliver, Macklem and Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 913, 915; see also Schneiderman, ‘Banging Constitutional Bibles’ (2005) 55 *UTLRev* 833, 835-39.

²⁸ Schneiderman, ‘Bibles’ (n27) 836, citing Reid, ‘In a Defensive Rage’ (1974) 49 *NYULR* 1043, 1087.

²⁹ Schneiderman, ‘Culture’ (n27) 915.

³⁰ Schneiderman, ‘Culture’ (n27) 915.

³¹ Schneiderman, ‘Universality vs Particularity’ (2006) 33 *SCLR* (2d) 367.

framed as universalistic – as intended to benefit all Canadians, including the middle classes – whereas discrimination claims concerning targeted schemes in which benefits are focused on poor or working class people are less likely to succeed. Schneiderman explains that in these cases we see courts deferring to the public’s ‘dominant opinion on contentious social questions,’ the values which make up a country’s constitutional culture.³² Turning back to harm, the political and rhetorical consensus on the primacy of the harm principle in western societies could, under Schneiderman’s reasoning, influence a court’s interpretation of constitutional rights.

The second conception of ‘constitutional culture’ is that advanced by Berger, who argues that constitutional law can best be understood as a cultural form in its own right. Canadian constitutional law does not sit ‘above’ culture, but in fact has its own culture: its own set of assumptions, commitments, and norms that mediate and shape its interaction with other phenomena, such as religion.³³ The meeting of law and religion produces a ‘cross-cultural interaction’³⁴ in which both law and religion bring to the table their own way of experiencing and understanding the social world. Drawing on the work of cultural anthropologists Mary Douglas and Clifford Geertz, Berger explains that culture is what mediates our experience of the world; it informs our perceptions and guides our understanding.³⁵ We apprehend the world through the prism of our culture, its norms giving meaning to our experience.

Along similar lines, Margaret Davies explains the role of cultural norms in structuring how one perceives and understands the world with an illuminating example from Michel Foucault. Foucault exposes (in Davies’ words) ‘the limitation of our own thought’ in his description of the taxonomy of animals from a Chinese encyclopaedia.³⁶ In this encyclopaedia animals are divided into categories with names such as ‘sucking pigs’, ‘innumerable’, ‘drawn with a very fine camelhair brush’, ‘frenzied’, and ‘that from a long way off look like flies’.³⁷ Foucault reports reacting to this classification with astonishment, noting that

[i]n the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.³⁸

³² Schneiderman, ‘Universality’ (n31) 387.

³³ Berger (n15) 17-19, 35-40, 62-64.

³⁴ *ibid* 18.

³⁵ *ibid* 37-38.

³⁶ Davies, *Delimiting the Law* (Pluto 1996) 13.

³⁷ Foucault, *The Order of Things* (Tavistock 1970) xv (as cited in Davies (n36) 13, 155).

³⁸ Foucault (n37) xv (as cited in Davies (n36) 155).

Much like the fictional residents of the two-dimensional world ‘Flatland’ in Edwin Abbott’s satirical novella of the same name, who cannot see or comprehend the three-dimensional world inhabited by the sphere – to them, the sphere appears simply as a circle, just as the two-dimensional shapes in Flatland appear as points to one-dimensional Line-landers³⁹ – our understanding and experience is bound by our culture. Davies writes: ‘[w]e cannot think anything we like. Our thought is limited by some natural or cultural norms of thinking’.⁴⁰

In applying similar insights about culture to the operation of law, Berger acknowledges his debt to Paul Kahn, who insists that the study of law must be undertaken in a way that recognizes law as ‘a way of being in the world’.⁴¹ Law is a culture that provides a structure and frame of reference for our experiences of ourselves, our communities, and our social world.⁴² It conditions our thinking and influences how we interpret and understand our lives. Importantly, the culture of law is not paramount; it sits in tension with, and vies for authority over, other cultural forms such as religion.⁴³

When constitutional law ‘meets’ religion, it understands religion on its own terms. Importantly, those terms – law’s ‘own structural assumptions’ and ‘symbolic and normative commitments’ – are deeply embedded in liberalism.⁴⁴ Berger explains that the liberal commitments and aesthetics informing constitutional culture operate to define the form that religion takes in its cross-cultural encounter with law.⁴⁵ Thus, when viewed through law’s gaze, religion is conceptually limited to that which is experienced at the individual level, is a product of autonomous choice, and is located within the private sphere.⁴⁶ Individualism, autonomy, and privacy: three foundational tenets of western liberal legalism. Berger’s skillful survey of the Canadian case law on religious freedom demonstrates the extent to which religion is protected only insofar as it is reflective of these three fundamental liberal ideals.

I return to questions about the culture of law and its ‘rendering’⁴⁷ of religion into its own image in Chapter 5 of this thesis. Here I propose that Canadian constitutional culture on

³⁹ Abbott, *Flatland* (Dover 1952, 1979).

⁴⁰ Davies (n36) 13.

⁴¹ Kahn, *The Cultural Study of Law* (UCP 1999) 36 (as cited in Berger (n15) 39).

⁴² Berger (n15) 40.

⁴³ *ibid* 172-3. Berger writes: ‘[f]or each good or principle that presents itself to the judge as utterly natural or incomparably valuable within the framework of law’s culture, there is the possibility for an alternate symbol, good, or ritual without which the world seems equally unintelligible to the committed actor in another culture’ (172-3). Of course, as Berger notes, the law is uniquely positioned to *enforce* its commitments and values over those of a competing culture, and thus will ‘assert[] its dominance’ in these encounters: 132, 102-04.

⁴⁴ *ibid* 63.

⁴⁵ *ibid* 62-104; see in particular 62-63, 77, 99-100.

⁴⁶ *ibid* 62-104.

⁴⁷ Berger uses this term to explain the way in which Canadian constitutional law ‘shapes the legal and political experience of religion’ (*ibid* 62). He writes: ‘Law’s religion is but a corner of lived religion,

Berger's account would invariably include an assumption about the 'correctness' of the harm principle, however loosely defined. In other words, one of the normative commitments making up Canada's constitutional culture is the idea that it is appropriate to use law as a way of preventing harm to others, and that it is generally (though not always⁴⁸) inappropriate to punish behaviour that causes no one harm. One cannot commit to liberty, freedom, or autonomy in a western, liberal democracy without limits, and those limits are set by the notion of harm. Of course, as I explained in the previous chapter, the official status of the harm principle in Canadian constitutional law is somewhat ambiguous: though the harm principle is not a principle of fundamental justice in Canadian law,⁴⁹ it is a central determinant in the legal regulation of sexual morality.⁵⁰ I maintain that by virtue of the inherently liberal culture of constitutional law, the harm principle effectively sets the terms upon which Canadian constitutional law approaches and understands religion.

To conclude, courts' frequent turn to harm in the corpus of constitutional religious freedom cases can be explained in part by the harm principle's role within Canadian constitutional culture. Schneiderman's conception of constitutional culture is premised on the notion of societal consensus and the existence of dominant understandings shared by citizens of a polity – or, more precisely, by those citizens in positions of social and economic power who are capable of influencing the content of constitutional culture. I argue that the popular consensus in western liberal democracies that the harm principle vanquished legal moralism has carved out a strong role for the harm principle in Canadian constitutional culture so understood. On Berger's more phenomenological account of constitutional culture (which I draw on throughout this thesis) the conclusion is the same, though the argument differs. For Berger, the prior normative and symbolic commitments of Canadian constitutional law act to structure and inform law's encounters with religion. As these commitments are derived from the 'political culture of liberalism',⁵¹ law's vision of religion is necessarily shaped by the guiding principles of individualism, choice, and privacy. I argue that law's prior cultural commitment to the harm principle also means that it will apprehend and understand the religious claim in terms that are consistent with the underlying logic of that principle. In this way, constitutional culture embeds the primacy of harm within law's analysis of other cultural forms, such as religion.

lived religion being simply too unruly to subsist within the imagination of the constitutional rule of law' (104).

⁴⁸ In *R v Malmo-Levine*, 2003 SCC 74 the court emphasized that many offences in Canadian law which enjoy public support are paternalist, moralist or offence-based.

⁴⁹ *ibid.*

⁵⁰ *Labaye* (n19).

⁵¹ Berger (n15) 63.

3.4 A phenomenological reason for harm

Legal academic Steven Smith has suggested that jurists, theorists, and people engaged in everyday discourse over public policy are drawn to the harm principle in part because of its ‘resonance’.⁵² The harm principle seems intuitively correct to most people. It conforms to familiar wisdom and adages that many of us have learned from childhood, and thus we reflexively accept and apply it to questions about the scope of state power and individual freedom.⁵³ I believe Smith is onto something important here, and I explore below how reflexive, intuitive comfort with the harm principle may explain harm’s prominent place in religious freedom cases.

Drawing on several judges’ reflections on the judging process and on insights from moral psychology (following the ‘social intuitionist’ model of moral reasoning), I explain below that judges often have strong intuitive reactions to cases and that these intuitions may be predictive of the judgments they come to write, particularly in morally difficult, open-ended constitutional questions. I then demonstrate that those intuitive responses are likely to be influenced by concerns about harm. Judges in western, liberal democracies are predisposed to think intuitively about moral questions in terms of the harm involved, even if unconsciously, and this predisposition will strongly guide them to adopt the language of harm in their judicial decisions. This section thus draws on phenomenological insights about judges’ experiences on the bench, turning the analytic gaze inward.

3.4.1 Intuition and judicial decision-making

I begin with the judges themselves. Albie Sachs, former judge of South Africa’s Constitutional Court, writes that good judging incorporates both reason and intuition. He describes this two-part process using the terminology of the ‘logic of discovery’ and the ‘logic of justification’.⁵⁴ The logic (or process) of discovery occurs first in time and is based on intuition: ‘that intense feeling emerging inside yourself based on a lifetime of experience’.⁵⁵ Intuition guides the judgment from the outset. But a discovery must always be justified: in the logic of justification, which follows, a judge refines and revisits the initial intuitive response by using ‘accepted principles, rules, and standards to arrive at a conclusion that is consistent with those rules, principles, and standards’.⁵⁶ Thus, although a judge’s intuition is strong and

⁵² Smith, ‘The Hollowness of the Harm Principle’ (2004) USanDiego LS Research Paper (05-07) 14-17.

⁵³ *ibid*; see also Smith, ‘Is the Harm Principle Illiberal?’ (2006) 51 AmJJuris 1, 6-11.

⁵⁴ Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 53.

⁵⁵ *ibid*.

⁵⁶ *ibid*.

often predictive of the outcome, it is not always determinative. Sachs explains that the final judgment represents a combination of many inchoate forces, including pre-judgment intuitions and emotions. A written decision may appear as a ‘...simple forward progression – tick-tock – the tick always coming before the tock. Yet in reality the tock had often long preceded the tick’.⁵⁷

Sachs points to Justice Brennan of the US Supreme Court, who also believed that good judging implicates both reason and passion (or intuition). Justice Brennan had noted that all judges were affected by a complex mix of conscious and unconscious forces. He believed that this interplay, in Sachs’ words, ‘did not taint the judicial process, but was in fact central to its vitality, and particularly true in constitutional interpretation’.⁵⁸ Sachs writes:

Brennan referred to these qualities under the rubric of ‘passion’, a word he chose deliberately because it was general and conveyed much of what seemed at first blush to be the very enemy of reason. By ‘passion’ he meant the range of emotional and intuitive responses to a given set of facts or arguments, responses which often sped into our consciousness far ahead of the lumbering syllogisms of reason.⁵⁹

Former US Court of Appeals judge Richard Posner also distinguishes between the intuition that drives judicial reasoning and the subsequent role of reasoned judgment. He explains that ‘[t]he judicial opinion can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on the basis of intuition, could have been arrived at on the basis of logical, step-by-step reasoning’.⁶⁰ Making reference to the research in moral psychology that I explore below, Posner submits that the more uncertain or indeterminate the case, the more judges will draw on their intuition to reach a conclusion on the matter.⁶¹ Constitutional cases are more likely to require this type of ‘telescoped’ thinking given the open-ended language of constitutional provisions and the failure of traditional legalistic tools and methods to point to a single correct solution.⁶² In religion cases in particular, he argues, judges rely on ‘fact-free intuitions about religion’ which are influenced in turn by the judge’s religious understanding, ideology, upbringing, and other personal characteristics.⁶³ Posner

⁵⁷ Sachs (n54) 47.

⁵⁸ *ibid* 114.

⁵⁹ *ibid* 115.

⁶⁰ Posner, *How Judges Think* (HUP 2008) 110. Like Sachs, Posner relies on the distinction between the logic of discovery and of justification, for which he credits Bowers et al, ‘Intuition in the Context of Discovery’ (1990) 22 *CogPsych* 72.

⁶¹ Posner (n60) 35, 79, 105, 369. Defending his reliance on psychological theories of preconceptions and their influence on decision-making in cases of uncertainty, Posner writes: ‘[t]he radical uncertainty that besets judges in many of the most interesting and important cases makes conventional decision theory largely inapplicable to judicial decision making and necessitates eclectic theorizing’ (35).

⁶² *ibid* 374-76.

⁶³ Posner, *Reflections on Judging* (HUP 2013) 82-82.

argues that as constitutional balancing tests fail to provide any real guidance to judges on what weight to give the relevant factors, they will draw on unconscious preconditions – emotions and intuition – to decide on the appropriate weights, and will then provide a *post-hoc* rationalization for the decision in legalistic language.⁶⁴

In a similar vein, British Supreme Court judge Lord Carnwath explains that he takes a pragmatic approach to the substantive judicial review of administrative decisions. He begins by asking himself whether what had occurred was sufficiently serious to require judicial intervention and if so, of what type: then, ‘[i]f the answer appears to be yes ... one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one’.⁶⁵ This is consistent with the views of other UK judges, such as Lady Brenda Hale and Sir Terence Etherton, who emphasize the role of the judge’s personal philosophy, ‘inarticulate premises’ and life experiences in making judicial decisions, as opposed to operating purely in the realm of precedent or logic.⁶⁶

According to the sample of judges considered above, judges might best be viewed as legal pragmatists whose decisions are guided by intuition and justified with recourse to legal tools and doctrines.

This tendency is consistent with recent neuroscientific research on emotion and cognition. Whereas the making of moral judgments used to be considered a primarily cognitive exercise, with reason taking precedence over emotion, the new received wisdom is that emotions and intuitive responses are highly implicated in judicial and moral decision-making.⁶⁷ The work of moral psychologist Jonathan Haidt, for instance, confirms the experiential accounts of judging explored above, showing that when people make moral judgments they are primarily driven by intuition.⁶⁸ In one study, subjects were unable to articulate the basis for their belief that certain ‘harmless’ taboo violations were morally wrong. And yet, they would usually not waver from their initial position despite being presented with

⁶⁴ Posner (n60) 96-99, 105-12.

⁶⁵ Excerpt from Lord Carnwath’s lecture to the Constitutional and Administrative Bar Association (citing Lord Donaldson in *R v Take-over Panel, ex parte Guinness plc* [1990] 1 QB 146) in Elliot, ‘Where next for the Wednesbury principle?’ (*UK Constitutional Law Blog*, 20.11.13) <<https://ukconstitutionallaw.org/2013/11/20/mark-elliott-where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/>> accessed 08.02.20.

⁶⁶ Etherton, ‘Liberty, the Archetype and Diversity’ (2010) *PubL* 727; Hale, ‘Judges, Power and Accountability’ (Constitutional Law Summer School, Belfast, 11.08.17) <<https://www.supremecourt.uk/docs/speech-170811.pdf>> accessed 16.02.20. See also Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *OHLJ* 507, 510.

⁶⁷ Wright, ‘The Role of Intuition in Judicial Decisionmaking’ (2006) 42 *HousLRev* 1381, 1406; Guthrie Rachlinski and Wistrich, ‘Blinking on the Bench’ (2007) 93 *CornellLRev* 1, 43; Sajó, ‘Emotions in Constitutional Design’ (2010) 8(3) *ICON* 354, 357, 366-68.

⁶⁸ Haidt, *The Righteous Mind* (Allen Lane 2012).

cogent counter-arguments.⁶⁹ In another study, subjects were hypnotized to feel disgust when they saw a particular neutral word such as ‘often’ or ‘take’.⁷⁰ They were later given stories to read and asked to judge the actor in the story for moral violations. The hypnotic code was embedded in half of the subjects’ stories, and those subjects judged the actors as more morally blameworthy than the subjects who read texts without their code word.⁷¹

Haidt uses studies such as these to support a ‘social intuitionist’ model of moral reasoning in which ‘intuitions come first, strategic reasoning second’.⁷² Humans are directed by strong intuitive responses and engage in post-hoc rationalization of those initial responses. Haidt uses the analogy of a rider (our strategic reasoning) on the back of an elephant (our intuitive processes) to explain our cognitive processes. The rider can try to direct the elephant, but the elephant is stronger. It is a modernization of David Hume’s thesis that ‘reason is, and ought only to be the slave of the passions’.⁷³ Perhaps Hume’s metaphor of slavery is inapt; Haidt explains that a person’s intuitive judgments can be overridden by strategic reasoning, and that with time and input from other people we are better able to revise our initial reactions to moral quandaries.⁷⁴ However, the more challenging the moral dilemma, the more likely it is that a person’s intuitive judgment, quickly arrived at, will stick.⁷⁵

3.4.2 Harm avoidance as intuitive response to moral dilemmas

Having set out the role of intuition in moral decision-making, we now turn to harm. There is evidence that people’s intuitive judgments on moral issues are strongly influenced by concerns about harm, particularly in western, liberal democracies.

Haidt and other researchers believe that people’s intuitions about right and wrong stem from six paired ‘moral foundations’: care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, sanctity/degradation, and liberty/oppression.⁷⁶ Though conservatives and liberals differ in their response to these pairings, the moral foundation most likely to drive an intuitive response from people across the political spectrum is that based on care/harm. It

⁶⁹ Haidt (n68) 36-40.

⁷⁰ *ibid* 53.

⁷¹ *ibid*. One story featured a faultless student council president who scheduled student-faculty meetings and tried to pick topics that would interest both groups. A third of subjects who read the story containing their hypnotic code still found a way to condemn him, despite the story containing no moral violation of any sort – only their embedded disgust-word.

⁷² *ibid* 50.

⁷³ Hume, *A Treatise of Human Nature* (Penguin 1969,1739) 462 in Haidt (n68) 25. Haidt credits Hume with setting the stage for the subsequent discovery of the role of emotions and intuition in moral decision-making by prominent thinkers in the field: 27-51.

⁷⁴ Haidt (n68) 67-71.

⁷⁵ *ibid* 35-40.

⁷⁶ *ibid* 123-27, 167-84. The researchers settled on these six foundations by drawing on and testing insights from evolutionary theory, virtue ethics, and cultural and moral psychology.

is deeply engrained in people to respond to stimuli that trigger a compassionate care response and to be concerned about harm to others.⁷⁷ The predominance of the harm criterion is much stronger among members of western, educated, industrialized, rich and democratic societies. Haidt reviews evidence that such people are more likely to understand society in terms of individualized, rational agents acting separately and autonomously, and to give moral priority to Mill's harm principle.⁷⁸ Haidt suggests that humans are essentially programmed to be alert to harm, with harm prevention serving as an innate ethical code that strongly influences our moral judgments.

A person's turn to harm can occur not only at the deeper, intuitive level but also at the secondary stage of strategic reasoning. In studies where subjects were presented with 'harmless' acts such as disrespecting a flag or fornicating with a dead chicken, their intuitive response that the act is morally wrong was often influenced by moral foundations other than harm, such as sanctity or respect for authority.⁷⁹ But when asked to justify their belief that the acts were wrong, many subjects engaged in a desperate search for potential harm, however remote.⁸⁰ Haidt believes that these efforts were 'post-hoc fabrications', intended to prop up a position that the subjects often could not quite understand themselves. He writes that 'people usually condemned the actions very quickly But it often took them a while to come up with a victim, and they usually offered those victims up halfheartedly and almost apologetically'.⁸¹ Although reliance on harm as the deciding factor in strategic reasoning on moral issues varies by geographical location and class, subjects in affluent, western, liberal democracies are much more likely to condemn acts that violate the bedrock moral rule that 'harm is wrong' than acts that seem to violate only social conventions.⁸² Harm thus plays a major role in both our intuitive approaches to moral judgments and in the subsequent processes of strategic reasoning and justification for those judgments.

This might help to explain why the turn to harm can seem so effortless and reflexive in religious freedom cases, particularly in western, liberal democracies where individualism

⁷⁷ Haidt (n68) 128-86. Liberals are more strongly directed by the ethic of care/harm than are conservatives, who draw on all six moral foundations. Although fairness also scored moderately high across political lines, liberals and conservatives understand fairness in different ways (138, 176-84).

⁷⁸ *ibid* 96-98.

⁷⁹ *ibid* 18-23.

⁸⁰ *ibid* 24-25. Judging a scenario in which a woman finds an old American flag and rips it into rags for cleaning, many children interviewed suggested that it was wrong because she might feel guilty later, or because the rags might block her toilet and make it overflow: 24. Haidt does not address the criticism that traditional conceptions of harm might simply be construed too narrowly, and that perhaps some of the proffered harms were perhaps not as ludicrous as he imagined.

⁸¹ *ibid* 24. This is backed up by findings from Sood and Darley, 'The Plasticity of Harm in the Service of Criminalization Goals' (2012) 100 *CalifLRev* 1313.

⁸² Haidt (n68) 14-17, 95-98.

is prized. Phenomenological accounts of judging and evidence from the social sciences emphasize the role of intuition in guiding responses to moral issues. These responses will often draw on narratives of harm, predisposing people to view a moral problem in terms of the harm involved. Few people now defend the view that judges engage in purely legalistic reasoning divorced from morality and emotion.⁸³ The adjudication of legal issues before a court necessarily implicates judges in moral reasoning – even more so in religious freedom cases, which touch on contentious moral topics and require judges to engage in open-ended proportionality or balancing exercises. Concerns about harm can prefigure a judge’s initial, intuitive response to a legal problem as well as influence her post-hoc processes of reasoning and justification.

3.5 Pragmatic reasons for harm

The final group of reasons for the discursive emphasis on harm in religious freedom cases I term ‘pragmatic,’ because they address why judges might deliberately choose harm as an interpretive aid or as a solution to the problems posed by religious freedom in a liberal, pluralist state. On one account, harm presents a legitimate mode of engagement with religious freedom that prevents a judge from relying on irrelevant or illiberal considerations and that plausibly unites people of different ethical persuasions. On another more cynical view, we might understand judges’ focus on harm as a form of ‘proxy debate’ that serves to deflect attention from the ontological beliefs underpinning the decision.

3.5.1 Quest for legitimacy in determining the limits of religious freedom under conditions of pluralism

Courts may turn to harm in resolving contested issues of law and religion as a genuine effort to find a principled, morally justifiable limit to law’s power to constrain religious freedom. As discussed in Chapter 2, the harm principle developed as a form of protection from the ‘engines of moral repression’ that threaten to engulf the individual and restrict her freedom according to the whims of the dominant classes.⁸⁴ It is thought to offer at least a partial solution to the problem of majoritarianism, ensuring that vulnerable minorities receive equal protection from repressive laws motivated by illegitimate concerns.⁸⁵ In modern parlance, we might say

⁸³ See Posner (n60) for a wholesale rejection of legalism.

⁸⁴ Mill (n5) 9-11, 18.

⁸⁵ See eg Nussbaum, who writes that recent US cases on LGBTQ+ rights are ‘a victory for the general approach to politics mapped out by John Stuart Mill, one in which majority attitudes are not allowed to deprive minorities of equal rights’: *From Disgust to Humanity* (OUP 2010) 123; see also 17-22, 199.

that the harm principle provides jurists with a ‘safe space’ from which to judge socially contested conduct.

In the context of religious freedom, the promise of harm has two strands. First, as noted above, it can serve to excise illegitimate reasons from the decision-making process. Cécile Laborde, for instance, believes that a liberal’s commitment to the harm principle would prevent her from imposing unjustified restrictions on religious freedom in the name of ‘public order, majoritarian sensibilities, or mere offense to others’.⁸⁶ A focus on harm might also help to steer judges away from mortgaging the case to their own conception of the good life. Indeed, liberal theories of multiculturalism and pluralism are replete with references to the harm principle as a guiding principle for determining the ‘limits of tolerance’ without engaging in cultural imperialism and imposing majority norms on minority practices.⁸⁷

For this reason, the concept of harm may assist judges in dealing with what US theorists call the ‘religious question doctrine’: the idea that civil courts cannot and should not pronounce on matters of religious belief or doctrine.⁸⁸ Canadian courts claim to stand at some distance from religious doctrine. In *Amselem*, Iacobucci J held that ‘secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion’.⁸⁹ The majority in *Amselem* dealt with this problem by proposing a subjective sincerity test to establish whether s2(a) had been violated, obviating the need for the court to inquire into whether the practice is mandated by official religious dogma or whether the individual could have interpreted the religious precept differently. It is enough for the claimant to sincerely believe that she needs to undertake that practice as a function of her faith.⁹⁰ Although the extent to which this aspired-to distance can actually be obtained is debatable,⁹¹ there is certainly a reluctance on the part of judges to appear to be making claims about the merits of religious beliefs or practices. This can render the task of judging the limits of religious freedom more difficult, constraining judges in their attempts to articulate what is at stake in the case. The language of harm can thus be freeing; it allows the court to shift the discussion from the spiritual domain back to law’s terrain. In the case, for example, of a public official refusing to carry out certain duties

⁸⁶ Laborde, *Liberalism’s Religion* (HUP 2017) 35.

⁸⁷ See eg Parekh, *Rethinking Multiculturalism* (HUP 2002) 265-67.

⁸⁸ Su, ‘Judging Religious Sincerity’ (2016) 5(1) OJLR 28, 29-30; Gedicks, ‘“Substantial” Burdens’ (2017) 85 GeoWashLRev 94, 106-09.

⁸⁹ *Amselem* (n21) [50]; *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [36]-[38].

⁹⁰ *Amselem* (n21) [42]-[50].

⁹¹ Berger, ‘Liberal Constitutionalism and the Unsettling of the Secular’ in Adhar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 198, 209; Webber, ‘The Irreducibly Religious Content of Freedom of Religion’ in Eisenberg (ed), *Diversity and Equality* (UBC 2006) 178, 185.

because she does not want to be complicit in acts she perceives as sinful, the court might wish to avoid debating the merits of that belief (ie by considering the religious rules themselves and what they require of adherents),⁹² and instead consider the harm caused to others by her refusal to perform the task and/or the harm to the claimant's liberty interest (for example) in being forced to choose between her profession and her religious convictions. A focus on harm may thus provide a judge with the discursive tools for understanding and discussing religious issues without cutting too close to the beliefs or practices themselves.

The second job that harm purports to do in religious freedom adjudication, closely linked to the first, is to provide a shared normative commitment which can transcend different or even incommensurable worldviews. John Stanton-Ife describes how there appears to be 'something special about harm,' noting that '[t]he point of describing an outcome as harmful, it has been thought by many, is to say that "it is deleterious from the point of view of a very wide range of conceptions of the good"'.⁹³ Lord Raymond Plant builds on this idea when he turns to the harm principle as a means of resolving the paradox of the liberal state committed to pluralism.⁹⁴ He states that the only justifiable way to limit religious freedom in a pluralist society without illiberally imposing a particular set of values on people who do not subscribe to them is by restricting state interference to those instances when the exercise of one's freedom does harm to a set of universal, basic goods, such as the value of human life. In response to the objection that notions of what constitutes harm will differ in a pluralist society, Plant writes that harm provides a shared language in which such claims can be discussed publicly and accessibly. Moreover, Plant suggests that 'there is a benchmark of harm that can be shared across all groups within a pluralistic society, because of the link between harm and the basic goods of agency'.⁹⁵ Maleiha Malik endorses Plant's approach, suggesting that a focus on harm can help to resolve conflicts between LGBTQ+ equality and religious freedom because it provides a unifying principle that is acceptable to most members of a diverse body politic.⁹⁶ These authors view the need to prevent harm as a shared normative commitment that can delimit 'tolerable' from 'intolerable' manifestations of religious belief.

⁹² Smith JA's concurring reasons in *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 are unusual in that she does test the limits of the complicity claim, concluding that there was no evidence that performing the act complained of (officiating a same-sex wedding) would actually make the believer complicit in sin, and 'might well be neutral': [142].

⁹³ Stanton-Ife, 'The Limits of Law' (*The Stanford Encyclopedia of Philosophy*, Winter 2014) <<http://plato.stanford.edu/archives/win2014/entries/law-limits/>> accessed 16.02.20.

⁹⁴ Plant, 'Religion in a Liberal State' in D'Costa, Evans, Modood and Rivers (eds), *Religion in a Liberal State* (CUP 2013) 9.

⁹⁵ *ibid* 36.

⁹⁶ Malik, 'Religion and Sexual Orientation' in D'Costa et al (n94) 67, 77. Several American law and religion scholars advocate resort to the harm principle in the law of religious freedom, though without ascribing to it the universalizing tendency of Plant and Malik: see eg Tebbe, *Religious Freedom in an*

To conclude, the harm principle may be invoked in religious freedom cases as a principled way of mediating competing claims about the proper limits of people's religious freedom without straying into illegitimate considerations or terrain, and without endorsing one belief system above others. Although the need to avoid harm is itself a moral position, Mill maintains that 'no other moral ground would be good enough' to justify limits on individual freedom.⁹⁷ On this account, harm is thought to provide not just a lexicon but a substantive tool for the jurist struggling to make fair decisions under the conditions of religious pluralism.

3.5.2 Harm as a proxy debate

Some jurists may believe in the power of harm to solve disputes of law and religion fairly, reverting to the discourse of harm as an honest attempt to excise illegitimate concerns from the decision-making process and to offer up public reasons for the decision that all participants can understand and accept. In the previous chapter, however, I explained that appeals to the harm principle do not necessarily negate the influence of supposedly illiberal considerations such as offense or moralism. Moreover, judicial attempts to define and interpret harm do not command universal acceptance and may serve to entrench unequal power relations. Thus a more sceptical version of the pragmatic argument above, one that better accounts for harm's ambiguity and plasticity, is that judges draw on harm as an attempt to mask their operative moral commitments in the more 'universal' language of harm.

Berger characterises judicial recourse to the harm principle as a 'proxy debate' that serves to deflect attention from the normative claims which are actually doing the work in such cases. He describes a proxy debate as a form of 'sanitized legal discourse' which is stripped of its overt symbolic and normative content.⁹⁸ By adopting a focus on harm in religious freedom cases, decision-makers can busy themselves with a harm analysis without appearing to endorse or reject the particular normative commitments at play.⁹⁹ Lori Beaman argues, similarly, that courts use harm as a technique for claiming moral neutrality.¹⁰⁰ They can claim not to be judging the religious practice on its merits, but to be merely quantifying and balancing risk of harm, which all parties agree is a legitimate judicial act. But of course,

Egalitarian Age (HUP 2017), who proposes 'avoiding harm to others' as one of four principles to guide courts judging the boundaries of religious freedom. Tebbe chooses 'harm to others' as a guiding principle because of its historic role in American constitutional law, and because he considers those religion cases that vindicate the harm principle to be defensible and just (49-70). This is consistent with his methodological approach ('social coherence') which involves finding solutions to legal problems that best fit with existing judgments and principles (8, 49).

⁹⁷ Stanton-Ife (n93).

⁹⁸ Berger, *LR* (n15)164.

⁹⁹ *ibid* 165-66. Berger writes that '...the harm principle veils cultural conflict; it holds off normative and interpretive questions by burying them under the second-order issue of what qualifies as harm' (165). See also Bhabha, 'From *Saumur* to *L(S)*' (2012) 58 *SCLR* (2d) 109, 138.

¹⁰⁰ Beaman, *Defining Harm* (UBC 2008) 162-63 (fn39).

as I describe in Chapter 2 and as Berger explains, the harm principle cannot do what is expected of it on its own, for it is an indeterminate construct that stands in for different ideas in different contexts.¹⁰¹ Judicial recourse to harm conceals the ontological basis for the decision of what constitutes harm and how serious it is.¹⁰² Berger suggests that this does a disservice to the democratic political order, ‘surreptitiously shifting around the more perplexing and fundamental questions raised by the interaction of law and religion, and engendering an evasive form of policy debate’.¹⁰³ It provides the jurist with a temporary but false reprieve from engaging with difficult moral, ethical and cultural questions that find themselves before the courts.

The regulation of polygamy is a paradigmatic issue that attracts judicial focus on harm. In the BC Supreme Court decision upholding the criminal ban on polygamy, Bauman J held that the case was ‘essentially about harm’ and concluded that the ban’s infringement of religious freedom was amply justified by the serious harms the practice inflicts on women, children, and society.¹⁰⁴ The evidence of harm in the case of polygamy could be sound, and in fact many feminist scholars defend prohibitions on polygamy on similar grounds.¹⁰⁵ However, the court’s adoption of harm as the overarching organizing principle in the case conceals deeper normative convictions about everything from the ontological meaning of family and the social good of monogamy to opinions about sexual deviance, immigration, and nation-building.¹⁰⁶ Some critics maintain that the alleged harms justifying criminal bans on polygamy fall apart under closer examination, revealing harm as a socially acceptable shell containing illiberal arguments based on discomfort, offence or moral abhorrence.¹⁰⁷ They maintain that the unwavering focus on harm in the polygamy debate impedes proper understanding of the issues at stake.¹⁰⁸

¹⁰¹ See eg Smith (ed), *Feminist Jurisprudence* (OUP 1993) 137-38; Harcourt (n25); Beaman (n100) 84-90; Berger (n15) 165-66.

¹⁰² Gray, *Mill on Liberty* (2nd ed, Routledge 1996, 1983) 140; Harcourt (n25) 181-83; Miller, ‘Morals Laws in an Age of Rights’ (2010) 55 *AmJJuris* 79; Berger, *LR* (n15) 165. Moore argues that the harm principle has endured precisely because of this ‘proxying function’: since so many harms are also moral wrongs (and the converse), ‘the harm principle can serve as a rough proxy for what is really doing the heavy lifting here, the moral wrong principle of legal moralism’ (Moore, ‘Legal Moralism Revisited’ (2017) 54(2) *SanD LRev* 441, 461).

¹⁰³ Berger, *LR* (n15) 168.

¹⁰⁴ *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [5] [*Polygamy Reference*].

¹⁰⁵ See eg Kaganas and Murray, ‘Law, Women and the Family’ (1991) *AJ* 116, 128-32; Kelly, ‘Bringing International Human Rights Law Home’ (2007) 65 *UTFacLRev* 1.

¹⁰⁶ Mathen, ‘Reflecting Culture’ (2012) 57 *SCLR* (2d) 357; Calder, ‘Conclusion’ in Calder and Beaman (eds), *Polygamy’s Rights and Wrongs* (UBC Press 2014) 215; Berger, ‘Polygamy and the Predicament of Contemporary Criminal Law’ in Calder and Beaman (same volume) 69.

¹⁰⁷ Bradney, *Law and Faith in a Sceptical Age* (Routledge Cavendish 2009) 110-15; Mathen (n106).

¹⁰⁸ Beaman writes: ‘I worry that the discourse of harm has stifled well-informed debate about polygamy specifically and family forms more broadly’ (Beaman, ‘Introduction’ in Calder and Beaman (n106) 1,

Berger explains that the use of harm as a proxy debate is not necessarily a deliberate move by jurists to shield themselves from criticism or to couch their reasons in the mantle of objectivity, aware that something else is afoot. Rather, courts are simply acting out what Berger calls the ‘conventional story’ about constitutional law and religion. On this account, law proclaims itself as a neutral arbiter of cultural disputes, sitting ‘apart from and above’ religion as an autonomous agent divested of its own cultural allegiances.¹⁰⁹ This false narrative is produced and maintained through the technique of depoliticization, by which a phenomenon is removed from its historical and political context and considered without reference to the structures of power that underpin it.¹¹⁰ When it comes to law and religion, depoliticization works to obscure the cross-cultural nature of their interaction and paints a misleading picture of constitutionalism as a ‘universalist enterprise’ to which all can subscribe.¹¹¹ A court’s reversion to proxy debates is part of this narrative of depoliticization, one that is deeply engrained in law’s conventional approach to religion. A court may talk about harm without needing to acknowledge the multiples encumbrances that inform its appraisal of the nature, risk, or severity of harm, in the same way that law purports to regulate religious freedom more generally by denying its own cultural commitments and operating in the realm of universals.

This view gives us reason to question the extent to which the harm principle can fulfil the ambitious consensus-making role set out for it by liberal thinkers such as Plant and Malik in legal disputes over religious freedom. On Berger’s account, what the discourse of harm might actually be doing in these cases is not so much providing a ‘shared normative benchmark’ with which to resolve disputes but, rather, seducing jurists into the fiction of universality and preventing full engagement with what is really at stake.

3.6 Conclusion

Though few courts go as far as Bauman J in proclaiming that the case is ‘essentially about harm’,¹¹² overt references to harm are a common feature in the s2(a) jurisprudence. As I explain in the next chapter, courts often directly call upon harm when faced with controversial social issues or minority religious practices that trench upon liberal public

7). Along similar lines, Calder writes in her response to the *Polygamy Reference* judgment that ‘what we miss in this decision is an opportunity to understand what the state is really worried about and why’ (n106, 230).

¹⁰⁹ Berger, *LR* (n15) 12-13, 147-52.

¹¹⁰ Brown, *Regulating Aversion* (Princeton 2008) 13-16; *ibid* 150.

¹¹¹ Berger, *LR* (n15) 151-52; Berger, ‘Freedom of Religion’ in Oliver, Macklem and Des Rosiers (n27) 755, 769. To the contrary, Charter interpretation is inherently a deeply political exercise: Hutchinson, ‘The Politics of Constitutional Law’ in Oliver, Macklem and Des Rosiers (n27) 989, 992-94; Joel Bakan, *Just Words* (Routledge 1997).

¹¹² *Polygamy Reference* (n104) [5].

values. One way to understand this trend is to see the concept of harm as a beacon for courts that guides their decision-making along an approved, liberal course, avoiding the pitfalls of deeper engagement with the morals, values and social norms that do the real work in these cases. From this perspective, harm is part of a broader tale of the depoliticization of law and religion, serving as a proxy for the operative factors in the decision that remain unspoken. Equally, this trend could be a function of judicial reticence in matters of religion: since courts cannot pronounce upon the validity of the religious belief under consideration, they may view harm as safer territory upon which to decide its limits. Indeed, the reversion to harm may reflect a genuine desire on the part of judges to solve difficult issues of law and religion without promoting one particular conception of the good life over others. On this account, the fact that harm is a contested term need not disqualify it as a legal tool capable of providing some foothold, however tenuous, in objective terrain.

Judicial reliance on harm in the religion cases may also be a product of less deliberate forces: it may reflect an intuitive predisposition to make difficult value judgments, including those involved in open-ended constitutional reasoning, through the lens of harm. The norms and principles guiding this process are cultural, and western liberal legalism is a cultural form steeped in ideas about the value of harm prevention. The courts' discursive orientation to harm might therefore be a form of judicial tic, a habitual reversion to legal norms and terms that provide some sense of certainty to otherwise abstract or contested ideas.

The intuitive turn to harm is not without consequence and deserves problematizing. Judicial intuition may collapse into a reflexive 'common sense' approach to determining the risk and nature of harm, which raises equality concerns; both intuition and common sense are notoriously fallible, susceptible to bias, and can smuggle in irrelevant and majoritarian assumptions.¹¹³ An unthinking, intuitive turn to harm might more accurately be an intuitive turn to a *particular conception* of harm, one that reflects the central concerns of liberalism: the individual, privacy, and personal autonomy. I discuss in Chapters 5 and 6 how unduly narrow conceptions of harm risk excluding legitimate forms of harm from the constitutional inquiry.

In this chapter I have proposed five potential explanations for the centrality of harm discourse in the constitutional adjudication of religious freedom. Some may play a stronger role than others, depending on the context of the case. Some suggest an element of conscious

¹¹³ Conaghan, 'Law, Harm and Redress' (2002) 22(3) LS 319, 333; Beaman (n100) 90-98; Goldberg, 'Intuition and Feminist Constitutionalism' in Baines, Barak-Erez and Kahana (eds), *Feminist Constitutionalism* (CUP 2012) 98; Schneiderman, 'Common Sense and the Charter' (2009) 45 SCLR (2d) 3. For a nuanced analysis of both the negative and positive dimensions of common sense in judicial decision-making see Cochran, *Common Sense and Legal Judgment* (McGill-Queen's 2017).

choice, while others point to deeper structural forces that prefigure a harm-based outlook. But whichever rationale is at play, harm has a discursive resonance in religion cases that makes it likely to endure. The multiplicity of conscious and unconscious mechanisms I investigate in this chapter indicates that the avoidance of harm is a fundamental part of the constitutional analysis of religion, which is likely to continue to inform the judicial approach in this area.

4 The role of harm in Canadian constitutional decisions on religious freedom

4.1 Introduction

The concept of harm does some seriously heavy lifting in religious freedom cases. And yet, the courts in these cases rarely address the concept of harm head-on. Unlike in *R v Labaye*¹ or *R v Malmo-Levine*,² where the Supreme Court engaged in extensive theorizing on the harm principle and its role in Canada's legal system, harm lands in the religion cases without much, if any, fanfare. Not even in the BC Supreme Court's reference opinion on the constitutionality of the criminal ban on polygamy – where Bauman J structures his entire judgment around the notion of harm to others – does the concept of harm attract much philosophizing.³ John Stuart Mill is a mere ghost flitting across these pages, the insights about harm from *Labaye* and *Malmo-Levine* largely ignored.

Having explored the question of *why* courts turn to harm in resolving constitutional disputes over religion in the previous chapter, I now turn to the *how* and the *what*. In this chapter I explore *how* courts use the concept of harm, or what 'work' it does in the religious freedom cases; in the next I take a closer look at *what* courts mean when they speak of 'harm' in these cases. This is an important move, for as Chief Justice McLachlin stated in *R v Sharpe*, 'until we know what the law catches, we cannot say whether it catches too much' – to this I would add: or too little.⁴ Again, my focus is on cases decided under section 2(a) of the Charter, but my conclusions apply more widely to all constitutional jurisdictions in which religious freedom disputes are resolved by reference to the concept of harm.

The US is one jurisdiction that has seen considerable judicial and academic attention paid to the role of harm in settling disputes over the constitutional right to religious freedom. Several American law and religion theorists point to the harm principle as an important constitutional constraint on how government can and should mediate between competing claims of religious freedom and other public interests.⁵ Nelson Tebbe, Micah Schwartzman

¹ *R v Labaye*, 2005 SCC 80.

² *R v Malmo-Levine*, 2003 SCC 74.

³ *Reference re section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [*Polygamy Reference*].

⁴ *R v Sharpe*, 2001 SCC 2 [32].

⁵ Lipson, 'On Balance' (1999-2000) 84 MinnLRev 589; Hamilton, *God vs the Gavel* (CUP 2005); Gedicks and Van Tassell, 'RFRA Exemptions from the Contraception Mandate' (2014) 49 HarvCR-LLaw Rev 343; Tebbe, *Religious Freedom in an Egalitarian Age* (HUP 2017) 14-15, 49-70; Tebbe, Schwartzman and Schragger, 'How Much May Religious Accommodations Burden Others?' in Fernandez Lynch, Cohen, and Sepper (eds), *Law, Religion, and Health in the United States* (CUP 2017) 215; Tebbe, Schwartzman and Schragger, 'When do Religious Accommodations Burden Others?' in

and Richard Schragger are prolific defenders of the view that the free exercise and establishment clauses of the First Amendment reflect a core commitment to avoiding harm to others, going so far as to describe the rule that government accommodation of religion must not harm others as a ‘bedrock tenet of the law governing religious freedom in our country’.⁶ They maintain that although government can accommodate a person’s religious observance when the costs are borne by itself or by the public, it cannot shift those burdens onto third parties. Court decisions that fail to honour this principle are unjustified, such as *Burwell v Hobby Lobby Stores Inc*, where the religious interests of the employer resulted in unrecognized economic, liberty, and health-related harms to women.⁷ Of course, they concede that there are situations in which a religious exemption could be granted despite the presence or risk of some harm to third parties. Where the harm caused by the religious accommodation is slight and the harm to the religious freedom interest in denying the accommodation is significant, the exemption should be granted.⁸ But overall, they make a strong case for the avoidance of harm to others as a constitutional principle constraining the scope of the state’s protection for religious freedom.

I make a similar but more limited claim to that of Tebbe and his contemporaries. Although there is no comparable ‘third party harms’ doctrine in Canadian constitutional law, no unified approach to harm in the religion cases, and no academic consensus on the role harm plays in the s2(a) analysis, Canadian courts also use the concept of harm to position the limits on the constitutional exercise of religious freedom. Canadian courts’ use of harm may appear haphazard, unrefined or even unprincipled, and yet assessments of harm operate at each stage of the Charter inquiry. The harm in these cases runs both ways: risk of harm is alleged both as a result of the religious practice or expression at issue (this is what Tebbe and others tend to focus on: ‘harm to others’ caused by the religious act), and as experienced by the claimant whose conduct is prohibited or constrained. These two forms of harm take on greater and lesser importance at different stages of the analysis, and I am interested in them both.

This chapter and the next bring harm to the forefront by analyzing its judicial *function* and *meaning* in a sample of Canadian religious freedom cases. I explained in Chapter 2 that the concept of harm is inherently open-ended and indeterminate, and capable of serving multiple roles within legal discourse. This multiplicity is brought into even starker relief by

Mancini and Rosenfeld (eds), *The Conscience Wars* (CUP 2018) 328; Schwartzman, Tebbe and Schragger, ‘The Costs of Conscience’ (2018) 106 *KyLJ* 881.

⁶ Tebbe, Schwartzman and Schragger, ‘How much...’ (n5) 229.

⁷ 134 S Ct 2751 (2014); Tebbe (n5) 50-70; Gedicks and Van Tassell (n5) 376-79; Tebbe, Schwartzman and Schragger, ‘When do...’ (n5) 336-39.

