

**A Court Bound, Unbinding and Bonding:
Ruling Diversity With Proportionality**

by

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BA, Simon Fraser University, 2005

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Supervisory Committee

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Abstract

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Proportionality review has become a common and expected legal test to determine the limits of rights under Canadian Charter adjudication. Section 2(a) of the Charter, which provides for freedom of religion, is one tool for people of cultural diversity to challenge the social order with their own *nomoi*. In this thesis I look at the freedom of religion cases that have been decided under section 1, thus also through proportionality analysis for how the proportionality test engages the democratic voice of persons of religious diversity. I argue that while the proportionality test is intended to recognize the democratic voice of diversity the reasoning structure of the test as usually utilized does not facilitate the processes of communication necessary to respectfully engage the voice of religious diversity and results in societal fragmentation. There are however, two recent cases that exemplify a very different and significantly new form of reasoning under the language of the proportionality test. I argue that these forms of proportionality analysis represent a form of deliberative or practical reason in which the *nomoi* of religious persons is recognized as of equal value as legislative *nomoi* and where political conflicts might be resolved not solely on the basis of power, but through the construction of shared histories that facilitate creating shared *nomoi*.

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I can only dedicate this to Nick whose committed partnering makes me free.

Dedication

to Nick

Introduction: Legitimacy and Diversity

This thesis is a response to a moment of surprise at the use of “balancing” as a metaphor for the reconciliation of conflicts between religious or cultural groups and the broader society under section 1 of the Canadian *Charter of Rights and Freedoms*. It seemed to me patently obvious that rights cannot be “balanced” because there is no way of quantifying rights such that each can be satisfactorily compared to each other. Is shelter for five people equal to clean drinking water for three people, or four? Moreover, if rights could be quantified, say by representing the essence of a right as autonomy or choice-exercising and then aggregating all personal choices through a social welfare matrix as libertarianism does, there would be no way of guaranteeing that the outcome would be desirable in the sense of actually producing the egalitarian societies that the concept of “rights” is thought to refer to anyhow. If the Charter is legitimated on the basis of its utility in realizing an egalitarian society, the use of a balancing metaphor under section 1 seems to introduce a countervailing set of ideas. Moreover, I was doubly surprised because the “balancing” metaphor continued in spite of longstanding critiques about the impossibility of balancing rights as presented by Alexander Aleinikoff, for example, and more generally, the critiques by Amartya Sen of the libertarian ideology behind “balancing.”¹ So I became interested in knowing what perpetuates the use of the “balancing” metaphor, how is the metaphor employed and to what effect?

What I initially found is that the “balancing” metaphor as used by the Supreme Court of Canada serves a purpose of institutional legitimacy. It is a language that observers of rights discourse both prefer and expect to hear in the latter half of the twentieth century from the

¹ T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing,” *The Yale Law Journal* 96(5) 1987; Amartya Sen, “Personal Utilities and Public Judgments,” *The Economic Journal* 89(355), 1979.

institutions that have been empowered to guard against the inequitable effects of our social orders. However, the political effect of its employment is ambiguous. It has alienated people from each other - minority groups from the state, but it might also be employed to build camaraderie between people by placing them in conversation with each other. Where people are alienated from each other they become subject to the balance of power between themselves and others. The alternative is to converse with each other, but it is not clear how “balancing” might be employed to this effect, whether it has been so employed, and whether conversation could actually facilitate the realization of egalitarian societies.

Rights are not used simply to realize egalitarian societies but also diverse societies. Adjudicating rights can be about preserving diversity against the assimilative or distorting power of the state, society, and “others.” However, law and rights are not necessarily the most adept tools for realizing diversity, perhaps especially because they are interpreted by judges who are necessarily partial and in institutional contexts that are similarly partial in the rules, language and expectations that are expected of claimants. The production of our social orders necessarily happens in contexts that cannot appeal axiomatically to universality – a judge will invoke their own understanding of law and this cannot be guaranteed to be the same as those affected by the judges’ interpretation. To the extent of a lack of overlap in interpretation of the law people act in what I will term a “distortive” or servile manner vis-a-vis what appears to be an arbitrary interpretation of law.

The historicity of law further exasperates the distortive capacity of law. A law composed in one moment in time will have different assimilative effects as the diversity of people and the material conditions of the society it reaches, changes. Canadian law is cognizably “western” – it is a product primarily (though not solely) of modern European imagination in its languages, the

particulars of its substantive law, in its focus on texted law, and in the institutional structure of legislature, executive and judiciary in which law is produced and enforced. To the extent that a society incorporates new sources of law in the form of discovering new sources (say through immigration and communication) and creative development of extant sources, the enforcement of past law will begin to exercise new distortive effects. It will also be newly regarded as exercising distortive effects where the values of a society change to newly recognize or differently value identities, for example in the way it has become important to found, or be perceived as founding, a valuable place for women, Japanese Canadians, indigenous peoples, Doukhobours, Jews, Muslims, Sikhs, Indo-Canadians, Asian-Canadians, lesbians, gays, bi- and trans-gendered persons, within the social order. The problem for any “present” is to act within the material of the passing social order to in some way appropriately refit it to our constantly renewing diversity.

The problem of a legitimate social order in the face of diversity is the point on which the use of “balancing” under section 1 is ambiguous in its effect. The court uses “balancing” for purposes of institutional legitimacy, but how does the use of “balancing” mediate the tension between the democratic claims of diversity and the given social order? This is the question I address in this thesis by looking at the Supreme Court of Canada’s use of “balancing” in adjudicating religion. “Proportionality” is the contemporary name for the type of judicial review that constructing the social order through the “balancing” of rights and interests is.² I have chosen to look at the use of proportionality in the context of freedom of religion because religion right through which the court frequently and contestedly addresses the problem of diversity. I argue that while the Supreme Court is an awkward institution for realizing a legitimate social

² The term “proportionality” is of course older, extending for example to Aristotle. It is associated with distributive justice, but the form of analysis engaged is contemporaneously distinct.

order, it does provide some unique opportunities for democratic legitimacy. I also argue that proportionality review *might* also be interpreted to facilitate conversation over a desirable social order and that the production of conversation produces its own form of legitimacy.

In the first chapter I show how proportionality is related to legitimacy. I argue that the development of proportionality review in international context fulfills a need for institutional legitimacy. Turning to the Canadian context I show how two key interpreters of the proportionality test in Canada, David Beatty and Lorraine Weinrib, use the test to emphasize self-determination for Beatty and the justice of the social order for Weinrib. I argue that a tension between the two approaches is aggravated by an attempt to avoid intersubjective judgment, a phenomenon I call “insularity.” In the third chapter I contrast insularity with reasonableness, an approach to intersubjective judgment that may be experienced as bonding.

In the second chapter I explore the Supreme Court of Canada’s actual use of proportionality review in the context of religion. Freedom of religion is just one Charter right under which minority groups challenge the social order, though there are a couple of reasons for especially considering this right. It is often under the guise of “religion” that conflicts with the governing social order in modern states are made manifest because religion approximates to culture and culture is reflective of many of the new forms of minoritized identity that challenge the social order in the Charter-era. Secondly, it is often in the realm of religion that liberal-democratic societies express an acute sense of compunction about enforcing the ideas of the collectivity, dominant groups, or the state over and against the “other.” This compunction is expressed in various practices such as the exemptions religious groups, have from general employment laws, or from corporate taxes, due to charitable status. In tension with this compunction to allow religious groups self-determination is a concern for the legitimacy of the

social order, in the sense of the normative value of the social and in the face of the reality that people sometimes do harmful things under the guise