⁸ Tebbe et al, ‘How much...’ (n5). They borrow the concept of ‘undue hardship’ from US employment discrimination law as the standard by which to judge the acceptable degree of harm to third parties.

the discussion in Chapter 3 in which we see the diverse and manifold reasons for the use of harm as an organizing principle in religious freedom cases. These next two chapters may seem to sit in tension with the picture I have painted of harm up to this point as slippery, capacious, and shifting, in that it may appear to treat the concept of harm as a clear, discernible concept with fixed meanings, easily pinned down. The courts certainly do tend to understand harm in the latter fashion. However, my goal of exploring the prevailing judicial conceptions of harm in the religion cases and recurring themes in how harm is used by courts is not inconsistent with a more critical understanding of harm. While I recognize that harm can have a multitude of meanings and functions, in these chapters I draw on the feminist critiques developed in Chapter 2 to analyze and critique the dominant ways in which harm is understood and deployed in the religion cases.

These chapters support my overall contention that the concept of harm is deeply involved in shaping judicial responses to claims of religious freedom. They reveal some of the fault lines underlying Canadian constitutional law's approach to religious freedom and help to demonstrate the ultimate paradox of harm-based reasoning in the religion cases – that although the use of harm to resolve religious freedom cases raises difficult challenges and significant limitations, its doctrinal embeddedness means that harm is not a discursive tool that can be jettisoned, but is here to stay.

In this chapter I break down the various ways in which harm does its 'work' in the religion cases, proposing three overlapping (and at times concurrent) functions that the concept of harm serves. First, I consider harm's role in helping to *legitimate* decisions that restrict religious freedom in the name of harm prevention. Here we see courts explicitly adopting the language of harm to justify limits on religious expression, harkening back to harm's supposed status as the antithesis of moralism, a harbinger of objectivity and neutrality. Next, I examine harm's *jurisdictional* or gate-keeper role, through which harm is used to define and limit those religious acts, practices and convictions that warrant Charter protection at each step of the constitutional analysis. I conclude by considering the *normative* role that harm plays in the religion cases. Harm alone is not determinative of any issue; it is the underlying normative commitments guiding the court's harm analysis that do the work. Thus resort to harm functions to express and signify the court's commitment to particular values and norms. It is worth noting that these three functions do not map neatly onto the rationales for courts' use of harm from the previous chapter. When there is a clear link between them, I draw attention to it in the text. But it is too simplistic to suggest that the three functions I have identified for harm can each be traced to a particular motivating factor or rationale. The

reasons for the turn to harm are multiple and diffuse, and they may drive the use to which harm is put in any number of different ways.

The courts' discursive use of 'harm' in the religion cases that I highlight here includes both implicit and explicit reliance on harm. I maintain that although courts frequently make overt reference to harm, the idea of harm may be present when the label is not. I argue throughout this thesis that, even when no explicit reference is made to harm, it continues to operate as an implicit organizing principle in the religion cases. The influence of harm, stemming from a combination of all the factors explained in the previous chapter, is strong; the desire to prevent harm to others and an overall preoccupation with harm structures and informs the courts' approach to religious freedom and their decisions on the appropriate limits to that freedom.

4.2 The work harm does in the religion cases: Three functions

4.2.1 Harm's legitimating function

Two of the rationales I identified in the previous chapter for the 'harm habit' in religion cases were pragmatic in nature: that the courts' turn to harm is intended to protect their judgment from the influence of illegitimate reasons, such as conventional morality or personal convictions, providing instead a shared language or unifying principle from which to decide religious disputes, or – more cynically – that it is used as a proxy debate, masking the underlying values and assumptions that are doing the real work in religion cases. These rationales are borne out in several of the cases I examined, which show harm carrying out what I refer to as its 'legitimating' function. In these cases, the language of harm seems intended to justify judicial intervention and to legitimize the state's authority to regulate religious freedom in particular ways. The cultural resonance of the harm principle in liberal legalism and our intuitive tendency to analyse contentious moral issues through the lens of harm lend further weight to harm's legitimating function, suggesting that the legitimating move comes easily to judges who are primed to use harm in this way. Although I maintain that recourse to harm is both explicit and implicit in the religion cases, this section focuses on harm's explicit role.

Harm's legitimating function is revealed most clearly in *Saskatchewan (Human Rights Commission) v Whatcott*, where the Supreme Court of Canada unanimously upheld provincial hate speech laws against claims that they violate the Charter rights to freedom of religion and expression.⁹ Hate speech bans regularly attract criticism that courts and

⁹ 2013 SCC 11 [*Whatcott*]. The respondent, who was prohibited from distributing flyers denouncing homosexuality, claimed that he had a religious duty to proselytize his beliefs. The court severed the

legislatures are encroaching on individuals' freedom of speech and the right to offend, and are engaging in illiberal policing of unpopular opinions.¹⁰ Writing for the court, however, Rothstein J emphasized that the impugned provision aims to prevent and punish the very real harms caused by hate speech. It is not intended to punish the expression of merely offensive views, nor to 'censor ideas or to legislate morality'.¹¹ Making over eighty references to the word 'harm' in his reasons, Rothstein J repeatedly deployed harm as a discursive counter-strike to arguments about the illegitimacy of curbing offensive speech.¹² Harm is used to render the legislative regulation of hate speech justifiable and defensible on liberalism's terms, gesturing toward a shared benchmark from which to judge the content of hateful expression.

Harm treads a similar path in the BC Supreme Court *Polygamy Reference* decision.¹³ The criminalization of polygamy is frequently criticized for entrenching a heteronormative moralism rooted in racial supremacy, Christian hegemony, and colonialism.¹⁴ The Canadian Civil Liberties Union, intervening in the case, described the ban as 'firmly rooted in Victorian conceptions of morality', while an expert witness argued that polygamy was only prohibited because of its 'injury to majoritarian moral tenets'.¹⁵ However, Bauman J firmly planted his reasons in the language of harm and structured the judgment around the risk of harm to women, children, society, and the institution of monogamous marriage.¹⁶ He declared that the primary reason to prohibit polygamy, and indeed the original impetus for the centuries-old ban, was to prevent such harms.¹⁷ This focus on harm is unsurprising both because the case concerns the constitutionality of a *criminal* provision, thus bringing the harm principle into

words 'ridicules, belittles or otherwise affronts the dignity of' in s14(1)(b) of *The Saskatchewan Human Rights Code* on the grounds that they were neither rationally connected to the objective of preventing hate speech nor minimally impairing of ss 2(a) and 2(b) of the Charter, but upheld the remainder of the provision under s1.

¹⁰ See eg Baker, 'Harm, Liberty, and Free Speech' (1997) 70 SCaLLRev 979; Sumner, *The Hateful and the Obscene* (UTP 2004); Dworkin, 'Foreword' in Hare and Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) vi. For a useful overview of the hate speech debate in a Canadian context, see Moon, *Putting Faith in Hate* (CUP 2018) 29-60.

¹¹ *Whatcott* (n9) [110].

¹² For instance, Rothstein J wrote that '...the "harm" these legislative prohibitions seek to prevent is more than hurt feelings, humiliation or offensiveness...' (ibid [47]). The effects of hate speech are repeatedly described as 'harmful' and the aim of the provisions is said to be harm prevention: ibid [24], [41], [43], [47], [52], [57]-[58], [72]-[73], [77], [80]-[82], [92], [99], [111], [116], [129], [140]-[141], [145], [148].

¹³ *Polygamy Reference* (n3).

¹⁴ Drummond, 'Polygamy's Inscrutable Criminal Mischief' (2009) 47 OHLJ 317, 329-333; Denike, 'The Racialization of White Man's Polygamy' (2010) 25(4) *Hypatia* 852; Mathen, 'Reflecting Culture' (2012) 57 SCLR (2d) 357, 368; Fowler, 'A Queer Critique on the Polygamy Debate in Canada' (2012) 21 DalJLegStudies 93.

¹⁵ *Polygamy Reference* (n3) [1159] and [835] respectively.

¹⁶ ibid [2]-[5].

¹⁷ ibid [218]-[233], [878]-[904].

greater focus,¹⁸ and because, in Berger's language, the courts often embark on a 'vigorous flight to the language of harm' when faced with contentious moral issues,¹⁹ such as the regulation of different family forms. Berger's argument is certainly borne out in this case: the court's reliance on harm seems intended to insulate the legislature from claims that it was enforcing conventional morality. By justifying the prohibition on the grounds of harm prevention, the court places both it and Parliament on safe liberal ground. Tellingly, Bauman J adopted the phrase of an expert witness who claimed that harm provides a 'sober argument' against the practice of polygamy.²⁰ Signalling a rejection of theological, emotional, moralistic concerns, the concept of harm is taken to imbue the reasons with a calm, level-headed rationality that Bauman J embraces.

To conclude, the courts in both the above cases justified their limits on religious freedom with explicit recourse to the concept of harm. Harm is cited repeatedly like a mantra to fend off concerns about law's role in regulating offense (in *Whatcott*) or moralism (in *Polygamy Reference*). The fact that notions of harm are themselves influenced by underlying values and social norms is not addressed in the judgments; harm is simply presented as a liberal antidote to the disease of legal moralism and regulated offense. I make no judgment as to whether this move is deliberate. As I explained in Chapter 3, many thinkers genuinely believe that the concept of harm provides a shared normative benchmark from which to resolve difficult moral issues; others might perceive the excessive reliance on harm in *Whatcott* and *Polygamy Reference* as a studied evasion of more difficult questions. My point is that whether deliberate or not, the rhetorical resonance of the concept of harm and its central role in liberal legalism allows it to easily step into the job of legitimating judicial decisions on contentious topics such as hate speech and polygamy.

4.2.2 Harm's jurisdictional function

The foregoing analysis focused on judges' explicit reliance on the language of harm, which serves to legitimize their decisions on polarizing moral issues. I now move away from harm's outward-facing, justificatory function to consider the deeper boundary-setting work that harm does in the religion cases, which occurs regardless of whether judges actually employ the word 'harm.' Notions of harm are relied upon both explicitly and implicitly to serve a jurisdictional function: it is harm that largely determines whether or not a violation of

¹⁸ Calder, 'Conclusion' in Calder and Beaman (eds), *Polygamy's Rights and Wrongs* (UBC 2014) 215, 226.

¹⁹ Berger, 'Moral Judgment, Criminal Law and the Constitutional Protection of Religion' (2008) 40 SCLR (2d) 513, 546.

²⁰ *Polygamy Reference* (n3) [276], [879]-[880].

s2(a) can be made out and subsequently justified under section 1 of the Charter (hereinafter ‘s1’).

In saying that one of harm’s functions in the religion cases is *jurisdictional* in nature, I mean that harm operates to mark the boundary between that which is the law’s concern and that which is not. For this idea of jurisdiction, I draw on insights from the work of legal geographer Nicholas Blomley and from Ben Berger’s writing on the aesthetics of religious freedom. Berger suggests that to understand the culture of constitutional law and its relationship to religion we must be attuned to its ‘aesthetics of space and time.’²¹ The concept of space exerts a strong influence in law,²² which can be seen in law’s invocation of the concept of the boundary.²³ In property law, for instance, boundaries serve to demarcate zones over which a person can legitimately claim the right to exclude others.²⁴ The boundary metaphor also holds powerful sway in traditional conceptions of rights as ‘bounded spheres’ in which autonomous people may exercise their freedom.²⁵ In *R v Morgentaler*, for example, Wilson J described the function of Charter rights as to ‘erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass’.²⁶ Courts often employ property-based, boundary metaphors when discussing the right to religious freedom. In *Amselem*, the court speaks of ‘zone[s] of freedom’²⁷ within which people are free to practice and express their religious convictions, drawing strict lines around that freedom and cautioning courts against engaging in illegitimate inquiries that would see them entering ‘forbidden domain’.²⁸ The right to religious freedom is viewed spatially, as if from above, forming a bubble zone of protection around an individual with a boundary that the state may not breach without good reason.

It is law which creates, reinforces and polices this boundary through the idea of jurisdiction.²⁹ Jurisdiction makes law’s power possible, implying the authority to impose the

²¹ Berger, *Law’s Religion* (UTP 2015) 42 [LR].

²² Blomley, ‘The Boundaries of Property’ (2004) 48(2) *CanGeo* 91-92 (‘There is an important and understudied relation between law and space. Space matters. Law matters. When combined, interesting things happen’); Blomley, ‘Flowers in the Bathtub’ (2005) 36 *Geoforum* 281. Berger, *LR* (n21) also writes that liberal legalism bears the ‘imprint of...spatial logic’ and that Canadian constitutional law understands religion through the lens of space and territoriality: 46.

²³ Blomley, ‘Boundaries’ (n22) 93.

²⁴ *ibid* 93-94; Berger, *LR* (n21) 47.

²⁵ Nedelsky, ‘Law, Boundaries, and the Bounded Self’ (1990) 30 *Representations* 162, 163, 167; Blomley, ‘Boundaries’ (n22) 94.

²⁶ *R v Morgentaler*, [1988] 1 SCR 30 [284].

²⁷ *Syndicat Northcrest v Amselem*, 2004 SCC 47 [189] (Binnie J) (‘I accept that Mr. Amselem has met the threshold test of bringing his claim within the protected zone of religious freedom’).

²⁸ *ibid* [67] (Iacobucci J).

²⁹ In some senses law *is* the boundary, excluding outsiders: Blomley, ‘Boundaries’ (n22) 94, citations omitted; see also Berger, *LR* (n21) 46.

boundary and to determine when it is breached.³⁰ I argue that law claims this jurisdiction over matters of religion through the concept of harm. To return to the imagery above, it is the presence or risk of harm that demarcates the edges of the protective ‘bubble’ surrounding the religious adherent. Law’s designation of a religious exercise as harmful authorizes it to regulate, constrain or limit that activity whilst, conversely, a demonstrated lack of harm insulates it from interference. Simply put, if the activity causes no harm to others, then the state cannot interfere; but once it risks causing non-trivial harm, the boundary is breached, and the exercise of that freedom becomes constrained.

Seeing harm as jurisdictional in nature evokes the spirit of the Millian harm principle. JS Mill and Joel Feinberg both stipulated that risk of harm (along with offense, for Feinberg) is a necessary condition for the state’s exercise of coercive jurisdiction over the matter at hand. Although there might be other factors that militate against coercive action, it is risk of harm that authorizes the state action.³¹ The notion of harm’s jurisdictional function harkens back to its early, liberal roots as a first order constraint on state power.

The boundary metaphor is pervasive in law and can be a useful way of conveying law’s authority to exclude, or to claim jurisdiction. However, one must not take the metaphor too far, because the image of law as a properly policed fence is not faithful to reality. Blomley explains that in the social world, fences and boundaries are ‘porous, relational, and ambiguous’, capable of not just limiting but also fostering communication between people on either side.³² Relational feminist critiques of atomistic theories of individual rights also find fault with the boundary metaphor. Jennifer Nedelsky, for instance, maintains that the visual imaginary of rights as marking off individually circumscribed spheres of protection obscures the fact that people are encumbered, connected and interdependent.³³ This rings particularly true in matters of religion, where the relational quality of the right is beyond dispute: it is often through togetherness and communion with others that the individual right to religious freedom is realized. Moreover, the boundaries around individual and collective religious identities are always shifting and permeable.³⁴ Those identities are woven into the communities or societies in which they are embedded, the religious and the non-religious impacting each other in unforeseen ways. Thus the idea of law drawing strict lines around religious freedom is simply not a faithful representation of law’s encounter with religion. Law, religion and the state sit in

³⁰ Blomley, ‘Flowers’ (n22) 282.

³¹ See also Smith, who describes the Millian harm principle as jurisdictional: ‘Is the Harm Principle Illiberal?’ (2006) 51 *AmJJuris* 1, 5.

³² Blomley, ‘Boundaries’ (n22) 95-98; see also Van Praagh, ‘Welcome to the Neighbourhood’ in Newman (ed), *Religious Freedom and Communities* (LexisNexis 2016) 63, 63-64.

³³ Nedelsky, ‘Bounded Self’ (n25), 163.

³⁴ Van Praagh (n32).

a complex web of intersections and connections.³⁵ They are interdependent and contingent, with concessions always being made on either side. The very fact that these boundaries are being drawn through the concept of harm – a contested, highly malleable concept – is testament to their porousness. When harm is deployed in the service of marking the edges of law’s jurisdictional authority, that boundary can never be rigid or fixed.

Nevertheless, in this chapter I demonstrate how courts use harm at each stage of the Charter inquiry to enforce a (moveable, porous) boundary around religious freedom and to establish jurisdiction over the matter at hand. I argue that the tendency to view religious disputes through the lens of harm is built into the doctrinal structure of the constitutional religious freedom provision. Both harm to the claimant from the alleged infringement and harm to others caused by the religious practice are relevant. I explain how harm operates in two ways at the initial s2(a) stage: first, the *Amselem* test for establishing a violation of s2(a) prompts courts to consider whether the alleged harm *to the claimant* is sufficiently weighty to warrant a constitutional remedy. Second, courts use the concept of harm *to others* as an over-arching limit on the s2(a) right before getting to the justification stage under s1.³⁶ Although the Supreme Court has urged that limits based on risk of harm to others not be applied until s1, the influence of landmark cases like *R v Big M Drug Mart* which hint at internal limits to the right³⁷ emboldens some courts to pre-emptively limit the type of conduct that deserves s2(a) protection. I then examine how the jurisdictional role of harm operates once a rights violation is established. At the stage of justifying an infringement under s1, both harm to the claimant and to others are assessed and placed on the scales in the proportionality analysis, cementing harm’s role as gatekeeper to constitutional protection.

4.2.2.1 *Internal limits to s2(a)*

The common tale about religious freedom under the Charter is that most cases are won or lost at the s1 stage, with s2(a) playing a relatively minor role. That is because the *Amselem* criteria for establishing a s2(a) violation are fairly easy to satisfy: the claimant need only prove that the impugned state action has interfered with her sincere religious belief in a more than trivial manner.³⁸ Moreover, courts generally prefer to leave concerns about harm caused by the religious practice to the proportionality or balancing stage under s1. Writing for

³⁵ Berger, *LR* (n21).

³⁶ A Charter violation is justified if the government can prove that the limit on the right is reasonable and ‘demonstrably justified in a free and democratic society’ under s1, to be determined by applying the proportionality test from *R v Oakes*, [1986] 1 SCR 103. If the state action complained of is a matter of administrative law, the justification inquiry is carried out under the test from *Doré v Barreau du Québec*, 2012 SCC 12 which is conceptually similar to *Oakes*. Unless otherwise specified, I refer to both the *Oakes* and *Doré* analyses when I speak of the s1 inquiry.

³⁷ [1985] 1 SCR 295 [*Big M*].

³⁸ *Amselem* (n27) [56] (Iacobucci J).

the majority of the Supreme Court in *B(R) v Children's Aid Society of Metropolitan Toronto*, LaForest J held that it was appropriate to interpret s2(a) broadly in keeping with the court's generous approach to rights interpretation, and to leave the balancing of competing rights to the more flexible, contextual analysis conducted under s1.³⁹ In more recent cases the Court has reiterated the orthodox view that s2(a) is not subject to internal constraints.⁴⁰ One cannot say it better than Berger, who writes that s1 has 'become the hungriest, the greediest, of Charter provisions, absorbing most issues of genuine constitutional dispute into its analytic grasp'.⁴¹ Religious freedom is often compared in this sense to the right to freedom of expression under section 2(b) of the Charter, which is interpreted expansively to include all expressive acts barring physical violence.⁴² The story is that s2(a) protects *all* manifestations of sincere religious belief while the state bears the burden of justifying any constraints upon it, including concerns about the harm it poses to others, at the point of the s1 inquiry.

Although this tale is largely true, I maintain that much of harm's gate-keeping function occurs at the outset of s2(a). The concept of harm often performs a *preliminary* jurisdictional role by setting 'internal' harm-based limits on the right. When the risk of harm to others caused by the religious activity is deemed too egregious or the harm is suffered by too vulnerable a group (ie children), courts may refuse to conduct the full s2(a) inquiry, instead immediately disqualifying the act from Charter protection.

The idea of preliminary, harm-based limits to s2(a) can be traced to *Big M*, the Supreme Court's first s2(a) case.⁴³ Establishing the scope and meaning of the right, Dickson CJ emphasized that the right to religious freedom is not absolute:

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, *provided inter alia only that such manifestations do not injure his or her neighbours* or their parallel rights to hold and manifest beliefs and opinions of their own.⁴⁴

³⁹ [1995] 1 SCR 315 [*B(R)*] [108]-[110]. The court split on whether the limits on parents' religiously motivated refusal of a blood transfusion for their infant child should be imposed under s2(a) or s1, the majority opting for the latter. See also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 [73]-[75].

⁴⁰ *Multani v Commission scolaire Marguerite-Bougeoy*s, 2006 SCC 6 [24]-[31] (Charron J); *Whatcott* (n9) [154]; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 [57]-[58] (Richards JA); *Polygamy Reference* (n3) [1067]-[1078], [1095]-[1098].

⁴¹ Berger, 'Section 1, Constitutional Reasoning and Cultural Difference' (2010) 51 SCLR (2d) 25, 26.

⁴² *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927; *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009] 2 SCR 295 [28].

⁴³ *Big M* (n37).

⁴⁴ *ibid* [123] (emphasis added).

Dickson CJ confirmed that the Charter only protects religious freedom up to the point at which it harms others, and is ‘subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.⁴⁵ He developed an approach to s2(a) that conforms to Mill’s harm principle, carving out a zone of liberty within which people can make fundamental decisions about what their conscience dictates and prohibiting the state from ‘compelling individuals to perform or abstain from performing *otherwise harmless acts* because of the religious significance of those acts to others’.⁴⁶ The above statements have a strong legacy in the religion jurisprudence and are taken as axiomatic of the inherent limits to religious freedom.⁴⁷

Dickson CJ did not indicate whether these limitations were a constraint on s2(a) or whether they were simply part of the s1 analysis.⁴⁸ Nevertheless, *Big M* is frequently cited by judges who continue to maintain, against the prevailing wisdom, that courts should adopt a narrower interpretation of religious freedom under s2(a). Justice Rowe, concurring in *Law Society of BC v Trinity Western University*, held that the orthodox approach of leaving questions of harm to the s1 inquiry risks conflating two ‘conceptually distinct’ stages of inquiry.⁴⁹ He cautioned that rights must be properly defined and delineated prior to the justification stage, for ‘[i]f infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights, then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*’.⁵⁰ Among other problems, this undermines the expressive dimension of the declaration that a Charter right has been violated⁵¹ and the symbolic value in declaring that the Charter simply does not protect conduct that is deeply harmful to others.⁵² Concurring in *Multani*, Justice LeBel also noted the doctrinal ‘straitjacket’ that the dominant approach to s2(a) has created, and the consequent failure of

⁴⁵ *Big M* (n37) [95].

⁴⁶ *ibid* [133] (emphasis added).

⁴⁷ See eg *Ross* (n39) [72]; *B(R)* (n39) [226] (Iacobucci and Major JJ); *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 [28]-[29] (Iacobucci and Bastarache JJ) [*TWU Teachers*]; *Amselem* (n27) [61]-[63] (Iacobucci J); *Congrégation des témoins de Jéhovah v Lafontaine (village)*, [2004] 2 SCR 650 [69] (LeBel J); *Multani* (n40) [26] (Charron J); *Bruker v Marcovitz*, 2007 SCC 54 [71]-[72] (Abella J); *Loyola High School v Quebec*, 2015 SCC 12 [43] (Abella J); *Polygamy Reference* (n3) [1067]-[1068]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [101] (Majority) [*Trinity Western*].

⁴⁸ As Charron J noted in *Multani* (n40) [30], the judgment in *Big M* preceded the development of the s1 *Oakes* test by several years, implying that Dickson CJ’s comments should perhaps not be interpreted as support for internal limits to s2(a).

⁴⁹ *Trinity Western* (n47) [189]; see also [186]-[194].

⁵⁰ *ibid* [191]-[193].

⁵¹ *ibid* [192]; Truesdale, ‘Section 15 and the *Oakes* Test’ (2012) 43 *OttawaLRev* 511; Newman, ‘Canadian Proportionality Analysis’ (2016) 73 *SCLR* (2d) 93.

⁵² *Polygamy Reference* (n3) [1077] (intervener’s argument, not ultimately accepted by the court). I discuss expressive harm in Chapter 6.

courts to acknowledge the precedent for some internal, harm-based limits to s2(a).⁵³ And in *B(R)*, concurring Justices Iacobucci and Major wrote that the right to religious freedom ‘must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary. Conduct which lies outside that boundary is not protected by the Charter’.⁵⁴ Their reasoning is consistent with the majority’s concession in *B(R)* that religious freedom under s2(a) is not absolute and can be limited when it conflicts with the rights and interests of others.⁵⁵

It is in cases where there is a serious risk of harm, particularly harm to children, that courts appear most keen to limit the reach of s2(a) to harmless conduct before even engaging in the merits of the claim or proceeding to s1.⁵⁶ In many of these cases, the debate over ‘internal limits’ is not acknowledged and the risk of harm acts abruptly to cut short any real analysis of the right. Section 2(a) claims involving parents’ religious objections to medical treatment for their children,⁵⁷ similar refusals by ‘mature minors’,⁵⁸ and the religiously motivated infliction of severe discipline⁵⁹ and unlawful cutting⁶⁰ of children were all dispensed with by a simple harm-based test. In family law, custody and access decisions that are made in the best interest of the child also cannot be displaced by a mere assertion of religious freedom; the Supreme Court confirmed in *P(D) v S(C)* that s2(a) does not protect religious expression or practices that risk causing harm to children.⁶¹ Courts also imposed internal, harm-based limits to s2(a) where religious freedom was used to challenge criminal

⁵³ *Multani* (n40) [149], citing *Young v Young*, [1993] 4 SCR 3 and *Montréal (City) v 2952-1366 Québec Inc.*, [2005] 3 SCR 141 [56]-[57] and [60]-[61].

⁵⁴ *B(R)* (n39) [224]; see also [224]-[227] (their preference to narrow the right before proceeding to s1 was adopted by the majority in *TWU Teachers* (n47) [30]).

⁵⁵ *B(R)* (n39) [107]. See also *Amselem* (n27) [61]-[63] (Iacobucci J) (though preferable to avoid constraining Charter rights prior to s1, religious freedom is not absolute and may not be protected if its exercise would harm others); *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [75]-[77] [CMDS] (court did not apply internal limits to s2(a), but noted it might be appropriate in some circumstances as ‘not all religious conduct is protected by the Charter’).

⁵⁶ Moon also observes that internal s2(a) limits are more likely to apply where harm to children is at stake in Moon, *Freedom of Conscience and Religion* (Irwin 2014) 179.

⁵⁷ *B(R)* (n39) (Iacobucci and Major JJ) [225]-[233]; *M(V) v BC*, 2008 BCSC 449 [87]-[96] (though court ambivalent as to whether claim failed at s2(a) or s1); *Alberta v L(D)*, 2012 ABQB 562 [69].

⁵⁸ *B(SJ) v BC*, 2005 BCSC 573 [83]-[85]; *H(B) v Alberta*, 2002 ABQB 371 [55]-[56] (court ambivalent as to whether claim failed at s2(a) or s1). These cases suggest the limited reach of a paternalist principle along with the harm principle. For a restriction of religious freedom when an incompetent *adult’s* best interests are at stake, see *Swiss v Alberta Health Services*, 2009 ABQB 691.

⁵⁹ *PEI v L(SP)*, 2002 PESCTD 74 [8]-[9], [17]-[18], [25]-[121].

⁶⁰ *R v W(DJ)*, 2011 BCCA 522 [18]-[21], aff’d 2012 SCC 63.

⁶¹ *P(D) v S(C)*, [1993] 4 SCR 141; see also *Young v Young* (n53).

laws against terrorist activity,⁶² child pornography,⁶³ and incest.⁶⁴ Although any violation of s2(a) would almost certainly have been justified under s1 in these cases, the courts preferred to close the door to s2(a) prematurely on the grounds of the serious harm the provisions averted. Courts wield law's jurisdictional power through the concept of harm, using the risk of serious harm to vulnerable people to place that particular manifestation of religious belief beyond the boundary of s2(a).

4.2.2.2 *Sincerity, religious nexus, and non-trivial interference under s2(a)*

If a court does not impose internal constraints on s2(a), then the concept of harm *to others* will usually not be relevant until s1. But harm continues to operate as a governing construct under s2(a). It is possible to see the doctrinal test from *Amselem* as a form of harm test: harm does invisible work in each part of the *Amselem* inquiry to circumscribe the court's authority to intervene. It is risk of harm, but *to the claimant* this time, that determines whether or not the claim will proceed to the justification stage. Here we see harm's jurisdictional function working in the opposite direction – not to restrict religious freedom for the harm it causes, but to open the door to a finding of a violation based on harm of the requisite nature and degree suffered by the claimant.

In *Amselem*, the Supreme Court majority declared that a person's s2(a) right will be infringed when the state interferes with her sincerely held religious belief or practice in a manner that is more than trivial.⁶⁵ Violations of s2(a) are initially to be judged against the subjective standard of sincerity. Sincerity simply requires that the asserted belief be in good faith; it must be 'neither fictitious nor capricious'.⁶⁶ It does not matter whether the practice is required by the official tenets of the religion or is followed by other adherents of that faith. It does not even have to be perceived by the claimant to be mandatory – it is sufficient that the person honestly wishes to perform that act as a function of her faith or believes that it will foster her connection to the divine.⁶⁷ This subjective turn helps to illustrate the nature of the harm to the claimant that most concerns the court: individual harm to a person's ability to develop herself, make autonomous choices, and follow her heart on matters of conviction. Indeed, Iacobucci J explained that requiring claimants to prove that their religious practice is mandated by official religious dogma would be 'inconsistent with the underlying purposes

⁶² *R v Ahmad* (2009), 257 CCC (3d) 199 [137] (Ont Sup CJ); *R v Khawaja*, 2012 SCC 69 (see also lower court decision rev'd: (2006), 42 CR (6th) 348 (Ont Sup CJ) [52]-[58]).

⁶³ *R v Sharpe* (1999), 58 CRR (2d) 261 (BCSC) [72]-[75], rev'd 2001 SCC 2, but s2(a) finding not appealed.

⁶⁴ *R v SM* (1996), 111 CCC (3d) 467 (BCCA) [55]-[56].

⁶⁵ *Amselem* (n27) [56].

⁶⁶ *ibid* [52].

⁶⁷ *ibid* [46]-[48].

and principles of the freedom emphasizing personal choice'.⁶⁸ At least part of the impetus for the subjective standard is thus that an objective test would underserve religious claimants, excluding worthy believers who have suffered real harm through the state's restriction on their ability to make free choices on religious matters. This reflects Canadian constitutional law's unwavering focus on personal autonomy.

Not any belief, however sincerely held, can ground a s2(a) claim. It must have some objectively ascertainable 'nexus' with religion.⁶⁹ The *Amselem* court dwelled only briefly on this requirement; indeed, it seems self-evident that a religious right would solely protect beliefs and practices that are 'religious' in nature. On a positivist level, this would be the end of the matter – religious nexus is required because the provision demands it. But one can query why it is that specifically *religious* beliefs and practices benefit from Charter protection. There are reams of scholarship exploring this question, some arguing that the right to religious freedom protects an inherently valuable sphere of action or that there is something 'special' about religion that legitimately attracts judicial protection.⁷⁰ Others maintain that religion is best understood as an aspect of a person's identity that deserves to be protected on egalitarian grounds.⁷¹ Although we may disagree on *what* exactly is at stake for the religious adherent making a s2(a) claim, the requirement of religious nexus suggests that there is *something* important at stake which concerns religion. The implication is that the claimant who cannot make out a nexus with religion simply has less to lose, and that is because of the value that is attached to religious beliefs and practices themselves.⁷² Those who fail to establish a religious nexus, such as the claimant challenging the constitutionality of seatbelt legislation who believes that wearing a seatbelt does 'more harm than good'⁷³ or the taxpayer refusing to file a tax return because he is opposed to the use of taxpayer contributions to fund abortions,⁷⁴

⁶⁸ *Amselem* (n27) [48]. See also *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 759 (Dickson CJ): 'The purpose of section 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being'.

⁶⁹ *Amselem* (n27) [39], [46]. Section 2(a) also protects 'freedom of conscience', but my focus is on the *Amselem* test, which specifically applies to religious claims. Questions about the nature of the beliefs that could ground a conscience claim fall beyond the scope of this project; for more, see Moon, *Freedom* (n56) 186-98; Bird, 'The Call in *Carter* to Interpret Freedom of Conscience' (2018) 85 SCLR (2d) 107.

⁷⁰ See eg McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul LRev 1, 9-12; Bussey, 'The Legal Revolution Against the Place of Religion' (2016) BYU LRev 1127.

⁷¹ Eisgruber and Sager, *Religious Freedom and the Constitution* (HUP 2010).

⁷² Webber, 'The Irreducibly Religious Content of Freedom of Religion' in Eisenberg (ed), *Diversity and Equality* (UBC 2006) 178, 184-85

⁷³ *R v Locke*, 2004 ABPC 152 [25].

⁷⁴ *R v Little*, 2009 NBCA 53. The rejection of claims by Pastafarians who seek to avail themselves of existing exemptions for religious headwear for drivers' license photographs can also be understood to come down to appraisals of harm: unlike sincere religious believers, the Pastafarians are not thought to suffer any harm from being made to remove their pasta strainers as their 'religion' is nothing but a parody: *Narayana c Québec (Société de l'assurance automobile)*, 2015 QCCS 4636.

are not considered sufficiently harmed to benefit from s2(a) protection by virtue of the non-religious character of their claims.

Harm to the claimant is therefore mediated through the sincerity and religious nexus requirements of the *Amselem* test. Insincere or insufficiently religious claims are refused s2(a) protection on the grounds, I argue, that the claimants are not considered sufficiently harmed by the alleged restrictions on their beliefs or practices.⁷⁵ The presence of ‘truly religious’ beliefs, sincerely held, indicate that a person is at risk of harm from state action that threatens to curb those beliefs, which the court can remedy. Risk of harm structures and informs the internal requirements of the s2(a) religious freedom test.

It is at the third step of the *Amselem* inquiry where the matter of harm to the claimant plays the biggest role. Here the claimant must establish that the state conduct has caused a non-trivial interference with her religious belief or practice.⁷⁶ Notably, interference is to be judged by an objective standard.⁷⁷ A court will inquire into the harm done to the claimant and determine whether it is of a sufficient magnitude to trigger s2(a) protection. The notion of harm thus continues to perform a jurisdictional function at this stage: it demarcates legitimate from illegitimate restrictions on religious freedom by policing the boundary of the right.

The interference inquiry provides an interesting window into how courts perceive harm in the religion cases and what forms of interference are serious enough to constitute a rights violation, questions I explore further in the next chapter. However, the principle of non-triviality is ‘under-theorized’;⁷⁸ few s2(a) cases are decided on these grounds⁷⁹ and courts rarely examine this step in any detail, making it difficult to extract over-arching principles to guide the inquiry. We do know that minor costs or burdens associated with the practice of one’s religion are not sufficient to trigger rights protection; there must be a reasonable basis upon which to conclude that the religious beliefs or practices are actually threatened or

⁷⁵ Although the concurrent constitutional protection for freedom of conscience might suggest that risk of harm is not linked to religiosity, the limited jurisprudence on that provision could indicate that freedom of conscience is ‘derivative’ of or ‘parasitic’ on religious freedom (Webber, n72, 179, 186-89; see also Moon, *Freedom* (n56) 190-91, 198). Conscience claims would thus be protected because they are ‘religion-like’. I am contrasting beliefs with a nexus to religion to those beliefs that no comparable nexus at all.

⁷⁶ *Amselem* (n27) [57]-[60]; *Multani* (n40) [34]; *Loyola* (n47) [134].

⁷⁷ *SL v Commission scolaire des Chênes*, 2012 SCC 7 [23]-[24].

⁷⁸ Kislowicz, ‘*Loyola High School v Attorney General of Quebec*: On Non-triviality’ (2015) 71 SCLR (2d) 331, 343.

⁷⁹ Notable cases in which there was no (or only trivial) interference are *R v Jones*, [1986] 2 SCR 284 (requirement to apply to government for permission to home school one’s children did not constitute interference); *Ktunaxa Nation v British Columbia*, 2017 SCC 54 (development on land believed by the Ktunaxa people to be sacred did not interfere with their ability to act upon their religious beliefs).

harmed.⁸⁰ An indirect interference can suffice, as in *Edwards Books* where a Sunday trading law made it much more costly for observants of a non-Sunday sabbath to conduct their business.⁸¹ The interference must also be a consequence of the state action, not simply a natural or inherent cost of the religious practice.⁸² Risk of harm to others caused by the religious practice has even been known to render trivial an alleged interference, as in *R v Chan* where the court held in the s2(a) inquiry that any interference caused by a ban on prayer beads and incense in prison cells was ‘insubstantial’ given the risk of harm their presence posed to others.⁸³

The question of interference is closely connected to both subjective sincerity and religious nexus under s2(a). Despite Iacobucci J’s repeated assertion that s2(a) protection should not hinge on whether the practice in question is an obligatory religious tenet,⁸⁴ it will be more difficult to argue that the harm to the claimant is serious enough to warrant protection if it involves ‘merely’ an optional or voluntary expression of faith.⁸⁵ Even in *Amelem* itself, Iacobucci J had a far easier time concluding that the harm to the claimant who had professed a religious *duty* to dwell in his own succah constituted non-trivial interference, compared to the claimants who simply preferred to do so.⁸⁶ A closely linked issue concerns the strength of the claimant’s conviction: the more fervent the belief, the more severe any interference with it will be.⁸⁷ Likewise, if the practice or belief lies at the outer reaches of what is considered ‘religious’, it may pass the religious nexus test but still fail to constitute a non-trivial

⁸⁰ *Edwards Books* (n68) 759 (Dickson CJ); *Jones* (n79) [65]; *Reference re Same-Sex Marriage*, 2004 SCC 79 (being made to live in a society whose public policy contradicts one’s beliefs does not constitute interference: [48]); *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [32] [*Hutterian*]; *SL* (n77) [39]-[40]; *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893 [27]-[28].

⁸¹ *Edwards Books* (n68) 758 (Dickson CJ) (though the infringement was justified under s1). See also Moon, *Freedom* (n56) 71-73.

⁸² *Edwards Books* (n68) 764-65 (Dickson CJ).

⁸³ *R v Chan*, 2005 ABQB 615 [164]; see also *R v Welsh*, 2013 ONCA 190 [41]-[43].

⁸⁴ *Amelem* (n27) [43]-[50], [65]-[72].

⁸⁵ See Moon, *Freedom* (n56), 76; cf *Trinity Western* (n47) [320] (Côté and Brown JJ, dissenting) (‘...the distinction between obligatory and non-obligatory practices is irrelevant to determining whether an interference is more than trivial or insubstantial.’). If not under s2(a), then the distinction between optional and mandatory religious practices may come back to bite a claimant in the s1 inquiry: eg *Trinity Western* (n47) [89]-[90] (Majority).

⁸⁶ It was ‘evident’ that the first claimant suffered a non-trivial interference, while the claimants who did not feel under a duty to dwell in their own succah had to provide evidence of harm sufficient to establish non-trivial interference: *Amelem* (n27) [74]-[77]. See also *Cham Shan Temple v Director, Ministry of the Environment*, [2015] OERTD No 9 in which members of a Buddhist meditation centre opposed the approval of a nearby wind farm. The tribunal held that although the wind farm might have some impact on the pilgrimage route, following that particular route was not a religious precept and was not required by their religion, so there was no interference ([588]-[592]).

⁸⁷ *Welsh* (n83) [67]. The majority in *R v NS*, 2012 SCC 72 held that strength of conviction was relevant in assessing the harm caused to the claimant by being made to depart from her religious beliefs ([13], [36]); Abella J, concurring, held it was an irrelevant concern and resort to it by courts was illegitimate ([89]).

interference.⁸⁸ The implication here, again, is that interference with a belief or practice not firmly rooted in religion is less harmful to the claimant than if it were religious in nature.

The above observations on interference suggest that assessments of harm to the claimant at this stage of the s2(a) inquiry are made against a standard of ‘reasonableness,’ which is hardly in the spirit of *Amselem*’s focus on the personal, subjective experience of religiosity.⁸⁹ As Howard Kislowicz puts it, when courts reject sincere s2(a) claims on the grounds of triviality they are essentially saying that the impugned state limit ‘should not have bothered them so much’.⁹⁰ In this way, judgments of non-trivial interference can serve to exclude non-hegemonic practices and beliefs. Take the recent Supreme Court case of *Ktunaxa Nation v British Columbia*, in which the Minister’s decision to approve a ski resort on land sacred to the Ktunaxa people was held not to violate s2(a) because the claimants had failed to prove non-trivial interference.⁹¹ The claimant First Nation group had maintained that the ski resort would drive the Grizzly Bear Spirit from the land and sever their connection to it.⁹² The majority, however, held that the development would not prevent the community from engaging in their usual religious practices despite the destruction of the object of their worship, and that as s2(a) does not protect the ‘spiritual focal point’ of worship their claim must fail.⁹³ Dominant norms around what constitutes religious practice and culturally-specific notions of harm situate claims like these outside the scope of s2(a)’s protection.⁹⁴ I leave further examination of the operative assumptions underpinning perceptions of harm to the claimant to the next section, where I address harm’s normative function.

What I have demonstrated in this section is that judgments of harm under s2(a) are jurisdictional in nature. They serve to exclude and to include, to mark out those instances of

⁸⁸ *R v Badesha* 2011 ONCJ 284 [66]-[70] (court rejected constitutional challenge to motorcycle helmet rules by Sikh driver on grounds that, since he was not willing to abandon his beliefs and remove his turban to comply with the law, the only effect would be that he would not be able to drive a motorcycle. As this was not a religious practice, there was no interference); *Welsh* (n83) (accused made self-incriminating statements to undercover officer posing as an ‘Obeahman’ spiritual advisor; court held the interference with accused’s s2(a) rights was trivial because there was insufficient evidence that he was communicating with the Obeahman for spiritual purposes: [67], [70]-[71]).

⁸⁹ See Kislowicz (n78) 342-43; Moon, *Freedom* (n56) 76. The court in *R v Purewal*, 2014 ONSC 2198 [197] conceded there was an element of reasonableness to the triviality inquiry but that it operated at ‘a very low threshold’ given the expansiveness of s2(a).

⁹⁰ Kislowicz (n78) 342. He suggests that the court could guard against capricious claims by requiring evidence of interference *simpliciter*, which would simply require that claimants make their beliefs or practices intelligible to the court: 342-43.

⁹¹ *Ktunaxa* (n79).

⁹² *Ktunaxa Nation Council, Factum of the Appellant: Ktunaxa Nation v British Columbia* <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=36664>> accessed 08.02.20, paras 9-10.

⁹³ *Ktunaxa* (n79) [70]-[71].

⁹⁴ On the barriers faced at the interference stage in a similar, hypothetical s2(a) claim by Indigenous peoples, see Borrows, ‘Living Law on a Living Earth’ in Moon (ed), *Law and Religious Pluralism in Canada* (UBC 2008) 161, 167-72.

conflict between law and religion over which the court will exercise jurisdiction. If the religious practice is deemed to cause serious harm, particularly to vulnerable people, then a court can immediately justify the incursion without proceeding to the proportionality analysis under s1. Conversely, if the harm to the claimant is sufficiently serious and of the requisite type, then a violation will be found and the court will proceed to s1. Although the s2(a) test is thought to represent a low hurdle for religious claimants, significant incursions on religious freedom can slip through the cracks, as they did in *Ktunaxa*. This ought to prompt us to question the strength of the boundary metaphor. Yes, harm operates to mark out the boundary between protected and not-protected religious practices, but when we acknowledge how notions of harm are contested and culturally determined, the boundary appears more porous. Harm's gate-keeping function continues to do its work, but on much more uncertain terms.

4.2.2.3 Balancing harms under section 1: Oakes and Doré

When a violation of s2(a) is found, the onus shifts to the state to justify the rights incursion under s1 using the *Oakes* framework. To show that the limit on the right is reasonable and 'demonstrably justified in a free and democratic society',⁹⁵ the government must first establish that the limit has a pressing and substantial objective. It must then meet the rigours of the proportionality test: the limit must be rationally connected to the law's purpose, minimally impairing of the right, and proportionate in its effects.⁹⁶

The determination of harm is firmly embedded in the s1 justification analysis. LW Sumner in fact argues that the *Oakes* test operationalizes Mill's harm principle, calling Mill the unacknowledged 'godfather of the *Oakes* tests'.⁹⁷ The first step in *Oakes*, which asks whether the legislative objective is sufficiently weighty in principle to justify overriding a Charter right, reflects the overarching question of the harm principle: is this particular instance of state coercion intended to prevent or punish harm to others? If it is, then Mill's necessary condition for state intervention has been met.⁹⁸ The second stage of *Oakes* – the proportionality analysis – reflects Mill's overall consequentialist reckoning. Both Mill and Feinberg maintain that harm is not a sufficient condition to justify state restrictions on

⁹⁵ *Canadian Charter of Rights and Freedoms*, s1.

⁹⁶ *Oakes* (n36); *Hutterian* (n80) [35]-[104] (McLachlin CJ).

⁹⁷ Sumner, *The Hateful and the Obscene* (UTP 2004) 69. See also Cameron, 'The Past, Present, and Future of Expressive Freedom Under the Charter' (1997) 35 OHLJ 1, 63-66 on the centrality of harm to the *Oakes* test.

⁹⁸ Sumner (n97) 68-69. Bastarache J noted in *Thomson Newspapers v Canada*, [1998] 1 SCR 877 that the characterization of the objective under s1 and the identification of the harm to be remedied are 'virtual correlatives of one another' ([96]); cf *Frank v Canada*, 2019 SCC 1 [139] (Côté and Brown JJ, dissenting).

freedom; there might be good, countervailing reasons for state restraint.⁹⁹ The proportionality analysis tests the strength of those reasons, weighing all the harms in the balance.¹⁰⁰ In fact harm may play its most significant role in the final step of the proportionality test (proportionality *stricto sensu*), where courts balance the deleterious effects of the measure (the harm caused) against its salutary effects (the harm averted).¹⁰¹ Here courts have the chance to assess the actual impact of the measure: the harm arising from the violation of the right itself.¹⁰²

The *Oakes* test is often applied deferentially, such that Parliament need only show that it acted on a ‘reasoned apprehension of harm’ when the evidence of harm is inconclusive, or when the nature of the harm alleged is difficult to measure or prove. The courts in such instances may rely upon a certain degree of common sense, reason, and logic.¹⁰³ While some believe this gives Parliament too much scope to curtail rights in the name of diffuse and speculative harms,¹⁰⁴ others maintain that it simply reflects the difficulty courts face in carrying out the *Oakes* test under conditions of empirical uncertainty.¹⁰⁵ Regardless of the degree of certainty required by courts, harm is the operative criterion in establishing that a rights violation is justified under s1 of the Charter.

When the violation is alleged as a result of a discretionary administrative decision, however, then courts will follow the approach from *Doré*: they will assess whether the decision-maker reasonably balanced the relevant Charter protections at stake (both rights and values) against the statutory objectives being carried out.¹⁰⁶ Proportionality is the key ingredient linking *Oakes* and *Doré*: under both approaches, the overarching question is how to strike a proportionate balance between the harm caused by the rights violation and the salutary effects of the state’s mandate.¹⁰⁷ They are fact-centered, contextual analyses that

⁹⁹ Feinberg, *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (OUP 1984) 9-10 [*Harm*]. For a review of Mill’s consequentialism as it applies to his arguments for the harm principle in *On Liberty*, see Sumner (n97) 21-35.

¹⁰⁰ Sumner (n97) 68.

¹⁰¹ Beaman, *Defining Harm* (UBC 2008) 67.

¹⁰² Cameron (n97) 66. See eg *Edwards Books* (n68) 768-69 (Dickson CJ); *Thomson Newspapers* (n98) [123]-[126] (Bastarache J); *R v KRJ*, 2016 SCC 31 [77]-[79] (Karakatsanis J).

¹⁰³ *R v Keegstra* [1990] 3 SCR 697, 776; *R v Butler*, [1992] 1 SCR 452, 503; *RJR-MacDonald v Canada*, [1995] 3 SCR 199 [137], [154] (McLachlin CJ); *Thomson Newspapers* (n98) [104]-[107] (Bastarache J); *Harper v Canada*, [2004] 1 SCR 827 [77]-[88] (Bastarache J); *R v Bryan*, 2007 SCC 12 [16]-[30] (Bastarache J); *Frank* (n98) [64] (Wagner CJ).

¹⁰⁴ Cameron (n97); Sumner (n97); Pal, ‘Democratic Rights and Social Science Evidence’ (2014) 32 NJCL 151 (with respect to democratic rights).

¹⁰⁵ Choudhry, ‘So What is the Real Legacy of *Oakes*?’ (2006) 35 SCLR (2d) 501.

¹⁰⁶ *Doré* (n36) [55]-[57]; *Loyola* (n47) [35]-[37] (Abella J).

¹⁰⁷ As Justice Abella explained in *Doré* (n36) [5], ‘while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality.’ See also *Trinity Western* (n47) [57], [80]-[82] (Majority). Other analytical frameworks used in religious freedom cases also rely on proportionality:

require judges to consider and weigh competing harms. Thus both *Oakes* and *Doré* operate to stitch the discourse of harm into the process for justifying violations of religious freedom. They enable harm's jurisdictional role to continue to be carried out, with assessments of harm determining where the balance should lie between state and individual interests and where the porous, shifting boundaries around the s2(a) right should be drawn.

It should be noted that the harm analysis conducted under s1 is not completely distinct from that required by the s2(a) inquiry. The court will already have begun a probe into the degree and nature of the harm to the claimant in the sincerity, nexus and non-trivial interference analysis, while harm to others may have been considered as an internal limit to the right. This undermines the idea of a bright line separating the two stages of the inquiry. Richard Moon also questions the veracity of a sharp distinction between s2(a) and s1, arguing that s1 involves more than a simple weighing or reconciling of harms and benefits.¹⁰⁸ He argues that s1 sees courts engaging in a 'pragmatic trade-off of interests,' deciding whether the state can or should absorb the challenge posed by the religious practice or belief to the state's democratic, public values.¹⁰⁹ In practice, it is the state interest that usually wins: courts have adopted a 'weak standard of justification under s1', rarely allowing exemptions from state rules unless they concern a private, self-contained religious practice that has no effect on others' interests or rights.¹¹⁰ Indeed, even when Moldaver J, concurring in *Ktunaxa*, explained that the state's interference with the religious practice under s2(a) was significant – that the development of the ski resort would render their beliefs 'devoid of any spiritual significance' and reduce their rituals to 'empty words and hollow gestures' – he still found it relatively easy to justify the rights violation.¹¹¹ The state is unwilling to cede normative ground to religious groups that threaten legitimate state objectives and values.

As in all other parts of the constitutional religious freedom inquiry where harm is deployed as a decision-making tool, there will be disagreements about the extent or nature of the harm under s1. In the paired *Trinity Western* decisions, for instance, the Supreme Court

eg *NS* (n87) [34]-[35] (McLachlin CJ) (balancing test for conflict of rights closely mirrors final two steps of *Oakes*).

¹⁰⁸ Moon, *Freedom* (n56) 134-38.

¹⁰⁹ *ibid* 138; see also 128-38. Likewise, Berger maintains that the proportionality exercise is just an exercise in judging reasonableness: 'Freedom of Religion' in Oliver, Macklem and Des Rosiers (eds), *The Oxford Handbook of The Canadian Constitution* (OUP 2017) 755.

¹¹⁰ Moon, *Freedom* (n56) 69, 131-34 (noting, though, that even paternalistic laws have withstood claims for exemptions by religious adherents: 134). See also Panaccio, 'The Justifications of Rights Violations' in Oliver, Macklem and Des Rosiers (n109) 657, 666. The *Oakes* test is intended, however, to impose stringent requirements on the state to justify its rights incursion: Hogg, *Constitutional Law of Canada* (Student ed, Thomson Carswell 2006) 35.2.

¹¹¹ *Ktunaxa* (n79): compare [124]-[134] (serious extent of infringement) and [141]-[155] (violation justified under *Doré*).

was tasked with deciding whether two provincial law societies were justified in refusing to accredit a law school at a Christian university that required its students and staff to sign a covenant forbidding, among other activities, sexual intimacy outside heterosexual marriage.¹¹² The majority downplayed the harm to the university members under s1 on the grounds that the covenant was not a required element of their faith but merely a ‘preferred’ or ‘optimal’ way of living their faiths.¹¹³ But for *Brown and Côté JJ*, dissenting, the harm to the claimants was profound, undermining the core character and vitality of a community of believers.¹¹⁴ Indeed, a common critique of balancing and proportionality tests is that they do not impart objectivity as promised, but merely serve to obscure the judge’s ‘moral-political commitments’ that determine which harms are placed on the scales and the weight they are afforded.¹¹⁵ Recent Supreme Court cases have in fact conceded that the s1 analysis is a normative exercise that implicates courts in ‘difficult value judgments’.¹¹⁶

Section 1 is just another site in which harm operates as a gate-keeper, guarding the boundaries of the claimant’s ‘zone of freedom’ in order, at this stage, to protect the *state* from over-generous drawing of those boundaries. Because notions of harm are always contested and uncertain, this process becomes a normative exercise guided by other operative moral and political commitments. It is to this issue that I now turn.

4.2.3 Harm’s normative function

Every time the concept of harm performs its jurisdictional function in the religion cases, it is simultaneously doing normative work. Assessments of harm are normative exercises that require context-specific judgment, as Patricia Smith points out when she writes that ‘recognizing a harm is not a trivial matter; it is not like recognizing a tree or a rock’.¹¹⁷ As I explained in Chapter 2, the concept of harm is open-ended and indeterminate, an empty vessel whose content derives from other commitments and values. Thus Lori Beaman explains that ‘implicit, if not explicit, in every risk assessment are judgments about what is right and what is good’.¹¹⁸ Beaman’s work focuses on a case study of a young Jehovah’s Witness,

¹¹² *Trinity Western* (n47) was heard alongside *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (all references citing to the former).

¹¹³ *Trinity Western* (n47) [87]-[90], [103]-[104].

¹¹⁴ *ibid* [324].

¹¹⁵ Webber, ‘Proportionality, Balancing and the Cult of Constitutional Rights Scholarship’ (2010) 23 *CJLJ* 179, 193; see also Tsakyrakis, ‘Proportionality’ (2009) 7(3) *I-CON* 468; cf Beatty, *The Ultimate Rule of Law* (OUP 2004). The fact that proportionality tests are not value-free or neutral but are inherently moral exercises need not detract from their usefulness: Möller, ‘Proportionality’ (2012) 10(3) *I-CON* 709, 716-17.

¹¹⁶ *KRJ* (n102) [79] (Karakatsanis J); *Frank* (n98) [38] (Wagner J).

¹¹⁷ Smith (ed), *Feminist Jurisprudence* (OUP 1993) 138.

¹¹⁸ Beaman (n101) 84; see also 85-87.

Bethany Hughes, whose attempt to refuse a blood transfusion was rejected by the courts.¹¹⁹ Beaman considered how the discourses of law, medicine and social work converged to ‘produce’ Bethany as an unreasonable religious subject. Scripts of her excessive religiosity and the challenge she presented to liberal notions of agency and consent were taken together to signal a risk of harm, thereby authorizing the limitation of her religious freedom. In Bethany’s case, the court’s judgments of harm were informed by prior assumptions about what constitutes good or bad religion, and reasonable or unreasonable religious beliefs and practices.

We see harm’s normative function clearly in the courts’ identification of the relevant harms in the religion cases and their judgments about the relative seriousness of those harms. Take *R v NS*, for instance, in which the Supreme Court developed a doctrinal test for determining whether a witness should be permitted to testify in court wearing a niqab.¹²⁰ McLachlin CJ (for the majority) held that if there were no way to reconcile the competing rights in the case (freedom of religion of the witness versus the accused’s fair trial rights¹²¹), then the matter should be determined by assessing the balance of harms: do the salutary effects of removing the niqab outweigh its deleterious effects?¹²² The three separate sets of reasons reveal different assessments of the risk of harm, which in turn tells us something about the prior commitments and assumptions of the judges that informed their varied conclusions on harm.¹²³ McLachlin CJ’s reasons, for instance, show an overwhelming concern for the rule of law and trial fairness. This leads her to adopt an expansive view of the harms that might arise if the witness’s face is not visible while she testifies.¹²⁴ Abella J (dissenting), defending the view that a witness should always be able to wear a niqab in the courtroom unless her identity is in issue, demonstrated an overriding concern for the rights of women and religious minorities. She thereby found that the potential harm to the witness in not being permitted to wear a niqab far exceeds the harm to the accused’s fair trial rights.¹²⁵ Justice LeBel’s concurring reasons reveal yet another host of operative commitments – concerns about religious neutrality, ‘core common values’, and open courts – which underpin his conclusion

¹¹⁹ *H(B)* (n58).

¹²⁰ *NS* (n87).

¹²¹ None of the justices questioned whether there were additional rights at play, such as the witness’s s15 equality right or her s7 right to security of the person (Chambers and Roth, ‘Prejudice Unveiled’ (2014) 29(3) *CanJL&Soc’y* 381), nor did they consider the witness’s own fair trial rights (Bakht, ‘In Your Face’ (2014) *S&LS* 1, 9).

¹²² *NS* (n87) [36]-[39].

¹²³ Although the court remitted the matter to the preliminary inquiry judge, its elaboration of the analytic framework to be used was indicative of the position it would have adopted: that the balancing test favours removal of the niqab. Indeed, this was the conclusion reached by the preliminary inquiry judge: *R v S(M)*, 2013 ONCJ 209.

¹²⁴ *NS* (n87) [21]-[27] (importance of demeanour evidence to trial fairness), [38]-[44], [48] (risk of serious harm to accused’s fair trial rights).

¹²⁵ *ibid* [82]-[109].

that the potential harm to the accused and to these values requires a clear rule that niqabs can never be worn in court.¹²⁶

Harm's normative function is also clearly revealed in *Polygamy Reference*, in which the court premised its conclusion on polygamy's risk of harm to women, children, society, and the institution of monogamous marriage.¹²⁷ Although Bauman J's findings were derived from the monumental evidential record in this case, the choice of which evidence to favour and how to interpret the often ambiguous findings regarding the harms of polygamy implicate the court in significant normative statements about the unreasonableness of polygamy and the threat it poses to society.¹²⁸ Feminist legal theorists have long maintained that the methodologies of legal reasoning, including the identification of issues, consideration of evidence, and choice of legal precedent, reflect active, normative choices.¹²⁹ 'Proof' of harm is always mediated through judicial experience, intuition, and pre-conceptions. In this case, Bauman J's interpretation of the evidence posits polygamy not just as a threat to the physical safety of women and children, but as a much bigger – and more concerning – threat to a set of 'shared' values: equality, human dignity, and the rule of law.¹³⁰ These normative positions are embedded in his extensive references to harm, which tend to obscure the workings of power that mark out polygamy as an inherent threat to Canadian values.

In both *NS* and *Polygamy Reference*, the concept of harm operates to communicate and to inscribe the values that 'we' hold dear. Values play an important role in the Charter's s2(a) jurisprudence and recourse to them is not necessarily problematic. 'Charter values' are used as interpretative guides to the enumerated rights,¹³¹ while assessments of harm in the s1 analysis are also conducted through the lens of those values.¹³² The Supreme Court addressed the role of values in the religion cases on a number of occasions, most notably in its judgments relating to the state's duty of neutrality. It confirmed that while the state must adopt a neutral

¹²⁶ *NS* (n87) [59]-[60], [70]-[78].

¹²⁷ *Polygamy Reference* (n3) [5]. I unpack the idea of 'harm to monogamous marriage' in Chapter 5.

¹²⁸ For example, Bauman J endorsed the expert evidence of Dr Heinrich and afforded it enormous weight throughout his reasons, despite acknowledging that some of his data was 'somewhat speculative and unproven' (ibid [552]-[553], [1294]). Dr Heinrich seemed, at times, to conflate correlation and causation, a fault which even when pointed out by the *Amicus Curiae* and other expert witnesses ([539]-[541], [762]), Bauman J did not address.

¹²⁹ Mossman, 'Feminism and Legal Method' (1987) 3 *WisWomen'sLJ* 147, 157-65; Hunter, 'More than Just a Different Face?' (2015) 68 *CLP* 119, 129-31.

¹³⁰ Beaman, 'Introduction' in Calder and Beaman (n18) 13.

¹³¹ Traditionally, Charter values have played two roles: (1) guiding the interpretation of the meaning and scope of Charter rights (*Oakes*); and (2) developing the common law to ensure it accords with the Charter (*RWDSU v Dolphin Delivery*, [1986] 2 *SCR* 573); Bredt and Krajewska, 'Doré' (2014) 67 *SCLR* (2d) 339, 349. Charter values are experiencing a renaissance in Canadian jurisprudence after *Doré*, now also serving as a constraint on the discretionary decisions of administrative decision-makers or tribunals.

¹³² *Thomson Newspapers* (n98) [125] (Bastarache J); *Hutterian Brethren* (n80) [88] (McLachlin CJ).

position as between different religions (and non-religion), it does not need to be neutral on all matters of morality or on what constitutes a healthy civil society.¹³³ In its judgment that a Catholic school had to follow some parts of the state-mandated Ethics and Religious Culture course in *Loyola High School v Quebec*, for instance, the majority held that ‘the state always has a legitimate interest in promoting and protecting...shared values’ such as ‘equality, human rights and democracy’.¹³⁴ As Kislwicz rightly notes, this position recalls the finding in *Butler* that Parliament can legislate to protect ‘some fundamental conception of morality’, provided it derives from Charter values;¹³⁵ so, too, the Supreme Court’s decision in *Labaye*, in which the harms of indecency capable of grounding a conviction were tethered closely to Canadian constitutional values.¹³⁶ It is also consistent with Feinberg’s retort to the criticism that the moral underpinnings of the harm principle commit it to the enforcement of morality. He simply states that not all moral principles and values can justifiably be enforced under his theory: only the protection of human rights and autonomy, the values to which the harm principle is aimed.¹³⁷

Judicial pronouncements about the legitimacy of promoting particular shared values are often tinged with some defensiveness or unease, given fears about law slipping back into the heady moralism of Devlin’s day. The critical distinction to be drawn is thus between core, ‘constitutive values’ that serve as the foundation for liberal, democratic states¹³⁸ and other values whose influence might be less legitimate, by liberal or more critical standards.¹³⁹ In some instances this will be an easier task than in others. Simply referring to ‘Charter values’ gets us nowhere, as Charter values have no settled legal content.¹⁴⁰ This is particularly so with values that do not flow from or parallel specific Charter rights,¹⁴¹ such as human dignity, autonomy, or secularism. Dissenting in *Trinity Western*, Justices Côté and Brown take up this line of inquiry and state that resort to Charter values is subjective and idiosyncratic, their amorphous and indeterminate character allowing them to be used as ‘mere rhetorical devices’ by courts to shield moral judgments.¹⁴² The danger is that supposedly ‘core’ national values

¹³³ *O’Sullivan v Canada*, (1991) 45 FTR 284 (FC TD) [45]; *Amselem* (n27) [1] (Iacobucci J); *Bruker* (n47) [2], [77]-[78] (Abella J); *Loyola* (n47) [43]-[47] (Abella J); *Trinity Western* (n47) [41] (Majority); Berger, ‘Religious Diversity, Education, and the “Crisis” in State Neutrality’ (2014) 29(1) *CanJL&Soc’y* 103, 121; Moon, *Freedom* (n56) 91-92; Kislwicz (n78) 347.

¹³⁴ *Loyola* (n47) [47]; see also [46] (religious difference cannot ‘trump core national values’).

¹³⁵ *Butler* (n103) 493 (Sopinka J); Kislwicz (n78) 347.

¹³⁶ *Labaye* (n1) [29]-[38] (McLachlin CJ).

¹³⁷ Feinberg, *The Moral Limits of the Criminal Law Vol 4: Harmless Wrongdoing* (OUP 1990) 11-12.

¹³⁸ Maclure and Taylor, *Secularism and Freedom of Conscience* (HUP 2011) 11.

¹³⁹ Kislwicz (n78) 348.

¹⁴⁰ Berger (n21)163.

¹⁴¹ Bredt and Krajewska (n131) 353-54.

¹⁴² *Trinity Western* (n47) [309]; see generally [308]-[311]. See also *ET v Hamilton-Wentworth District School Board* (n80) [103]-[104] (Lauwers JA).

can be used to illegitimate ends, enforcing hegemonic, dominant norms against unorthodox practices that come before the courts. Uncritical resort to harm, particularly when the ‘harm’ consists in a threat to a particular set of values, can result in a failure to address these important distinctions.

4.3 Conclusion

In this chapter I have described three ways in which the concept of harm does its ‘work’ in decisions rendered under s2(a) of the Charter. First, harm is used to *legitimate* the state’s coercive interference with religious freedom, particularly in cases where there appears to be a risk that the state is limiting individual freedom on the grounds of preventing personal offense or immorality. Decisions upholding the constitutionality of bans on hate speech and polygamy, for instance, were strongly serviced by the defensive discourse of harm.

Second, risk of harm performs *jurisdictional* work, serving to mark out the boundaries of the constitutional right to religious freedom in Canada and distinguishing between those religious practices and beliefs that can be protected from the impugned state action, and those that cannot. I have shown how some judges rely on a rough harm principle in their application of internal limits to s2(a): religiously motivated conduct that threatens serious harm to others (especially vulnerable people) falls beyond the boundary of the right and is not protected by the Charter. Harm also serves as a threshold question through the application of the sincerity, religious nexus, and interference tests under s2(a), constraining who is justified in seeking a constitutional remedy. The claimant must be sufficiently harmed (interference) and the harm must attach to the correct interests: those that are religious (nexus) and that express a vital aspect of a person’s autonomy (sincerity). Under s1, judgments of harm yet again occupy central conceptual ground. The stringency of the evidentiary requirements for risk of harm under *Oakes* (or *Doré*), the determination of which harms are relevant under s1, and the weight they are afforded in the proportionality inquiry all serve together to determine the outcome of the case. When harm’s legitimating function is also at play, the courts’ reliance on harm throughout these processes is loudly proclaimed. But often it remains unspoken, an invisible organizing principle running through both s2(a) s1.

However, judicial conceptions of harm are not fixed: as I explained in Chapter 2, assessments of harm are mediated through the lens of culture and other normative assumptions. Thus the *normative* work that harm does – how it reflects, expresses and entrenches the judges’ operative commitments – also influences its jurisdictional function. The courts’ use of harm to determine where and how to draw the boundaries around the religious freedom right will shift and change depending on the particular conception of harm

that they adopt. These boundaries are not fixed by any stable, presumptive notion of harm, but rather will move and bend depending on the underlying factors that influence the court's assessment of harm.

I continue to explore the question of harm as a vector for particular moral or normative judgments in both the next chapter, where I examine the dominant meanings that courts ascribe to harm and the priority they give to certain harms over others. A judge's decision about what counts as a constitutionally cognizable injury in the religion cases – whether as an 'interference' under s2(a), a 'deleterious effect' under s1, or an overriding harm capable of grinding the whole analysis to a halt through 'internal limits' on the right – speaks volumes to constitutional law's underlying normative commitments. This undercuts claims that courts applying s2(a), with its generous, subjective *Amselem* test, do so without pronouncing on the merits or reasonableness of the religious belief or practice at issue.¹⁴³ It also undercuts the 'conventional story' of law and religion in which law operates at a distance from the cultural claims before the court,¹⁴⁴ serving as 'neutral managers' of religious disputes.¹⁴⁵ Law's use of harm tells us exactly what it thinks about those religious beliefs or practices when they fall afoul of a risk of harm test.

¹⁴³ Berger, 'Liberal Constitutionalism and the Unsettling of the Secular' in Adhar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 198.

¹⁴⁴ Berger, *LR* (n21).

¹⁴⁵ Kislowicz, 'The Court and Freedom of Religion' (2017) 78 *SCLR* (2d) 221, 231.

5 The meaning of harm in Canadian constitutional decisions on religious freedom

5.1 Introduction

Law is deeply implicated in human experience: it constructs, constrains and acts upon our social world. But despite this influence, law does not – and does not aim to – provide a perfect reflection of human life as it is experienced. Marriage and divorce laws, for instance, are mainly procedural and do not express the value of those institutions to the parties involved.¹ Criminal laws on sexual assault focus on lack of consent, but seeing the ‘wrong’ in this way does not reflect that which is valuable about human sexuality, nor how rape is experienced by the victims.² The disconnect between law and human experience is also stark in Canadian religious freedom cases and is particularly visible when courts attempt to delineate the harms suffered by a person claiming a violation of her religious freedom. The significance of a person’s religious faith, practice or community is typically broader and deeper than constitutional law’s shallow and narrow understanding of religion. As Berger demonstrates in his scholarship, law systematically cuts away at or ‘renders’ religion into a particular shape that fits within its normative commitments and practices, leaving behind an ‘experiential residue...on the cutting room floor’.³ In this way, judicial conceptions of harm in s2(a) cases are unlikely to capture what is truly at stake for religious claimants. Although I do not believe that law’s understanding of religion could or even should map the precise contours of a person’s experience of religion, I maintain – like Berger – that it is worth investigating what is left behind in this act of rendering.

Once we accept that harm plays a significant role in structuring and guiding the courts’ engagement with the Charter right to religious freedom, as I demonstrated in the previous chapter, then we need to ask what particular conceptions of harm are tracked by that engagement. Although much of the following discussion focuses on harm to the claimant, that is not the only harm that interests me – for any harm to the claimant must then be weighed against the countervailing interests of other people or the state. In this chapter I consider which forms of injury or detriment most concern the court in the Charter’s religious freedom cases,

¹ See eg Laborde, *Liberalism’s Religion* (HUP 2017) 31. Laborde credits Dworkin’s theory of interpretivism for the point that ‘legal concepts cannot be reduced to their semantic meaning’ (31).

² Lacey, *Unspeakable Subjects* (Hart 1998) 104-17.

³ Berger, *Law’s Religion* (UTP 2015) 103. Berger explains that although law purports not to make comprehensive claims about religion, its power and authority mean that ‘...law’s understanding of religion quickly becomes the only game in town’ (103). Referencing Robert Cover (in ‘*Nomos and Narrative*’ (1983) 97 HarvLRev 4) he writes that ‘the very nature of law is that it kills other normative arrangements and interpretations’ (103).

including both the alleged harm to the claimant and the risk of harm to others or to society from the religious conduct at issue. I do not set out to provide a comprehensive account of everything that has or has not ‘counted’ as harm in law’s treatment of religion; rather, I track themes in the courts’ approach to harm and highlight those forms of harm that carry weight, and those that do not. I conclude that the cases show an implicit hierarchy of harms which prioritises those harms that fit more comfortably within the culture of Canadian constitutional law, as per Berger’s account of the interaction between law and religion explored in the last two chapters. The critical perspectives on harm from Chapter 2 are borne out by this conclusion, particularly the problem of ‘injury inequality’ which sees the harms suffered by marginalized people more likely to fall outside the bounds of legal redress. However, given the varied rationales for judges’ resort to harm in deciding religious cases (demonstrated in Chapter 3) and harm’s deeply embedded role in the s2(a) inquiry (from Chapter 4), the solution to this problem is not to attempt to rid s2(a) decisions of harm-based reasoning, but to address it more openly, honestly and directly. The first step in that process is to take stock of how harm is commonly understood in the religion cases, which is the issue to which I now turn.

5.1.1 A hierarchy of harms

Any harm one suffers must be of sufficient magnitude to warrant legal redress. Indeed, the Supreme Court confirmed in *R v Edwards Books* that the Charter does not require the elimination of ‘every miniscule state-imposed cost associated with the practice of religion’.⁴ It did not, however, go on to explain precisely *how* courts ought to assess the seriousness of the alleged harm. This is not a straightforward task, for as McLachlin CJ cautioned in *Alberta v Hutterian Brethren of Wilson Colony*, ‘[t]here is no magic barometer to measure the seriousness of a particular limit on a religious practice’.⁵ One expects that the claimant would understand the harm she has suffered to be significant. But different people experience harm in different ways: if borne by another, one person’s heavy burden may feel rather light. Likewise, a judge may not accept the claimant’s argument about the quantum of harm incurred by the alleged rights violation.

Feinberg’s objective theory of harm seeks to avoid the problems of subjectivity by grounding harm in the notion of a wrongful setback to interests.⁶ But Feinberg’s theory is not a constitutional standard for what constitutes harm sufficient to ground a successful freedom

⁴ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 759 (Dickson CJ). As discussed above, the requirement of non-trivial interference in the s2(a) *Amselem* test puts paid to such a possibility.

⁵ 2009 SCC 37 [89] [*Hutterian*]; *Hak v Procureure générale du Québec*, 2019 QCCA 2145 (‘It is generally acknowledged that the harm caused by a violation of a right guaranteed by the *Canadian Charter* is difficult to quantify’: [70], Bélanger JA).

⁶ Feinberg, *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (OUP 1984) [*Harm*].

of religion claim. That standard has both subjective and objective elements. As noted in the previous chapter, whether the belief underpinning the religious freedom claim is sincerely held is judged on a subjective standard; courts must not impose their own interpretations of what is or is not required by the religion, and barring evidence of bad faith, must take the claim at face value.⁷ American scholar Frederick Gedicks notes that this subjective turn puts judges in a difficult position. Because questions of religious doctrine are not justiciable by secular courts, courts end up hamstrung into accepting the claimant's perspective on the harms she suffers, giving over too much power to the claimant.⁸ In Canada, the objective standard introduced through *Amselem's* non-trivial interference requirement addresses Gedicks' concern to some extent; it allows courts to make their own determinations of whether the harm suffered by the claimant is sufficiently serious to warrant constitutional intervention. Moreover, once the court proceeds to the s1 inquiry, the gloves are off: the court makes its own determination of the harm to the claimant in assessing the 'deleterious effects' of the measure under the *Oakes* test.⁹ But it is not entirely clear how a claimant's subjective experience of religious harm is to be understood and measured in the objective tests under both s2(a) and s1.

The court was alert to these difficulties in *Hutterian Brethren*, in which it considered a claim from members of a Hutterite colony who led a traditional, self-sufficient lifestyle centred on farming and religious observance.¹⁰ Both the federal and provincial governments had previously accommodated the Hutterites' religious beliefs and practices, exempting them from military service and allowing them to hold tracts of land in common.¹¹ However, when the government of Alberta introduced a universal photo requirement for drivers' licenses, the colony members found their religious beliefs about the sinfulness of being photographed pitted against state interests. They challenged the regulation under s2(a), arguing that they would not be photographed against their will but needed to continue holding drivers' licences in order to sustain their traditional, collective, and rural way of life. A majority of the Supreme Court found a violation of s2(a) but upheld the regulation under s1. In determining its

⁷ *Syndicat Northcrest v Amselem*, 2004 SCC 47 [46]-[56] (Iacobucci J).

⁸ Gedicks explains that US courts hearing religious accommodation cases are prevented (by the religious question doctrine) from inquiring into the religious costs of the measure in assessing whether the law imposes a substantial burden on the claimant. Because they are non-justiciable, they are deemed to be substantial provided the claim is sincere. He argues that this presents a threat to the rule of law (Gedicks, "'Substantial' Burdens" (2017) 85 *GeoWashLRev* 94, 96-115). See also Su, 'Judging Religious Sincerity' (2016) 5(1) *OJLR* 28.

⁹ *R v Oakes*, [1986] 1 SCR 103. The same applies when the court considers the 'severity of the interference' under the administrative law approach from *Doré v Barreau du Québec*, 2012 SCC 12 [56].

¹⁰ *Hutterian* (n5).

¹¹ Janzen, *Limits on Liberty* (UTP 1990). The Alberta government had imposed rules designed to break up these communal landholdings in 1947 through the *Communal Property Act*, but it was repealed in 1973.

deleterious effects in the final stage of the *Oakes* test, McLachlin CJ made the following observations about how to judge the harm experienced by the claimant, which are worth citing in full:

In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multireligious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. *The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis.* Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state.¹²

McLachlin CJ thus confirmed that the claimant's perspective on the harm of the state limit is important, but not determinative. The court must 'go further and evaluate the degree to which the limit actually impacts on the adherent'.¹³ How does it do this? She explains that they are to judge the seriousness of the alleged harm on a case-by-case basis, for which 'guidance can be found in the jurisprudence'.¹⁴

In this chapter I follow through on her advice, looking to the jurisprudence for guidance on how courts judge the meaning and degree of harm relevant to a religious freedom claim. This examination reveals a clear hierarchy of harms in the religion cases. More constitutionally cognizable harms lie at the top: harms of coercion and physical harm. These harms conform to law's pre-existing cultural commitments and thus tend to be viewed as especially serious or weighty; they fit within law's understanding of religion as primarily a function of private, individual choice.¹⁵ In the middle lie harms with fuzzier edges and which, at times, slip through the cracks: harm to one's personal or cultural identity, associational harm, and psychological harm. Aesthetic, economic and spiritual harms sit at the bottom of this hierarchy. The courts understand and mediate these harms through the lens of an overarching commitment to protecting the state from undue religious incursions. Thus, institutional harms – harms to legal institutions, to public values, and to the Charter itself – impede and constrain recognition of all the above. Although it is certainly possible to argue that other harms lurk within s2(a) cases that I have not addressed, my own examination has revealed these as the dominant harms in the jurisprudence. I address them layer by layer, but do not dwell on those that have been amply considered in the literature. My aim is to paint a

¹² *Hutterian* (n5) [90] (emphasis added).

¹³ *ibid* [90].

¹⁴ *ibid* (91).

¹⁵ *Berger* (n3) 64-104.

picture of how the courts understand these harms and judge their seriousness, and to recapture some of what is lost in that picture.

The act of identifying and critiquing law's dominant conceptions of harm is a feminist practice. Drawing on the critical perspectives on harm surveyed in Chapter 2, this practice demands the unveiling of assumptions guiding the prioritization of some harms over others and a certain amount of pushing at the boundaries of what is considered harmful, to locate and recognize harms that may fall outside of law's grasp.¹⁶ It requires the disruption of rigid, essentialist categories of legal harm and the acknowledgment that assessments of harm are a messy business, often serving to inscribe the needs and interests of the powerful to the detriment of others.¹⁷ It also recognizes law's designation of boundaries – its determination of what falls within and outside law's protection – as an act of power that exerts its authority over the social world.¹⁸ By adopting an implicit hierarchy of harms in the boundary-drawing exercise, the courts risk devaluing and silencing the harms suffered by those who are not reflected in the image of law's abstracted rights bearer: the freely choosing, individual, unencumbered subject. The hierarchy exposes gaps in constitutional law's protection of religion through which new and different harms, such as injury inequality, seep in.

5.1.1.1 Harms of coercion and physical harm

The above quotation from McLachlin CJ's majority reasons in *Hutterian Brethren*, in which she addresses the challenge of judging the seriousness of the harm alleged by the claimant, is immediately followed by this statement: 'Limits that amount to state compulsion on matters of belief are always very serious'.¹⁹ This statement positions the harm to a person's ability to make free choices in the context of her religious beliefs, practices and associations at the apex of the constitutional protection for religious freedom. Indeed, in my sample of s2(a) Supreme Court cases decided over the last 15 years, only two did not focus at some point on the freedom to make choices.²⁰ I refer to the harm in being made to follow or abandon a particular course of action or practice as a 'harm of coercion.'

¹⁶ West, *Caring for Justice* (NYU 1997); Stimpson, 'A Feminist Analysis of the Harm Principle' (2013) 38:2 AltLJ 103, 106.

¹⁷ Brown, *States of Injury* (Princeton 1995) 145-49; Beaman, *Defining Harm* (UBC 2008) 86; Franks, 'Injury Inequality' in Bloom, Engel and McCann (eds), *Injury and Injustice* (CUP2018) 231.

¹⁸ Cover (n3); Mossman, 'Feminism and Legal Method' (1987) 3 WisWomen'sLJ 147, 163-65; Smart, *Feminism and the Power of Law* (Routledge 1989) 21-23; Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 Representations 162, 177; Asad, 'French Secularism and the "Islamic Veil Affair"' (2006) Hedgehog Review 93, 95.

¹⁹ *Hutterian* (n5) [91].

²⁰ Those are *Ktunaxa Nation v British Columbia*, 2017 SCC 54 and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26.

Harms of coercion are considered very serious because they directly contradict the Charter’s overarching protection for individual autonomy and for the adherent’s liberty to make important decisions about her spiritual life free from state coercion. Canadian courts have consistently held that religious freedom ‘revolves around the notion of personal choice’ and that the ability to exercise a meaningful choice in matters of religion ‘lies at the heart’ of the right.²¹ As such, religious (but not civil²²) officials cannot be compelled to conduct same-sex marriage ceremonies against their will,²³ a Catholic school cannot be forced to teach its own religion from a ‘neutral’ standpoint,²⁴ and the state cannot make a woman carry a pregnancy to term against her will as – among other reasons – that decision is a deeply personal matter of conscience protected by s2(a) of the Charter.²⁵ One sees this emphasis in less obviously ‘weighty’ conscience claims as well; the Ontario Superior Court held that the Children’s Aid Society had violated the s2(a) rights of a couple when it removed their foster children from their care for refusing to affirm the existence of Santa Claus and the Easter bunny. By forcing the foster parents to maintain the fiction of these holiday characters, the Society was found to have coerced them to express views that conflicted with their religious beliefs.²⁶

Even in state neutrality cases, where one might expect to see less emphasis on the question of personal choice and more on the state’s jurisdiction over religious questions, harm to one’s ability to choose freely is prominent. The Supreme Court’s judgment in *Mouvement laïque québécois v Saguenay (City)*, which declared the recitation of Christian prayers in town council meetings unconstitutional, emphasized that the principle of neutrality imposes a duty on the state to avoid interfering with, pressuring, or judging people’s fundamental life choices.²⁷ Likewise in *Zylberberg v Sudbury Board of Education*, the Ontario Court of Appeal held that the possibility of student exemptions from religious prayers at a state primary school

²¹ *Amselem* (n7) [40] (Iacobucci CJ) and *Hutterian* (n5) [99] (McLachlin CJ), respectively. See also *R v Big M Drug Mart*, [1985] 1 SCR 295, 347 (Dickson CJ); *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, [2004] 2 SCR 650 [65] (LeBel J, dissenting but not on these grounds); *Hutterian* (n5) [88]-[94]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [212]-[214] (Rowe J) [*Trinity Western*].

²² It was not coercive to require *civil* commissioners to conduct same-sex marriage ceremonies; they freely chose to undertake public office and must bear the consequences of that choice: *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 [64], [97] (Richards JA).

²³ *Reference re Same-Sex Marriage*, 2004 SCC 79; *Marriage Commissioners* (n22).

²⁴ *Loyola High School v Quebec*, 2015 SCC 12 [63] (Abella J): ‘the state is telling them how to teach the very religion that animates Loyola’s identity’.

²⁵ *R v Morgentaler*, [1988] 1 SCR 30 [308], [313] (Wilson J). The case was decided under s7 of the Charter, but Wilson J framed the relevant ‘principle of fundamental justice’ under s7 in terms of the s2(a) right to freedom of religion and conscience.

²⁶ *Baars v Children’s Aid Society of Hamilton*, 2018 ONSC 1487 [85]-[88].

²⁷ 2015 SCC 16 [74], [85], [121] (Gascon J) [*Mouvement laïque*].

did not efface the coercive element of the prayer but, rather, ‘impose[d] on religious minorities a compulsion to conform to the religious practices of the majority’.²⁸

Sometimes the coercive effect of the state action or measure will arise not from direct compulsion on religious matters, but from the incidental effects of a generally applicable law. Indirect coercion such as this can also be very serious, as when the state measure so severely limits a person’s options that it ‘effectively deprive[s] the adherent of a meaningful choice’.²⁹ In contrast, a measure that simply puts a person to a ‘difficult’ choice with attendant costs or burdens would not trigger the same level of constitutional scrutiny – it would not be characterized as a coercive harm capable of grounding a s2(a) violation.³⁰ The more it can be said that a person is deprived of a meaningful choice and thus suffers a true harm of coercion, the more likely it is that that she will benefit from s2(a) protection.

There are no hard and fast rules for determining whether the claimant has been subject to a ‘forced choice’ (coercive, constitutionally suspect), or merely a difficult one (not coercive, not suspect), and in fact the cases provide little clarity in this respect. The Orthodox Jewish condominium owners in *Amselem* who were prevented from building temporary succahs on their balconies for a religious holiday could have moved elsewhere or availed themselves of a communal succah on the building’s grounds.³¹ But the majority held that the claimants ‘did not have a real choice’ and that ‘it would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere’ to remedy the problem.³² Likewise, the Sikh student in *Multani v Commission scolaire Marguerite-Bougeoy*s who was prevented from wearing his *kirpan* to school could (and, eventually, did) attend a private school where no such restriction exists, but still he was said to have been ‘forced to choose between leaving his kirpan at home and leaving the public school system’ which amounted to a serious infringement of his religious freedom.³³ The contrary decision was reached in in *Hutterian Brethren*, where McLachlin CJ held that although the photo requirement might impose a financial burden on the claimants who would need to hire third party drivers to transport their agricultural goods, it would not deprive them of a meaningful choice – it would ‘not negate the choice that lies at the heart of freedom of religion’.³⁴ Physicians who challenged the policies requiring them to make effective referrals for medical procedures they objected to on religious grounds were also not subject to the coercion of a forced choice. While the objecting

²⁸ (1988), 52 DLR (4th) 577 (ONCA) [38] [Zylberberg]; see also *Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990), 71 OR (2d) 341 (CA).

²⁹ *Hutterian* (n5) [94] (McLachlin CJ).

³⁰ *ibid* [95].

³¹ *Amselem* (n7) [13]-[14], [74]-[81] (Iacobucci J).

³² *ibid* [98].

³³ 2006 SCC 6 [40] (Charron J) [*Multani*].

³⁴ *Hutterian* (n5) [99]; see also [96].

physicians faced a difficult choice, they still did have options: they could choose a different specialism that did not involve those types of procedures, change the province in which they practiced, or change profession entirely.³⁵

It might be said that the choice put to the claimants in *Amselem* and *Multani* was not any more onerous than that faced by the claimants in the cases above. The condominium owners could have moved to a different building without balcony restrictions, just as the objecting physicians could have moved to a different province without similar policies in place. The choice put to the colony members in *Hutterian Brethren* also required ‘significant sacrifices’ on their part; Justice Abella (dissenting) drew attention to the severity of the coercive impact on the claimants, concluding that ‘when significant sacrifices have to be made to practice one’s religion in the face of a state imposed burden, the choice to practice one’s religion is no longer uncoerced’.³⁶ The courts’ characterisation of a choice as either forced or merely difficult may have more to do with the other factors influencing the decision than with their understanding of the nature of coercion *per se*. Here is yet further evidence of the malleability of harm.

The alleged harms of coercion in the above cases were all suffered by the claimants; however, religious adherents cannot claim a right to engage in practices that threaten to impose harms of coercion on others. In *Bruker v Marcovitz*, a majority of the Supreme Court held that a husband could not use his right to religious freedom to shelter his refusal to provide his ex-wife with a *get* (a document effectuating a Jewish divorce) following their civil divorce. Any interference with the husband’s religious freedom to provide the *get* was justified by the harm he had caused to his ex-wife’s freedom to make her own choices and live her life autonomously.³⁷ Likewise, the BC Supreme Court justified the s2(a) violation caused by the polygamy prohibition on the grounds that polygamous marriage coerces women and girls and impairs their autonomy.³⁸ Justice Bauman explained that ‘[i]f the nature of the exercise of an infringed right is itself distant from the values the Charter was designed to protect, the weight

³⁵ *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [CMDS] [165], [187]. See also *Trinity Western* (n21) [90] (Majority): denying accreditation did not deprive TWU students of a meaningful choice: they could attend TWU without the covenant or attend any other university. Though they would *prefer* to study at TWU with a mandatory covenant, ‘denying someone an option they would merely appreciate certainly falls short of “forced apostasy”’ (citing *Hutterian* (n5) [89] (McLachlin CJ)).

³⁶ *Hutterian* (n5) [167]; see also [163], [170] (Abella J).

³⁷ *Bruker v Marcovitz*, 2007 SCC 54 [80], [93] (Abella J). The majority emphasized that it was merely requiring the husband to follow through on his freely undertaken contractual obligation, turning his coercion argument on its head ([79]). Although this case was decided under s3 of the Quebec Charter rather than s2(a) of the (Canadian) Charter, the Supreme Court has affirmed that the same interpretive approach is followed for both provisions: *Amselem* (n7) [132] (Bastarache J).

³⁸ *Reference re section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [8], [532], [564], [779], [782], [1328] [*Polygamy Reference*].

accorded to its infringement as a deleterious effect at the balancing stage is minimal, at best'.³⁹ This is so in the indirect coercion cases as well. In *Trinity Western*, McLachlin CJ (concurring) explained that accreditation of the law school despite its discriminatory covenant would constrain the autonomy of prospective LGBTQ+ law students who would be forced to choose between attending TWU and suffering the harms of the covenant, or insisting on equal treatment and thereby being restricted to a smaller range of university options than heterosexual students.⁴⁰ The majority also flipped the script on the religious claimants' coercion argument by characterizing the covenant – as opposed to the state action – as coercive, restraining the conduct of members of the TWU community who do not subscribe to the views adopted in the covenant.⁴¹ Thus harms of coercion operate both to constrain and to protect the right to religious freedom.

Physical harm is the other paradigmatic form of harm that informs Canadian court decisions on religious freedom: s2(a) provides no defence against laws that protect people from physical harm. Law is deeply implicated in the protection of the undefiled, intact human body. Ngaire Naffine explains that this commitment reflects the influence on law of rationalist thinkers like Kant, who believed that humanity's distinct value stems from our capacity to reason, and that we must protect our rational selves from our troublesome bodies by keeping ourselves at some distance from one other.⁴² Religious conceptions of the 'legal person' also project a similar belief of the body as sacred and inviolate, the law serving to protect our body as 'the housing for the soul'.⁴³ In other respects, law's concern for physical integrity might be understood as an expression of its overarching commitment to individual autonomy – the idea being that every person has the right to make decisions about her own body without constraints imposed by the religious convictions of others. In the context of religious freedom, physical integrity becomes conjoined to the overall idea that s2(a) is primarily a liberty-based right.

Physical harm presents few conceptual challenges to jurists.⁴⁴ Religious freedom was no defence for the accused in *R v Jones* who claimed that his assaults against his wife and

³⁹ *Polygamy Reference* (n38) [1328], citing *Keegstra* [1990] 3 SCR 697. See also *Trinity Western* (n21), where Justice Rowe (concurring) noted that TWU's efforts to coerce its staff and students to follow the lifestyle advocated in the Covenant was inconsistent with the spirit of s2(a), whose 'character is noncoercive; its antithesis is coerced conformity' ([213], see also [212]-[214], [251]).

⁴⁰ *Trinity Western* (n21) [138].

⁴¹ *ibid* [96]-[99]; see also [237]-[239], [251] (Rowe J).

⁴² Naffine, *Law's Meaning of Life* (Hart 2009) 145-49, 159-60.

⁴³ *ibid* 148-49. These ideas are implicit in many of our laws, such as rules against non-consensual touching in tort (battery) and criminal law (assault): 148-49.

⁴⁴ Note that it is the risk of physical harm *to others* from religiously motivated conduct that arises most commonly in the cases. Only rarely is a claimant's own right to physical integrity considered: cf *AC v Manitoba*, 2009 SCC 30 [167] (Binnie J).

daughter were rooted in scripture,⁴⁵ nor did it protect a father who performed a dangerous home circumcision of his child⁴⁶ or members of a religious commune who administered severe physical discipline to their children.⁴⁷ Courts regularly deny s2(a) protection to parents who object to blood transfusions or other medically necessary treatment for their children, holding that no parent has a religious right to act contrary to their child's best interests, particularly when it carries a risk of serious physical harm or death.⁴⁸ Concerns about physical harm also tend to outweigh the other interests of mature minors who refuse medical treatment for religious reasons.⁴⁹ And in *Polygamy Reference*, the risk of physical harm to women and children posed by the practice of polygamy was one of the court's primary reasons for upholding the ban despite its clear violation of the polygamists' religious freedom.⁵⁰

Threats of physical harm must, however, be soundly established by the evidence and not consist in spurious claims. The majority in *Amselem* deemed concerns about the safety of condominium owners whose fire exit routes might be blocked by the *succahs* to be groundless, as the claimants had undertaken to leave fire lanes unobstructed.⁵¹ Similarly, the kirpan that the claimant wished to wear to school in *Multani* was viewed not as a bladed weapon but as a religious symbol, which did not pose a real risk of physical harm to others.⁵² Charron J, writing for the majority, concluded that safety concerns 'must be unequivocally established for the infringement of a constitutional right to be justified'.⁵³ Referencing this statement from *Multani*, the Ontario Court of Appeal in *Christian Medical and Dental Society [CMDs]* pointed to evidence that a physician's refusal to provide an effective referral would present a real risk of physical harm to vulnerable patients, arising from delayed access or barriers to treatment.⁵⁴ There was no case in my sample in which a risk of physical harm, firmly established on the evidence, was capable of being overridden by other concerns.

⁴⁵ *R v Jones*, 2011 NSPC 47 (Prov Ct) [82]-[83].

⁴⁶ *R v W(DJ)*, 2011 BCCA 522 [18]-[21], aff'd 2012 SCC 63 (SCC declined to 'rule definitively on whether a circumcision performed by a person without medical training can ever be considered reasonable and in the child's best interest': [1]).

⁴⁷ *PEI v L(SP)*, 2002 PESCTD 74 [9], [17]-[18].

⁴⁸ *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *M(V) v BC*, 2008 BCSC 449 [82]-[86], [96]; *Alberta v L(D)*, 2012 ABQB 562 [69].

⁴⁹ *H(B) v Alberta*, 2002 ABQB 371 [55]; *B(SJ) v BC*, 2005 BCSC 573 [83]-[85]; *AC* (n44) [30], [104]-[105], [108], [115]-[116] (Abella J), [155], [160] (McLachlin CJ).

⁵⁰ *Polygamy Reference* (n38). The physical harms that concerned the court included physical abuse of women and children, higher risk of mortality for women and infants, harms associated with early sexual activity, pregnancy, and childbirth for girls, and risk of civil violence caused by a large pool of unmarried young men: see eg [779]-[793].

⁵¹ *Amselem* (n7) [88]-[89]. Iacobucci J conceded that if the security concerns had been 'soundly established,' they 'would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom' ([88]).

⁵² *Multani* (n33) [45]-[48], [57]-[67] (Charron J), [97]-[98] (Deschamps and Abella JJ).

⁵³ *ibid* [67].

⁵⁴ *CMDS* (n35) [115]-[125], [132]-[147], [157], [160]-[161].

To conclude, incursions on religious freedom are primarily regarded as problematic when they result in direct or indirect harms of coercion to the adherent; likewise, religious freedom claims cannot be upheld when they inflict either harms of coercion or physical harm on others. The court's focus is trained on freedom of choice and physical integrity, asking whether the state has unduly restricted someone's ability to exercise autonomous choice over her religious choices or her own body.

5.1.1.2 Psychological harm, associational harm, and harm to identity

In the middle of the hierarchy lie those harms which are recognized as such by courts, but which do not attract the same level of resolute concern that is shown to harms of coercion and physical harm, above. Here we are on more ambivalent terrain. While courts claim to prioritize the prevention of these harms in the religion jurisprudence, in practice their role is unsettled and uncertain.

To start, psychological harm is often considered on a par with physical harm. Improved awareness of emotional health in society has contributed to the acknowledgement that it can be just as harmful (or more) to emotionally abuse a person as to break her leg. In the religion cases, courts are alert to the potential psychological toll upon the claimant when state action interferes with her ability to follow her religious convictions or practices, and they will also limit the reach of s2(a) when the religious practice poses a risk of psychological harm to others. In *Marriage Commissioners* and *Trinity Western*, for example, the courts stressed the significant emotional harms that would be visited upon LGBTQ+ people by a commissioner's refusal of service and by their effective exclusion from a Canadian law school, respectively.⁵⁵

However, psychological harm is rarely itself conclusive of the matter. Rather, psychological harm seems to have the most sway when it is closely allied to another form of harm. In both of the above cases, the risk of psychological harm was bolstered by wider social harms, such as the perpetuation of historic prejudice and harm to the repute of the administration of justice.⁵⁶ Likewise, the risk of emotional harm to patients from a physician's refusal to refer in *CMDS* was considered serious: the court noted that patients would suffer feelings of shame, anxiety, and stigmatization.⁵⁷ But, again, it was the risk of physical harm through barriers to healthcare and the unequal treatment of vulnerable groups which provided

⁵⁵ *Marriage Commissioners* (n22) [41], [95]-[96] (Richards JA), [105]-[106], [142] (Smith JA); *Trinity Western* (n21) [96]-[98] (Majority).

⁵⁶ *Marriage Comms* (n22) [45] (Richards JA), [107]-[108], [142], [158] (Smith JA); *Trinity Western* (n21) [41]-[43], [47], [95], [98], [103] (Majority), [137]-[140], [146], [149]-[150] (McLachlin CJ).

⁵⁷ *CMDS* (n35) [132], [141]-[142], [146], [164].

the greatest justification for the policies.⁵⁸ Conversely, the court only acknowledged the anxiety or upset suffered by objecting physicians insofar as they were a function of the ‘difficult choice’ they had to make between acting against their conscience and changing to a different practice area.⁵⁹ In state neutrality cases such as *Mouvement laïque* and *Zylberburg*, again, the courts noted people’s feelings of embarrassment, discomfort, and exclusion when faced with state religious practices such as the recitation of prayer in municipal council meetings and in state schools, respectively, but they ultimately focused on the harms of inequality and coercion.⁶⁰ In all of these cases, emotional or psychological harm becomes justiciable only when it exacerbates or causes further harms of a more constitutionally cognizable sort.⁶¹

The reason for this may be that some level of upset, hurt, or mental stress is considered unavoidable in a liberal, multicultural society. As I noted in Chapter 2, Joel Feinberg is one of the few liberal theorists to recognize personal offense as a legitimate excuse for limiting individual freedom – and even then, it is heavily circumscribed by a complex balancing test.⁶² The notion of emotional injury as a ‘harm’ sits uneasily beside law’s confident assertions of objectivity and predictability, running up against the edges of the harm principle and its promise to protect a wide zone of conduct from others’ disapproving gaze. This is particularly so in the context of law’s regulation of religion. Religious matters are destined to cause disagreement in a pluralist state that recognizes people’s right to hold incommensurate moral viewpoints. It is no surprise, then, that courts are reluctant to place too much weight on emotional harm caused by or to the religious adherent. Instead, courts in the religion cases operate on the assumption that law’s protection of religious freedom in Canadian society necessarily imparts a degree of discomfort and disagreement with the religious views of others, and it is not the role of the courts to limit the terms of that engagement.⁶³ This point

⁵⁸ For example, when detailing a patient’s emotional damage from physician refusal at [133], Justice Strathy collapsed this concern into the risk that stigma and upset she felt could go on to impede her access to healthcare (*CMDS*, n35).

⁵⁹ *ibid* [165].

⁶⁰ *Mouvement laïque* (n27); *Zylberburg* (n28). I address this issue at more length in Chapter 6.

⁶¹ For other examples, see *Polygamy Reference* (n38) [1179] (court rejected argument that the polygamy ban causes ‘constitutionally cognizable levels of psychological stress’ to polygamists); *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (emotional damage suffered by targets of hate speech not alone sufficient to justify incursions on right).

⁶² See text to n66-n81, ch2.

⁶³ See eg *SL v Commission scolaire des Chênes*, 2012 SCC 7 [38]-[40] (Deschamps J) (court rejected argument that students should be exempt from Ethics and Religious Culture course because their exposure to beliefs that differ from those of their parents would upset and confuse them); *Chamberlain v Surrey School District No 36*, 2002 SCC 86 [64]-[66] (McLachlin CJ) (court rejected argument that the school board should not include books featuring same-sex parents because of ‘cognitive dissonance’ suffered by students whose parents oppose same-sex unions); *Multani* (n33) [72]-[76] (court rejected claim that a student should not be permitted to wear a kirpan to school because other students may feel upset or aggrieved by the ‘special treatment’ afforded to Sikh students).

might explain the courts' reluctance to settle religious disputes with reference to psychological or emotional harm alone.

I turn now to questions of equality, identity, and cultural belonging. Harms of inequality arise in the religion cases in two ways: first, they can serve to limit the scope of the right. Much has been written about the capacity for religious freedom claims to encroach upon hard-won victories for minority or vulnerable groups.⁶⁴ The courts are generally alive to this problem and seek to ensure that the extension of rights to one group (religious believers) does not occur at the expense of another (eg LGBTQ+ people). In the paradigmatic cases where a person claims a religious right under the Charter to discriminate against members of a vulnerable group, courts have recently tended toward the restriction of the religious right.⁶⁵ Some consider the courts in such cases to be imposing dominant social norms and values on religious believers, and maintain that the actions of the religious claimants in these cases did not cause sufficient harm to warrant the rights restriction.⁶⁶ Conversely, these cases are applauded by equality rights advocates who view the prevention of the harms of discrimination and prejudice as a legitimate and principled limit on s2(a).⁶⁷ However, these outcomes are certainly not foregone; each case is determined in its context and on its merits. As there is no formal hierarchy of Charter rights⁶⁸ and in light of the limited success of equality rights claims under s15 of the Charter, it is far too simplistic to suggest, as some do, that equality will necessarily trump religion when such conflicts arise. I address the difficult interaction between equality, harm to others, and religious freedom in more detail in Chapter 6, so I leave further discussion of equality as a limit to religious freedom until then.

⁶⁴ See eg Feldblum, 'Moral Conflict and Liberty' (2006-2007) 72 *BrookLRev* 61; Evans and Gaze, 'Between Religious Freedom and Equality' (2008) 49 *HarvInt'l LJ* 40; Stychin, 'Faith in the Future' (2009) 29(4) *OJLS* 729; MacDougall and Short, 'Religion-based Claims for Impinging on Queer Citizenship' (2010) 33 *Dal LJ* 133; Malik, 'Religious Freedom, Free Speech and Equality' (2011) 17 *ResPub* 21; NeJaime and Siegal, 'Conscience Wars' (2015) 124 *Yale LJ* 2516; Moon, 'Conscientious Objections by Civil Servants' in Berger and Moon (eds), *Religion and the Exercise of Public Authority* (Hart 2016) 149; McGill, 'Now it's My Rights Versus Yours' (2016) 53(3) *AltaLRev* 584; Corvino, Anderson and Girgis, *Debating Religious Liberty and Discrimination* (OUP 2017); Mancini and Rosenfeld (eds), *The Conscience Wars* (CUP 2018).

⁶⁵ *Chamberlain* (n63); *Marriage Commissioners* (n22); *Eadie and Thomas v Riverbend Bed and Breakfast and others*, 2012 BCHRT 247; *Whatcott* (n61); *Eweida and others v UK* (2013), 57 EHRR 8 (ECtHR); *Trinity Western* (n21) (cf *Trinity Western University v College of Teachers*, 2001 SCC 31); *CMDs* (n35).

⁶⁶ Major, 'Translating the Conflict over Trinity Western University's Proposed Law School' (2017) 43 *Queen's LJ* 175; Epp Buckingham, 'Trinity Western University's Law School' in Adhar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 420; Ross, 'Intolerant and Illiberal' (2019) 89 *SCLR* (2d) 127.

⁶⁷ Craig, 'TWU Law' (2014) 37 *Dalhousie LJ* 621; Cameron, Chaisson and McGill, 'The Law Society of Upper Canada Must Not Accredite Trinity Western University's Law School' (2015) *UOttawa Working Paper Series*; Elliot and Elliot, 'Striking the Right Balance' (2017) 50(3) *UBC LRev* 797.

⁶⁸ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 877; *Same-sex Marriage Reference* (n23) [50].

The second way in which equality issues come before the courts in the religion cases is when equality is itself threatened by the state limit on the religious right. Here we see the rights to religious freedom and to equality not as conflicting, but as interdependent. Many scholars believe that the right to religious freedom shares the same moral foundations as the right to equality – that the best justification for constitutionally protecting the right to freedom of religion is on the grounds of the equality rights of religious believers (and non-believers).⁶⁹ The egalitarian perspective on religious freedom has had an ascending influence on Canadian courts' s2(a) decisions.⁷⁰ Courts are increasingly viewing the harm at stake in violations of religious freedom in terms of the state's failure to treat religious individuals or communities even-handedly, the fault lines lying either between different religious groups (with minority religious groups most at risk of harm) or between religious and non-religious individuals. This trend is arguably even more prominent in s2(a) state neutrality cases, where the courts explicitly invoke the language of equality and minority rights to justify restrictions on the state's endorsement of religion.⁷¹

On this reading of the cases, religious adherence is primarily a marker of cultural identity, a fundamental part of who that person *is*.⁷² Richard Moon explains that religious affiliation, on this view, 'represents a significant connection with others – with a community of believers – and structures the individual's view of herself and the world'.⁷³ When the state fails to treat members of all religions equally, it signifies not only a rejection of those particular religious beliefs but also a denial of the equal worth and civic standing of those adherents.⁷⁴ So when the courts apprehend religious freedom under s2(a) on these terms, it might be understood to be acting on the basis of harms to a person's cultural identity or affiliation.

There is certainly evidence for the recognition of identity- and equality-based harms in the religion cases. Courts are keen to stress that their judgment is rendered against the backdrop of the state's constitutional commitment to multiculturalism, substantive equality

⁶⁹ Ryder, 'The Canadian Conception of Equal Religious Citizenship' in Moon (ed), *Law and Religious Pluralism in Canada* (UBC 2008) 87; Eisgruber and Sager, *Religious Freedom and the Constitution* (HUP 2010); Trispiotis, 'Religious Freedom and Religious Antidiscrimination' (2019) 82(5) MLR 864.

⁷⁰ Moon, 'Liberty, Neutrality and Inclusion' (2003) 41 BrandeisLJ 563; Ryder (n69); Moon, 'Government Support for Religious Practice' in Moon, *Pluralism* (n69) 217, 217, 231; Moon, *Freedom of Conscience and Religion* (Irwin 2014) 18-21; Berger (n3) 84-86.

⁷¹ Moon, 'Liberty' (n70); Moon, *Freedom* (n70) 18-24, 38-41; Moon, 'Neutrality and Prayers' (2015) 4 OJLR 512. See also: *Mouvement laïque* (n27); *Loyola* (n24); *SL* (n63); *Christ the Teacher Roman Catholic Separate School Division v Good Spirit School Division*, 2012 SKCA 99 [420]-[421] (violation of s2(a) through breach of the state's duty of neutrality necessarily incurs a violation of s15).

⁷² Moon, 'Government Support' (n70) 217, 231; Ryder (n69) 92; Berger (n3) 84-86.

⁷³ Moon, 'Government Support' (n70) 217.

⁷⁴ *ibid* 217, 232.

and minority rights.⁷⁵ In cases like *Multani* and *Amselem*, the claimants were clearly marked out as belonging to minority religious and cultural groups, Sikhs and Orthodox Jews respectively, who deserved protection from majoritarian rules and policies. The courts' somewhat dubious characterisation of the claimants as being deprived of any meaningful choice in the matter (as discussed above) may have been influenced by their interest in preventing the imposition of discriminatory barriers on minority groups accessing the public sphere (in education and housing, two sites bearing the historic effects of discrimination most keenly). Especially as the countervailing interests were not strong in these cases, the courts were simply unwilling to uphold policies that would threaten the claimants' religious and ethnic identities.⁷⁶ Courts have also recognized the propensity for members of mainstream religions to benefit more easily from legal and legislative protections, and hence have taken steps in the jurisprudence to even the playing field.⁷⁷ In these and other cases, the courts are acting out the role of 'defender of minorities',⁷⁸ protecting religious claimants from state-imposed harms to their religious or cultural identity.

But if it is identity underpinning the courts' approach to s2(a), then it is a fairly precarious notion of identity. Contrast the above cases, for instance, with the judgments in *Hutterian Brethren* and *Ktunaxa*, in which robust conceptions of substantive equality were notably absent. The claimants in both cases alleged that the state limits prevented them from carrying out religious practices that were integral to their sense of identity, belonging, and spiritual fulfilment. Yet it was only the concurring or dissenting justices who recognized these potential harms to the claimants. In *Ktunaxa*, Moldaver J (concurring) recognized that even-handed treatment of religions requires that all religious groups be afforded the same level of protection; this in turn means that courts need to 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'.⁷⁹ In *Ktunaxa*, that awareness would include recognition that Indigenous spirituality is often inextricably linked to the land – the human, natural and spiritual worlds being so closely bound that destruction of a sacred site jeopardizes the well-being of the

⁷⁵ See eg *Amselem* (n7) [1], [87] (Iacobucci J); *Loyola* (n24) [43]-[48] (Abella J); *SL* (n63) [1], [10]-[11], [40] (Deschamps J).

⁷⁶ See eg *Amselem* (n7) [87] (Iacobucci J): 'In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies -, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable'.

⁷⁷ The subjective sincerity test for s2(a) might be explained on this basis: see *Amselem* (n7) [55] (Iacobucci J), [139] (Bastarache J); *Ktunaxa* (n20) [128] (Moldaver J); *Loyola* (n24) [60] (Abella J). See also the state neutrality cases: *Big M* (n21); *Mouvement laïque* (n27); *Zylberberg* (n28); text to n70-n71 this chapter.

⁷⁸ Kislowicz, 'The Court and Freedom of Religion' (2017) 78 SCLR (2d) 221, 225-28.

⁷⁹ *Ktunaxa* (n20) [128] (Moldaver J).

community.⁸⁰ Moreover, the colonial project of dispossession means that Indigenous groups like the *Ktunaxa* are usually not able to exert property claims over their sacred land (barring expensive, lengthy litigation), unlike Catholic and Protestant churches that benefited from significant historic land grants and are now cushioned by the laws of private property.⁸¹ Borrows suggests that even if s2(a) were interpreted through the lens of equal citizenship, it would remain ‘exceedingly difficult’ for Indigenous religious freedom claimants to benefit from that protection.⁸² Sadly, his words were prescient: the majority in *Ktunaxa* failed to engage at all with the systemic inequality faced by Indigenous peoples in Canada, and certainly did not demonstrate any awareness of the ‘unique’ circumstances of the state’s interference with the spiritual practices of the claimants, as Moldaver J had suggested. Although the courts have acknowledged the potential for religion claims to cause harm to the claimant’s identity or equality, cases like *Ktunaxa* indicate that this recognition might not be as robust as is hoped.

The above discussion is wrapped up in larger debates about the extent to which the s2(a) guarantee protects the collective or communal dimension of religious freedom. Courts consistently state that the provision does not merely safeguard individual religious beliefs but must also account for the socially embedded nature of religion: it protects the rights of religious believers to ‘come together and create cohesive communities of belief and practice’.⁸³ Occasionally, the courts follow through on this promise. In *Loyola*, for instance, the Supreme Court held that it was not reasonable to expect a private Catholic high school to teach those portions of a mandatory religion and ethics program that touched on Catholicism from a ‘neutral’ or objective perspective. It reasoned that private religious schools such as *Loyola*’s were ‘created to support the collective practice of Catholicism and the transmission of the Catholic faith,’ and that the neutrality requirement badly impaired the school’s ability to realize these objectives.⁸⁴ While the majority held that it was not necessary for it to decide whether its concern for protecting ‘the vitality of a religious community’ mandated the extension of s 2(a) rights to religious organizations *per*

⁸⁰ Borrows, ‘Living Law on a Living Earth’ in Moon, *Pluralism* (n69) 161; Morales, ‘Qat’muk’ in Newman (ed), *Religious Freedom and Communities* (LexisNexis 2016) 287; Bakht and Collins, ‘The Earth is our Mother’ (2017) 62(3) McGill LJ 777, 777-84.

⁸¹ Kislowicz and Luk, ‘Recontextualizing *Ktunaxa Nation v British Columbia*’ (2019) 88 SCLR (2d) 205.

⁸² Borrows (n80) 176.

⁸³ *Trinity Western* (n21) [64] (Majority); see also *Edwards Books* (4n) 781; *Congrégation des témoins* (n21) [9] (McLachlin CJ), [68] (LeBel J); *Amsalem* (n7) [137]-[138] (Bastarache J); *Loyola* (n24) [59]-[62] (Abella J); *Trinity Western* (n21) [122]-[126] (McLachlin CJ). As LeBel J (dissenting) held in *Hutterian* (n5) [182], ‘[r]eligion is about religious beliefs, but also about religious relationships’ (endorsed by majority in *Loyola* (n24) [59]).

⁸⁴ *Loyola* (n24) [61] (Abella J); see [59]-[70] more generally.

se, McLachlin CJ and Moldaver J (concurring) believed that the individual and collective elements of religious freedom were so intertwined that religious schools and institutions should themselves be considered rights-holders.⁸⁵ *Loyola* represents the high watermark of judicial recognition of associational or collective harms in religious freedom cases.

More often, however, courts conceive of harm in the religion cases as an individual matter. Constitutionally cognizable harm is to the rational, choosing individual rather than to the collective.⁸⁶ Even when courts acknowledge the communal dimension to a religious freedom claim, it is typically as a function of the *individual's* right to make decisions about joining with others in a religious community.⁸⁷ There are certainly good reasons for constitutional law's focus on the individual religious claimant.⁸⁸ However, the individualist lens reduces the complexities of religious belonging, distorting and excluding important forms of religious experience from constitutional protection.⁸⁹ Recent cases confirm this trend. The majority judgment in *Hutterian Brethren*, for instance, begs for greater recognition of the communal element of the religious freedom claim, given that the very reason the claimants wished to retain their driving privileges was to sustain their centuries-old tradition of self-sufficiency and communalism. The majority concluded that the colony members could easily do without drivers' licenses by hiring third party transport, thus failing to grasp that the primary harm they would suffer would be not to themselves as individuals but to the invisible bonds of history, religion and culture that held the group together.⁹⁰ Likewise, one can critique the majority reasons in *Trinity Western* for their failure to apprehend the nature of the harm claimed by TWU members, even while agreeing with the outcome of the case. This position was adopted by McLachlin CJ who, despite rejecting TWU's claim, recognized that real

⁸⁵ *Loyola* (n24) [64], [33]-[34] (Abella J), [88]-[102] (McLachlin CJ and Moldaver J). The matter of institutional s2(a) rights remains open: *Trinity Western* (n21) [61] (majority concluded it was unnecessary to decide whether TWU itself possessed s2(a) rights).

⁸⁶ This conforms to the fact that 'the individual is the dominant unit of constitutional rights analysis': Berger (n3) 67.

⁸⁷ *ibid* 66-77. Even *Loyola* can be seen as ultimately underwritten by concerns about the individual, despite its language of collective and communal religious adherence: [33]-[34], [54], [59]-[62] (*ibid* 77).

⁸⁸ See eg Van Praagh, 'Welcome to the Neighbourhood' in Newman (n80) 63.

⁸⁹ Epp-Buckingham, 'The Fundamentals of Religious Freedom' (2007) 36 SCLR (2d) 251; Beaman (n17) 65; Muñoz-Fraticelli and David, 'Religious Institutionalism in a Canadian Context' (2015) 52(3) OsgoodeHallLJ 1049; Esau, 'Collective Freedom of Religion' in Newman (n80) 77; Newman, 'Ties that Bind' in Newman (n80) 3.

⁹⁰ *Hutterian* (n5) [97]-[99]. The separate dissenting reasons of Abella and LeBel JJ both urged greater recognition of the harms to the religious collective: [114], [118], [130], [165]-[167], [170] (Abella J), [181]-[182] (LeBel J). See also Berger (n3) 75-76.

damage was done to their ability to work and study in a religious environment where all have chosen to live in a particular way and abide by the same code of conduct.⁹¹

The courts' consistent failure to deliver meaningful protection to the collective dimension of religious freedom destabilizes claims that the courts seek primarily to protect religion as a function of the claimant's personal or cultural identity. The mismatch is evident. A court cannot provide robust acknowledgement of identity-based harms without appreciating the role of the community in creating religiously 'encumbered selves'.⁹² While Canadian courts are sometimes alive to such concerns, the status of identity-based, communal, and psychological harms in the s2(a) jurisprudence remains tentative, at best.

5.1.1.3 *Aesthetic, economic, and spiritual harm*

At the bottom of the hierarchy lie harms that carry little weight in the s2(a) jurisprudence and that are rarely identified, even, as 'harms'. Harm to people's economic and aesthetic interests falls in this category. Unless particularly egregious or prohibitive,⁹³ these are generally considered insufficiently serious to justify incursions on religious freedom under s1 or *Doré*. For instance, the condominium co-owners in *Amselem* had argued that the claimants' *succahs* violated their own rights to enjoy their property and preserve its economic and aesthetic value.⁹⁴ Despite the fact that the *Quebec Charter of Human Rights and Freedoms* protects the right to 'peaceful enjoyment and free disposition' of one's property,⁹⁵ the majority determined that the impact of the *succahs* would 'undoubtedly be quite trivial', little more than a 'potential annoyance'.⁹⁶ Justice Iacobucci concluded that 'nominal, minimally intruded upon aesthetic interests' could not trump the religious rights of the claimants, especially in a tolerant, multicultural state like Canada.⁹⁷ In contrast, Bastarache J (dissenting, joined by LeBel and Deschamps JJ) held that even if the condominium by-laws forbidding balcony structures had violated the claimants' religious freedom (which he did not concede), the violation would be justified in light of the co-owners' countervailing right to preserve the market value of their flats, enjoy the common areas, and maintain the building's appearance.⁹⁸

⁹¹ *Trinity Western* (n21): compare [122]-[126], [130]-[134] (McLachlin CJ) to [86]-[90] (Majority). See also the dissenting reasons of Brown and Côté JJ which explain how covenanting creates and strengthens the religious community ([319], [324]). Setting aside the problems with its content, the nature of the covenant itself—the imposition of mandatory behavioural norms on group members—is a common feature of evangelical religiosity that subverts and threatens liberal notions of autonomy: Major (n66) 178-83; Newman (n89) 13-19.

⁹² Sandel, 'Religious Liberty' in Bhargava (ed), *Secularism and its Critics* (OUP 1998) 73, 87.

⁹³ Outside of the religion context, see *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 for an example of economic interests justifying a rights restriction.

⁹⁴ *Amselem* (n7) [83].

⁹⁵ CQLR c C-12, s6.

⁹⁶ *Amselem* (n7) [86].

⁹⁷ *ibid* [87].

⁹⁸ *ibid* [166]-[172].

Bastarache J's deference to aesthetic and economic harms is unmatched in the religion cases. In fact, these are more likely to be discursively brandished by courts as examples of harm falling on the 'less serious end of the scale', as they were in *Hutterian Brethren*.⁹⁹ While I do not dispute that economic harms may often be less serious than other forms of harm, there is a tendency for courts to characterize harms that sit less comfortably within law's liberal frame (such as those asserted by the colony members in *Hutterian Brethren*) as 'merely' economic in nature.¹⁰⁰ Such an approach risks not only mischaracterizing the actual harm at stake for religious claimants, but also under-serving the needs of vulnerable people for whom economic harm can be felt as especially serious, and who have historically failed to reap the benefits of Charter protection.¹⁰¹ It also re-inscribes the image of the 'ideal' religious claimant as someone who can easily rebound or recover from economic setbacks.

Another harm in the religion cases that lies on the bottom rung of this hierarchy is what I refer to as 'spiritual harm': a catch-all for those harms that a person suffers that are specifically religious in nature. For instance, the Hutterites might defend their claim in terms of *equality* arguments: that they are disadvantaged on the grounds of their religion as compared to non-Hutterite Albertans. Or they may be said to suffer from a collective or *associational* harm, in the sense that their ability to live together and function as an autonomous religious collective is threatened. The *spiritual* harm in this case, however, appears only on the margins: it is the claim that being photographed against their will would cause them to commit a grievous sin and risk damnation. This is a 'harm done to the soul' – their salvation imperilled by the violation of core tenets of their faith.¹⁰² This could be described as an 'existential harm,'¹⁰³ a 'moral harm' arising from the inability to act upon one's meaning-giving commitments,¹⁰⁴ or as a violation of one's integrity – a betrayal or alienation of the self.¹⁰⁵ Harm to a person's

⁹⁹ *Hutterian* (n5) [102] (McLachlin CJ); see also [95]-[99].

¹⁰⁰ *ibid* [93]-[97] (McLachlin CJ); see also *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250, where the Ontario Divisional Court downplayed the harm to the claimants by characterizing their desire for law society accreditation as 'more economic than it is religious' ([120]).

¹⁰¹ See eg *Gosselin v Québec (Attorney General)*, 2002 SCC 84. On the Charter's uneven and ambiguous protection of socio-economic rights for vulnerable people see Jackman and Porter, 'Social and Economic Rights' in Oliver, Macklem and Des Rosiers (eds), *The Oxford Handbook of The Canadian Constitution* (OUP 2017) 843.

¹⁰² Beaman (n17) 89.

¹⁰³ Neihart, 'Awes Tingni v Nicaragua Reconsidered' (2013) 42(1) *Denver JInt'l & Pol'y* 77, 99 (as cited in Bakht and Collins (n80) 779).

¹⁰⁴ Maclure and Taylor, *Secularism and Freedom of Conscience* (HUP 2011) 77. Feinberg uses 'moral harm' to mean the degradation or corruption of one's character, which does not fall within the terms of the harm principle: *Harm* (n6) 65-70.

¹⁰⁵ Maclure and Taylor (n104) 77; Hambler, 'Recognizing a Right to Conscientiously Object' (2012) 7 *Religion&HumRts* 157,160-61; Perry, 'Freedom of Conscience as Religious and Moral Freedom' (2014) 29(1) *JL&Relig* 124, 133-34; Anderson and Girgis, 'Against the New Puritanism' in Corvino, Anderson and Girgis (n64) 108, 125-26, 138-42; Bird, 'The Call in *Carter*' (2018) 85 *SCLR* (2d) 107. Both Perry and Bird use the notion of integrity to frame the harm at stake in freedom of *conscience* claims, though their understanding of integrity also maps onto freedom of religion.

integrity is understood as deeper and more wounding than the mere frustration of one's preferences.¹⁰⁶ I do not parse these terms too closely as the aim of this section is not to explore the abstract meaning of spiritual harm but, rather, to determine how such conceptions of harm are reflected (or neglected) in the case law.

Courts rarely engage directly with claims of spiritual harm. It is challenging for judges to articulate what is at stake in a metaphysical sense when a person is made to betray her religious convictions, as McLachlin CJ noted in *R v NS*: '[i]t is difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it'.¹⁰⁷ The courts do not consider themselves competent to assess such claims in terms of their truth or falsity;¹⁰⁸ even if they were accepted as sincere beliefs, there is no obvious way for a court to determine the weight they should be afforded in the proportionality analysis. Dissenting in *Bruker v Marcovitz*, Deschamps J concluded that the harms flowing from the breach of a religious rule were non-justiciable, as courts will only concern themselves with the civil, not religious, consequences of the impugned conduct.¹⁰⁹ A similar concern prompted the majority in *Ktunaxa* to conclude that the religious claim did not even fall within the scope of s2(a). Although the majority accepted that the Ktunaxa had a sincere belief that the development would drive the Grizzly Bear spirit from land sacred to them, it held that it was unable to assess how that spirit should be protected by law without entangling the court in spiritual matters and submitting 'deeply held personal beliefs' to judicial scrutiny.¹¹⁰ Quite apart from the justiciability point, spiritual harm simply fits less comfortably within the bounds of liberal legalism. There is little room in constitutional discourse for salvation or damnation, for the wrath of a vengeful God, for the sacred.¹¹¹ Religious experience is reduced to that which conforms to the informing commitments and cultural assumptions of constitutional law.¹¹² Unless it can be understood within that governing framework, spiritual harm lies mainly outside the court's purview.

How, then, do courts understand or address spiritual harm in the religion cases? I have identified three judicial responses to the puzzle of spiritual harm. The first is to ignore it. In

¹⁰⁶ Bird (n105) 124.

¹⁰⁷ *R v NS*, 2012 SCC 72 [36]. See also *Amslem* (n7), in which Iacobucci J justified the subjective standard for s2(a) in part because it is so 'hard to qualify the value of religious experience' ([72]).

¹⁰⁸ The courts profess to be neither permitted to decide, nor capable of deciding, matters of scriptural or theological authority: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [36]-[38]; *Amslem* (n7) [49]-[51] (Iacobucci J).

¹⁰⁹ *Bruker* (n37) [125]-[132], [174] (Deschamps J, joined by Charron J).

¹¹⁰ *Ktunaxa* (n20) [72]. The majority concluded that the Ktunaxa were asking the court to protect 'the spiritual focal point of worship' rather than the freedom to hold and manifest a belief, which it declined to do [71].

¹¹¹ Major, 'Religion and Law in *R v NS*' (2015) 32 Windsor YB AccessJust 25, 30.

¹¹² Berger (n3).

Polygamy Reference, for instance, Bauman J listed the scriptural reasons for practicing polygamy that were presented to the court, noting for instance the Mormon belief that entering a ‘celestial marriage’ allows believers to ‘qualify for the highest degree of glory in heaven’.¹¹³ But when it came time to consider the deleterious effects to the claimants under s1, no reference was made to the spiritual harm they might incur in being denied the option to enter polygamous marriages.¹¹⁴ Even in cases where the s2(a) claim succeeded, such as *Multani*,¹¹⁵ courts were unlikely to acknowledge the possibility of spiritual harm.

The second response is one of limited engagement. On rare occasions, courts attempt to grapple with the spiritual ramifications of the alleged religious freedom violation. In *Marriage Commissioners*, Smith JA (concurring) queried the effect that being compelled to perform a same-sex wedding ceremony would have on the religious integrity of civil marriage commissioners. She engaged in a lengthy analysis of the alleged harms, focusing in particular on the claim that conducting same-sex ceremonies would render the commissioners complicit in acts they perceived as morally wrong.¹¹⁶ Although her analysis was mainly restricted to harms felt in the ‘earthly’ sphere, her effort to dissect the nature of the religious claim was laudable. Likewise, the majority reasons in *NS* present one of the few examples of a court addressing the difficulty of measuring the costs of religious non-adherence. McLachlin CJ explained that in assessing the harm done by limiting the claimant’s religious practice or beliefs under s1, a court should inquire into the degree of importance of the practice to the claimant, the severity of the interference, and any contextual factors that would affect the harm she might experience.¹¹⁷ As the court did not go on to adjudicate the merits of the case (it remitted the matter to the preliminary inquiry judge), it provided only limited guidance on how to address spiritual harms in the s1 inquiry.

The third, and by far the most prevalent, judicial response to spiritual harm is one of translation. Spiritual harms are ‘translated’ into constitutionally cognizable harms, such as harms of coercion. In both *CMDS* and *Marriage Commissioners*, for instance, the courts were

¹¹³ *Polygamy Reference* (n38) [318]; see also [242]-[249] (Islam), [264]-[277], [318]-[324] (Mormon Church), and [341]-[343] (First Nations).

¹¹⁴ Bauman J simply noted that while some affiants experienced the ban as a significant interference, others did not: *ibid* [1348]. A similar lack of engagement is shown in the s2(a) analysis: [1092].

¹¹⁵ At no point did the court inquire into what harms the claimant might himself endure if forced to leave his kirpan at home. In the analysis of the measure’s deleterious effects, the majority focused solely on harm to Canadian values of equality and multiculturalism: *Multani* (n33) [78]-[79].

¹¹⁶ *Marriage Commissioners* (n22) [129]-[151].

¹¹⁷ *NS* (n107) [36]. Abella J disputed the relevance of the claimant’s strength of conviction under s1 on the grounds that the court risked ‘re-entering into inappropriate inquiries into a claimant’s past practices, or into the extent to which a claimant’s practices follow a religion’s orthodox traditions,’ [89]. For another set of reasons that show some engagement with the spiritual harms at stake see the minority reasons in *Ktunaxa* (n20) [124]-[134] (Moldaver J).

faced with complicity claims by religious adherents who did not want to implicate themselves in the allegedly ‘sinful’ conduct of others.¹¹⁸ The courts treated the potential harm to the claimants as a simple instance of indirect coercive harm: the claimants had to make a difficult choice between violating the dictates of their religion or finding another job.¹¹⁹ At no point did the courts question what it would *mean* to the claimants to violate their religious beliefs.¹²⁰ That question can be averted by simply viewing ‘acting against one’s conscience’ as one option among many, and in locating the source of the harm not in the threat to their spiritual integrity but, rather, in the fact of having to make a choice they did not want to make.

Another form of translation is from spiritual harm to psychological harm. Certainly part of what is at stake for a religious claimant is emotional in nature: being compelled to violate one’s religious beliefs can induce negative feelings such as shame or guilt. Courts are thus prone to interpret spiritual harm claims along these lines. In the lower court decision of *CMDS*, the physicians had claimed that the policy inflicted a moral harm upon them. The court viewed this as a psychological harm, expressing skepticism about whether ‘moral injury’ constituted a known psychological disorder and affording it little to no weight in the s1 inquiry.¹²¹ Likewise, the court’s only nod to the impact on the claimants in having their photos taken in violation of the second commandment in *Hutterian Brethren* was to suggest that they might experience some censure, ‘such as being required to stand during religious services’.¹²² This move can help provide a language with which to address matters of spiritual harm; however, as I explained earlier in the chapter, psychological harms carry little weight on their own. At most, they tend to amplify the claims of other more cognizable harms such as physical or coercive harms. These attempts at translation may keep the courts on safe, constitutional terrain but the detritus on the ‘cutting room floor’, in Berger’s language, is substantial.

¹¹⁸ See eg arguments by the claimants in *CMDS* (n35) [68]-[71], [165],[175]. NeJaime and Siegal (n64) suggest that complicity claims differ both in *form* and in *social logic* from other religious freedom claims: in form because they concern the conduct of third parties outside of the faith community (2520, 2524), and in social logic because they invoke the political mobilisation of religious believers to fight a ‘culture war’ on issues of sexual morality (2520-21). See also Moon, *Freedom* (n70) 113; Moon, ‘Conscientious Objections’ (n64).

¹¹⁹ *CMDS* (n35) [165]; (*Marriage Commissioners* (n22) [65] (Richards JA). In fact this framing is often urged by the claimant, no doubt because of the well-known challenges in articulating the claim in any other way. See *Whatcott* (n61) [160]: rather than claim that the consequences of not being able to proselytize are themselves harmful –eg to his salvation or inner peace– he adopts the ‘forced choice’ heuristic.

¹²⁰ Though see concurring reasons of Smith JA in *Marriage Commissioners* (n22) [129]-[151].

¹²¹ *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 [188]-[190] (though the claimants appear to have contributed to this psychological conception of the harm alleged). See also the UK case of *The Queen v D(R)* in which the harm to the accused in being made to remove her niqab in court was understood in terms of the ‘discomfort’ it caused her (Crown Court, 2013, para 58); Bakht, ‘In Your Face’ (2014) S&LS 1, 13.

¹²² *Hutterian* (n5) [28] (McLachlin CJ).

Law's failure to fully apprehend spiritual harms is not surprising, nor is it necessarily problematic: there are very good reasons for insulating the spiritual sphere from judicial intervention, both for believers and for the state.¹²³ However, it can produce an incomplete record of the deleterious effects suffered by the religious adherent, as in *Hutterian Brethren*, and/or an unduly narrow account of the interference under s2(a), as in *Ktunaxa*. Moreover, it can result in 'injury inequality,' in the sense that the costs to the claimant from violating the more familiar tenets of mainstream religions may be easier for courts to accept at face value than those of minority religious groups – again, *Ktunaxa* is a case in point.¹²⁴ Lack of familiarity with the religious practices or beliefs becomes a shorthand for their inherent 'unknowability' and lack of fit in Canadian constitutional law.¹²⁵ Because spiritual harm is so difficult to articulate and weigh in the balance, it is reasonable to expect that judges who can intuitively grasp what is at stake for the religious claimant will be better able to account for those harms. As we saw in Chapter 3, intuition plays a significant role in the act of judging and is likely to exert a strong influence on judges' decision-making process. The problem of injury inequality for minority religious beliefs and practices will arguably persist until the acknowledged lack of diversity in the judiciary is remedied. A more diverse bench 'challenges the complacency and normative superiority of the status quo'¹²⁶ and brings different perspectives to bear on legal issues.¹²⁷ Courts might begin to engage more closely with the nature of minority spiritual beliefs and the different ways in which claimants suffer harm from their violation.

Conversely, and somewhat counter-intuitively, constitutional law's discomfort with spiritual harm also risks over-emphasizing the extent of the religious claim. Without a conceptual framework from which to assess the weight or significance of spiritual harms in the course of the s1 inquiry, courts may choose to simply adopt at face value the claimant's perspective on the extent of the spiritual harm. This move risks overstating the magnitude of

¹²³ Myerson, 'Why Religion Belongs in the Private Sphere' in Cane, Evans, and Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 44; Sajó, 'Constitutionalism and Secularism' (2008-09) 30 *CardozoLRev* 2401.

¹²⁴ Franks (n17) 231; Beaman (n17). Regarding *Ktunaxa* (n20), the majority failed to grasp the significance of the alleged spiritual harm. They restricted their analysis to whether the Ktunaxa could continue worshipping the Grizzly Bear spirit, failing to comprehend how threats to the land and thereby to the spirit would impair a wider spirituality in which the people, the land, and the spirits are indissociable from one another: see eg Borrows (n80); Borrows, *Canada's Indigenous Constitution* (UTP 2010) 28-35. Although Moldaver J's concurring reasons fared better in this regard, he too reverted to more familiar conceptions of spiritual harm such as the claimants' inability to 'perform songs, rituals or ceremonies' ([118]).

¹²⁵ Herman, *An Unfortunate Coincidence* (OUP 2011) 50-68.

¹²⁶ Rackley, 'What a Difference Difference Makes' (2008) 15(1-2) *IJLP* 37, 50. Judicial diversity 'requires the usual to be transformed by the remarkable and the extraordinary to become the norm' (50).

¹²⁷ Rackley, *ibid*; Milligan, 'Pluralism in America' (2006) 81 *NYULRev* 1206; Hunter, 'More than Just a Different Face?' (2015) 68 *CLP* 119.

the harm (given the incentive for claimants to describe the impact of the state measure as maximally impairing), tipping the balance of the s1 inquiry in favour of the claimant.¹²⁸ Indeed, by characterizing spiritual harms as I have in this section, I do not mean to suggest that courts should necessarily consider those harms to be significant or especially weighty. The claim may quite rightly fail at any stage of the analysis, for any number of reasons. But the courts' inability to grasp spiritual harm serves to trouble any simple understanding of constitutional law as equally protective of all religious beliefs limited only by sincerity of belief.

There is no easy solution to the conceptual challenge posed by spiritual harm in the Charter adjudication of religious freedom claims. However, courts should be aware that the s2(a) analysis and the justification exercise conducted under s1 will always run up against these problems. Methodical application of those tests will not relieve the court of the task of making difficult decisions about the meaning and significance of spiritual harm in law; if anything, it merely masks those judgments in the language of proportionality and balancing.

5.1.2 Institutional harm

A common thread running through the religion cases is the courts' concern to guard against institutional harms, by which I mean harms to the state and its fundamental institutions and values. The constitutional adjudication of religious freedom in Canada occurs within a wider framework in which courts seek to prevent and protect against such harms. This sees courts casting themselves in the role of what Kislowicz calls the 'defender[s] of the state'.¹²⁹ When identified by the court, institutional harms tend to take on an over-arching character, mediating between and constraining the harms explored in the previous sections. This is due in part to the structure of the rights claim: it is state interests, after all, that are capable of justifying rights violations under s1. Institutional harms can also operate to frustrate the rights claim prior to s1 through the imposition of internal limits on the right, as noted in the previous chapter.

The court's solicitude for protecting the state's foundational institutions and values means that courts are unlikely to extend s2(a) protection to anything that amounts to a rejection of state authority.¹³⁰ While minor encroachments on the state may be permitted, individual

¹²⁸ See eg Gedicks (n8) (100-02).

¹²⁹ Kislowicz (n78) 228. He explains that this role sits in tension with its other role as defender of minorities.

¹³⁰ Esau, *The Courts and the Colonies* (UBC 2004) 300-24 (discussing the 'outside law sovereignty model' of the relationship between law and religion in Canada); Moon, *Freedom* (n70) 76-77. See *R v Jones*, [1986] 2 SCR 284; *SL* (n63) [39]-[40] (Deschamps J).

religious freedom claims must not trench upon the foundations of constitutional democracy.¹³¹ This point was clearly made by Justice Muldoon of the Federal Court in *O'Sullivan v Canada*, an early s2(a) Charter decision rejecting the claim of a taxpayer who sought to withhold payment of that part of his income tax that corresponded to the amount the state spent on therapeutic abortions.¹³² Muldoon J held that the constitution 'must be resolutely defended' in any conflict with religious precepts or values, 'for it simply cannot on any pretext be seen to contain, under the rubric of any right or freedom, the seeds of its own dilution or destruction'.¹³³ He concluded that '[n]o religious value or manifestation can admissibly distort or subvert validly enacted law or the entrenched constitutional imperatives, principles and values of Canada'.¹³⁴ These are fighting words, in contrast to most of the courts' more tempered statements about state authority in the face of religion's claims. But it is certainly true that courts will take up the mantle of 'state-defender' when a fundamental institution or value appears to be under threat.

In my review of the Supreme Court's religion jurisprudence over the past fifteen years I have isolated two recurring, and overlapping, manifestations of institutional harm: harm to legal and social institutions, and harm to Charter or public values.¹³⁵ I examine these in turn.

The prevention of harm to legal and social institutions was a central theme in *Polygamy Reference*, evidenced by the court's identification of the harm polygamy posed to the institution of monogamous marriage.¹³⁶ Although the ban was also upheld on the grounds that it caused harm to women, children, and society, I maintain that it was the threat of institutional harm that most concerned the court. This can be gleaned from what is arguably the most fascinating aspect of the judgment: the distinction Bauman J drew between polyamory and polygamy. He maintained that most forms of polyamory (the simultaneous holding of multiple romantic or sexual partners) would not be caught by the ban, which only aims to prohibit multiple *matrimonial* unions that have been 'sanctioned by civil, religious or other means'.¹³⁷ The sanctioning event in a polygamous marriage confers some 'purportedly binding authority' on the relationship, an authority that undermines the state's efforts to preserve and protect the prominent status of monogamous marriage in western cultures.¹³⁸

¹³¹ Berger (n3).

¹³² *O'Sullivan v Canada* (1991), 45 FTR 284.

¹³³ *ibid* [45].

¹³⁴ *ibid* [45].

¹³⁵ Examination of a different set of cases might draw out different themes, such as the court's prevention of harm to the 'foundational compromise' in s93 of the *Constitution Act, 1867*: Kislowicz (n78) 232.

¹³⁶ *Polygamy Reference* (n38). References to the institution of monogamous marriages recur throughout the judgment; see eg [878]-[904], [982]-[1042].

¹³⁷ *ibid* [987].

¹³⁸ *ibid* [957] and [1041] respectively.

This is the central harm posed by polygamy: the threat to the state from the rival authority implied by plural marriage.¹³⁹ This conclusion is strengthened by the argument that the harms to women and children that worry the court (eg assault, sexual exploitation, human trafficking) are already subject to existing criminal offences.¹⁴⁰ The primary harm *not* addressed by existing offences is the institutional harm – the threat to the state itself. This is what justifies the ban, and this is arguably what the court is most concerned to prevent.

The criminalization of polygamy in North America has historically been motivated by the threat it posed to state authority. As Lori Beaman writes, the fear about polygamy may be that it creates “a monstrous form of conjugality”...which is in turn imagined as undermining the entire structure of Canada as we know it’.¹⁴¹ This threat can be viewed two different ways. One reading is that, because the state controls the institution of marriage, attempts to undercut the institution are taken as threats to the state’s authority itself. On another reading, polygamy is to be feared because it threatens ideas about the nation ‘and who we are’.¹⁴² The state’s promotion of the institution of monogamous marriage is thus an assertion of sovereignty, which sees it not only imposing order on and thereby making ‘the people’ it serves, but also ‘*unmaking* [the] extant, parallel, and rival sovereignties’.¹⁴³ Efforts to curb polygamy have always been part of the state’s colonial, nation-building project of protecting a white, Christian Canada.¹⁴⁴ The BC Supreme Court’s decision upholding the prohibition forms part of a long history of judicial and legislative attempts to shore up state power against rival threats.

Another common institutional harm that serves to constrain and limit the exercise of religious freedom under s2(a) is harm to the operation and repute of the justice system. In *Bruker v Marcovitz*, for instance, the majority held that the claimant could not use his religious freedom to resile from his binding promise to provide his ex-wife with a *get*, noting that the state itself has an interest in ensuring the enforcement of legal obligations.¹⁴⁵ Similar justifications were made in *Trinity Western*, where the majority justices maintained that the law’s society’s decision not to accredit TWU’s law school helped to safeguard the integrity of

¹³⁹ Drummond, ‘Polygamy’s Inscrutable Criminal Mischief’ (2009) 47 OsgoodeHall LJ 317, 350.

¹⁴⁰ *Polygamy Reference* (n38) [1191]-[1196]. Bauman J rejected this argument in his s7 analysis.

¹⁴¹ Beaman, ‘Introduction’ in Calder and Beaman (eds), *Polygamy’s Rights and Wrongs* (UBC 2014) 1, 13, citing Johnson, ‘Reflecting on Polygamy’ (same volume, 112).

¹⁴² Beaman, ‘Introduction’ (ibid) 15.

¹⁴³ Johnson, Klassen and Fallers Sullivan, *Ekklesia* (Chicago 2018) 12.

¹⁴⁴ Carter, *The Importance of Being Monogamous* (UAlberta 2008); Denike, ‘The Racialization of White Man’s Polygamy’ (2010) 25(4) *Hypatia* 852. In the French context, see Selby, ‘Polygamy in the Parisian Banlieues’ in Calder and Beaman (n141) 120.

¹⁴⁵ *Bruker* (n37) [92]; see also *R v Welsh*, 2013 ONCA 190 [68]-[72] (religious freedom will not protect activities designed to subvert the justice system).

the legal system and promote the public's trust in it.¹⁴⁶ The court went even deeper in *Marriage Commissioners*, concluding that the proposed accommodation would harm the rule of law. It would 'undermine a deeply entrenched and fundamentally important aspect of our system of government' – that the state serves all people equally and that public office holders cannot mould their interaction with the public in the shape of their own private beliefs.¹⁴⁷ But it was in *NS* that institutional harm took centre stage, as each of the three separate sets of reasons emphasized the risks to the legal system and the rule of law (though it led them to different conclusions). For LeBel and Rothstein JJ, allowing a witness to testify with her face covered was said to harm the principle of open courts and the rule of law;¹⁴⁸ conversely, Abella J was of the view that *not* allowing a witness to testify in a niqab would harm public confidence in the justice system and prevent Muslim women from accessing the courts.¹⁴⁹ The justices' different interpretations of what the 'state-defender' role demands of the court demonstrates that the court's interest in preventing institutional harm does not mandate a particular result: to protect the state and its institutions from harm is not necessarily to authorise incursions on religious freedom, as Abella J's judgment shows.

The second way to view institutional harm is in terms of a threat posed to a given set of values. Often these are framed as 'Charter values,' but not always.¹⁵⁰ It is not unusual for the concept of harm to be used as a placeholder for threats to values. As Bernard Harcourt and Mariana Valverde have argued, the strong cultural incentives to frame complaints about political or sexual morality in terms of harm and the ease with which harm arguments can be made mean that the concept of harm now stands in for basically any undesired or injurious effect, whether rooted in conventional morality, offense, thwarted interests, or something else entirely.¹⁵¹ Though it is certainly legitimate for courts to protect against public, institutional harms,¹⁵² particularly in the realm of constitutional law, we are right to be cautious when

¹⁴⁶ *Trinity Western* (n21) [43], [47], [95], [98], [103].

¹⁴⁷ *Marriage Commissioners* (n22) [97]-[98] (Richards JA).

¹⁴⁸ *NS* (n107) [74], [78]; see also [38], [48] (McLachlin CJ) ('[t]he right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble' [38]).

¹⁴⁹ *ibid* [95]; see also [37] (McLachlin CJ) (risk of harm to the justice system arising from barriers to the courts faced by Muslim women).

¹⁵⁰ For instance, Justice LeBel's reasons in *NS* (*ibid*) went off-script, departing from the usual catalogue of Charter values to include the 'common values' of Canadian society such as the promotion of open courts, social interaction and inter-personal communication ([70]-[74]).

¹⁵¹ Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *JCrimL&Criminology* 109; Valverde, 'The Harms of Sex and the Risk of Breasts' (1999) 8 *S&LS* 181.

¹⁵² Berger, 'Religious Diversity, Education, and the "Crisis" in State Neutrality' (2014) 29(1) *CanJL&Soc'y* 103, 121. Feinberg writes that threats to public institutions are 'public harms' falling within the terms of the harm principle: *Harm* (n6) 11; Feinberg, *The Moral Limits of the Criminal Law Vol 4: Harmless Wrongdoing* (OUP 1990) 33-34. Likewise, he states that it can be legitimate to protect 'general social well-being' through, eg, prohibitions on duelling which protect respect for life and social security, but care must be taken as the concept of the public interest can be stretched to justify bans on conduct that is merely disapproved of: *Harm* (n6) 221-22.

justifications for the state's rights incursions are made in the name of the threat posed to particular values. I alerted in the previous chapter to the oft-cited distinction between core, 'constitutive' values¹⁵³ and those lying beyond that core, and I pointed to the difficulty in distinguishing between them in tough cases. The danger when values are used to define the content of legal obligations is that they can easily inscribe dominant, hegemonic norms that exclude minority voices and interests.¹⁵⁴ In Justice LeBel's drive to protect the 'common values' of Canadian society in *NS*, for instance, he excludes some – niqabi Muslim women – from the public sphere to make it more hospitable for those remaining. The courts' articulation of 'harm to values' may simply make explicit what usually lies hidden, for harm judgments always express particular normative commitments and are thus always to some extent values-based.

What is the locus of the harm when courts identify harm to values? Typically, it is the state. Values such as secularism, tolerance, and equality are all inscribed in the state's institutions and functions and a threat to these values can be interpreted as a threat to the state. This is even clearer when the abstract threat to values does *not* 'attach' to any particular individuals (as it did in *Marriage Commissioners* and *Trinity Western*, where the call to respect certain values was in aid of LGBTQ+ people, as with Sikhs in *Multani*). In *SL*, for instance, the majority of the court implied that parental requests for student exemptions from the mandatory Ethics and Religious Culture course constituted a 'rejection of the multicultural reality of Canadian society' and ignored 'the Quebec government's obligations with regard to public education'.¹⁵⁵ An unwillingness to expose one's children to alternative viewpoints at school became a threat to state values of tolerance and secularism, rather than to any particular individuals or groups. The majority and concurring judgments in *AC v Manitoba (Director of Child and Family Services)*, which concerned the rights of mature minors to refuse medical treatment for religious reasons, show a similar shift from individual to institutional harm.¹⁵⁶ Perhaps by virtue of the fact that the children refusing treatment do not want to be protected, the state's interest in protecting them comes to the fore. In this sense, allowing children to refuse medical care could cause not only (physical) harm to the child but also (institutional) harm to the state itself.¹⁵⁷ Institutional harm thus has an aspirational quality to it: 'we' protect

¹⁵³ Maclure and Taylor (n104) 11; see also *R v Butler*, [1992] 1 SCR 452, 493, 497 (Sopinka J); *R v Labaye*, 2005 SCC 80 [33]; *Loyola* (n24) [46]-[47].

¹⁵⁴ Hunter-Henin, 'Living Together in an Age of Religious Diversity' (2015) 4 OJLR 94, 99-100.

¹⁵⁵ *SL* (n63) [40], see also [10]-[11] (Deschamps J) and [44] (LeBel J). In *Loyola* (n24) [44]-[48] the majority also emphasized the importance of educating children in values like multiculturalism and tolerance; it held that the state had 'a legitimate interest in ensuring that students in all schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences ([48]).

¹⁵⁶ *AC* (n44) [108] (Abella J), [127], [141], [144] (McLachlin CJ).

¹⁵⁷ *ibid* [127] (McLachlin CJ).

children (*AC*) and women (*Polygamy Reference*) because ‘we’ are the type of nation that cares about such things. In its relations with religion, in particular, the state both creates and protects its own (secular) ‘personality’ through the limitations it places on the religious other.¹⁵⁸ The harm is thus as much to the state’s impression of itself as constituted by particular values and principles as it is to the people it seeks to protect.

Taken together, all these overlapping forms of institutional harm work to ensure that religious claims do not undercut the institutions, principles, and values that define and buttress the state. Despite its conceptually fuzzy edges, institutional harm is a megalith whose shadow extends over all parts of the s2(a) and s1 inquiry, constraining the terms upon which the other harms examined in this chapter operate and are understood in the constitutional adjudication of religious freedom in Canada.

5.2 Conclusion

In this chapter I have examined how courts understand the nature and magnitude of the harms incurred by claimants in religious freedom cases. I have demonstrated that there is an implicit hierarchy of harms in s2(a) cases, which conforms to Berger’s insights about constitutional law’s cultural understanding of religion. In the words of John Borrows, ‘law is a liberal god that creates religion in its own image’.¹⁵⁹ Thus certain harms are ignored, devalued or treated with ambivalence, while others – institutional harm, harms of coercion and physical harm – are paramount. The feminist critiques I rely on throughout this thesis help to show that the determination of harm in religious freedom cases is a normative practice, mediated through culture and the judge’s prior operative commitments. It is also, at least in part, an intuitive practice. As I explained in Chapter 3, judges show an intuitive turn to harm in resolving open-ended legal and moral questions. It is my contention that this is an intuitive turn to *particular conceptions* of harm, those that reflect the needs and interests of law’s abstracted rights-bearer: the bounded, able-bodied, rational, male subject.

Given the conclusions I reached in the previous chapter about harm’s pervasive role in the adjudication of religious freedom under the Charter, it is vital that courts adopt a critical, flexible, and contextual approach to harm, one that resists seeing harm as a clear-cut, determinate concept with fixed and narrow meaning. This might open up new possibilities of understanding: the dominant urge to protect against harms of coercion, for instance, might be tempered by the notion that there are different and more complex ways of exercising agency

¹⁵⁸ Asad (n18).

¹⁵⁹ Borrows (n80) 168; Berger (n3).

that challenge the dichotomy of either full autonomy or complete incapacitation.¹⁶⁰ It may also enable greater recognition of the expressive harms of state action, particularly in the context of equality arguments, which I turn to in the next chapter.

A broader understanding of what counts as harm does not, however, demand that courts be more willing to decide in favour of the claimant. The outcome may not be affected with the adoption of broader and more flexible conceptions of harm. But the court's reasoning and its language matters – the way it speaks of the harm to the claimant and engages with the range of relevant harms in the case, matters – even if the effect of that consideration is mainly expressive or symbolic in nature. I maintain for this reason that Moldaver J's reasons in *Ktunaxa* are preferable to those of the majority, as are those of McLachlin CJ in *Trinity Western*, because of the way in which these justices took pains to address and explore important harms that were overlooked or diminished by others despite reaching the same conclusion.

This chapter was not only concerned with harm to the claimant, but with the full range of harms relevant to the s2(a) and s1 inquiry. The same concerns noted above apply when the court is looking outwards at the harms averted by the state limit. Here, too, courts need to recognize that harm can occur on multiple levels and in different ways, including at the social or relational level. Whether in relation to harms incurred by the claimant or those arising on the other side, the adjudication of harm will always take place on slippery terrain. As Feinberg notes, harm is 'a very complex concept with hidden normative dimensions'.¹⁶¹ The categories of harm that I have detailed in this chapter are merely sketches of the more prevalent forms of harm that mark religious freedom disputes. In other areas of law, we might expect to find other harms – reputational, environmental, or political – which arise less often in this context.

There is of course a tension between the claim that the concept of harm is inherently too malleable or contentious to be conceptually useful, and the proposal to investigate, label and categorize harms. It risks treating these 'harms' as foregone conclusions. The rationale behind this move stems from the fact that, like it or not, the concept of harm is quietly operating under the surface in religious freedom jurisprudence. This calls for an excavation, to bring those harms to light and see what has been missed out, overblown, or misconceived. In the next chapter I turn my attention to a particular form of harm whose boundaries are particularly diffuse: symbolic or expressive harm. It too benefits from the act of naming and

¹⁶⁰ Beaman (n17) 102; see also 101-07; Mahmood, *Politics of Piety* (Princeton 2005) 5-25.

¹⁶¹ Feinberg, *Harm* (n6) 214.

from attention to the way in which it, like those forms of harm investigated above, operates to govern and inform the constitutional adjudication of religious freedom in Canada.

6 Expressive harm, equality, and the constitutional adjudication of religious freedom

6.1 Introduction

Up to this point, harm's malleability has been presented as more of a liability than a strength. But, in fact, shape-shifting is also one of harm's great virtues: prevailing conceptions of harm can change to reflect society's growing awareness of different forms of social injury, with the discourse of harm being harnessed in law to render marginalized harms legitimate and visible. Setting aside for the moment how this construction may be faulted for implicitly adopting a narrative of progress (for of course this can work in ways that undercut as well as promote progressive social aims), we see this potential in Canadian constitutional law's growing recognition of expressive harms.

The notion of expressive harm concerns the *message* that is sent by particular acts: it is the harm inhering in the social meaning of an action, as opposed to its tangible effects. The province of Quebec's recent legislation limiting the rights of certain public sector workers to wear religious symbols in the course of their duties provides an instructive example of expressive harm. One of its immediate effects is to prevent hijabi Muslim women or Sikhs who wear turbans (among others) from gaining employment as police officers, teachers, or government lawyers.¹ This inflicts substantial material harms on minority racialized and religious groups in the form of barriers to meaningful employment, psychological harm, and financial setbacks.² But it also *expresses* something seriously damaging about them, marking them out as suspicious, as 'other', as less deserving of the opportunities and experiences that are open to others. This expressive harm is not restricted to the impact it has upon individuals subject to these laws but extends across society, changing the way people perceive and interact with members of that group.

It is hardly controversial to suggest that state action has an important expressive dimension. Law sends messages about what society values and believes in: legislation, court decisions and regulatory measures all 'communicate legal and social meaning' and help to

¹ *Loi sur la laïcité de l'État*, SQ 2019, c12. The legislation includes a 'grandfathering' provision in s31, so it does not apply to people already employed in those fields (though it does prevent promotions or lateral transfers).

² *Hak v Procureure générale du Québec*, 2019 QCCA 2145. Despite the split judgment, all three judges recognized that female Muslim teachers in particular had already suffered serious, irreparable material harms as a result of the legislation: [68]-[72] (Hesler CJQ), [86]-[90] (Bélanger JA), [113]-[115] (Mainville JA).

build law's normative character.³ Court decisions may have a narrow doctrinal effect and yet exert profound expressive meaning, with the potential to shape social norms that far exceeds its doctrinal footprint.⁴ This applies across all areas of law: criminal sanctions have a distinct expressive function that distinguishes them from other legal penalties,⁵ while in human rights law, a finding of a rights violation can declare something important – even if the violation is subsequently justified under a ‘saving’ provision.⁶ Expressivists claim that even unenforced laws can have an expressive effect, the law ‘on the books’ signalling the moral opprobrium with which we ought to view such behaviour.⁷

This chapter investigates this expressive dimension of state action and the ways in which it can cause constitutionally cognizable harm. Judicial and theoretical recognition of expressive harm demands a contextual, dynamic, and social understanding of harm. Though one could argue that Feinberg's interest-based theory of harm is capable of accounting for some harms that are expressive in nature,⁸ the picture of expressive harm I paint in this chapter pushes up against dominant conceptions of harm as tangible, concrete wrongs done to specified individuals. To the contrary, expressive harms are elusive, intangible, and social; they can be difficult to define and prove with any certainty. They may confuse, threaten and disorient people who ‘are wary of abstract harms they cannot touch, feel and smell’.⁹ Indeed,

³ Buss, ‘Performing Legal Order’ (2011) 11 IntCLR 409, 413; Young, ‘Social Justice and the Charter’ (2013) 50 OsgoodeHallLJ 669, 670-71.

⁴ Sunstein, ‘On the Expressive Function of Law’ (1996) 144(5) UPaLRev 2021, 2028; Velte, ‘*Obergefell*'s Expressive Promise’ (2015-16) 6 HousLR 157. Legislation can have this same effect: see eg Monaghan, *Monaghan on Equality Law* (2nd edn, OUP 2013) 1.27.

⁵ Feinberg, ‘The Expressive Function of Punishment’ (1963) 49(3) Monist 397, 400-03; Kahan, ‘What do Alternative Sanctions Mean?’ (1996) 63 UChiLRev 591.

⁶ However, repeated findings that a rights violation is justified might send a more damaging message about the value of that right. On the symbolic import of the difference between a finding of no discrimination and of justified discrimination see Lawrence, ‘Equality and Anti-Discrimination’ in Oliver, Macklem and Des Rosiers (eds), *Oxford Handbook of The Canadian Constitution* (OUP 2017) 815; Truesdale, ‘Section 15 and the Oakes Test’ (2012) 43 Ottawa LRev 511, 537-38.

⁷ Sunstein (n4) 2032; *Norris v Ireland*, App no 10581/83 (ECtHR, 26 October 1988) [46]; Mohr, *Gays/Justice* (Columbia 1998) 60 (‘unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum’). Conversely, a *failure* to prosecute can signal that those acts are less deserving of censure, viz. the on-going failures to punish the murders of Black or Indigenous victims by white killers (eg Colton Boushey in Canada, Trayvon Martin in US); see Feinberg (n5) 407.

⁸ One might argue under Feinberg's theory of harm that a person's interests are wrongfully set back when the state expresses harmful messages about the group to which the person belongs, eg by blocking her attainment of ulterior interests, which would persist even if she were unaware of it. However, this betrays a focus on the concrete, observable effects of expressive acts rather than the harmfulness of the message itself, a distinction I address below. Moreover, his rejection of arguments against the criminal regulation of reasonably avoidable (and thus non-offensive) racist practices and extreme pornography and his characterization of them as instances of ‘bare-knowledge offense’ suggest limited tolerance for arguments about harm arising from impermissible messages: Feinberg, *The Moral Limits of the Criminal Law Vol 2: Offense to Others* (OUP 1985) 86-96, 143-64.

⁹ Hughes, ‘Tensions in Canadian Society’ (1986) 6 Windsor YB AccessJust 282, 289; see also Epstein, ‘The Harm Principle And How it Grew’ (1995) 45 UTLJ 369 (harm principle should be restricted to fraud, force and commercial monopoly); Smith, ‘Is the Harm Principle Illiberal?’ (2006) 51 AmJJuris 1, 14-20 (on challenges to liberals posed by ‘psychic’ and ‘communal’ harms).

they may appear to sit more comfortably with legal moralism than with the harm principle, given the expressivists' conviction that it can be justifiable for courts to limit individual rights on the basis of harms to the social order.

This chapter has two primary aims: one descriptive and one normative. The descriptive goal is to examine how Canadian courts understand and weigh expressive harms in their adjudication of religious freedom under the Charter. This is an under-investigated dimension of the s2(a) jurisprudence. I seek to draw expressive harm out from the shadows of the jurisprudence; though rarely addressed by courts directly, it bears an imprint on the cases that merits close attention. This builds upon my work in the previous chapter on prevailing conceptions of harm in s2(a) cases. I explain that the courts are willing to restrict state action and individual s2(a) rights in order to guard against expressive harm. We see this most clearly in the cases that concern equality.¹⁰ Themes of expressive harm arose most often in the constitutional religion cases I studied where the exercise of religious freedom was in conflict with anti-discrimination laws and policies on LGBTQ+ rights, and when the state's duty of religious neutrality was impaired by state-endorsed religious practices such as prayers in government settings. In these cases, the courts are often as concerned about what the state action expresses as they are with its more tangible, material effects.

The second aim of the chapter is normative. I make a case for the recognition of expressive harm as a legitimate constitutional injury in religious freedom cases, while at the same time highlighting those areas of contestation and tension that arise when expressive harm is used juridically. Expressive harm has a Janus-like quality to it: on the one hand, acknowledgement of it as a 'real' harm under s2(a) of the Charter can highlight marginalized forms of injury that often slip through the cracks. It can be progressive and egalitarian, entailing the recognition that expressive acts can constitute the social world in unjust hierarchies and impede people's ability to participate meaningfully and equally within it. On the other hand, claims of expressive harm can be subverted to less progressive ends. The very concept of expressive harm magnifies the already malleable and slippery quality of harm and exacerbates all of the usual problems with what Mariana Valverde has called 'harm-based governance':¹¹ its core is so capacious, and its boundaries so porous, that its deployment in law can work to varied and incommensurate ends. Following through on the logic of expressive harm claims in law can end up undermining the egalitarian goals that legitimate it

¹⁰ Berger made a similar observation about the convergence of equality and expressive harm, noting that 'themes of equality seem to emerge in places at which the Court speaks of the communicative harm done by favouring one religion over another' (Berger, *Law's Religion* (UTP 2015) 84 [LR]).

¹¹ Valverde, 'The Harms of Sex and the Risk of Breasts' (1999) 8 S&LS 181, 187.

in the first place. This second dimension to expressive harm thus tempers the case I make for its deployment in the Charter adjudication of religious freedom.

This chapter begins with an introduction to the primary theories of expressive harm, providing further detail on what exactly is meant by ‘expressive harm’ and noting in particular its intangible, social character. I then examine the egalitarian dimension of expressive harm, setting out the normative benchmarks for my argument that it is appropriate for Canadian courts to consider expressive harms in their constitutional adjudication of religious freedom. I rely on the work of theorists Sophia Moreau and Nancy Fraser to show that expressive acts can impair people’s status equality and warrant judicial consideration on that basis. The following section examines the two groups of s2(a) cases in which expressive harm is most prominent: those on state religious neutrality, and those addressing conflicts between LGBTQ+ equality rights and religious freedom. I demonstrate the quiet, under-investigated role played by expressive harm in these cases and, by reading the judgments through the theoretical lens established above, argue that the courts’ recognition of expressive harm was amply justified in the service of equality.

The second half of the chapter concerns the conceptual challenges that arise when expressive harm arguments are made before the courts, starting with the difficulty in properly determining the identity of the ‘speaker’ and the meaning of the expressive act. Next, I consider how to draw the line when claims of expressive harm are made, as parties on both sides of the dispute can often make plausible claims to be harmed by the state’s failure to recognize them as equals. Finally, I question whether it is possible for courts to make judgments of expressive harm without falling back on dominant norms that reflect society’s existing power structures and hierarchies. Law’s inquiry into the ‘true’ meaning of an expressive act and the harm it causes risks becoming one more site for the imposition of hegemonic norms on minority groups and challenges the claims of Canadian constitutional law to interpret s2(a) without adjudicating on the merits of religious practices and beliefs. I conclude that these critiques, while valid and challenging, overstate the difficulty of constitutionalizing expressive harm and that by tethering expressive harm to its egalitarian function we can rescue those elements of the concept that are needed to realize its progressive potential.

6.2 The meaning of expressive harm

Expressive harm is the injury inflicted through the expression of an attitude or idea that is distinct from any other negative, material consequences. The harm inheres in what a given action, decision, or law *says* as opposed to what it *does*. This definition borrows from the work

of American expressivist theorists, most notably Elizabeth Anderson and Richard Pildes.¹² Although expressive harm can emanate from non-state actors,¹³ their theory is of most relevance to studies of constitutional law in the claims it makes about the state. They maintain that the state is ‘required to express the appropriate attitudes toward persons’,¹⁴ with appropriateness judged according to whether it complies with existing legal or constitutional standards. Under an expressivist theory, laws and policies ‘can be unconstitutional not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms’.¹⁵

This approach presumes a distinction between expressive and material harms. Material harms are tangible, practical burdens such as psychological or physical damage, barriers to goods and services, or constraints on liberty.¹⁶ Expressive harm, however, is intangible and impersonal. The attitude of contempt expressed through racial segregation laws, for instance, is harmful in and of itself; though the laws and their harmful message might also lead to material harms such as denied opportunities or emotional distress, the wrong persists even if those tangible consequences do not occur.¹⁷

In this chapter I thus focus on the *manner* in which the harm is inflicted and experienced. The particular categories of harm that I explored in the previous chapter – such as physical harm, harms of coercion, or harms to equality – might be understood to have two dimensions: material and expressive. Take physical harm for instance: the harm in a physical assault is usually considered as a function of its tangible, material consequences – physical damage to the body – but it might be said that there is also an expressive harm inhering in the malicious and disrespectful attitude conveyed by the assault.¹⁸ Likewise, the harms associated with inequality can be both material and expressive.¹⁹ As I noted in the introduction above,

¹² Pildes and Niemi, ‘Expressive Harms, ‘Bizarre Districts’, and Voting Rights’ (1993) 92 MichLRev 483; Pildes, ‘Why Rights Are Not Trumps’ (1998) 27 JLS 725; Anderson and Pildes, ‘Expressive Theories of Law’ (2000) 148 UPaLRev 1503.

¹³ Anderson and Pildes (n12) 1508-14.

¹⁴ *ibid* 1520. A state’s attitude is located in the laws or policies it enacts, not in the minds of its legislators (1520-27). The attitude expressed through law might be understood as the law’s ‘normative commitments’: Edwards, ‘Legal Expressivism’ (2009) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361101> accessed 06.02.20, 8.

¹⁵ Pildes (n12) 755.

¹⁶ See eg NeJaime and Siegal, ‘Conscience Wars’ (2015) 124 YaleLJ 2516, 2522.

¹⁷ Black, ‘The Lawfulness of the Segregation Decisions’ (1960) 69 YaleLJ 421, 427; Koppelman, ‘Commentary’ (2001) 60 MdLRev 777, 781; Anderson and Pildes (n12) 1528, 1542-43; Hellman, ‘The Expressive Dimension of Equal Protection’ (2000) 85 MinnLRev 1, 3, 8-13.

¹⁸ Duff, *Punishment, Communication, and Community* (OUP 2003) 128.

¹⁹ Corvino, ‘Religious Liberty, Not Religious Privilege’ in Corvino, Anderson and Girgis (eds), *Debating Religious Liberty and Discrimination* (OUP 2017) 20, 72-74; NeJaime and Siegal (n16) 2566-78. Note that these authors describe expressive harm as a ‘dignitary harm’, a term I have chosen to avoid both for its contested meaning and its tendency to be interpreted subjectively in terms of how people feel (see eg *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [53].

this chapter focuses on expressive harms arising in the context of equality – simply because it is when issues of equality arise in s2(a) cases that Canadian courts are most likely to track expressive concerns, and it is in those cases that the need to recognize expressive harm is most potent.

Another point to highlight about expressive harm is that it opens the door to a more social, impersonal theory of harm. For one thing, it requires the consideration of the social context and structures in which the expressive act is embedded. When we speak of ‘the message’ sent by an action, we are referring to its public, social, or cultural meaning.²⁰ Lawrence Lessig explains that social meaning is a function of the context in which the act occurs. It is discerned through the lens of the community’s background norms, social practices, history, and shared understandings.²¹ Though social meanings are certainly not ‘fixed, or stable, or uncontested’, expressivists maintain that it is possible to identify at least a range of potential meanings that are plausible within that context.²² The social meaning of an expressive act is independent of what the speaker intends to express and of how the particular target of the expression reacts to it; it is intelligible on a wider scale and is therefore not mortgaged to individual motives or perceptions.²³ Expressive harm can thus be contrasted with personal offense or hurt feelings. In this respect, at least, it chimes with Feinberg’s interest-based theory of harm under which the existence of harm is not determined by a person’s subjective experience of being harmed, but by an objective thwarting of their interests.²⁴ Because the harm lies not in how it makes a person feel but in what the expressive act says more generally,²⁵ the recognition of expressive harm as a constitutional injury need not entail the ‘tyranny of the thin-skinned’.²⁶ Thus expressive harm is also social in that its effects are not only meaningful or relevant at the

I do not deny, however, that the concept of dignity is probably best understood as an ‘expressive norm’: Khaitan, ‘Dignity as an Expressive Norm’ (2012) 32(1) OJLS 1.

²⁰ Lawrence, ‘The Id, the Ego, and Equal Protection’ (1987) 39 StanLRev 317, 355-62 (‘cultural meaning’); Lessig, ‘The Regulation of Social Meaning’ (1995) 62(3) UChiLRev 943 (‘social meaning’); Anderson and Pildes (n12) 1524 (‘public meaning’).

²¹ Lessig (n20) 958; Anderson and Pildes (n12) 1525.

²² Lessig (n20) 954-55 (‘Gold has value even though its value across individuals differs dramatically’: 955). Nejaime and Seigel (n16) write that the social meaning of being refused a service on the basis of one’s sexual orientation is immediately intelligible ‘because it reflects and reiterates a familiar message about contested social norms’ (2576).

²³ Anderson and Pildes (n12) 1524-25. See also Lawrence (n20) 352-55 (stigma occurs regardless of motive, so while ‘evil intention’ can be sufficient to establish expressive injury, it is not necessary).

²⁴ Feinberg, *The Moral Limits of the Criminal Law Vol 1: Harm to Others* (OUP 1984) 85 [*Harm*]. Even a deceased person can be said to have her interests set back (83-87). Likewise, events that hurt, distress or offend a person are not necessarily harmful (45-51).

²⁵ cf Frederick Gedicks, ‘Atmospheric Harms in Constitutional Law’ (2009) 69 MdLRev 149, 151 (‘atmospheric harms’ are better understood as harms to the individual).

²⁶ Eisgruber and Sager, *Religious Freedom and the Constitution* (HUP 2010) 135. See also Waldron, *The Harm in Hate Speech* (HUP 2012) 105-43 (explaining the difference between his conception of dignity as social standing, and personal offense).

individual level. State actions speak to and affect everyone in society, not simply those who are most directly affected.

There is some debate over whether an expressive act must have some observable social impact before it can be said to matter, both morally and legally. Anderson and Pildes' theory is deontological: they believe that the harmfulness of an expressive act *precedes* the realisation of any adverse consequences.²⁷ The message is harmful in and of itself, regardless of its consequences. Theirs can be contrasted to consequentialist theories of expressive harm, which judge the state's expressive acts not according to the moral status of the attitude expressed, but by its concrete effects on individual and society.²⁸ Theorists such as Lessig and Cass Sunstein, for instance, highlight law's expressive role primarily in how it serves to shift social norms and thereby influence people's behaviour.²⁹ The distinction between these two approaches to expressive harm is admittedly rather fuzzy. Several theorists have questioned the extent to which the deontological account of expressive harm is in fact truly deontological.³⁰ Sunstein also highlights their common ground, explaining that 'good expressivists' ought to be at least somewhat consequentialist by grounding their concerns in the real-world effects of state action. Put differently, the potential (harmful) consequences of the state's expressive acts might be said to give expressivist arguments their 'bite'. Likewise, 'good consequentialists' are also expressivists, given the impossibility of judging the consequences of a legal rule without resort to expressive norms.³¹ Where the two positions converge is in the acknowledgement that the messages sent by state action can cause harm that is distinct from the other tangible deprivations or harms that may result from it.

²⁷ Anderson and Pildes (n12) 1530-31; Blackburn, 'Group Minds and Expressive Harm' (2001) 60 *MdLawRev* 467, 470.

²⁸ Lessig (n20); Sunstein (n4) 2045-48; Adler, 'Expressive Theories of Law' (2000) 148 *UPaLRev* 1363, 1376; McAdams, 'A Focal Point Theory of Expressive Law' (2000) 86 *VaLRev* 1649, 1650-51. For an overview of the consequentialist approach to legal expressivism, see Edwards (n14) 2-7.

²⁹ Sunstein (n4) 2044. The expressive power of anti-discrimination laws, for instance, is often as or more powerful than its pragmatic, enforcement function ('If discriminators are ashamed of themselves, there is likely to be less discrimination': 2043).

³⁰ Hellman, 'Judging by Appearances' (2001) 60 *MdLRev* 653, 673-74; Smith, 'Expressivist Jurisprudence and the Depletion of Meaning' (2001) 60 *MdLRev* 506, 522; Godsil, 'Expressivism, Empathy and Equality' (2003) 36 *UMichJLReform* 247, 275 (n137); Moreau, 'In Defense of a Liberty-Based Account of Discrimination' in Moreau and Hellman (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 71, 84 ['Liberty']. Anderson and Pildes (n12) retort that 'expressive theories...do not deny that the consequences matter. Rather, they tell us why the consequences matter, and which consequences matter' (1514; see also 1531). Theirs is not a theory of 'vulgar deontology,' which would examine a law's purpose without any consideration of its effects (1541-42).

³¹ Sunstein (n4) 2047-48. Blackburn (n27) suggests that deontological expressivists embrace a form of *indirect* consequentialism: certain acts are apt to cause harm and are therefore prohibited even if that particular harm has not occurred: 489.

6.3 The egalitarian dimension of law's recognition of expressive harm

The concept of expressive harm can serve as a powerful vector for equality and social justice, by expanding traditional notions of harm to account for intangible harms to society's status order. Judicial recognition of expressive harm in the service of equality is not without precedent. Canadian courts have been willing to limit state action on the grounds that it sends a harmful message impairing the status of vulnerable groups in society, without requiring evidence of further material harms.

Not surprisingly, this is most apparent in the courts' adjudication of the equality guarantee under section 15 of the Charter. For instance, holding in *Vriend v Alberta* that the province could not lawfully exclude sexual orientation from the list of prohibited grounds of discrimination in its human rights code, the Supreme Court pointed to the 'strong and sinister message' sent by that exclusion.³² It maintained that even if the omission of sexual orientation would not lead to an increased incidence of overt discrimination against gay and lesbian individuals, it would still constitute a violation of the Charter's equality guarantee because of its implicit statement that LGBTQ+ people do not deserve the same level of protection as others.³³ Likewise, in the courts' marriage equality cases, expressive harm was considered no less constitutionally cognizable than concrete, material harm. In both *Halpern v Canada*³⁴ and the minority judgment in *Egan v Canada*,³⁵ the courts were swayed by the harmful social meaning of excluding gay and lesbian couples from the institution of marriage and its attendant benefits.³⁶ As Moreau notes, by the time *Halpern* was decided most material benefits had been equalised between gay and straight couples, and so the court was engaged in a largely expressivist exercise of deciding whether it was constitutional to reserve the symbolic importance of the institution of marriage to straight couples.³⁷ These cases conspicuously addressed the expressive harms of state action where the material disadvantages it caused were slight. Although prior iterations of the s15 test had brought expressive concerns to the forefront through their unerring focus on dignity (an inherently expressive norm),³⁸ Denise

³² [1998] 1 SCR 493 [100] (Cory and Iacobucci JJ) [*Vriend*].

³³ *ibid* [100]-[101].

³⁴ (2003), 65 OR (3d) 161 (CA) [5], [94].

³⁵ 1995 2 SCR 513. Denying same-sex couples access to spousal benefits caused stigmatic harm 'even though no economic loss is occasioned' (594-95, Cory J); the exclusion carried a harmful 'metamessage' that same-sex relationships are 'less worthy of respect, concern and consideration (567, L'Heureux-Dubé J).

³⁶ See also *Canada v Moore*, [1998] 4 FC 585 [61], [68] ('separate but equal' regime for spousal benefits was discriminatory despite equal allocation of material benefits).

³⁷ Moreau, 'Liberty' (n30) 77-90. For a pre-*Halpern* discussion of similar themes see MacDougall, 'The Celebration of Same-Sex Marriage' (2001) 32 OttawaLRev 235.

³⁸ *Law v Canada* (n19) [47]-[54]; Réaume, 'Discrimination and Dignity' (2003) 63 LaLRev 645, 669 (s15 turned not on the 'actual, concrete effect of the legislation ... not the dollars and cents or the

Réaume maintains that the courts did not jettison those normative commitments when they moved away from dignity to ask, instead, whether the impugned unequal treatment is rooted in prejudice or stereotyping.³⁹ Section 15's grounding in substantive equality continues to provide discursive space for expressive harm.

Canadian courts have also upheld laws against hate speech on the grounds of preventing expressive harm (again for reasons related to equality). The harms of hate speech are said to take two forms: direct harm to individuals in the target group (eg fear, humiliation) and indirect harm to society from designating that group as inferior.⁴⁰ The courts have confirmed that hate speech bans can be justified in order to prevent this second category of social harm.⁴¹ In *Whatcott*, the Supreme Court adopted a definition of hate speech that maps nicely onto Anderson and Pildes' theory of expressive harm. Rothstein J held that the harm targeted by hate speech bans transcends both the feelings or intent of the publisher and any personal offense or emotional distress to the target; it inheres, rather, in how the expression affects a group's standing in society.⁴² These cases demonstrate that courts will push back against narrow, individualistic conceptions of harm to protect against harms that transcend the individual and that relate more to social relationships and hierarchies.

I defend the courts' recognition of expressive harm as a valid form of injury in Canadian constitutional law with reference to two existing theories of equality and social justice. Expressive acts can cause harm, first, by unjustly positioning some people or groups as subordinate under Moreau's theory of social subordination, and second, by impeding their ability to participate fully in public life as equals through the act of misrecognition, under Fraser's account of social justice. Their work helps to explain why we should care about the

specific opportunity, benefit or service denied' but on what the state action expressed); Levy, 'Expressive Harms and the Strands of Charter Equality' (2002-03) 40 *AltaLRev* 393; Khaitan (n19) 7.
³⁹ Réaume, 'Turning Feminist Judgments into Jurisprudence' (2018) 8(9) *Oñati Socio-legal Series* 1307, 1318-19. See eg *R v Kapp*, 2008 SCC 41 [21]; *Withler v Canada*, 2011 SCC 12 [39], [71]; *Quebec (AG) v A*, 2013 SCC 5.

⁴⁰ Moon, *Putting Faith in Hate* (CUP 2018) 36. This categorization reflects the typology adopted by Dickson CJ in *R v Keegstra*, [1990] 3 SCR 697 [66], endorsed in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [73]-[74].

⁴¹ *Whatcott* (n41) [71] (hate speech ban serves to protect against expression that would 'delegitimize group members in the eyes of the majority'), [74]-[75]; *Keegstra* (n41) [46]-[47]; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 (though Dickson CJ focused more on the possibility of civil conflict and overt acts of discrimination).

⁴² *Whatcott* (n41) [43], [47], [71]-[75], [79]-[83], [89]-[90]. 'Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech' [82]. (In this respect, Rothstein J appears to channel Waldron's dignity-based defence of hate speech laws: Waldron, n26). Noting both the difficulty of proving causation in respect of such harm and the seriousness of the harm suffered by vulnerable groups, the court held that it was sufficient for the government to show that it acted on a 'reasonable apprehension of societal harm': *Whatcott* (n41) [129]-[135], citing *Keegstra* (n41); *R v Butler*, [1992] 1 SCR 452; *Thomson Newspapers Co v Canada*, [1998] 1 SCR 877.

harm in state messages: quite simply, because we care about how expressive acts affect people. They can change the way members of a social group are viewed in society, positioning them as subordinate to others or as less deserving of the state's attention. I pull together a small sample of Moreau and Fraser's work to defend the notion that expressive harm is an injury worthy of recognition in law because of its effect on what I refer to as people's *status equality*.

6.3.1 Sophia Moreau on social subordination

Although she maintains that the expressivist position cannot fully account for all the harms associated with discrimination,⁴³ Moreau explains that the expressivist position explored above captures some of what we know intuitively to be wrong about discrimination. The real harm in a discriminatory act often stems from what the act expresses about a particular group, from its denial of their equal standing and worth in society.⁴⁴ This does not depend on the intention of the agent who discriminates; when wheelchair access is only granted at the back of a building, for instance, it expresses a harmful message about people with disabilities that persists regardless of the agent's views about people with disabilities.⁴⁵

Moreau's work is useful because she provides a more precise account of what it means to fail to recognize someone's equal standing.⁴⁶ She does this by rooting her theory in the concept of subordination, which is 'the state of affairs in which one social group occupies a standing in society that is lower than that of other social groups'.⁴⁷ Moreau understands subordination as a social phenomenon that is linked to existing power imbalances between social groups and that is implicated when social practices, institutions and structures serve to prop up such divisions.⁴⁸ The structures that contribute to subordination are enabled, sustained and rationalised in part through stereotypes, which ascribe members of social groups with particular dispositions or abilities by virtue of their possessing a singular unifying trait – such

⁴³ Moreau, 'Liberty' (n30) 83; Moreau, 'Discrimination and Subordination' [DRAFT] in *Faces of Inequality* (OUP forthcoming) 5-8 ['Subordination']. All drafts cited with permission.

⁴⁴ Moreau, 'Equality and Discrimination' [DRAFT] in Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (CUP forthcoming) 5, 9-10 ['Equality']; Moreau, 'Subordination' (n43) 6-8.

⁴⁵ Moreau, 'Equality' (n44): 'It expresses certain messages: that requiring people with disabilities to take extra time to go around the back of the building is not an undue imposition on them because they are less productive than the rest of us; that we would really rather not clutter our grand entrances with the physical structures necessary to accommodate them, and that it is fine to prioritize aesthetics over the needs of this group; that people with disabilities are, quite literally, invisible' (5).

⁴⁶ Moreau, 'Subordination' (n43) 6.

⁴⁷ *ibid* 10. Her theory of discrimination is pluralist; discrimination is also wrong because of its denial of people's deliberative freedom and its failure to redistribute goods and opportunities to those who are worse off. I focus on social subordination as I believe it provides the most conceptual space for notions of expressive harm within her analysis.

⁴⁸ Moreau provides the term 'structural accommodations' for those 'apparently neutral policies, practices, and physical structures that privilege the interests of the dominant group, while overlooking those of the subordinate group' ('Subordination', n43, 13-16).

as being Muslim, or female.⁴⁹ These map onto and sustain existing attributions of positive traits to more powerful groups in society, and negative traits to subordinated groups. Discriminatory acts also subordinate others by marking out certain social groups as less worthy, by ‘stigmatiz[ing] them in the literal sense of placing a mark on them that ranks them as inferior’.⁵⁰ Racially segregated public services, for instance, proclaim those subject to them as inferior and express lesser consideration toward those groups or, in cases of indirect discrimination, render them invisible.⁵¹ Through her account of subordination, Moreau recognises that expressive acts can cause harm by acting in intangible ways upon society’s social ordering.

6.3.2 Nancy Fraser on misrecognition

Nancy Fraser’s theory of social justice also accounts for the possibility of expressive acts to harm people’s status equality, which she defends through her conception of recognition.⁵² ‘Recognition’ has become, for better or for worse,⁵³ a buzzword in liberal, multicultural discourse.⁵⁴ Traditional accounts of recognition, such as Charles Taylor’s, focus on the individual’s experience of a distorted sense of self arising from the denial of recognition.⁵⁵ Fraser diverges from this approach in that she views recognition not in terms of protecting a group’s claim to cultural identity or valorising a person’s self-esteem, but as a matter of social status.⁵⁶ Institutional or social arrangements that express a lack of concern or respect for a person’s place in society can lead to status-based harms of misrecognition, such as stigmatisation, social exclusion, and cultural devaluation. Laws restricting marriage to straight couples, policing practices that deploy racial profiling, and social welfare policies that

⁴⁹ Moreau, ‘Subordination’ (n43) 12.

⁵⁰ *ibid* 20.

⁵¹ *ibid* 22-25.

⁵² Fraser argues that people’s ability to participate in society as equals requires both the redistribution of material resources (redistribution) and the institutional valuing of people as equally deserving of respect (recognition): ‘Social Justice in an Age of Identity Politics’ in Fraser and Honneth, *Redistribution or Recognition?* (Verso 2003) 7, 11-26 [‘Social Justice’]; Fraser, ‘Recognition Without Ethics?’ in McKinnon and Castiglione (eds), *The Culture of Toleration in Diverse Societies* (ManUPress 2003) 86, 94-95 [‘Ethics’]. Moreau’s pluralist theory of discrimination also accounts for both the ‘unfair distribution of goods’ and ‘unequal social standing’ (‘Equality’, n44, 12).

⁵³ See Coulthard’s critique of Fraser for assuming that the settler state forms the baseline to which oppressed groups should be joined, rather than questioning the legitimacy of that framework: Coulthard, *Red Skin, White Masks* (UMP 2014) 36-37. This is a valid critique; for the purposes of this chapter, however, what is important is Fraser’s understanding of the *nature* of harms of misrecognition.

⁵⁴ Fraser, ‘Social Justice’ (n52) 1.

⁵⁵ Taylor, ‘The Politics of Recognition’ in Gutmann (ed), *Multiculturalism* (Princeton 1994) 25, 38-39; Honneth, ‘Redistribution as Recognition’ in Fraser and Honneth, *Redistribution* (n52) 110, 150-53; Koppelman ‘Commentary’ (n17) 781.

⁵⁶ Fraser, ‘Social Justice’ (n52) 29-33. Fraser’s rejection of the ‘psychologizing’ aspect of recognition theory ‘risks leaving an important contributing dynamic to identity-related forms of domination unchecked’ (Coulthard, n53, 37), though it does not necessarily follow that a *judicial* conception of expressive harm needs to account for these harms.

penalise single mothers can cause harms of misrecognition by constituting people in unjust hierarchies: ‘straight is normal, gay is perverse; “male-headed households” are proper, “female-headed households” are not; “whites” are law-abiding, “blacks” are dangerous’.⁵⁷ All of these harms of misrecognition derive from and exacerbate status subordination, echoing Moreau.⁵⁸

Fraser’s focus on status firmly roots such harms in the social order, rather than making them contingent on ‘psychological fact’: institutional norms that impair recognition are ‘morally indefensible whether or not they distort the subjectivity of the oppressed’.⁵⁹ In line with Moreau and legal expressivists such as Anderson and Pildes, she maintains that the ‘wrong’ in misrecognition does not depend on how the person feels or what was intended, but on how it structures and influences social relationships. Fraser’s work situates expressive harm within an overarching theory of justice; a state’s failure to attend to expressive harm can thus constitute an injustice.

Overall, the work of Moreau and Fraser demonstrates that the concept of expressive harm is embedded in social relations. We already know that the expression of words and ideas can harm individuals. Feminist and critical race theorists have amply demonstrated the extent to which words can inflict psychological distress or trauma; they can act on people’s lives in tangible ways, limiting their freedom and constraining the course of their lives.⁶⁰ To paraphrase Catharine MacKinnon, words do more than simply express ideas: speech can act, and acts can speak.⁶¹ The concept of expressive harm that I interrogate in this chapter, however, is not confined to the individuals affected.⁶² Expressive acts can constitute the social world in unjust hierarchies and mark certain people out as ‘other’ or render them invisible, positioning the state and its citizens according to particular divisions of power. As Moreau and Fraser explain in different ways, the impact of this social ordering is to deprive people in certain groups of the ability to participate fully and freely in society. It is this particularly social character of expressive harm that makes it such a powerful conceptual vehicle for understanding what is at stake in the intersection of law and religion.

⁵⁷ Fraser, ‘Social Justice’ (n52) 30.

⁵⁸ *ibid* 23.

⁵⁹ *ibid* 32 (emphasis removed).

⁶⁰ See eg Lawrence, ‘If He Hollers Let Him Go’ (1990) DukeLJ 431; Matsuda, ‘Public Response to Racist Speech’ in Matsuda, Lawrence, Delgado and Crenshaw (eds), *Words that Wound* (Westview 1993) 17; MacKinnon, *Only Words* (HUP 1993).

⁶¹ MacKinnon (n60) 30.

⁶² Pildes (n12) writes: ‘[e]xpressive harms are therefore social rather than individual. Their primary effect is not the tangible burdens they impose on particular individuals but the way in which they undermine collective understandings’ (755).

6.4 Expressive harm in the constitutional adjudication of religious freedom

In this section I focus on how the egalitarian promise of expressive harm is manifest in the Canadian constitutional s2(a) religion cases. This inquiry reveals the ways in which the religion cases are woven through with expressive concerns about status equality and social divisions. Themes of expressive harm and status equality are most prevalent in two groups of cases: those concerning state neutrality, and those in which religious beliefs present a challenge to the equality rights of LGBTQ+ people. In these cases, courts are often as concerned with the expressive dimension of state action as they are with its material effects. This judicial attention to expressive harm is amply justified by the need for courts to attend to *all* relevant harms in the s2(a) analysis, particularly when state action raises equality concerns.

6.4.1 State religious neutrality

A discursive thread running through the cases and theory on the state's duty of religious neutrality is the need to ensure that the messages sent by the state about religion do not impair people's status equality. Cécile Laborde defends an expressivist understanding of the 'wrongs' of state religious establishment on those grounds. She explains that so long as religion remains a salient marker of social division and domination in a given society, it is wrong for the state to symbolically endorse one religious group over others.⁶³ Doing so 'communicates that religious identity is a component of civic identity – of what it means to be a citizen of that state – and thereby denies civic status to those who do not endorse that identity, who are then treated as second-class citizens'.⁶⁴ On this account, the expressive dimension of the state's actions matters just as much as the actual institutional arrangements in place when it comes to protecting people's civic equality.

The approach adopted by US courts in interpreting the establishment clause of the First Amendment reflects this conviction. It operates on the principle that 'when the government lends its imprimatur to a particular religion, that impairs the citizenship standing of others'.⁶⁵ Although the constitutional protection for religious freedom in the US differs markedly from that in Canada both in theory and doctrine, the American establishment clause jurisprudence is instructive in its approach to expressive harm and has spawned many of the

⁶³ Laborde, *Liberalism's Religion* (HUP 2017) 132-43.

⁶⁴ *ibid* 135. Laborde seeks to 'disaggregate' religion into those aspects that trouble the liberal democratic state; as such, she does not view *religious* establishment as uniquely problematic. Expressive acts that signal the state's endorsement of other social identities such as race can also 'affirm and consolidate boundaries between dominant and dominated groups' and are equally wrong (137). This impact on civic equality is one of the three harms of establishment that she identifies, the other two being the exclusion from democratic deliberation when religious reasons are used to defend laws, and the state's failure to treat citizens as self-determining agents: 113-159.

⁶⁵ Tebbe, *Religious Freedom in an Egalitarian Age* (HUP 2017) 99.

critiques that I explore in the second part of this chapter. The establishment clause forbids government from making any ‘law respecting an establishment of religion’ and is popularly known as the constitutional provision that entrenches a ‘wall of separation’ between church and state.⁶⁶ Many alleged breaches of the establishment clause pertain to the material impact of state support for religion on social benefits and services, such as state funding for religious schools. But others, such as those concerning public displays of religious iconography (state-sponsored Christmas tree displays,⁶⁷ nativity scenes,⁶⁸ or biblical monuments⁶⁹) are constitutionally suspect for their *expressive* effects. Justice O’Connor explained in *Lynch v Donnelly* that as the establishment clause ‘prohibit[s] government from making adherence to a religion relevant in any way to a person’s standing in the political community,’ the courts need to determine whether the display sends a message that the state favours a particular religion.⁷⁰ If the display sends a message to adherents that they are insiders and to non-adherents that they are outsiders, then it runs afoul of the state’s duty of non-endorsement.⁷¹ Justice O’Connor’s development of the ‘endorsement test’ linked the harms of state endorsement of religion to people’s social status and their exclusion from mainstream society.

Notably, the endorsement test does not require empirical evidence of material harm resulting from the display. It operates on the basis that the message of endorsement can be harmful in and of itself apart from what the state intends to communicate, how it is actually perceived by citizens, or the existence of other material harms or coercive effects.⁷² The relevant question is how a ‘reasonable observer’ would interpret the display – what meaning she would attribute to it – when viewed in its historic and social context.⁷³

⁶⁶ ‘Congress shall make no law respecting an establishment of religion [establishment clause] or prohibiting the free exercise thereof [free exercise clause]’ (US Const amend I). The ‘wall of separation’ analogy is from Thomas Jefferson’s 1802 letter to the Danbury Baptist Association, cited in *Reynolds v United States*, 98 US 145, 164 (1878). On the uneasy relationship between the two clauses, see Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton 2005).

⁶⁷ *County of Allegheny v American Civil Liberties Union*, 492 US 573 (1989) [*Allegheny County*].

⁶⁸ *Lynch, Mayor of Pawtucket v Donnelly*, 465 US 668 (1983) [*Lynch*].

⁶⁹ *Van Orden v Perry*, 545 US 677 (2005); *McCreary County v ACLU of Kentucky*, 545 US 844 (2005).

⁷⁰ *Lynch* (n68) 687 (concurring).

⁷¹ *ibid* 688-692. See also *Allegheny County* (n67) 620 (Blackmun J); *Lee v Weisman*, 505 US 577 (1992), 604-09 (Blackmun J), 609-31 (Souter J); *McCreary County* (n69). On how the endorsement test is directed at expressive harm, see Anderson and Pildes (n12) 1545-51; Hellman, ‘Expressive’ (n17) 25-26.

⁷² See eg *Lynch* (n68) 690 (O’Connor J explained that ‘the message actually conveyed may be something not actually intended’); Hill, ‘Putting Religious Symbolism in Context’ (2005) *MichLRev* 491, 502-06; Pildes (n12) 747-50.

⁷³ O’Connor J in *Lynch* (n70) spoke of the display’s ‘objective meaning’ (690), later refined as the perspective of a ‘reasonable observer’ in *Allegheny County* (n67) 620 (Blackmun J), 631 (O’Connor J). See also *Capital Square Review and Advisory Board v Pinette*, 515 US 753 (1995); *Elk Grove Unified School District v Newdow* 542 US 1 (2004), 35; *Salazar v Buono*, 559 US 700 (2010). I return to the ‘reasonable observer’ in the second part of this chapter.

Through these cases, expressive harm has become a viable constitutional concept used to police the boundaries of state support for religion. The harm addressed through the endorsement test could be described as the state's 'disparagement' of non-adherents,⁷⁴ or as 'dignitary affronts in the symbolic realm'.⁷⁵ However understood, the locus of the harm that concerns the courts is in society's status order. Although the endorsement test is currently on shaky ground, with conservative judges tending to view the harm of state endorsement in terms of its coercive impact on individuals,⁷⁶ American courts remain willing to impose constitutional limits on state religious activity because of its expressive meaning.

Canadian courts have shown a similar, though more muted, concern to guard against the message of exclusion in their judgments on the state's duty of neutrality under s2(a). State neutrality has emerged as one of the guiding principles in Canadian religious freedom jurisprudence, serving as 'the conceptual touchstone for the modern secular state'.⁷⁷ The duty of state neutrality is often viewed through the lens of freedom and autonomy. On this account, state neutrality demands that the state take a 'hands-off' approach to religious matters to refrain from coercing its citizens on religious matters.⁷⁸ However, as noted in the previous chapter, Canadian courts have shown an ascending concern with the egalitarian dimension of religious freedom.⁷⁹ In the context of state neutrality, this has materialized in the requirement that the state adopt a posture of even-handedness between religions (and between religion and non-religion). Much like the American endorsement test, this doctrinal move reflects the idea

⁷⁴ Eisgruber and Sager (n26) 126 (the 'special charge or valence' associated with state endorsements of religion serves to mark people as insiders or outsiders of the political community).

⁷⁵ Nussbaum, *Liberty of Conscience* (Basic Books 2010) 21; see also 225-32, 252-65; Tebbe (n65) (constitutional limits on what the state can 'say' are largely in place to protect equal status of all citizens before their government: 100-01).

⁷⁶ Nussbaum (n75) 265-72; Schragger, 'Unconstitutional Government Speech' (2019) 56 *UVaPubL& LegTheory Series*, 21-24. See *Town of Greece v Galloway*, 134 S Ct 1811 (2014) (majority upheld practice of reciting Christian prayers in town council meetings). Although it does not signal a total rejection of the endorsement test (it was decided on other grounds), only the dissenting justices were concerned about the potential violation of 'the norm of religious equality' (1841, 1849, Kagan J). See also *American Legion v American Humanist Assoc*, 588 US __ (2019) (Latin cross on public land does not violate establishment clause; presumption of constitutionality for long-standing religious monuments on public property).

⁷⁷ Berger, 'Religious Diversity, Education, and the "Crisis" in State Neutrality' (2014) 29(1) *CJLS* 103, 117.

⁷⁸ *R v Big M Drug Mart*, [1985] 1 SCR 295 [95], [121]-[124] (Dickson CJ); Webber, 'The Irreducibly Religious Content of Freedom of Religion' in Eisenberg (ed), *Diversity and Equality* (UBC 2006) 178, 179-81; Berger, (n10) 78-91. See also text to n19-n24 in ch3 and text to n19-n41 in ch5 where I discuss autonomy in s2(a) cases.

⁷⁹ See eg *SL v Commission scolaire des Chênes*, 2012 SCC 7 [17], [21] (Deschamps J); *Christ the Teacher Roman Catholic Separate School Division v Good Spirit School Division*, 2012 SKCA 99 [420]-[421]; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [64]-[88] (Gascon J). Claimants in s2(a) cases typically make concurrent s15 claims, though courts rarely go on to consider the s15 claim.

that the perceived promotion of a particular faith risks sending a harmful message about the unequal worth and civic standing of non-adherents.⁸⁰

The interplay between expressive harm and equality in state neutrality decisions is clear in the Supreme Court's recent decision on the constitutionality of municipal prayers. In *Mouvement laïque québécois v Saguenay (City)*, the court held that the recitation of a non-denominational prayer before city council meetings amounted to the state professing a belief in and preference for one religion to the exclusion of others, in violation of its duty of neutrality.⁸¹ Gascon J explained that when the state aligns itself with a particular religious belief, it is doing more than just stating an opinion on religious matters – rather, '[i]t is creating a hierarchy of beliefs and casting doubt on the value of those it does not share'.⁸² This amounts to a denial of the equal worth of non-adherents and a breach of the state's duty to promote multiculturalism, equality, and full participation in public life regardless of one's religion.⁸³ Gascon J emphasised repeatedly that the state is forbidden from 'professing' a faith; it cannot engage in practices or pass laws that proclaim it to be on the side of one religion over others. But what does it mean for the state to 'profess' a religious belief? This is all about messages and symbolism: the court was concerned about the state being perceived to have a preference for one religion, whatever the material consequences of that endorsement, because of what that preferential treatment might be heard to say about people's status equality in Canadian society. Thus the courts are willing to curb state practices for expressive reasons alone, when there are few if any tangible or material consequences of the impugned state action.

⁸⁰ Moon, 'Liberty, Neutrality and Inclusion' (2003) 41 BrandeisLJ 563 ['Liberty']; Moon, 'Government Support for Religious Practice' in Moon, *Law and Religious Pluralism in Canada* (UBC 2008) 217, 217 and 231-32; Webber, 'Understanding the Religion in Freedom of Religion' in Cane, Evans, and Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008) 26, 30; Moon, *Freedom of Conscience and Religion* (Irwin 2014) 18-24, 27-30 [*Freedom*]; Berger, *LR* (n10) 85-86; Moon, 'Neutrality and Prayers' (2015) 4 OJLR 512, 512-14.

⁸¹ *Mouvement laïque* (n79) [113], [118], [120], [137] (Gascon J).

⁸² *ibid* [73].

⁸³ *ibid* [74]-[76]. See also *Freitag v Penetanguishene (Town)* (1999), 47 OR (3d) 301 (CA), in which a town council's practice of opening meetings with the Lord's Prayer was declared unconstitutional on largely the same grounds as in *Mouvement laïque*: the prayer was intended to 'impose a specifically Christian moral tone' on meetings and had the effect of singling out and stigmatising the appellant ([24]; see also [24]-[25], [36]-[40]). The court was concerned with what the practice expressed or symbolized: it was unjustified because it sent an 'unacceptable message of exclusion to nonadherents': Moon, *Freedom* (n80) 35; see also Moon, 'Christianity, Multiculturalism and National Identity' in Temperman (ed), *The Lautsi Papers* (Brill/Martinus-Nijhoff 2012) 249. Replacing the Lord's Prayer with a non-denominational prayer could not cure the constitutional defect: *Freitag v Penetanguishene (Town)*, 2013 HRTO 893; see also *Payette v Laval (Ville)*, 2006 QCTDP 17 (practice of reciting non-denominational prayer making reference to the Lord's grace and wisdom at council meeting was contrary to ss3 and 10 of the *Quebec Charter of Human Rights and Freedoms*); cf *Allen v Renfrew (County)* (2004), 69 OR (3d) 742 (SupCtJ) [16]-[27] (adopted coercion-based test, held that nondenominational prayer did not contravene s2(a)).

Justice Gascon’s recognition that state neutrality requires a court to consider the expressive dimension of state action lies in stark contrast to the judgment it reversed from the Quebec Court of Appeal. There, the court characterised the prayer as merely a manifestation of Quebec’s cultural heritage that caused no real harm to the complainant or other non-believers, or to people of different faiths; Gagnon JA wrote, for the majority, that ‘the demonstration of harm is non-existent’.⁸⁴ The complainant had not established that the prayer was anything more than an ‘irritant’⁸⁵ and, if any interference was caused, it was of a ‘trivial or insubstantial’ kind.⁸⁶ The Court of Appeal’s futile search for evidence of coercion was eclipsed by the Supreme Court’s subsequent emphasis on equality, and its willingness to find that a prayer can express an unconstitutional message, determined with reference to its potential impact on the socio-political order.

This approach is consistent with even the courts’ earliest treatment of state neutrality under the Charter. *R v Big M Drug Mart*, where the Supreme Court declared the federal government’s mandatory Sunday closing legislation to be unconstitutional, is better known for the court’s rhetorical positioning of s2(a) as a bulwark against individual coercion.⁸⁷ However, Dickson CJ was also clearly motivated by expressive concerns: that the state might be sending a prohibited, exclusionary message to non-Sunday Sabbath observers that they were less than full and equal citizens.⁸⁸ He suggested that the law ‘creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians’ and serves as a ‘subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture’.⁸⁹ Likewise, in the educational context, the courts did not require proof of material harm to students in order to conclude that the recitation of Christian prayers⁹⁰ or religious lessons⁹¹ violated the state’s duty of neutrality. They held that even though students could absent themselves from prayers and lessons, they risked being stigmatised and marked out as inferior to their Christian classmates if they did

⁸⁴ *Saguenay (ville de) c Mouvement laïque Québécois*, 2013 QCCA 936 [130]; see also [64]-[79], [98]-[107], rev’d *Mouvement laïque* (n79).

⁸⁵ *ibid* [132].

⁸⁶ *ibid* [115]; see also [116]-[127] on the negligible impact on the complainant of the religious symbols in the council’s meeting rooms. The court was divided as to this issue’s justiciability.

⁸⁷ *Big M* (n78), see eg [337]; Berger, *LR* (n10) 81-82.

⁸⁸ Moon, *Freedom* (n80) 18, 27-29.

⁸⁹ *Big M* (n78) [97] (emphasis added). But see *R v Edwards Books and Art*, [1986] 2 SCR 713, which upheld Ontario’s Sunday trading legislation. Though the Acts had similar material effects (preventing certain businesses from operating on Sundays), the court differentiated the legislation in *Edwards Books* by its secular purpose: 739-47. Whilst a law’s social meaning does not turn on legislative intent, that is not to say that purpose is irrelevant; blatantly sectarian legislation such as the *Lord’s Day Act* struck down in *Big M* is likely to have a particularly charged and divisive social meaning. Invidious purpose or motive is not *determinative* of meaning but is still relevant.

⁹⁰ *Zylberberg v Sudbury Board of Education*, (1988), 52 DLR (4th) 577 (Ont CA) [41].

⁹¹ *Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990), 71 OR (2d) 341 (CA).

so.⁹² In all the above cases, the actual coercive impact of the legislation or state practice was minimal, and there was no empirical evidence of impaired social or political participation arising from it. Arguably, and in light of the courts' statements on the 'message of exclusion,' the primary harm in the state neutrality cases is expressive.

Despite these compelling statements about expressive harms and status equality, themes of coercion continue to resurface in the jurisprudence. In *Mouvement laïque*, for instance, the court held that if the challenge is to state practice (as opposed to a legal rule), then the claimant must prove not only that the state imposed, favoured, or professed 'one belief to the exclusion of all others,' like it did in *Big M*, but also that the practice interfered with her religious freedom by impeding her ability to act on her convictions.⁹³ The court did not explain why this additional step was required in the case of state practice, and in fact there is little evidence for its usefulness. Moon, for instance, objects that when the state acts in a way that favours one religion, the differential treatment that results is necessarily 'objectionable, and harmful, regardless of the degree of offence or hurt experienced by the members of the excluded group'.⁹⁴

The individualized harm requirement for state practices may indicate that the court has not abandoned freedom from coercion as the primary value underpinning s2(a).⁹⁵ Indeed, there is a compelling argument that despite the courts' repeated references to equality and inclusion in state neutrality cases, the underlying fear is of individual coercion. In fact, Berger suggests that the courts' commitment to equality in the prayer cases above – as evidenced by the language of 'exclusionary messages' and stigmatisation – can be understood as simply another dimension of their overriding concern for individual autonomy.⁹⁶ He explains that when the law values equality *qua* religious identity, it is because of the importance it ascribes to the individual's ability to make autonomous choices about matters of fundamental importance to her: 'to send the message that someone is less worthy of regard on the basis of his or her religious identity is to fail to respect a choice particularly close to his or her autonomous self-definition'.⁹⁷ Berger's point is borne out by Justice Gascon's conclusion in *Mouvement laïque* that the state must preserve 'a neutral public space that is free of discrimination *and in which true freedom to believe or not to believe is enjoyed by everyone*

⁹² *Zylberberg* (n90) [38]-[50]; *Civil Liberties* (n91) [55]-[56], [61]-[69]. It should be noted, however, that the courts still emphasized the potential for harm to materialise in the form of peer pressure and coercion.

⁹³ *Mouvement laïque* (n79) [81]; see [80]-[88] more generally.

⁹⁴ Moon, 'Neutrality and Prayers' (n80) 518.

⁹⁵ *ibid.*

⁹⁶ Berger, *LR* (n10) 87-89.

⁹⁷ *ibid* 88.

equally, given that everyone is valued equally'.⁹⁸ Equality here is understood in terms of people's equal ability to make religious decisions without coercive interference by government.

This seems to undermine the case that the primary harm in state neutrality decisions is expressive – and yet, even coercion has an important expressive element. In his reformulation of the harm principle as underpinned by a normative commitment to autonomy, Joseph Raz explains that the wrongfulness of coercion can persist even in cases where it causes no tangible interference with a person's autonomy, no reduction of the options available to her.⁹⁹ He explains that the 'natural fact' that coercion *tends* to reduce a person's opportunities 'has become the basis of a social convention loading [acts of coercion] with ... symbolic meaning expressing disregard or even contempt for the coerced'.¹⁰⁰ Coercion's expressive or symbolic character 'transcends the severity of the actual consequences of these actions'.¹⁰¹ Thus coercion can be wrong because it expresses inappropriate disregard of the person coerced, regardless of whether it also restricts her choices.¹⁰²

Applying this logic to the state neutrality cases, then, it would barely matter whether the atheist city council member standing silently during prayers, or the observant Jewish shop owner made to close her doors to business on a Sunday rather than a Saturday, experience actual adverse consequences from their coerced obedience to Christian norms. The harm they suffer is expressive, as it stems from the message of disregard and domination conveyed by the impugned law or practice. The state's assumption that it is correct and proper for it to require such obedience is the source of the problem, not the material consequences of that obedience. What cases like *Mouvement laïque* might actually demonstrate by relying on the language of both equality and coercion is the delicate tension not between equality and coercion, as usually supposed, but between two dimensions of the phenomenon of coercion. The courts look for material coercive harms in the form of negative feelings (shame, anger) or changed behaviour (saying a prayer against one's will, deciding not to run for office), for instance, but still employ a broader view of coercion that sees (expressive) harm in the expected submission to coercive norms. This brings us back, full circle, to questions of equality – for it is the *unequal* infliction of the message sent by coercive acts that really grates. In the example I posit above, not everyone suffers the symbolic dominance of the state through coercive religious laws: it is the Jewish shop owner, or the atheist councillor. Given the

⁹⁸ *Mouvement laïque* (n79) [74].

⁹⁹ Raz, *The Morality of Freedom* (Clarendon 1988) 378.

¹⁰⁰ *ibid* 378; see also Stanton-Ife, 'The Limits of Law' (*The Stanford Encyclopedia of Philosophy*, Winter 2016) <<http://plato.stanford.edu/entries/law-limits/>> accessed 16.02.20.

¹⁰¹ Raz (n99) 378.

¹⁰² *ibid*.

salience of religious affiliation as a marker of social division,¹⁰³ the inconsistent application of these coercive norms inflicts a further harm on the groups subject to them. As such, whether it is understood in terms of the expressive effects of coercion or inequality, expressive harm serves as a vehicle by which courts are able to grasp at harms of status inequality through breaches of state neutrality.

None of the above is meant to suggest that expressive concerns are the only legitimate reason for curbing state religious establishment,¹⁰⁴ nor that every instance of state establishment inflicts expressive harm on non-adherents. To the contrary, not all forms of state establishment are illegitimate, even on an expressive test.¹⁰⁵ The presence of religious symbols in public spaces such as schools and city council buildings do not necessarily send a prohibited message of state endorsement of religion, and such a message would also not necessarily carry an exclusionary valence.¹⁰⁶ However, when courts are judging the legitimacy of perceived breaches of state neutrality they are right to not confine their analysis to material harms or effects and to consider, in addition, the expressive impacts on people's status equality. As with all harm judgments, discerning the risk of expressive harm is not an easy task. But the state's unequal treatment on the grounds of religion can just as easily be borne out through concrete actions (eg unequal distribution of resources) as through its expressive acts. Courts safeguarding the state's religious neutrality must be alert to the state's ability to exact these forms of expressive harm.

6.4.2 Religious beliefs in conflict with LGBTQ+ equality rights

There is a new species of dispute finding its way before the courts in Canada and throughout the western world: cases in which people do not want to be 'complicit' in third party conduct they perceive as sinful ['complicity claims']. In recent years these cases have tended to involve issues of sexual morality: claimants are using constitutional religious rights to challenge or seek exemptions from laws and policies extending equality protection on the grounds of sexual orientation,¹⁰⁷ Cases such as these tend to be discursively framed as a 'clash

¹⁰³ Laborde (n63) 132-43.

¹⁰⁴ See *ibid* 113-50; n(64) this chapter.

¹⁰⁵ May, 'Democratic Legitimacy, Legal Expressivism, and Religious Establishment' (2012) 15(2) *CritRevInt'l Soc & PolPhil* 219; Laborde (n63) 150-59.

¹⁰⁶ Hunter-Henin, 'Believing in Negotiation' in Guesnet, Laborde and Lee (eds), *Negotiating Religion* (Routledge 2017) 207.

¹⁰⁷ In Canada see eg *Ontario (Human Rights Commission) v Brockie*, (2002) 222 DLR (4th) 174; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3; *Eadie and Thomas v Riverbend Bed and Breakfast and others*, 2012 BCHRT 247; *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [CMDs]. In the UK see *Bull v Hall* [2013] UKSC 73; *Lee v Ashers Baking Company (Northern Ireland)* [2018] UKSC 49. American complicity cases include *Burwell v Hobby Lobby Stores*, 134 SCt 2751 (2014); *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US ___ (2018). At the ECtHR see most notably *Eweida & Others v United Kingdom*, [2013] ECHR 37. See also *Trinity Western University v College*

of rights’.¹⁰⁸ It is the material harms at stake in these disputes that tend to take centre stage, while the social meanings of the state’s accommodation of complicity claims ‘often recede from view’.¹⁰⁹ The fact that constitutional rights are engaged on both sides of these disputes, however, places an expressive harm analysis on shakier ground. It is one thing to limit *state* action on the grounds that it expresses something unconstitutional, as with laws against same-sex marriage or state endorsement of a particular faith, but it is quite another to limit an *individual’s* rights because of the expressive harm flowing from her exercise of that right.

In this section I examine, through an expressive lens, two Canadian cases where religious adherents sought the freedom to engage in practices or conduct that had an exclusionary effect on LGBTQ+ individuals. The first, *Marriage Commissioners Appointed Under the Marriage Act (Re)*, concerns the constitutionality of legislation that would have allowed public officials to refuse to conduct civil marriage or partnership ceremonies for same-sex couples.¹¹⁰ The second, *Trinity Western*, involves a private religious university that sought state approval for its proposed law faculty despite engaging in discriminatory practices.¹¹¹ Much like the s2(a) state neutrality cases considered above, these judgments reveal the courts’ underlying commitment to guard against expressive harms in the social order. The courts were rightly concerned about the harmful social meaning that could arise from the state’s decision to accommodate or grant complicity claims, above and beyond any threat of material injury to specific individuals.

6.4.2.1 Civil marriage commissioners, religion, and same-sex marriage

The Supreme Court of Canada confirmed in 2004 that religious officials are not required to conduct same-sex marriages against their religious beliefs.¹¹² This is not the case for *civil* marriage commissioners, who are government actors and can be made to solemnise same-sex marriages whatever their religious beliefs.¹¹³ I focus here on litigation arising in the

of Teachers, 2001 SCC 31 [*TWU (Teachers)*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*Trinity Western*]. While the TWU litigation does not, strictly speaking, involve complicity claims, it does see the claimants resisting the extension of LGBTQ+ equality norms to their religious community.

¹⁰⁸ Of course, the issue is more complex than this framing suggests and much is lost in failing to see them differently: Nedelsky and Hutchinson, ‘Clashes of Principle and the Possibility of Dialogue’ in Moon, *Pluralism* (n80) 41; Butler, ‘Sexual Politics, Torture, and Secular Time’ (2008) 59 *BritJSoc* 1.

¹⁰⁹ Nejaime and Seigel (n16) 2575.

¹¹⁰ *Marriage Commissioners* (n107).

¹¹¹ *Trinity Western* (n107), from BC, was heard alongside *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, which arose in Ontario. All references are to the BC decision.

¹¹² *Reference re Same-Sex Marriage*, 2004 SCC 79 [56]-[60]; *Civil Marriage Act* 2005, Preamble and s3.

¹¹³ Civil marriage commissioners are appointed by the Minister and perform a governmental role: *Marriage Commissioners* (n107) [128] (Smith JA); *Nichols v Saskatchewan Human Rights Commission*, 2009 SKQB 299 [42]-[55], [74].

province of Saskatchewan following the introduction of same-sex marriage. Some civil marriage commissioners simply resigned rather than conduct same-sex wedding ceremonies, while others filed complaints under the provincial human rights codes (all complaints were dismissed).¹¹⁴ Another human rights complaint was filed by a gay couple against a commissioner who had refused to officiate their marriage.¹¹⁵ The Court of Queen's Bench upheld the Tribunal's finding that the government was under no duty to accommodate the commissioners' religious beliefs about marriage. It did not matter that there were more than enough commissioners willing to solemnise same-sex marriages and that the complainant couple was 'able to receive a near seamless service',¹¹⁶ as the commissioners were subject to the Charter requirement to treat all people equally regardless of their sexual orientation.¹¹⁷ In response to these events, the province drafted legislation that would allow civil marriage commissioners to refuse to solemnise a marriage for religious reasons and sought an opinion on its constitutionality from the Court of Appeal.

The court declared the proposals unconstitutional.¹¹⁸ It noted the serious material harms that the legislation would inflict on gay and lesbian couples: first, they would experience the direct harm of being refused a public service on the basis of their sexual orientation.¹¹⁹ This would be 'genuinely offensive' and hurtful to gay and lesbian couples.¹²⁰ Second, the legislation could lead to greater numbers of commissioners refusing to solemnise same-sex marriages, creating practical burdens to gay and lesbian couples looking to marry, particularly in rural areas.¹²¹ In concurring reasons, Justice Smith also acknowledged the significant tangible harms that the legislation would cause, such as the 'potential for psychological harm and for inconvenience to individual same-sex couples'.¹²² In the marriage registration system in place in Saskatchewan, where there is a direct line of communication between prospective couples and the commissioners,¹²³ the proposed accommodations could

¹¹⁴ *Nichols v Saskatchewan* (2006), CHRR 06-887; *Bjerland v Saskatchewan* (2006), CHRR 06-888; *Goertzen v Saskatchewan* (2006), CHRR 06-889. Outside of Saskatchewan, see *Dichmont v Newfoundland and Labrador*, 2015 NLTD(G) 14 (Human Rights Commission failed to provide adequate reasons for decision to reject the complaint; given the *prima facie* case for religious discrimination, the Commission should have ordered an adjudication panel); *Kisilowsky v Manitoba*, 2016 MBQB 224, aff'd 2018 MBCA 10 (complaint dismissed). See the summary of related proceedings in *Marriage Commissioners* (n107) [11]-[15].

¹¹⁵ *Nichols* (n113).

¹¹⁶ *ibid* [38].

¹¹⁷ *ibid* [73]-[76].

¹¹⁸ *Marriage Commissioners* (n107).

¹¹⁹ *ibid* [38]-[39] (Richards JA).

¹²⁰ *ibid* [41], [95]-[96].

¹²¹ *ibid* [42]-[43].

¹²² *ibid* [106].

¹²³ *ibid* [8].

incur serious, concrete harms on gay and lesbian couples who would be denied equal access to a public service.

But the court also looked beyond the direct impact of service refusal on same-sex couples, to the expressive harm inhering in the state's decision to accommodate and what it would say about the (un)importance of LGBTQ+ equality. The majority held that the legislation would be a 'significant step backward' for gay and lesbian equality rights – 'a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions'.¹²⁴ The harm would be felt not just by LGBTQ+ people and their allies but by the general public, who would be 'negatively affected by the idea' that government employees were permitted to discriminate against gay and lesbian couples.¹²⁵ Smith JA, concurring, considered the expressive harms to be of primary importance in the case, citing the 'affront to dignity, and the perpetuation of social and political prejudice and negative stereo-typing'.¹²⁶ She maintained that these harms would persist even if the commissioners rarely resorted to the exemption, as the bare knowledge that the state had enacted legislation justifying discrimination would itself be 'an affront to the dignity and worth of homosexual individuals'.¹²⁷ Smith JA cautioned that granting public officials an exemption from anti-discrimination legislation was not only 'unprecedented' but also, citing *Vriend*, sent a 'strong and sinister message' about the value and worth of gay men and lesbians in Canadian society.¹²⁸ The court could not uphold a legal rule that would see the state entrenching the lesser status of gay and lesbian couples, even if it meant imposing limits on individual s2(a) rights.

One possibility mooted in the cases was a 'single entry-point system,' which was thought to avoid or mitigate some of the harms of service refusal associated with the direct-access system. Under a single entry-point system, couples would not have to contact marriage commissioners directly and risk being turned away on the basis of their sexual orientation but would, instead, contact a central office to be allocated a commissioner who had already consented to officiate same-sex marriages. The possibility of other institutional arrangements such as this led Richards JA to conclude that the proposed legislation was not minimally impairing of same-sex couples' rights.¹²⁹ Although the court emphasised that it was not pronouncing on the constitutionality of such a scheme, advocates cited in subsequent decisions

¹²⁴ *Marriage Commissioners* (n107) [45]; see also [94]-[97].

¹²⁵ *ibid* [96].

¹²⁶ *ibid* [107]; see also [108], [142].

¹²⁷ *ibid* [107]. This reasoning chimes with *Norris v Ireland* (n7).

¹²⁸ *Marriage Commissioners* (n107) [158].

¹²⁹ *ibid* [85]-[89].

appear to have seized on this idea as a sort of ‘middle ground’ between a system allowing individual conscience exemptions and one denying them completely.¹³⁰

In fact, the single entry-point system was the very system in place in the UK case of Ms Ladele, a marriage registrar who sought (and was refused) an accommodation from rules requiring all registrars to conduct civil partnership ceremonies for same-sex couples. What makes Ms Ladele’s case so compelling is that, under the UK system, she could have been accommodated ‘behind closed doors’ with no gay or lesbian couple suffering the indignity of being directly refused a service. And still, she lost her case.¹³¹ The absence of any risk of material harm to gay and lesbian couples – they would not be turned away and need not even know that an accommodation had taken place – suggests that the borough council and the courts were primarily concerned about the symbolic or expressive impact of granting the accommodation.¹³²

Indeed, the single entry-point system is hardly the panacea it is often taken for because even in this relatively closed system, expressive harms can still take root. As noted by Noa Mendelsohn Aviv, such a system is not insulated from public involvement: the government officials charged with operating such a unit would still be required to undertake tasks –even mundane tasks like data entry and form filling– that ‘facilitate the singling out of LGBTQ people for exclusion’.¹³³ In cases like Ms Ladele’s, the very fact that she challenged the borough’s refusal to accommodate her religious beliefs brought the issue into the public realm.¹³⁴ Whilst her case was winding its way through the tribunal and court system, the requested accommodation that formed the basis of the dispute could no longer be said to be operating entirely ‘behind closed doors.’ Moreover, the ostensibly harmless act of stating the couple’s genders to the central marriage unit would serve to mark out one’s sexual orientation

¹³⁰ *Dichmont* (n114) [96]-[100]; *Kisilowsky* (n114) [82]-[84].

¹³¹ *Islington LBC v Ladele*, [2010] 1 WLR 955 (Eng CA) (Ms Ladele’s article 9 right to religious freedom could not override the efforts of her employer, the borough council, to combat discrimination against LGBTQ+ individuals). Ms Ladele appealed the judgment to the ECtHR, which dismissed her claim, granting the state a wide margin of appreciation in its attempt to strike a balance between competing Convention rights: *Eweida* (n107).

¹³² Hunter-Henin, ‘Living Together in an Age of Religious Diversity’ (2015) 4 OJLR 94, 112; Smet, ‘Conscientious Objection to Same-sex Marriages’ (2016) 11 Rel&HR 114; Pearson, *Proportionality, Equality Laws, and Religion* (Routledge 2017) 92; McCrudden, ‘Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights’ in Mancini and Rosenfeld (eds), *The Conscience Wars* (CUP 2018) 414, 423, 455-57. Note that although there was no real risk of material harm to same-sex couples seeking service, Ms Ladele’s accommodation request had a negative material effect on her office colleagues; it caused scheduling difficulties and her gay and lesbian colleagues reported feeling victimized and upset by her position (*Eweida*, n107, para 26).

¹³³ Aviv, ‘(When) Can Religious Freedom Justify Discrimination’ (2014) 22(2) JL&Pol’y 613, 658-59.

¹³⁴ Smet (n132) 134 (‘it is difficult to keep these kinds of refusals hidden ... They are likely, sooner or later, to become public knowledge’); see also Wintemute, ‘Accommodating Religious Beliefs’ (2014) 77(2) MLR 223, 242.

as a morally relevant characteristic in a civil system of marriage that no longer draws legitimate distinctions on these grounds.¹³⁵

What if all these harms could be averted or substantially mitigated by – for instance – a fully automated marriage registration system? Such a system could be linked to government-issued identification containing a person’s gender, thus negating the harm to individuals in illegitimately making their gender relevant to their marriage ceremony; it could reduce or even eliminate the need for human involvement in coordinating the marriage registration system, so there would be little to no impact on government officials made to operate it.¹³⁶ But such a system could still cause problems of an expressive, or symbolic, nature. If the purpose of such an automated system were to facilitate gay and lesbian couples receiving a different (though not necessarily worse) service than straight couples, its introduction and use would send a message, again, that it is acceptable to distinguish between people on the basis of their sexual orientation in delivering the state’s marriage services. It risks legitimating the desire to refuse to serve gay and lesbian couples in the name of religious freedom. Even if the purpose of such a system were found to be unimpeachable, however, its effects would be vulnerable to challenge. Despite the lack of direct impact on individuals involved, the effect of this fictitious system would be to allow people’s religious beliefs about same-sex marriage to determine the content of their employment as government officials, and to create two ‘separate but equal’ systems of marriage registration: one for straight couples, and one for gay and lesbian couples. Both the perception and the fact of the state’s differential treatment could reinforce and enhance the stigmatisation and social subordination of LGBTQ+ people throughout society.

What we learn from *Marriage Commissioners* is that courts adjudicating s2(a) of the Charter will consider not only the material effects of the exercise of religious freedom, but also the expressive harm it could cause. A state committed to promoting status equality will seek to limit the ways in which state actions express inappropriate valuations of subordinate groups regardless of the other material harms that might result.

6.4.2.2 Religion and sexuality on a Christian campus: Trinity Western

Religion was relevant in *Marriage Commissioners* to the extent that it was the commissioners’ *religious* beliefs that motivated their refusal to officiate same-sex marriages. However, it was decided primarily on the basis of the countervailing equality rights of gay

¹³⁵ Aviv (n133) 658.

¹³⁶ For the sake of the thought experiment, let us assume that no person is required to create or maintain such a computer program.

and lesbian couples. It was section 15 of the Charter that provided the constitutional muscle: once a s15 violation was found, the s2(a) claim was correspondingly weakened.

In the legal disputes concerning Trinity Western University (TWU), however, religious freedom arguments have taken on greater heft. TWU is a private university in rural British Columbia, Canada, founded on evangelical Christian principles. Its mission is to ‘develop godly Christian leaders...with thoroughly Christian minds’.¹³⁷ Although the courts refrained from holding that the university itself is entitled to religious freedom,¹³⁸ the collective aspect of the university’s claim and the relative autonomy granted to religious entities in Canadian law¹³⁹ render the TWU cases particularly challenging and controversial.

The focus of the dispute in *Trinity Western* was TWU’s ‘community covenant agreement,’ which required all university students and staff to abstain from – among other acts – ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’.¹⁴⁰ At the time of the litigation, initial or minor violations of the agreement were addressed through dialogue, while persistent or serious violations led to formal disciplinary procedures including dismissal or expulsion. Commitment to the agreement was a condition of employment and attendance for staff and students respectively.¹⁴¹ As a private religious institution, TWU is entitled to set its own membership rules even if they run contrary to the anti-discrimination provisions in the British Columbia (BC) *Human Rights Act*,¹⁴² and it is not directly subject to the Charter.¹⁴³ However, problems with the covenant arose when TWU

¹³⁷ Trinity Western University, *About TWU* <<https://twu.ca/about/>> accessed 08.02.20. For more information about TWU’s statutory purpose see Chan, ‘Identifying the Institutional Religious Freedom Claimant’ (2017) 95 CanBarRev 1.

¹³⁸ *Trinity Western* (n107) [61]: ‘it is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(a) of the Charter’ (cf Rowe J, concurring: ‘I would decline to find that TWU, as an institution, possesses rights under s. 2(a)’). On the implications of religious institutions holding Charter rights, see Chan (n137).

¹³⁹ See eg Ogilvie, *Religious Institutions and the Law in Canada* (Carswell 1996); Moon, *Freedom* (n80) 139-60.

¹⁴⁰ Trinity Western University, *Community Covenant Agreement: Our Pledge to One Another* <https://www.twu.ca/sites/default/files/community_covenant_without_signature.pdf> s. 3 accessed 08.02.20 [*Covenant*]. Subsequent to the Supreme Court judgment, TWU declared the covenant to be optional: students and staff are now urged rather than ordered to sign the covenant (*Covenant*, s1; see also Trinity Western University, *Frequently Asked Questions* <<https://www.twu.ca/frequently-asked-questions>> accessed 08.02.20). The covenant still includes a ban on gay and lesbian sexual activity (s3). TWU states on its website that although the covenant has changed, nothing about its core values or ethos has changed – to the contrary: ‘this season has encouraged us towards a renewed commitment and intentionality on the part of staff and faculty’ (*Frequently Asked Questions*, *ibid*).

¹⁴¹ *Trinity Western* (n107) [7].

¹⁴² *Human Rights Code* 1996, ss 8, 13, 41. Section 41 is taken to allow religious organisations to restrict their membership to people who fulfil their religious criteria for membership: *Caldwell v Stewart*, [1984] 2 SCR 603 (predecessor provision in *Human Rights Code* allowed a Catholic school to refuse to hire a teacher who had violated Catholic dogma by marrying a divorced man in a civil ceremony); *TWU (Teachers)* (n107) [28], [35]; *Trinity Western* (n107) [335] (Côté and Brown JJ).

¹⁴³ Although the Charter does not apply to TWU, the court made its decisions with reference to Charter rights and values: *TWU (Teachers)* (n107) [25]-[26], [28], [60]-[61]; *Trinity Western* (n107) [41], [57]

sought accreditation of certain of its higher education programs by public bodies, namely the British Columbia College of Teachers in *TWU (Teachers)* and, most recently, provincial law societies in *Trinity Western*. The latter dispute began when TWU decided to establish a faculty of law on its BC campus. The Federation of Law Societies of Canada and BC's Minister of Advanced Education approved the law school in 2013, but the Law Society of BC denied approval following the result of a referendum of its members.¹⁴⁴ A law society's decision to 'approve' a law faculty entitles its graduates to be admitted to the bar; without approval, graduates are unable to practice law in the province. A decision not to accredit TWU's law school was also made by the law societies of Upper Canada (Ontario) and Nova Scotia.¹⁴⁵ The university sought judicial review of the law society decisions and was ultimately successful in Nova Scotia and BC but defeated in Ontario.¹⁴⁶ The appeals were heard together by the Supreme Court of Canada and a decision released in June 2018, upholding the decisions of the law societies of BC and Upper Canada to deny accreditation or approval of TWU's law school.

The majority in *Trinity Western* held that the law society was statutorily empowered to consider the community covenant's impact on the public interest in the course of its decision. The law society reasonably believed that the covenant would impose unfair burdens on LGBTQ+ people seeking to enter the legal profession, reduce diversity in the profession, and cause harm to LGBTQ+ people.¹⁴⁷ Although this decision violated the religious freedom rights of TWU members, the majority concluded that the law society proportionately balanced the competing Charter rights against its statutory mandate.¹⁴⁸ In concurring reasons, McLachlin CJ reached the same result as the majority but gave greater weight to the burdens imposed on TWU members' religious freedom.¹⁴⁹ Also concurring, Rowe J departed from his colleagues by finding that the law society's decision did not infringe the s2(a) rights of TWU members at all and therefore did not trigger the proportionality inquiry.¹⁵⁰ I consider the

(Abella J et al), [166]-[175] (Rowe J). Moreover, it was the decision of the Law Society not to accredit that was challenged in the courts rather than the covenant itself, which makes the Charter applicable.

¹⁴⁴ For an overview of the events leading up to the judicial review, see *Trinity Western* (n107) [11]-[22].

¹⁴⁵ Law societies in the provinces of Alberta, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon all voted to approve the law school.

¹⁴⁶ *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, aff'd 2016 BCCA 423; *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250, aff'd 2016 ONCA 518; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, aff'd 2016 NSCA 59.

¹⁴⁷ *Trinity Western* (n107) [29]-[47].

¹⁴⁸ *ibid* [79]-[105].

¹⁴⁹ *ibid* [129]-[134], [145].

¹⁵⁰ *ibid* [236]-[251]. Specifically, Rowe J wrote that the claimants failed to prove that they suffered a *non-trivial interference* under s2(a), because the relevant belief or practice involved the imposition of a coercive religious rule on third parties (TWU students who are not evangelical Christians and who do not share the beliefs expressed in the covenant).

dissenting reasons of Justices Brown and Côté separately below, along with the Supreme Court’s judgment concerning TWU’s teaching college from nearly two decades prior, in which it reached the opposite result.

In deciding for the law society, the majority justices and McLachlin CJ (concurring) were clearly alive to the social meaning of accreditation. Their decisions were underpinned by a concern about the harmful message sent by the TWU’s mandatory covenant, and whether the law society, the provincial government and, by implication, the courts, might become associated with that message.

Support for this reading can be found, first, in the majority and McLachlin CJ’s repeated warning that accreditation could be perceived as condoning discrimination against the LGBTQ+ community. McLachlin CJ questioned the extent of the material harms identified by the majority, such as reduced diversity in the bar and concrete harms to LGBTQ+ law students at TWU (given that few if any would choose to study there).¹⁵¹ Instead, she stated that the gravest harm in the case was the possibility that, by approving the law school in the face of the covenant, the law society would be condoning discrimination.¹⁵² She later clarified that it is not only the law society’s duty to ‘avoid condoning’ discrimination, but also to avoid ‘*even appearing to condone*’ discrimination.¹⁵³ As a result, it could not accredit a law school with a conduct requirement that ‘singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them’.¹⁵⁴ The majority echoed the Chief Justice’s concern, noting that the law society had properly understood its role of protecting the reputation of the administration of justice, ‘which necessarily includes upholding a positive public *perception* of the legal profession’.¹⁵⁵ Their emphasis on what the law society’s actions proclaimed to the public reflects their concern to avoid causing expressive harm through the state’s perceived endorsement of the values in the covenant.

The majority emphasized at the end of its judgment that the law society’s decision not to approve TWU’s law school ‘prevents *concrete*, not abstract harms to LGBTQ people and to the public in general’.¹⁵⁶ Rather than indicating a rejection of expressive harms, this statement acknowledges expressive harm as a ‘real’ harm, no less significant than the other

¹⁵¹ *Trinity Western* (n107) [136].

¹⁵² *ibid* [137]; see also [140], [146]-[150].

¹⁵³ *ibid* [149], emphasis added; see also [140]. The Ontario Court of Justice took a similar stance in its TWU judgment (n146) at [118]: ‘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’.

¹⁵⁴ *Trinity Western* (n107) [138].

¹⁵⁵ *ibid* [40].

¹⁵⁶ *ibid* [103].

material harms identified in the judgment, such as barriers to entry in the legal profession and psychological harm to LGBTQ+ people. Indeed, the majority was careful to emphasize that it was not justifying limits on the religious freedom of TWU members in the name of preventing mere “disagreement or discomfort” with views that some will find offensive’ but with preventing serious harm.¹⁵⁷ The suggestion throughout their judgment and that of McLachlin CJ was that those limits were justified at least in part by the law society’s legitimate refusal to send a message that it is acceptable to discriminate against LGBTQ+ people.

The result and reasoning in *Trinity Western* are consistent with the dissenting reasons of Justice L’Heureux-Dubé in the earlier *TWU (Teachers)* decision. There, the issue was whether the British Columbia College of Teachers (BCCT) could lawfully require TWU education students to complete a fifth qualifying year outside of TWU at a public university. Much like the law societies in the dispute over TWU’s law school, the BCCT had denied full accreditation of TWU’s education program on the grounds that it would be against the public interest given the school’s discriminatory covenant. A majority of the Supreme Court of Canada, however, held that refusal to accredit constituted an unjustified violation of the religious freedom of TWU members.¹⁵⁸ It maintained that without evidence of concrete harms caused by the covenant in the form of overt discriminatory conduct in the classroom, for instance, the BCCT could not legitimately deny accreditation.¹⁵⁹ In dissent, L’Heureux-Dubé J took a broader view of the social harm caused by the covenant. She explained that it was open to the BCCT to operate on the basis of a ‘reasonable apprehension of harm’ in public school classrooms, casting doubt on the majority’s insistence on proof of discriminatory conduct.¹⁶⁰ Moreover, she noted the ‘harmful messages’ sent by the covenant and its capacity to impair the social status of gay men and lesbians by perpetuating stereotypes and prejudice within the TWU community, in public school classrooms, and across society.¹⁶¹ She suggested that the fifth qualifying year at a public institution might, therefore, serve a symbolic function: it spoke to the problems of requiring students to adhere to a discriminatory code of practice and, one might add, conveyed the state’s refusal to condone the covenant’s values.¹⁶² As L’Heureux-Dubé J wrote, TWU is free to train its students to be teachers in a Christian environment without state interference, but once it seeks state accreditation the ‘public interest

¹⁵⁷ *Trinity Western* (n107) [101], [103].

¹⁵⁸ *TWU (Teachers)* (n107).

¹⁵⁹ *ibid* [32]-[38].

¹⁶⁰ *ibid* [96].

¹⁶¹ *ibid* [73]-[75], [87]-[88]. L’Heureux-Dubé J reiterated the concern of Rowles JA (dissenting) from the BCCA that “the ‘message’ sent by TWU’s Community Standards Contract not only to gays and lesbians but also to every member of the TWU Community is discriminatory in a way that may be viewed as contrary to the public interest’ [73].

¹⁶² *ibid* [78].

comes to the fore’ and public, secular concerns can act to restrict the religious rights of its members.¹⁶³

The two dissenting judges in *Trinity Western*, much like the majority justices in the earlier *TWU (Teachers)* case, denied that accreditation would cause any ‘legally cognizable injury’ capable of justifying limits on s2(a).¹⁶⁴ Justices Côté and Brown maintained that the law society and the courts should be guided by evidence of concrete harm, not by concerns about ‘public perception’.¹⁶⁵ But they were not completely opposed to judging ‘perceptions’, for at the same time, they wrote that the message sent by accreditation was one of tolerance for religious freedom and difference, rather than exclusion and disregard for LGBTQ+ people.¹⁶⁶ Moreover, they rejected the notion that the law society’s approval of the law school in the face of the mandatory covenant would make the state complicit in TWU’s stance on marriage and sexuality. They held that ‘the recognition of a private actor by the state cannot be construed as amounting to an endorsement of that actor’s religious beliefs or practices’.¹⁶⁷ The expressive effect of accreditation thus reframed, and failing to find any ‘specific evidence’ of concrete harm that fell within the law society’s mandate,¹⁶⁸ the dissenting judges were able to conclude that accreditation would cause no legally cognizable harm.

In both iterations of the TWU saga, the majority and dissenting justices adopted starkly different interpretations of the social meaning of accreditation. For one set of judges, accreditation expressed the state’s approval of the discriminatory views in the covenant. For the other, it signalled the state’s commitment to religious tolerance and diversity in public life. This schism maps onto the court’s divergent approaches to the constitutional status of expressive harm – implicit recognition of expressive harm on the part of the majority and concurring judges in *Trinity Western* and the dissent in *TWU (Teachers)*, as opposed to a narrower view of constitutionally cognizable harms as necessarily concrete, material, and

¹⁶³ *TWU (Teachers)* (n107) [106].

¹⁶⁴ *Trinity Western* (n107) [332]. The majority in *TWU (Teachers)* (ibid) held that BCCT’s refusal to accredit could only be justified with evidence of material harm, such as overt acts of discrimination committed by TWU graduates in the classroom: [19], [32]-[35], [38], [42]. The Supreme Court of Nova Scotia also concluded that accreditation would cause no real harm: *Trinity Western University v Nova Scotia Barristers’ Society*, 2015 NSSC 25 [251]-[264]; see also the BC Court of Appeal decision reversed in *Trinity Western* (2016 BCCA 423 [188]-[189]).

¹⁶⁵ *Trinity Western* (n107) [265]. ‘The “imperative of refusing to condone discrimination against LGBTQ people” ... is not a valid basis for the LSBC’s decision’ ([292]). Justices Côté and Brown held that the law society exceeded its statutory mandate by considering the public interest in its decision and should have focused exclusively on whether TWU law graduates would meet the required standards of competence to practice: see [267], [278]-[293], [321], [332], [341].

¹⁶⁶ *ibid* [269], [326]-[327].

¹⁶⁷ *ibid* [292]; see also [338]-[339].

¹⁶⁸ The dissenting judges did not consider whether gay and lesbian students at TWU would be harmed, as they held that discrimination within the educational setting was a matter for human rights tribunals, the executive, and the legislature, and thus fell outside the Law Society’s mandate: *ibid* [290]-[291].

supported with evidence adopted by the remaining judgments. These divergent conclusions betray different operative commitments underpinning the judges' assessments and intuitions of harm. An understanding of constitutionally cognizable harm as either narrow or broad, rigid or flexible, individual or social, expressive or material is a normative exercise influenced by a combination of cultural, experiential, political, and legal pre-commitments. *Trinity Western* suggests that judges who are willing to acknowledge the role of expressive harms in law will be better able to see the intangible, social harms of inequality. Likewise, and conversely, a judge who is inclined to adopt a robust, substantive conception of equality may be more willing to accept expressive harm as a 'real' harm in the first instance.

Recognition of expressive harm in the above cases was essential given the potential for the state's expressive acts – religious accommodation for marriage commissioners who object to same-sex marriage and the accreditation of a law school with discriminatory practices – to impair status equality for vulnerable groups in society. This invisible harm ripples out over society, causing diffuse and intangible shifts in how people perceive the target group, magnifying and entrenching existing social hierarchies. Failure to account for this harm in law is inconsistent with the state's constitutional commitment to equality and social justice. And yet, the dissenting judges in *Trinity Western* are right to note that expressive harm can cut both ways – that the failure of the state to carve out sufficient space for religious freedom can, in some instances, be seen as expressing condemnation of that group's beliefs and way of life.

6.5 Problems in the adjudication of expressive harm in the religion cases

The notion of expressive harm can be palatable to courts; when coupled with themes of equality, non-subordination and even coercion it can sit within the existing constraints of liberal constitutionalism, pushing up against them but not so hard that they collapse. However, as I have demonstrated throughout this thesis, notions of harm are frequently contested, as the concept of harm has no settled normative content. Given both the cultural predominance of the harm principle and the ease with which harm arguments can be made, we are often left in a position where claims of harm are simply met by further claims of opposing harms, with no clear way to decide between them.¹⁶⁹ Moreover, judicial recognition of flexible, impersonal conceptions of harm – which I advocate above – can usher in more precarious claims of harm that may have resonance for the man on Devlin's 'Clapham omnibus' but that test the boundaries of constitutional law's promotion of only fundamental, core, or constitutive values. All of these critiques are relevant to the study of harm in the s2(a) adjudication of religion

¹⁶⁹ Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *JCrimL&Criminology* 109.

more generally, but never more clearly than in the courts' judgments of expressive harm. Expressive harm presents several puzzles for the jurist, as, 'by its nature, an expressive harm is always "in the air"' and thus is inherently harder to ascertain and defend.¹⁷⁰

In this section I review four issues that arise when claims of expressive harm are made in the context of law's interaction with religion under the Charter. The first concerns the state's ability to cause expressive harm through its association with the expressive acts of third parties, as in *Trinity Western* and *Marriage Commissioners*. The second (related) problem relates to the indeterminate meaning of contentious expressive acts. The difficulty in attributing social meaning with any certainty may render the concept of expressive harm less useful in the law and religion context, where prevailing norms and commitments diverge so widely. Next, I examine how claims of expressive harm on one side of a dispute are likely to be matched by opposing claims on the other – this I refer to as the problem of 'warring harms.' Finally, I consider how the legal recognition of expressive harm will be influenced by society's pre-existing power structures and norms, opening the door to illegitimate and exclusionary conceptions of harm that undercut the goals of equality and social justice that lend such credence to the concept of expressive harm in the first instance. The particular conceptual expansiveness of expressive harm exacerbates the challenges that plague the adjudication of harm more generally.

These challenges demonstrate the difficulty of attempting to give substance to the concept of expressive harm in constitutional law. As the concept will continue to inform law and religion cases, it requires careful, considered and critical analysis. The critiques might be used to help develop a more resilient conception of expressive harm and a more robust account of its limits.

6.5.1 Who sends the message? The problem of state endorsement

The first problem with expressive harm concerns the difficulty in determining when the state should properly be understood to be the 'speaker' of a given message. Expressivist scholars maintain that state action should be scrutinised for inappropriate and potentially unconstitutional messages.¹⁷¹ But it is not always clear to what extent it is the *state* that is 'sending a message' when the expressive act originates in the actions or statements of third parties. Liberalism demands that the state carve out a space in which citizens have the freedom to pursue their own goals, which in a pluralist state will be conflicting or incommensurate. On this understanding, the liberal state surely cannot be held to endorse the conduct and beliefs

¹⁷⁰ Hellman, 'Expressive' (n17) 14.

¹⁷¹ Pildes (n12); Anderson and Pildes (n12); Hellman, 'Expressive' (n17).

of private individuals operating within that zone of freedom, simply by virtue of having secured for them that freedom. However, the boundary metaphor yet again fails to deliver certainty, for it is the state that enables and oversees the institutional structures within which such expressive freedoms can be exercised. Those structures are not neutral but, rather, exercise enormous normative power. So the question remains – when should the state’s role as intermediary in the expressive acts of private individuals open it up to charges that it is sending unconstitutional or impermissible messages?

It is helpful to start this discussion by stepping back and distinguishing between direct and indirect state expression. In some cases, it is the state’s own actions – its laws, policies, pronouncements and omissions – which are said to cause expressive harm by directly marking certain individuals or groups as less deserving of respect in society. Legal rules or state practices that favour or disparage particular religions may send constitutionally impermissible messages that full and equal membership in society is contingent on one’s religious affiliation.¹⁷² A government body’s decision to erect religious monuments or display religious symbols in public places may express preferential treatment of members of that religious group to the exclusion of others.¹⁷³ State rules restricting the wearing of religious clothing in citizenship ceremonies, courtrooms, or when accessing public services may communicate something about the dignity and worth of those religious believers subject to them.¹⁷⁴ In these cases the state is *directly* implicated in the production of expressive harm, its own ‘institutionalised patterns of valuation’ expressing a lack of concern or respect for a person’s social standing, reproducing and building on society’s hierarchies of belonging and power.¹⁷⁵

In other cases, the state may be only *indirectly* implicated in the expressive acts of others. If a private religious organisation sets up a nativity scene outside a government building, the government’s decision to either allow it to remain or to have it removed will situate the state as a relevant actor in the dispute, even though the display was initiated by a third party. Likewise, discriminatory acts of private individuals might implicate the state indirectly through the state’s reaction to that discrimination, as in *Trinity Western*. In cases such as these where there is greater conceptual distance between the state and the original action, the state’s

¹⁷² See eg *Big M* (n78); *Mouvement laïque* (n79).

¹⁷³ See eg *McCreary County* (n69); *Lautsi and others v Italy*, App no 30814/06 (ECtHR, 18 March 2011).

¹⁷⁴ See eg Bill C-6, *An Act to amend the Canada Elections Act (visual identification of voters)*, 2nd Sess, 39th Parl, 2007; *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156, aff’d 2015 FCA 194 (niqabs in citizenship ceremonies); *R v NS*, 2012 SCC 72 (niqabs in courtrooms); *Loi sur la laïcité de l’État* (n1) (ban on religious symbols for listed public officials).

¹⁷⁵ Fraser, ‘Ethics’ (n52) 89.

response to it becomes an expressive act in its own right, and it is that response which is relevant in constitutional law.

The court's willingness to ascribe indirect messages to the state is one of the main points of divergence between the majority and dissenting judgments in *Trinity Western*. As noted above, dissenting Justices Côte and Brown did not agree that the state would be indirectly complicit in discrimination against LGBTQ+ people if the law society were to accredit. They wrote that '[s]tate recognition of the rights of a private actor does not amount to an endorsement of that actor's beliefs' and that '[e]quating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors'.¹⁷⁶ They drew an analogy with the *Same-sex Marriage Reference*, in which the Supreme Court held that religious officials should not be forced to conduct same-sex marriage ceremonies against their will.¹⁷⁷ If such an accommodation could legitimately be made by a state that recognizes same-sex marriage without unlawfully implicating the state in the reasons behind the religious officials' refusal to officiate, they asked, then why must the state be held to convey or endorse the religious values in the covenant in this case?¹⁷⁸ *Trinity Western* squarely raises the question of the extent to which the state should be held accountable for the expressive acts of third parties. Is the law society, and thus the state, expressing the same message through accreditation that TWU is expressing through its discriminatory covenant? Moreover, when does state involvement turn into state endorsement?

Richard Posner refers to the types of state complicity/endorsement arguments we see in *Trinity Western* as 'extravagant' and 'border[ing] on the absurd'.¹⁷⁹ Posner was writing about a law that required American law schools to allow campus access to military recruiters if they wished to retain federal funding. Known as the 'Solomon Amendment,' this law was enacted in response to many law schools' refusal to allow the military to recruit on campus because of its discriminatory stance toward LGBTQ+ people.¹⁸⁰ One of the arguments against the law made by a coalition of Harvard professors before the Supreme Court was that allowing campus access to military recruiters would make the law faculty complicit in the military's discrimination, forcing them into the position of effectively telling LGBTQ+ students that

¹⁷⁶ *Trinity Western* (n107) [338]; see also [292], [339].

¹⁷⁷ *Same-Sex Marriage Reference* (n112) [56]-[60].

¹⁷⁸ *Trinity Western* (n107) [339]. The answer may have something to do with the extent of the alleged interference in each case. There is a particularly charged coerciveness in compelling a religious official to perform a religious ritual that runs contrary to the tenets of that religion, which is arguably not present when a religious university is denied a request for accreditation. This may account for their different social meaning.

¹⁷⁹ Posner, *How Judges Think* (HUP 2008) 226, 223.

¹⁸⁰ *ibid* 223.

they were not fit to serve in the armed forces because of their sexual orientation. In Posner's furious riposte to this argument he states:

No student could think that by virtue of Yale's bowing to the Solomon Amendment, the law school faculty was complicit with the military policy on homosexuals. If the Yale hospital treats a homophobe who has cancer, is the Yale medical faculty signaling its approval of homophobia? That is the logic of the brief.¹⁸¹

But is it necessarily so clear that students would not perceive complicity on the part of the law school – or that the public would not perceive complicity on the part of the state – when it fails to stand up against acts of discrimination?¹⁸² Posner offers no compelling argument to support his position other than analogies which may stretch the logic too far. It is no easier to simply say 'the state (or law school) would not be seen to be complicit' than to say that it would be.

The ultimate question should be (and is, in American law¹⁸³) whether the expressive act carries the 'imprimatur' of the state, indicating the state's approval or endorsement of that message. One might expect that the further removed the individual action is from organs of the state – both geographically¹⁸⁴ and conceptually¹⁸⁵ – the more tenuous the claim that the state should be held accountable for its role in condoning the expressive act in question. Context is important here. As Laborde notes, a cross in a public square clearly has a different social meaning than a cross placed in a courthouse¹⁸⁶ and would implicate the state to differing degrees, but not all cases are so easily distinguished. To return to the American standard of

¹⁸¹ Posner (n179) 226; see also 226-29.

¹⁸² The Solomon Amendment example is not perfectly analogous to the situation in *Trinity Western*. Because the Amendment *required* law schools to permit access, if they then followed the law and permitted military recruiters on campus, they might be *less* likely to be perceived as complicit in the military's anti-LGBTQ+ message. The legal requirement to allow access to the military would ambiguate the meaning of providing access: see Lessig (n20) 965-66. (Additionally, the analogy is weakened because law faculties, unlike the law societies in *Trinity Western*, are not state bodies).

¹⁸³ Tebbe (n65) 99.

¹⁸⁴ For instance, is the religious display inside the courthouse? On the front lawn? Or across the street? Questions of geographical proximity inflect the American endorsement test cases. For instance, in *American Legion* (n76) [5], Ginsburg J (dissenting) held that when a religious display is on government property a presumption of endorsement arises; see also *Van Orden* (n69), *Allegheny County* (n67).

¹⁸⁵ What does the cultural, political, or historic context tell us about the expressive act and the state's role in facilitating it? In *Capital Square* (n73), the US Supreme Court held that the board's decision to allow the Ku Klux Klan to display a cross in a public square did not constitute an endorsement of religion, given that the public square was well known as a forum for non-governmental expression. The majority characterized the display as protected, private religious speech and held that since the board allowed other religious expression in the square, its issuance of a permit to the Klan would simply indicate neutral treatment of private expression. Two concurring justices suggested that the state should display a disclaimer alongside the cross to distance itself from the Klan's message. Dissenting, Ginsburg and Stevens JJ held that the display violated the establishment clause.

¹⁸⁶ Laborde (n63) 138; see also Hill, 'Religious Symbolism' (n72).

the reasonable, objective or hypothetical observer,¹⁸⁷ perhaps the question is whether she would ‘reasonably’ hear the state to be speaking (indirectly) through that expressive act. Any ‘plausible deniability’ to the link between the state and the expressive act must account for the entire context in which the act occurred, including public perceptions of the state’s involvement in it.¹⁸⁸ With highly charged, divisive policy issues such as confederate symbols¹⁸⁹ or refusals to serve,¹⁹⁰ the role of the state might reasonably be considered more plausible, its ‘imprimatur’ more visible.

Indeed, it is not possible for the state to occupy true positions of neutrality on contentious issues such as these. Feminist and critical scholars have repeatedly argued that neutrality simply conceals approval for the *status quo*; the state’s failure to intervene to halt injustice makes it complicit in that injustice. Its permissive position on hate speech, for instance, might be framed as advocating tolerance for heterodox, insulting, repugnant views, as many free speech enthusiasts claim - but that claim to tolerance is undermined by the fact that the state’s neutral stance ‘constitutes the polity as *properly* ambivalent on issues such as racial equality, gay sexuality, Jewish ontology and so forth in a way that reasserts the outsidership of the targeted identities’.¹⁹¹ Likewise, it might be argued that positions of state neutrality on conflicts between religious freedom and equality rights for gay men and lesbians are not neutral, but rather conceal ambivalence about whether sexuality is a morally relevant personal characteristic, which in itself is a moral position.¹⁹² The state’s moral positioning in this regard is all the more striking when it does not offer similar exemptions to anti-discrimination laws on the grounds of other protected characteristics, such as race.¹⁹³ By allowing religious believers to discriminate on the grounds of sexual orientation, the state situates itself as a moral actor in the debate and constitutes itself and its citizens according to those norms.

This is doctrinally consistent with the Supreme Court’s holding in *Vriend* that the province’s failure to include sexual orientation in its anti-discrimination law would leave the

¹⁸⁷ All three terms are used by US courts: *Capital Square* (n73) 780. O’Conner J (concurring) explained in *Wallace v Jaffree* that the question is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools (472 US 38 (1985) [76]).

¹⁸⁸ Michele Moody-Adams, ‘Taking Expression Seriously’ (NYU Centre for Law and Philosophy, Colloquium in Legal, Political and Social Philosophy, 18.10.18) 8-11. Moody-Adams writes that the social meaning of expressive acts must be interpreted in their ‘total expressive situation’, referencing Austin’s ‘total speech act’ from *How to Do Things with Words* (HUP 1962, 1975) 52.

¹⁸⁹ Moody-Adams (n188).

¹⁹⁰ Nejaime and Siegal (n16).

¹⁹¹ Cooper, ‘Promoting injury or freedom’ (2000) 23 *Ethnic&RacStud* 1062, 1078.

¹⁹² Feldblum, ‘Moral Conflict and Liberty’ (2006-07) 72 *BrookLR* 61, 87-89.

¹⁹³ For problems with relying on race analogies to draw attention to LGBTQ+ inequality see Halley, ‘Like Race’ Arguments’ in Butler, Guillory, and Thomas (eds), *What’s Left of Theory?* (Routledge 2000) 40.

state with unclean hands. Although the discriminatory acts regulated by the human rights code are those committed by private actors, the government's failure to intervene would make it complicit by sending a message that it was legitimate or excusable to discriminate against LGBTQ+ individuals. The suggestion that one must maintain a strict divide between direct and indirect state expression fails to fully account for the effects of state action, unduly prioritizing its intention. As Souter J (concurring) said in an American religious display case, '[u]nless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize a public perception of endorsement as a harm only in that subclass of cases in which the government owns the display'.¹⁹⁴

While it may be difficult to determine whether the state is indirectly implicated in the expressive acts of private individuals and groups, this must not prevent the state from being held accountable for condoning the harmful expressive acts of others where appropriate. Full attention must be paid to the context of the expressive act and its proximity to state organs in making such decisions, whilst acknowledging the bigger picture: that the state has a duty to prevent discrimination and protect the equality of vulnerable groups.

6.5.2 What is the message? The problem of meaning

A related challenge in any theory of expressive harm is the vexed question of how to determine the meaning of an expressive act. Recall how Anderson and Pildes explain that it is possible to discern an act's 'public meaning' (that meaning which makes the most sense within its interpretive and social context) according to social, linguistic, and cultural conventions.¹⁹⁵ Lessig also stresses that social meaning is to be determined with reference to the context in which the act occurs, with context understood as 'the collection of understandings or expectations shared by some group at a particular time and place'.¹⁹⁶ Public or social meaning does not depend on the intentions of the speaker or the subjective reaction of the audience, but can be objectively ascertained.¹⁹⁷ Courts have developed doctrinal tests to meet these interpretive demands, such as the endorsement test's 'reasonable observer' heuristic discussed above, or the Supreme Court of Canada's 'subjective-objective' test for judging violations of equality under section 15.¹⁹⁸ Judges are accustomed to the difficult task of interpretation and have an arsenal of conceptual tools such as these with which to undertake it.

¹⁹⁴ *Capital Square* (n73) 787.

¹⁹⁵ Pildes and Niemi (n12) 513; Anderson and Pildes (n12) 1528.

¹⁹⁶ Lessig (n20) 958 (references omitted).

¹⁹⁷ Lessig (n20) 954-55, Anderson and Pildes (n12) 1524-25.

¹⁹⁸ This test was introduced by L'Heureux-Dubé J (dissenting) in *Egan* (n35) and adopted by the majority of the Supreme Court in *Law* (n19). The court held that the s15 inquiry must be undertaken from the perspective of the claimant, but with objective elements: 'Equality analysis under the Charter is concerned with the perspective of a person in circumstances similar to those of the claimant, who is

Some expressive acts are relatively easy to interpret. Racial segregation laws, for instance, send an unambiguous message of racial devaluation and inferiority.¹⁹⁹ But not all meanings are so clearly ascertained. As Tarun Khaitan states, ‘actions may speak louder than words, but they are rarely as clear’.²⁰⁰ Lack of certainty on expressive meaning may be even greater in the law and religion context, where there is little social consensus on the symbolic import of particular actions, practices or rituals.²⁰¹ Critics point to the impossibility of fixing expressive acts with a single meaning as cause to abandon the claims of deontological legal expressivists such as Anderson and Pildes.²⁰² For when reasonable people are divided on what a certain law or policy expresses, whose perspective is adopted? Would the reasonable observer believe that the message sent by an affirmative action program is one of empowerment, or of paternalism?²⁰³ The presence of Anglican bishops in the upper chamber of the UK Parliament may express a harmful exclusionary message that non-Anglicans are not full members of the political community, or it may simply reflect the nation’s historic religious roots. Does the sight of a judge in religious clothing ‘send a message’ of state affiliation with that religion, or does it express our society’s respect for individual religious freedom and equality?²⁰⁴ Equally, might it express their moral independence from the state?²⁰⁵ Moreover, meanings are not fixed or stable; they change over time and in different contexts. Whereas single-sex bathrooms were once used as exemplars of a sex-based distinction with ‘innocuous’ social meaning that ‘does not imply less regard for one sex or the other’,²⁰⁶ there is now a strong case to be made that reliance on single-sex bathrooms does send a harmful message of lesser regard for transgender, non-binary or gender-fluid individuals. But although single-sex bathrooms have recently become loaded with cultural meaning, this ‘new’ meaning is not accepted by all. Unfortunately, the dominant account of legal expressivism does not

informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity’ ([59]-[61]).

¹⁹⁹ Racial segregation is the paradigmatic example of expressive harm, rolled out in most academic descriptions of expressive harm: eg Anderson and Pildes (n12), Hellman, ‘Expressive’ (n17), Khaitan (n19).

²⁰⁰ Khaitan (n19) 9.

²⁰¹ Since social meaning is a function of context, itself made up of society’s shared expectations and norms, it is logical to conclude that ‘the more contested or contingent, the less powerful meanings appear to be’ (Lessig, n20, 961).

²⁰² Hurd, ‘Expressing Doubts About Expressivism’ (2005) UChicago LegForum 405, 418-28; Adler (n28); Smith, ‘Depletion of Meaning’ (n30).

²⁰³ See eg Hellman, ‘Expressive’ (n17) 17-18; Edwards (n14) 15.

²⁰⁴ Bouchard and Taylor chose the former on the grounds of the coercive power of judges over the individual, in *Building the Future* (Quebec 2008) 150-51; Taylor has since revised his position and declared his stance against Quebec’s law forbidding judges (and other public employees) from wearing religious symbols at work: Taylor, ‘Neutralité de l’état’ *La Presse+* (14.02.17) <<http://plus.lapresse.ca/screens/36c5c72e-28b9-49df-ba29-514fc56d647a%7CpUtyV30bPPsb.html>> accessed 08.02.20.

²⁰⁵ Berger, ‘Against Circumspection’ in Berger and Moon (eds), *Religion and the Exercise of Public Authority* (Hart 2016) 23.

²⁰⁶ Hellman, ‘Expressive’ (n17) 15.

provide sufficient guidance on how to determine an act's social meaning in conditions of pluralism and difference.

This uncertainty is reflected in the case law when expressive concerns are taken into account. Consider the differences of opinion that mark most US endorsement test cases: a Christmas crèche displayed on state property alongside secular symbols signifies for one judge the celebration of a public holiday with both secular and religious aspects; for another, it proclaims the lesser status of non-Christians in the political community.²⁰⁷ Even a religious symbol as unambiguous as a crucifix can elicit disagreement: in *Lautsi v Italy*, for instance, the ECtHR deferred to the government's claim that although the crucifix hanging in public school classrooms was a religious symbol, on the walls of the classroom it took on a cultural meaning rooted in tolerance and in Italy's national historic character.²⁰⁸ This stood opposed to the position of the applicants, who argued that the crucifix sent a message of state endorsement of Christianity that marginalised students of minority faiths or non-believers.²⁰⁹ These interpretive challenges also lie at the heart of the religious 'complicity' cases I examined above. Would Saskatchewan's legislative proposal to accommodate marriage commissioners have sent a message that it did not value LGBTQ+ equality, or that it placed a high priority on religious freedom? Ms Ladele, the claimant in *Eweida*, made a similar submission to the court by analogizing her situation to that of doctors refusing to perform abortions. She argued that when the state allows doctors to refuse to perform abortions, it is expressing not approval of that decision, but rather a healthy respect for tolerance and religious freedom.²¹⁰ Similarly, while the majority of the court in *Trinity Western* held that accreditation would signal an endorsement of LGBTQ+ discrimination, the dissenting justices held that it would express the state's accommodation of difference and respect for religious freedom.²¹¹ Some doubt that there can ever be a 'single, objective, public meaning of government actions',²¹² particularly in matters affecting sexuality and religion, where opinions diverge so strongly.

²⁰⁷ *Lynch* (n68) [690]-[693] (O'Connor J), [713] (Brennan J); see also *Allegheny County* (n67) for five divergent interpretations of the same holiday display. On the problem of determining symbolic meaning in the context of US endorsement cases, see Hill, 'Religious Symbolism' (n72).

²⁰⁸ *Lautsi* (n173) paras 36, 72. See also Liu, 'Restricting the Public Display of Religious Symbols by the State on the Grounds of Hate Speech' in Temperman (n83) 383, 391-97.

²⁰⁹ *Lautsi* (n173) paras 41-46.

²¹⁰ *Eweida* (n107) para 72. See also Ahdar, 'Solemnisation of Same-Sex Marriage and Religious Freedom' (2014) *EccLJ* 16(3) 283, 296.

²¹¹ *Trinity Western* (n107) [269] (Côté and Brown JJ). Likewise, the Nova Scotia Supreme Court queried what message the Barristers' Society would have conveyed if it had accredited, given that the society allows entry to lawyers who hold bigoted views or who are members of organizations that actively deny LGBTQ+ rights: *Trinity Western University v Nova Scotia Barristers' Society* (n146) [257]-[264].

²¹² Edwards (n14) 15.

A more honest approach to the problem is to acknowledge that there will not always be a single right interpretation of an expressive act's meaning, and that the expressive content of a controversial practice, action or law will nearly always be disputed. On this account, meaning is invariably contested, indeterminate, and multiple. Postmodern theorists deny that certain images have 'a clear and unequivocal meaning that can be interpreted objectively'.²¹³ Pushing back against claims, for instance, that violent or degrading pornography necessarily inflicts harm through the expression of images constituting women as subordinate subjects,²¹⁴ postmodern feminists point to sexual representations as 'a site of political and discursive struggle', capable of holding a multiplicity of meanings.²¹⁵ For Judith Butler, different readings of a text or speech act are always possible; it does not have any necessary or inevitable impact.²¹⁶ Indeterminacy may simply be 'an inherent quality of all symbolic (linguistic or nonlinguistic) communication', an uncomfortable fact that will continue to complicate constitutional doctrines that rely on social meanings.²¹⁷

Indeterminacy is not, however, a dead-end proposition. Judges can still adopt good, defensible interpretations of social meaning for the purposes of identifying expressive harm. Tarun Khaitan, for instance, explains that despite the practical difficulties involved, it is possible for courts to adjudicate cultural or social facts and to discern social meaning with some level of objectivity.²¹⁸ The US Supreme Court was simply mistaken in the notorious decision of *Plessy v Ferguson* when it concluded that the message of inferiority conveyed by race segregation laws had no objective basis, that it arose 'solely because the colored race chooses to put that construction upon it'.²¹⁹ The meaning of segregation at the time of *Plessy* was 'as clear a sign of disrespect as one might find, and about as hard as a social fact can be'.²²⁰ Properly interpreting the symbolism of such acts requires judges to fully consider the historic and social context in which they occur.²²¹ Hellman suggests that this might see judges

²¹³ Cossman, Bell, Gotell and Ross, *Bad attitude/s on trial* (UTP 1997) 25; see also Foucault, *The History of Sexuality* (Penguin 1981); Lyotard, *The Postmodern Condition* (Minnesota 1984); Cooper (n191) 1078-80.

²¹⁴ Mackinnon, *Feminism Unmodified* (HUP 1987); Rae Langton, 'Speech Acts and Unspeakable Acts' (1993) 22 *Phil&PubAff* 293.

²¹⁵ Quistgaard, 'Pornography, Harm and Censorship' (1993) 52 *UTFacLRev* 132, 154-60; Cossman, Bell, Gotell and Ross (n213) 26.

²¹⁶ Butler, *Excitable Speech* (Routledge 1997) 25 as cited in Cooper (n191) 1078.

²¹⁷ Hill, 'Religious Symbolism' (n72) 533-34; see also Khaitan (n19) 9-13.

²¹⁸ Khaitan (n19) 11-12; 'Expressive Harms and Standing', (1999) 112(6) *HarvLRev* 1313, 1318 (the fact that social meaning is 'contested, difficult to discern, and unstable' does not necessarily mean that its interpretation would be any harder than in other contexts).

²¹⁹ *Plessy v Ferguson*, 163 US 537, 551 (1896) (emphasis added), rev'd in *Brown v Board of Education*, 347 US 483 (1954); Khaitan (n19) 12.

²²⁰ Green, 'Two Worries about Respect for Persons' (2010) 120 *Ethics* 212, 228; Khaitan (n19) 12.

²²¹ Lessig (n20); Hill, 'Religious Symbolism' (n72). For instance, Justice Harlan, dissenting in *Plessy v Ferguson* (n219), easily concluded that racial segregation laws were intended to exclude black people from white spaces simply by looking at the historic and social context of segregation policies: [557].

applying the criterion of *coherence*, by which expressive acts are interpreted according to what best coheres or ‘fits’ with the social world in which they occur. The chosen interpretation should reflect this broader social reality and provide some explanation of it.²²² This is consistent with how Anderson and Pildes explain the judge’s role in interpreting the public meaning of an expressive act according to which interpretation has the best fit with ‘other meaningful norms and practices in the community’.²²³ Thus the indeterminacy problem on its own need not be considered fatal to the notion of expressive harm playing a role in constitutional law.

Indeed, the interpretive demands made of courts in the context of expressive harm are not out of step with the tasks they face in most religion cases. Secular courts are always implicated in the messy business of ‘determining meaning’ in adjudicating religious freedom. They are routinely asked what a particular religious symbol or practice stands for and how that meaning is informed by other historical, social or political values. Ben Berger illustrates this point with reference to *Mouvement laïque*, discussed above. In order to find that the practice of reciting prayers was unconstitutional, the court had to ‘interpret the character of this prayer (and prayer generally), assess it against the historical backdrop of religion in Québec, imagine the communicative effect on listeners, and make claims about the character of the modern state’.²²⁴ Likewise, Jeremy Webber argues that courts do (and in fact must) engage in thick symbolic interpretation in religious freedom cases. Faced with a dispute over a land development that would damage a sacred Indigenous site, for instance, a court would need to interpret not just the spiritual meaning and significance of the site to the Indigenous group, but also how the development would interfere with it and the weight that religious interference should have against the government’s (secular) interests. This, he writes, ‘is a substantive exercise, one that forces the decision maker to consider the nature and significance of religious belief’.²²⁵ In both of these examples, courts are called upon to interpret and assess symbolic claims within their historic, political and social context. And, indeed, this is required any time the courts make assessments of harm – a practice which, as I have shown, they engage in at all stages of the s2(a) Charter analysis.

²²² Hellman (n17) 21. Given that judges will always be bound by their own experience, Hellman then looks beyond coherence to argue for an idealized project of interpretation. Drawing on the work of Habermas, she proposes that a law’s expressive meaning ‘is best understood as the meaning that we would arrive at if we were to discuss the interpretive question together under fair conditions’ (23). She maintains that the ‘back and forth’ of constitutional litigation approximates this type of ideal dialogue (24); cf Hurd (n202) 426.

²²³ Anderson and Pildes (n12) 1525.

²²⁴ Berger, ‘Liberal Constitutionalism and the Unsettling of the Secular’ in Adhar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 198, 209; see also Bhabha, ‘From Saumur to L(S)’ (2012) 58 SCLR (2d) 109.

²²⁵ Webber, ‘Irreducibly Religious’ (n78) 185.

This point necessarily unsettles constitutional law's claim to adjudicate religious freedom cases according to the logic of fixed principles that purport to abstract the religious question into the realm of 'pure' legal reasoning, such as proportionality or the harm principle.²²⁶ For whenever religion comes before the courts, some degree of symbolic interpretation is required. Rather than conducting simple balancing tests or weighing one interest against another, courts in these cases are engaged in a 'symbolizing practice ... us[ing] law to make claims about national identity, history, and value'.²²⁷ In this respect, then, claims of expressive harm simply instantiate existing dilemmas and contradictions in the constitutional adjudication of religious freedom.

6.5.3 Which meaning matters most? The problem of warring harms

The third point is closely related to the second. As the work of Bernard Harcourt has shown, harm arguments tend to proliferate.²²⁸ Harm's malleability or stretchiness means it is capable of being used on both sides of a debate to support opposing positions, each claim of harm met with another, contrary claim, getting us nowhere. This tendency is reflected in many s2(a) religion cases.²²⁹ It is no different in the case of expressive harm; in fact, it may be even easier to conjure up competing claims when we speak of 'harmful messages,' as claims of expressive harm are not susceptible to proof in the usual way.

The problem of 'warring' expressive harms arose in *Multani*, where the school board had argued that allowing kirpans to be worn in schools would send a message to students that conflicts should be resolved by force.²³⁰ The majority rejected this argument by drawing on evidence of other, contrasting symbolic meanings of the kirpan based on mercy and honour, and by making an opposing claim that refusing to allow kirpans in school would express disrespect for Sikh students and for Canadian values of multiculturalism and diversity.²³¹

It is also a common thread running through reactions to cases such as *Trinity Western* and *Marriage Commissioners*. Critics of the decisions counter that it is the religious adherents

²²⁶ Berger, 'Liberal Constitutionalism' (n224) 209; Bhabha (n224).

²²⁷ Berger, 'Liberal Constitutionalism' (n224) 209.

²²⁸ Harcourt (n169).

²²⁹ See eg *Reference re section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (*Polygamy Reference*) (Bauman J focused on the harms caused by the practice of polygamy; the *Amicus* and interveners argued that it was the ban itself that caused harm: see eg [707]-[708], [1219]-[1223], [1316]-[1328]); *Whatcott* (n41) (Commission held that Mr Whatcott's actions were harmful to LBGTQ+ people; he argued that his actions were protecting others from the harms of gay sex: [152]-[153]).

²³⁰ *Multani v Commission scolaire Marguerite-Bougeoyoys*, 2006 SCC 6 [55].

²³¹ *ibid* [37], [71]. See also *NS* (n174) (whereas the majority and concurring reasons implied that allowing niqabs to be worn in court would send a harmful message to the public about the integrity of the justice system, Abella J retorted that was the *denial* of the right to wear niqabs that would send such a message: [94]); *Sauvé v Canada*, 2002 SCC 68 (majority and dissenting justices adopted opposing interpretations of the 'message sent' by denying prisoners the right to vote: [154] (Gonthier J)).

who are at risk of expressive harm in such cases, not LGBTQ+ people. They maintain that the state's refusal to accommodate or accredit sends a disparaging message about religious believers: that they are not worthy of accommodation, that they do not fully belong in the public sphere. In response to legal decisions rejecting complicity claims by business owners who refuse to provide services to same-sex weddings, for example, Ryan Anderson and Sherif Girgis ask why it is that allowing them to refuse those services necessarily sends a damaging message about LGBTQ+ people, but that refusing their claim for an exemption sends no such message about religious people.²³² If we take religious freedom seriously, we need to engage with this criticism. It is not out of line for critics to argue that failures to accommodate religious believers can express condemnation, disparagement or disregard for members of that group, or for religious adherents more generally.²³³

The leading judgments in *Trinity Western* failed to properly address this criticism, levelled against them by Côté and Brown JJ. The dissenting justices had maintained that the refusal to accredit expressed disregard toward TWU members and indicated that religious believers are not full members of the political community.²³⁴ Likewise, the intervener Christian Legal Fellowship claimed that the law society's decision sent a message at least as harmful as that alleged to stem from accreditation: that religious people's 'lawful views about marriage' are archaic and bigoted.²³⁵ The majority and concurring justices did not respond to these arguments, instead following the familiar pattern illustrated by Harcourt in which harm arguments are met with further harm arguments.

There is no quick answer or simple solution to this problem. However, it is possible to test claims of expressive harm to see if they stand up to scrutiny, taking account of the institutional structures, social norms and overall context in which such claims are made.²³⁶ Not every claim of expressive harm is plausible or legitimate, and some social meanings will prevail over others. Moreover, as Nelson Tebbe explains in the context of 'complicity' cases like *Marriage Commissioners* where religious adherents claim a right to discriminate against LGBTQ+ people, the opposing claims of harm are not necessarily symmetrical.²³⁷ Although it is true

²³² 'Against the New Puritanism' in Corvino, Anderson and Girgis (n19) 108, 169-70: 'What about denying the bakers' claims? Won't that tell them – and all traditional Muslims, Orthodox Jews, and Christians – that acting on beliefs central to their identities is immoral?'

²³³ Raz, *Ethics and the Public Domain* (OUP 1995) 160-62; Eisenberg, 'How Should Public Institutions Assess Religious Liberty?' in Calder and Beaman (eds), *Polygamy's Rights and Wrongs* (UBC 2014) 46, 62-63; Edwards, 'Harm Principles' (2014) 20 LEG 253, 261.

²³⁴ *Trinity Western* (n107) [324].

²³⁵ Christian Legal Fellowship, *Factum of the Intervener* <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37318>> accessed 08.02.20, para 30.

²³⁶ Gedge, "'Healthy' Human Embryos and Symbolic Harm' in Nisker et al (eds), *The 'Healthy' Embryo* (CUP 2010) 233, 238-40.

²³⁷ Tebbe (n65) 16-19.

that religious adherents may suffer some (expressive) harm by being denied accommodation, the social meaning of requiring a religious objector to follow regular human rights laws or policies by not discriminating is not one of ‘disfavoured status on the basis of religion’.²³⁸ Holding religious objectors to these standards does not arise from prejudice or stereotypes about religious believers.²³⁹ Tebbe maintains that the message sent by the state’s requirement that religious adherents obey generally applicable anti-discrimination laws does not position them as subordinate to others in society; the harm does not go to their equal citizenship in the way that a decision to accommodate them would implicate the equal citizenship of LGBTQ+ people.²⁴⁰ Applying this reasoning to *Marriage Commissioners*, for instance, it is not a stretch to conclude that the message sent by the province’s efforts to accommodate objecting marriage commissioners would inflict a graver harm than that arising from its refusal to accommodate, taking account of the purpose and function of the Charter, the historic (and ongoing) context of discrimination against LGBTQ+ people, and the signification and seriousness of refusals to serve based on a personal characteristic.

As such, it is helpful to tether more closely the two dimensions of expressive harm that I have explored in this chapter: if the reason that we – and the courts – care about the ‘messages’ sent by state action is because of their potential to subordinate or to impair people’s status in society (a position that is reflected in Canadian constitutional law), then courts ought to maintain this focus in responding to claims of expressive harm. Judgments on expressive harm should be undertaken within an overarching commitment to the egalitarian dimension that gives the concept of expressive harm its heft. Tethering judicial conceptions of expressive harm to notions of status equality can also remind us that we should be willing to hold the state to account when its own expressive acts, or its perceived endorsement of the expressive acts of others, could lead to social subordination and injustice.

6.5.4 Whose values? The problem of power

In this chapter I have argued for the expansion of traditional accounts of legal harm to better account for social injury that is not reducible to tangible, concrete harm to individuals. However, the vague and ephemeral nature of expressive harms and the practical difficulty of backing up assertions of such harm with evidence mean that they risk pushing against the boundaries of harm so hard that they collapse. Claims of expressive harm often appear to the unconvinced as merely personal offense (while its defenders go to great lengths to differentiate

²³⁸ Tebbe (n65) 19.

²³⁹ See *Trinity Western* (n107) [123] (McLachlin CJ) (rejecting TWU’s s15 equality claim).

²⁴⁰ Tebbe (n65) 19.

them). They can be used to argue for restrictions on liberty for paternalistic reasons²⁴¹ or in the furtherance of conventional social morality.²⁴² It is not difficult to see how, in some contexts, a concern about ‘messages’ and ‘social meanings’ can tip the balance between the individual and society a little too far toward society, slipping into Devlin’s terrain.

Of course, not all norms of conventional morality are necessarily illiberal or illegitimate.²⁴³ The problem is that loose appeals to expressive harm can, if reflected in law, serve to inscribe those norms uncritically and without differentiation, leading to the entrenchment of contested social mores or values that are in the service of dominant groups. The ‘majoritarian critique’ of expressive harm²⁴⁴ raises the important question of who has discursive authority to identify the risk of expressive harm. A judge’s interpretation of the meaning of an expressive act will be influenced by a combination of social norms, a community’s shared expectations and understandings,²⁴⁵ and the judges’ own experiences, intuitions and cultural commitments. This interpretive process occurs within and not outside of society’s pre-existing power structures. It thus raises difficult questions about *whose* values are protected and whose voices are heard within the discourse of expressive harm.

When it comes to issues of law and religion, existing social hierarchies and the influence of dominant assumptions in discerning symbolic meaning may lead courts to more readily see the practices and symbols of familiar or majority religious groups as natural or normal, and as less likely to express harmful messages than those of less familiar minority groups.²⁴⁶ In state neutrality cases, for instance, the majority is often so blind to its own privilege that a ‘reasonable observer’ –or, more accurately, the judge herself²⁴⁷– might fail to see the harm caused to adherents of minority religions or to non-adherents by the state’s

²⁴¹ Hunter-Henin, ‘Why the French Don’t Like the Burqa’ (2012) 61 ICLQ 613, 626-27 (bans on ‘dwarf-tossing’ and the wearing of burqas often fall into this category: the activities are said to express something harmful about the dignity and worth of those who consent to it).

²⁴² Green, ‘Pornographies’ (2000) 8(1) JPOLPHILO 2729 (the alleged intangible harms of pornography slide easily into ‘moralism of the old sort’).

²⁴³ If ‘conventional’ is understood to mean ‘widely held’, that is not to say that they are necessarily false or not based on reason. Conventional and critical morality can overlap: Miller, ‘Morals Laws in an Age of Rights’ (2010) 55 AMJJURIS 79, 87-88.

²⁴⁴ Hill, ‘Anatomy of the Reasonable Observer’ (2014) 79 BROOKLREV 1407, 1410.

²⁴⁵ Lessig (n20) 958.

²⁴⁶ Hill, ‘Religious Symbolism’ (n72) 521; Beaman, ‘Who Decides?’ (2006) 10(1) NOVA RELIGIO 43, 48; Mancini, ‘The Power of Symbols and Symbols as Power’ (2009) 30 CARDOZO LREV 2629; Herman, *An Unfortunate Coincidence* (OUP 2011); Hill, ‘Anatomy’ (n244) 1411. Outside of the religion context see White, ‘Subordination, Rhetorical Survival Skills, and Sunday Shoes’ (1990) 38 BUFFLREV 1, 4 who writes: ‘Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups’.

²⁴⁷ Hill, ‘Anatomy’ (n244) 1437.

affiliation with the majority religion.²⁴⁸ The role of social power in shaping law's conceptions of expressive harm is certainly also relevant in the assessment of other forms of harm, for even the most mundane harm judgments are normative exercises conducted through a cultural lens,²⁴⁹ but the problem is clearer when expressive as opposed to material harm is alleged as there are no tangible, visible indicia of harm to rely upon.

Legal restrictions on female Islamic dress provide a useful example of this problem. Western liberal democracies still struggle to respect and accommodate women who wear Islamic dress, particularly more modest garments such as the niqab. Few supporters of bans on Islamic veils argue that veiled women pose a risk of concrete, tangible harm to others.²⁵⁰ Their concerns, rather, are almost entirely expressive or symbolic in nature. Arguments for restrictions on Muslim veiling are phrased in terms of what it *means* for a woman to wear a veil – what the veil signifies about women's equality, sexuality, and submission to patriarchal dominance; about the proper role of religion in the public sphere; or about the valuing of the communal over the individual.²⁵¹ Of course, Islamic veils are polysemic: they have multiple meanings and signify different ideas to different people.²⁵² But judicial attempts to interpret the veil's meaning are often inflected with majoritarian bias – not in terms of judges considering irrelevant criteria or improperly carrying out their duties, but in the sense that the attribution of meaning to minority religious symbols will occur within existing power structures which render minority religious practices inherently more dangerous, unknowable, and harmful.

Mayanthi Fernando's study of French Muslim women who choose to veil shows how prevailing norms that structure political and legal debates on minority religious practices limit the intelligibility of minority readings of religious symbols. Debates on Islamic veiling maintain a discursive focus on the secular, liberal virtue of autonomy framed as a binary: on whether the veil signifies either a woman's *abdication* of autonomy through her capitulation

²⁴⁸ Hill, 'Religious Symbolism' (n72) 521; Corbin, 'Nonbelievers and Government Speech' (2011-12) 97 IowaLRev 347, 389.

²⁴⁹ Beaman, *Defining Harm* (UBC 2008); Cooper (n191) 1062.

²⁵⁰ Though security concerns around identification are sometimes raised: *SAS v France*, [2014] ECHR 695, para 139. Such arguments are usually given short shrift as most women profess to be willing to unveil for identification purposes.

²⁵¹ Fernando, 'Reconfiguring Freedom' (2010) 37(1) *American Ethnologist* 19, 21; Hunter-Henin, 'Burqa' (n241); McCrea, 'The Ban on the Veil and European Law' (2013) 13 *HRLRev* 57. See also *SAS v France* (ibid), joint partly dissenting opinion of Nussberger and Jäderblom JJ (characterising arguments in favour of France's ban on face veils as stemming from fears about the veil's symbolic meaning) para 62.

²⁵² See eg Cowan, 'The Headscarf Controversy' (2008) 14 *ResPubl* 193, 199-200; Hussein, 'Looking in or Looking out?' in Dreher and Ho (eds), *Beyond the Hijab Debates* (CambridgeScholars 2009) 81; Ahmed, *A Quiet Revolution* (Yale 2011) 209-13; Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (CUP 2014).

to religious authority, or the *assertion* of individual autonomy and choice – women donning the veil in order to participate in civic society without breaking ties to their families and communities.²⁵³ Fernando’s research has shown, however, that for many of these women their submission to religious authority was a way of autonomously realizing their true religious selves; the practice of veiling was a process of learning to ‘undertake willingly what is necessary’.²⁵⁴ The women explained that wearing the veil constituted both choice and duty, that ‘normative religious authority and inner, individual desire are not constituted by a relationship of opposition, but rather are inextricably linked’.²⁵⁵ This framing challenges the binary, secular notion of autonomy. As it cannot be squared with the dominant norms that structure legal protections for religious freedom, their claims wind up ‘in a no-man’s-land of discursive and legal unintelligibility’.²⁵⁶ The impossibility of fitting the veil into the matrix of secular norms and values which inform courts’ interpretive processes restricts the possibility of knowing just what it means to veil.

The discursive construction of minority religious orders and practices as inherently unknowable then allows courts to make broad claims about the symbolic or expressive harm they cause. Without the need (or the ability) to provide concrete evidence to back up claims of expressive harm, courts can retreat into generalities about harmful messages.²⁵⁷ This problem is exemplified in several judgments of the European Court of Human Rights (ECtHR) on Islamic headscarves.²⁵⁸ In *Dahlab v Switzerland*, which concerned whether it was permissible for a teacher to wear a hijab in the classroom, the court stated:

...[I]t is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. ...[I]t cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-

²⁵³ Fernando (n251) 22; see also Mahmood, *Politics of Piety* (Princeton 2005) on the limitations of prevailing conceptions of agency in the context of veiling.

²⁵⁴ Fernando (n251) 25; Mahmood (n251) (agency can be realized through pious submission to external authority).

²⁵⁵ Fernando (n251) 26.

²⁵⁶ *ibid* 30. Alternatively, this conception of veiling can be re-deployed to construct veiled women’s ‘voluntary servitude’ as a sign of ‘fanatical’ – and thus intolerable – religious commitment: Asad, ‘French Secularism and the “Islamic Veil Affair”’ (2006) *Hedgehog Review* 93, 104-05. See also Herman (n246, 50-68) for how courts have discursively constructed ‘the Jew’ in English law as inherently unknowable.

²⁵⁷ Evans, ‘The ‘Islamic Scarf’ in the European Court of Human Rights’ (2006) 7 *MelbourneJInt’lLaw* 52, 63.

²⁵⁸ Note that the court did not assign any particular meaning to the veil in *SAS v France* (n250) paras 118-120.

discrimination that all teachers in a democratic society must convey to their pupils.²⁵⁹

The headscarf was deemed to send a message of intolerance, gender inequality and coercion based on little more, it seems, than judicial hunches and unsubstantiated assertions.²⁶⁰ The same court also considered the headscarf worn by a student contrary to university regulations in *Şahin v Turkey* to express something fundamentally at odds with the values of secularism and equality.²⁶¹ In contrast, it failed to find any harm caused by the presence of a crucifix on the classroom wall of a public primary school in *Lautsi*. In a tenuous effort to distinguish the case from *Dahlab*, the court held that the crucifix was ‘an essentially passive symbol’ that was not capable of exerting the headscarf’s same harmful influence on students.²⁶² Although direct comparison between these cases is complicated by the fact that the court deferred to state interests in both cases and by the different charge or valence that the veil and the crucifix have in each of these countries, their juxtaposition demonstrates the tendency for minority religious practices to be interpreted as more harmful than culturally embedded, majority religious symbols.²⁶³ The conceptual expansiveness of expressive harm brings this issue to the fore, providing a notable way in which majoritarian influences can shape the judicial assessment of whether a particular act or symbol causes harm.

A similar example can be found in the Supreme Court of Canada’s judgment in *R v NS*, on whether a female witness could wear a niqab while testifying as a witness in court. All three sets of reasons acknowledged the risk of some sort of expressive harm, though it is the reasoning of the concurring judges that is most relevant here.²⁶⁴ After detailing the material harms a veiled witness would pose to trial fairness, Justice LeBel (joined by Rothstein J) considered the symbolism of allowing niqabi women to testify in court, asking how it would comport with constitutional values such as ‘openness and religious neutrality’ and the rule of law.²⁶⁵ They concluded that although Canadian law preserves and promotes diversity, it does

²⁵⁹ *Dahlab v Switzerland*, [2001] ECHR 449, 463. The reasoning in *Dahlab* was endorsed in *Dogru v France* App No 27058/05 (ECtHR, 4 December 2008), para 64 and *Şahin v Turkey*, (2007) 44 EHRR 5, para 111.

²⁶⁰ Evans (n257) 63-73.

²⁶¹ *Şahin* (n259) paras 111, 115-16.

²⁶² *Lautsi* (n173) paras 72-75. The lack of evidence of harm to students was a factor in the court’s decision (para 66), whereas it had no bearing in either *Dahlab* or *Şahin*: see Judge Tulkens’s dissenting reasons in *Şahin* (n259) pts 5&7; Evans (n257).

²⁶³ Liu (n208) 392-94, 407-08; Mancini (n246) 2631.

²⁶⁴ *NS* (n174). The majority took account of what allowing or prohibiting the niqab in court would ‘say’ to the public at large: it noted the ‘broader societal harms’ of prohibiting the niqab in the form of the message it would send to other niqabi women who might be deterred from reporting sexual assaults in the future ([37]), as well as the harm to the repute of the administration of justice by allowing witnesses to testify with their faces covered ([38]). Justice Abella, dissenting, held that prohibiting the niqab would harm the public’s perception of the justice system ([95]).

²⁶⁵ *ibid* [60].

so within the constraints of the ‘core common values of Canadian society,’ rooted in the country’s history and traditions.²⁶⁶

LeBel and Rothstein JJ were engaged in precisely the type of expressive analysis I advocate in this chapter: they were looking beyond material harm to individuals and considering the intangible, impersonal harm stemming from an expressive act’s social meaning. However, the harm they identified was linked not to the status of vulnerable groups in society, as it was in *Marriage Commissioners*, for instance, but simply to ‘Canadian values’.²⁶⁷ As I explained in earlier chapters of this thesis, the Supreme Court confirmed that restrictions on freedom can be justified by recourse to social values, but only ‘core national’ values²⁶⁸ or (in the criminal context) those that are constitutionally entrenched, such as tolerance, equality, dignity, and autonomy.²⁶⁹ The concurring justices in *NS* claimed to tie their objection to the niqab to constitutional values, rather than to community mores.²⁷⁰ It is questionable whether the values they identified do, in fact, reflect core constitutional commitments.²⁷¹ But moreover, while a commitment to constitutional values in the context of law’s regulation of sexuality might provide some objective benchmark that preserves a zone of privacy and respect for minority sexual practices,²⁷² the path hewn by those same values becomes more muddied in matters concerning law and religion. ‘Canadian constitutional values’ can be used to both affirm and deny a woman’s right to wear a niqab in court, as is evident from the contrasting judgments in *NS*.²⁷³ The outcome of a values-based adjudication of reasonable limits on the niqab depends on how one perceives the niqab and the message it sends in the first instance, and that perception will be coloured by dominant social and cultural norms.

I have already noted that the concept of expressive harm is not immune to the problems that attend the concept of harm more generally. The Islamic dress cases help to illustrate how the slippery, capacious quality of expressive harm, while a virtue in some cases

²⁶⁶ *NS* (n174) [70]-[73].

²⁶⁷ *ibid* [60], [70]-[74] (these include the promotion of open courts, social interaction, and inter-personal communication).

²⁶⁸ *Loyola High School v Quebec*, 2015 SCC 12 [46]-[47] (Abella J).

²⁶⁹ *R v Labaye*, 2005 SCC 80 [33] (McLachlin CJ).

²⁷⁰ *NS* (n174) [60], asking: ‘is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?’.

²⁷¹ Recall that it was LeBel J (with Bastarache J), dissenting in *Labaye* (n269), who held that the criminal law can legitimately enforce the community’s prevailing social morality: [75]-[76], [97]-[98], [103]-[109].

²⁷² Craig, ‘Laws of Desire’ (2009) 54 McGillLJ 355; cf Jochelson and Kramar, ‘Governing through Precaution to Protect Equality and Freedom’ (2011) 36(4) CanJSociology 283.

²⁷³ And indeed, it was ‘common values’ such as *vivre ensemble* that served to justify the French ‘burqa ban’ in *SAS v France* (n250): Hunter-Henin, ‘Living Together’ (n132).

as it can enable an honest and progressive account of the actual social harms caused by an expressive act, can also be its downfall. A judge's understanding of the meaning of a religious symbol or an expressive act will be informed by her guiding normative commitments, her own experience of the social world, and a whole set of hegemonic cultural, political and historical norms. This presents a challenge to the proper adjudication of expressive harm in the law and religion context. These norms and conventions may result in minority religious symbols or practices being more readily characterized as harmful, allowing majoritarian commitments to constrain the interpretive exercise. Moreover, the very notion of expressive harm might open the door to illegitimate or illiberal arguments that push up against the already tenuous boundaries of the harm principle, allowing vague and unfounded concerns or moralistic, values-based reasoning to sway judicial decisions. Recourse to expressive harm arguments may be made when claims of harm are dubious – concerns about 'messages' and 'statements' serving as the final refuge for arguments that lack an evidentiary foundation. This can easily descend into a harm free-for-all, with concerns about an act's expressive dimension simply countered by other expressive arguments. Indeed, when multiple claims of expressive harm are possible, society's pre-existing power structures may act to determine which message 'sticks', undermining some of the progressive, egalitarian potential for expressive harm explored in the first half of this chapter. Valverde's caution that 'harm-based governance can have very different rationales and produce extremely varied results' rings particularly true in the case of expressive harm, and perhaps even louder and clearer when it is claims of religion that are before the court, where questions of symbolism take centre stage.²⁷⁴ The relationship between power, social meaning, and assessments of harm thus presents a serious challenge to the argument for expressive harm in constitutional decision-making.

6.6 Conclusion

There are problems in trying to employ a defensible conception of expressive harm in constitutional law. Vague appeals to the 'message sent' by an action are easily made and can be difficult to rebut. Moreover, the interpretative feat of isolating the particular social meaning of an expressive act in order to decide whether it causes harm may too easily allow for majoritarian or moralistic concerns to influence the constitutional analysis. Expressive harm arguments can thus cut both ways.

These challenges do not mean that expressive harm arguments should be jettisoned or necessarily viewed with suspicion. I have demonstrated that judicial recognition of expressive harm can be a powerful means of remedying harms that transcend individual, material injuries

²⁷⁴ Valverde (n11) 187.

or deprivations. Full realisation of the goals of social justice and equality requires law's recognition of the ways in which expressive acts can cause intangible harm to the social order, as the work of Fraser and Moreau has shown. This is particularly so in disputes over religious freedom, given that such disputes often track social divisions and hierarchies. Thus, there is a compelling argument for recognising expressive harm as a cognizable injury in constitutional cases.

What is crucial in the interpretation of expressive meaning is that full attention be given to the social, political and historical context in which the expressive act occurred. Feminist legal scholars have long argued for the imperative of considering social context in constitutional reasoning.²⁷⁵ In cases dealing with prayers or religious symbols in state institutions, for instance, courts must not view the dispute in isolation from the wider societal factors that will influence the reasonable meaning to be attributed to that symbol or practice. Restrictions on Muslim dress must also be considered in light of the systemic barriers faced by Muslim women in western societies and the contextual factors that influence their experience of veiling.

Second, courts and advocates should be transparent when deploying or considering expressive harm arguments. This could prompt greater reflection on their part, both on the merits and the challenges of an expressivist perspective, and would lay bare some of the assumptions guiding their analysis. If judges clearly explain their expressivist reasoning within a judgment, it may even provide a foothold for legal appeals in the case of inappropriate deference to contested, popular norms in their process of interpretation. Expressive arguments should not 'sneak in through the back door' but, rather, should be subject to full examination and debate.

Finally, it is important to remember why it is that we ought to care about the expressive effects of state action. Calling attention to the 'message sent' by a given law, practice or decision is not about 'virtue signalling' nor is it merely a question of optics. The state's expressive acts have the potential to cause real harm by creating, entrenching or exacerbating the conditions for social subordination and misrecognition of target groups. It is thus a matter of equality and justice. As such, any constitutional conception of expressive harm should be firmly tethered to these goals. Indeed, this is already the terrain upon which courts are most comfortable with the discourse of expressive harm, as I demonstrated above in s2(a) cases on

²⁷⁵ Bartlett, 'Feminist Legal Methods' (1990) 103(4) HarvLR 829; Munro, *Law and Politics at the Perimeter* (Hart 2007) 45-49; Hunter, McGlynn and Rackley (eds), *Feminist Judgments* (Hart 2010) 35, 38.

state-sanctioned prayer and those involving conflicts between religious objections to same-sex marriage and laws promoting and protecting LGBTQ+ equality.

This response can go some way toward helping courts to deal with the problem of ‘warring expressive harms’ and to distinguish between legitimate and illegitimate expressivist claims. This challenge arises frequently in the religious ‘complicity’ cases, in which religious adherents seeking the freedom to act on their beliefs about sexual morality claim that the state’s enforcement of legal rules mandating equal treatment for LGBTQ+ people sends an equally harmful message that is disparaging of their beliefs and their status in society. One must not reject their argument out of hand, for the constitutional right to religious freedom demands that the state consider constraints on the right and determine whether they can be justified in a liberal, pluralist state. But by training one’s focus on over-arching questions of status equality and social subordination, one can conclude that the social meaning of denying an accommodation from existing human rights laws that protect LGBTQ+ people is not one of disparagement toward religious believers. As I explained above, the message sent by the state’s requirement for religious adherents to comply with anti-discrimination laws does not position them as socially subordinate. Though they may indeed incur some harm by being denied the accommodation, which should not be discounted, the harm does not impair their equal citizenship in the way that the state’s accommodation of their beliefs would implicate the equal citizenship of LGBTQ+ people. A critical, open approach to expressive harm that is rooted in the goals of social justice and equality is thus needed to safeguard its important egalitarian function in the constitutional adjudication of religious freedom.

7 Conclusion: A way forward for harm?

As I put the final touches on this thesis, Canada is in the grip of a crisis. Early this year, the Royal Canadian Mounted Police entered the unceded land of the Wet'suwet'en people in British Columbia, arresting Indigenous matriarchs and activists who were protesting the government's authorization of a pipeline through their traditional territory. Protests and blockades in solidarity with the Wet'suwet'en are springing up around the country, the media are reporting restrictions on their press freedom, and the national railway has been shut down.¹ At the same time, and in the shadow of the deadly shootings at a Quebec City mosque in 2017, public demonstrations and political and legal disputes continue over Quebec's recent law banning certain public sector workers from wearing religious apparel in the exercise of their duties.² Supporters and proponents of the ban await the Supreme Court of Canada's decision on whether it will hear an appeal from the Quebec Court of Appeal's decision refusing a provisional stay of the provisions.³ Religious minority public sector workers are already leaving Quebec to look for work in other provinces.⁴

These are two significant moments in Canada's constitutional history that serve to remind us of both the power and the fragility of constitutional rights. It was Thomas R Berger who, nearly forty years ago and shortly before the Charter came into force, spoke of this duality, warning Canadians not to be smug about the nation's successes: 'Sometimes we have upheld human rights, but sometimes we have succumbed to the temptations of intolerance. Sometimes we have listened to the voices of protest; at other times we have tried to stifle them'.⁵ The protection afforded to religious freedom under s2(a) of the Charter is marked by

¹ Bracken and Cecco, 'Canada: Protests go mainstream as support for Wet'suwet'en pipeline fight widens' *The Guardian* (14.02.20) <<https://www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies>> accessed 16.02.20; MacLeod, 'RCMP Accused of Creating 'Crisis of Press Freedom' in Wet'suwet'en Raids' *The Tyee* (14.02.20) <<https://thetyee.ca/News/2020/02/14/RCMP-Accused-Crisis-Press-Freedom/>> accessed 16.02.20; Kestler-D'Amours, 'RCMP off Wet'suwet'en land': Solidarity grows for land defenders' *Al Jazeera* (14.02.20) <<https://www.aljazeera.com/news/2020/02/wet-land-solidarity-grows-land-defenders-200214163301407.html>> accessed 16.02.20.

² *Loi sur la laïcité de l'État*, SQ 2019, c 12. The legislation is shielded from s2(a) and s15 challenges through its invocation of the 'notwithstanding clause' under s 33 of the Charter. On public and political reactions to the law see eg Malhotra, 'McGill students strike against Bill 21' *The Bull & Bear* (26.01.20) <<http://bullandbearmcgill.com/mcgill-students-strike-in-outpour-against-bill-21/>> accessed 16.02.20; Mulcair, 'Trudeau is afraid to challenge Bill 21' *Toronto Sun* (04.02.20) <<https://torontosun.com/opinion/columnists/mulcair-trudeau-is-afraid-to-challenge-bill-21>> accessed 16.02.20.

³ *Hak v Procureure générale du Québec*, 2019 QCCA 2145 (leave to appeal filed with SCC).

⁴ 'Bill 21 is sending us Quebec civil servants, Manitoba premier says' *Montreal Gazette* (20.01.20) <<https://montrealgazette.com/news/quebec/bill-21-is-sending-us-quebec-civil-servants-manitoba-premier-says>> accessed 16.02.20

⁵ Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Clarke, Irwin & Co 1981) xii.

this fragility. There are fault lines and fractures running through the religious freedom cases, which bear upon adherents in substantial ways. It is of more than merely academic concern when, for instance, Indigenous claimants are denied constitutional protection for spiritual practices tied to the land or when insular religious minorities are made to sacrifice significant beliefs or practices that form a historic backbone to their communities.⁶ It can be difficult to square these cases with Canada's rhetorical and constitutional commitment to multiculturalism, individual and collective freedom, and substantive equality.

By looking at the cases through the lens of harm, we can see these fault lines more clearly and gain a better understanding of what the fragility in s2(a) adjudication entails. We can see that the cracks in the jurisprudence tend to form around judgments of harm. I have shown in this thesis that the concept of harm plays a pervasive and central role in constitutional religious freedom decisions. I have drawn out and mapped the contours of that role, indicating how and where the doctrinal tests used under s2(a) and s1 of the Charter demand a harm analysis, both implicitly and explicitly. But complicating this steady resort to harm is the messy reality of harm-based adjudication. When judges make decisions about the relevance, seriousness, and proof of harm in the religion cases, they are necessarily drawing on a host of other pre-commitments and assumptions, mediated through the over-arching culture of Canadian constitutional law and the judge's own ethical and moral intuitions. Judgments of harm are complex and contested sites of discursive tension, serving as flashpoints in the religious freedom jurisprudence where fragility reveals itself.

My research thus paints an interesting picture of religious freedom under Canadian constitutional law. It reveals an invisible hierarchy of harms, with harms to the state's fundamental institutions and values at the apex. State authority constrains and delimits the right to religious freedom and the courts are the discursive guardians of that authority. Harm to the state is often synonymous with harm to vulnerable people or minorities, particularly given Canada's entrenched commitment to values of equality and diversity. The courts can thus protect the rights of LGBTQ+ people⁷ and religious minorities⁸ while simultaneously affirming 'core' public values and state interests. But values can be understood to mean different things in different contexts, and deference to them can further trouble the fault lines of the right to religious freedom.⁹ The courts will also vigilantly guard against harms of

⁶ *Ktunaxa Nation v British Columbia*, 2017 SCC 54; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

⁷ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3; *Law Society of British Columbia v Trinity Western University*, 2015 BCSC 2326.

⁸ *Syndicat Northcrest v Amselem*, 2004 SCC 47; *Multani v Commission scolaire Marguerite-Bougeoyoys*, 2006 SCC 6.

⁹ See eg *R v NS*, 2012 SCC 72.

coercion and physical harm, ensuring that the s2(a) right does not risk harm of that nature whilst protecting religious adherents from those same harms. Harms to people's identity, to their collective religious interests, and psychological harm attract more ambivalent constitutional protection, whilst harms of an economic, aesthetic or spiritual nature lie at the bottom of the hierarchy, rarely playing any significant role in the constitutional analysis.

The ubiquity of harm in the court's Charter adjudication of religious freedom thus raises challenging questions about how courts define and understand harm. If harm is to retain its preeminent place in s2(a) jurisprudence, it falls to courts and advocates to consider what is lost in conventional accounts of harm and what is gained by more flexible, capacious approaches. I explored these questions through my analysis of the role of expressive harm in religious freedom cases. I demonstrated the value of pushing against narrow conceptions of harm that fail to do justice to intangible, impersonal, but equally significant harms that are expressive or symbolic in nature. I argued that the constitutional contours of the right to religious freedom do reflect concerns about expressive harm, most often in the context of equality, where it is understood that expressive acts can impair the status equality of vulnerable groups in society without any of the traditional markers of harm present. This analysis challenges us to think about harm differently. However, it also illustrates some of the problems arising from the inherently shifting and slippery quality of harm. Uncertainty around the source, significance and meaning of expressive harm may lead Canadian courts back onto the troublesome terrain of community standards and mores determining the content of legal norms, as we saw in *R v Butler*.¹⁰

Overall, my analysis helps to underscore and to explain the instability of religious freedom under Canadian constitutional law. Legal adjudication of the right depends heavily on a construct that is riddled with uncertainties of definition, scope and proof. The drive to expand conceptions of harm to better account for subaltern, social injuries sits in tension with the need to ensure that the state is not limiting religious freedom in the name of 'vague and symbolic objectives'¹¹ untethered from substantive commitments to equality and justice. Seemingly rigid boundaries around the right yield and bend to different, sometimes conflicting values and interests. All of this is occurring in the shadows of the jurisprudence, exerting profound effects on its shape and trajectory without much, if any, overt consideration by judges of harm's role in creating this state of disequilibrium.

Though the courts fail to engage with harm in the religion cases, academic writers and theorists fare somewhat better. Of those who do address the role of harm in the constitutional

¹⁰ [1992] 1 SCR 452.

¹¹ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [22] (McLachlin CJ).

adjudication of religious freedom, however briefly, most focus on the courts' *explicit* turn to harm.¹² Either harm is proposed as a legitimate, principled limit to religious freedom which courts and legislatures are right to adopt,¹³ or it is viewed suspiciously, as a 'proxy debate', a retreat from tough questions, an obfuscation.¹⁴ Neither of these accounts provides a fully satisfactory account of the function harm plays in the constitutional adjudication of religious freedom.

Those in the first group fail to account for the contentious, malleable nature of harm. As I demonstrate throughout this thesis, the concept of harm cannot provide the certainty so often demanded of it; it is indeterminate, vague, and has no settled content. Explicit resort to harm as a limiting principle often fails at the first hurdle of adequately and legitimately defining harm, before even getting to the difficult point of trying to balance competing harms against each other.

Robert Wintemute's recent article on religious accommodation is instructive on this point.¹⁵ Wintemute proposes the risk of direct or indirect 'harm to others' as a metric for deciding whether to accommodate manifestations of religious belief.¹⁶ Although he acknowledges that the degree of harm caused by a given manifestation can be disputed,¹⁷ he then confidently asserts the presence or absence of harm to others in his two case studies with little interrogation into the culturally and normatively loaded concept of harm he employs. For instance, he advocates a strong, equality-based defence of the right of Muslim women to wear hijab at work and at school, on the grounds that a headscarf causes no direct or indirect harm to others.¹⁸ He maintains that Muslim face coverings such as the niqab, however, do cause harm: the combination of the harm it causes to people trying to communicate with a woman in a niqab and the threat it poses to public values and policies around sex discrimination justify

¹² A notable exception is Beaman, whose work focuses on the discursive construction of the religious claimant as harmful as therefore undeserving of constitutional protection under Canadian law (Beaman, *Defining Harm* (UBC 2008)).

¹³ Nussbaum, 'Religion and Women's Equality' in Rosenblum (ed), *Obligations of Citizenship and Demands of Faith* (Princeton 2000) 335; Plant, 'Religion in a Liberal State' in D'Costa, Evans, Modood and Rivers (eds), *Religion in a Liberal State* (CUP 2013) 9; Wintemute, 'Accommodating Religious Beliefs' (2014) 77(2) MLR 223; Tebbe, *Religious Freedom in an Egalitarian Age* (HUP 2017).

¹⁴ Berger, 'Moral Judgment, Criminal Law and the Constitutional Protection of Religion' (2008) 41 SCLR (2d) 1; Beaman, 'Introduction' in Calder and Beaman (eds), *Polygamy's Rights and Wrongs* (UBC 2014) 1.

¹⁵ Wintemute (n13). See also Plant (n13), whose attempt to settle conflicts over the limits of religious freedom with resort to the harm principle suffers from similar problems.

¹⁶ He maintains that accommodation can be justified if the religious practice in question causes neither direct nor indirect harm to others and results in only minor inconvenience or cost to the accommodating party: (n13) 228-29.

¹⁷ *ibid* 230 (eg regarding male circumcision and the ritual slaughter of animals for halal or kosher meat).

¹⁸ *ibid* 234. Arguments that headscarves cause indirect harm simply reflect 'self-inflicted anxieties or prejudices of the viewer, for which the wearer is not responsible and which cannot justify non-accommodation'.

refusals to accommodate in such cases. My problem is not with the particular conclusion that Wintemute reached (though I disagree with him) but with the implication that this is a natural outcome of adopting a harm analysis. In judging harm in the niqab example, it is equally plausible to argue the converse: that a commitment to eradicating sex discrimination demands that women *not* be told by the state what they can or cannot wear. Like all harm arguments, claims about the harm caused (or not caused) by the niqab betray wider political, social and cultural commitments and norms. The explicit turn to harm does not provide the additional clarity or certainty in the determination of religious accommodation claims that Wintemute hopes.

Those in the second group – the skeptics – are thus quite right to be critical of courts’ resort to the language of harm in judging the limits of religious freedom. However, they understate the extent of the problem. Though judges do revert to harm to shield their decisions from perceptions of morality-making,¹⁹ I maintain that this is only one aspect of the work that harm performs in the adjudication of religious freedom. The concept of harm is deeply embedded in the constitutional approach to religion. At each stage of the doctrinal analysis, courts inquire into risk of harm – both to the claimant and caused by the claimant’s religious conduct or beliefs – without necessarily using the language of harm.²⁰ This move betrays a more reflexive, intuitive propensity for analysing religious disputes through the lens of harm, one rooted both in the particular challenges presented by the claims of religious freedom in liberal democratic states, and in the structure and culture of the constitutional rights provision itself.²¹ There is no escaping harm when religious freedom claims come before the courts. Thus, it is not sufficient to point the finger at those instances in which the harm analysis is more explicit, as in *Polygamy Reference*; harm plays a comparable role in most other religious freedom claims, its work simply more hidden from view.

Is harm’s embeddedness in the constitutional rights protection for religious freedom *necessarily* problematic? I do not believe it is. We are right to be critical of un-critical recourse to harm, for the reasons noted above and developed throughout this thesis. However, I believe that attention to harm in the constitutional adjudication of religious rights can be fruitful, for two reasons (and with two important caveats).

First, I turn to Waldron’s defence of the concept of dignity in constitutional human rights law for the notion that attention to harm and the important role it plays could serve as a prompt

¹⁹ Beaman (n12) 67-68 (harm as a technique by which the courts claim moral neutrality); Berger (n14) 546. This is what I refer to as harm’s ‘legitimizing function’ in Chapter 4.

²⁰ This is harm’s ‘jurisdictional function’ from Chapter 4.

²¹ See Chapter 3.

for thoughtfulness among judges. Like the concept of harm, dignity has been described as a ‘hopelessly vague’ and a ‘subjective, squishy notion’.²² Its ‘chameleon-like character’ means it is, again like harm, frequently called upon by either side of a given dispute.²³ But Waldron does not believe that these criticisms negate its value. While dignity is a multi-faceted concept that is not amenable to simple definition, perhaps we are asking too much of our constitutional concepts, none of which can or should be applied mechanistically. What a concept like dignity can do, he argues, is invite the court to engage in ‘serious normative reflection’.²⁴ Indeed, when affronts to dignity are argued on both sides of a dispute, the two dignity claims do not necessarily cancel each other out – they need not be equivocal. In fact, their deployment may simply suggest that there is something meaningful at stake on each side which may be hard to articulate, but which is worth considering. It falls to the court to think about the claims being made and make a reasoned judgment about what dignity demands in that instance. A concept like dignity is ‘a catalyst for thinking; and the heritage it trails is an invitation to reflect on the application of that thinking to the case at hand’.²⁵

Waldron’s conclusions about dignity can equally be applied to the problem of harm. Harcourt’s insight into the tendency of harm arguments to proliferate and be used to support incommensurate claims²⁶ is valuable, but not conclusive. It is possible to differentiate specious claims of harm from those that are supported by the evidence.²⁷ It is possible to reject claims of harm as barely disguised appeals to enforce a conventional, false morality. And it is possible to acknowledge that there is some merit to the claims of harm on each side of a dispute, without throwing one’s hands up in despair. Courts are well-equipped to judge harm, and though they will often get it wrong, it is not necessarily their recourse to harm that is the problem, but how they respond to the demands it makes on them.

The second point in favour of a harm-based approach to adjudicating religious freedom claims stems from harm’s rich pedigree as an emancipatory principle. Mill developed his ‘principle of liberty’ in response to the oppressive moralism of 19th century Britain. The embrace of the harm principle by subsequent liberal thinkers such as HLA Hart and Joel Feinberg betrays their underlying commitment to egalitarianism and the eradication of human suffering.²⁸ Despite the problems posed by harm’s inherent vagueness and the frequent co-

²² Waldron, ‘Is Dignity the Foundation of Human Rights?’ in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 118, 121.

²³ Waldron, ‘Human Dignity – A Pervasive Value’ (*Foundational Concepts in Constitutional Theory*, UCL Laws, London, July 2019) 16-17.

²⁴ *ibid* 16.

²⁵ *ibid* 16.

²⁶ Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *JCrimLaw&Criminology* 109.

²⁷ See eg *Multani* (n8), text to n52 in ch5.

²⁸ Harcourt (n26).

opting of the language of harm by socially conservative movements, the core of the concept of harm retains this progressive potential. Canadian legal approaches to obscenity and indecency help to illustrate this point. Although the Supreme Court's decision in *R v Labaye* left many questions unanswered, the critical turn to harm that it ushered in – by insisting on evidence of harm, attending to real and not imagined victims of harm, and tying judicial findings of harm to constitutional principles – was a marked improvement over the thinly veiled moralism of the *Butler* era in which harm was a proxy for social opinion and subjective judicial preference.²⁹ Recent judicial and legislative recognition of harm reduction efforts by vulnerable social groups in the areas of drug use, sex work and life-end decision-making³⁰ also illustrate the potential for the language of harm to produce equality-affirming results in line with the aims of social justice.³¹ The turn to harm can serve as a powerful call to investigate the social, cultural and political reality of a particular issue, looking for proof of harm rather than relying on perceptions of distaste or personal offense. Harm's progressive potential is not obliterated by the searching critiques I investigate throughout this thesis, though it certainly must account for them.

Now for the caveats. First, if courts are to engage with the challenges posed by the concept of harm in law, they must proceed with the harm analysis overtly and self-consciously. This means acknowledging their reliance on a contested term, reflecting on their methods of assessing harm, and openly addressing the values and normative assumptions that are guiding the particular understanding of harm adopted. Even Lori Beaman, who is highly suspicious of judicial reliance on narratives of harm, notes that harm has some potential as a limiting principle, provided that the underlying moral convictions that guide a court's use of harm be revealed and addressed 'rather than masked under the guise of neutrality and objectivity'.³² Likewise, in their defence of a 'third-party harms' doctrine, authors Tebbe, Schwartzman and Schragger emphasize that for courts to adequately assess harm in religious accommodation cases they must carefully examine the underlying values and public commitments on both sides.³³ In this sense judicial appeals to harm are no different than to any other constitutional

²⁹ *R v Labaye*, 2005 SCC 80; *Butler* (n10).

³⁰ Klein, 'Criminal Law and the Counter-Hegemonic Potential of Harm Reduction' (2015) 38 DalLJ 447, 450.

³¹ On sex work, see eg *Bedford v Canada (AG)* (2010), 327 DLR (4th) 52 (Ont Sup Ct) where Himel J focused on the harm caused by the criminal laws themselves, noting that 'the issue of harm faced by prostitutes is forefront in the present case and supported by two decades of new research' ([72]). It was through the language of harm that the court could voice its concern for the impact of the impugned laws on marginalized populations and lend that concern the necessary weight to offset the claims made by government about the harmful nuisance targeted by the laws.

³² Beaman, 'Church, State, and the Legal Interpretation of Polygamy in Canada' (2004) 8(1) Nova Religio 20, 28-29.

³³ Tebbe, Schwartzman and Schragger, 'When do Religious Accommodations Burden Others?' in Mancini and Rosenfeld (eds), *The Conscience Wars* (CUP 2018) 328, 340-42; see also Tebbe (n13) 60

or legal principle; all constitutional adjudication is to some extent political, drawing on and reflecting ideological and political value judgments.³⁴ But as Hutchinson explains, this is ‘no bad thing’.³⁵ Judges should not shirk from this knowledge but, rather, seek to understand and accept it – only then will they be in a position to begin to judge the legitimacy of their own decisions not by whether they comport to formalist ideals, but by whether they advance the goals of social justice.³⁶

Chief Justice McLachlin’s reasons in *Labaye* stand out in this regard. She acknowledged that as the new harm-based test to judge criminal indecency would require ‘careful and express analysis of whether the alleged harm is ... truly incompatible with the proper functioning of Canadian society’, judges would have to make value judgments.³⁷ However, she explained that the making of value judgments does not necessarily implicate a court in subjective, illegitimate decision-making. Judges must first show some awareness of the possibility for these judgments to stem from ‘unarticulated and unacknowledged values or prejudices’.³⁸ Second, they must strive to make their decisions with ‘full appreciation of the relevant factual and legal context’ and the evidence before the court. Finally, they should think carefully about and articulate the underlying factors influencing the value judgment.³⁹ Justice Karakatsanis also recently emphasized the importance of making value judgments explicit in the context of the section 1 inquiry, acknowledging section 1 as an invariably normative exercise.⁴⁰ These cautionary principles could help to ensure a more robust form of harm-based constitutional adjudication in religious freedom cases.

The second caveat is that courts should not be unduly rigid or restrictive in their approach to harm. They should be open to perceiving different forms and modes of injury, re-imagining harm in a more inclusive manner to account not only for individual coercive or physical harm, but also expressive, identity-based, psychological and associational harms in an effort to capture the full range of harms at stake. This can only be achieved if the first caveat is taken to heart. Otherwise courts run the risk of entrenching narrow, neo-liberal notions of individual

(‘...the most powerful and sensible way to set baselines for measuring burdens on the right is to consider the substantive values at play’).

³⁴ Hutchinson, ‘The Politics of Constitutional Law’ in Oliver, Macklem and Des Rosiers (eds), *The Oxford Handbook of The Canadian Constitution* (OUP 2017) 989 (‘...constitutional common law is awash in the roiling and muddy waters of political power. Although judges and lawyers claim to keep relatively clean and dry by wearing their institutional wet-suits of abstract neutrality and disinterested fairness, they are up to their necks in ideological mud’: 998).

³⁵ *ibid.*

³⁶ *ibid* 998-99.

³⁷ *Labaye* (n29) [53].

³⁸ *ibid* [54].

³⁹ *ibid.*

⁴⁰ *R v KRJ*, 2016 SCC 31 [79].

harm and failing to account for the undeniably social character of harm as it is experienced in and mediated by the social world.

Of course, courts do not always draw on harm explicitly, leaving harm's implicit role in the religious freedom analysis unacknowledged. I would encourage judges to reflect on the invisible ways in which their analysis of the limits to religious freedom is necessarily conducted through the lens of harm and to render them visible. When harm is brought to the forefront of the analysis, it need not be treated as an inherently evasive measure or a proxy debate – rather, we can expect the court to proceed with a harm analysis by being clearer about how it is judging harm, against what standard, and which underlying values and assumptions are influencing the analysis. It is not enough for a judge or advocate to rely on a vague claim of harm to justify a position. Harm on its own gets us nowhere, and care must be taken to properly elaborate on the commitments undergirding the particular approach to harm that is adopted. In the words of Gonthier and Binnie JJ in *R v Malmo-Levine*, 'the existence of harm (however defined) does no more than open a gateway to the debate; it does not give any precise guidance about its resolution'.⁴¹ Harm alone cannot provide the answer to a problem, but is merely a question that needs to be answered.

My contribution in this thesis has been to shine light on the myriad ways in which harm is implicated in the Charter right to religious freedom. This is not to suggest that other principles, values and themes are not relevant to the inquiry. Questions of harm are not the only flashpoints in the constitutional adjudication of religion. Indeed, Tebbe's confidence in the harm principle as a means of resolving difficult issues over the limits to religious freedom is tempered by the fact that he proposes three other operative principles – fairness to others, freedom of association, and government non-endorsement – which do much of the work that the harm principle is simply incapable of doing.⁴² No one principle will provide the key to resolving difficult disputes over the constitutional limits to religious freedom. Judges, scholars and advocates must resist universalist appeals to single principles or criteria to resolve complex and highly contested legal problems. A more varied, highly textured adjudicative approach may be better able to withstand some of the pressures upon the right to religious freedom, an already unstable and fragile freedom.

⁴¹ *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [127].

⁴² Tebbe (n13).

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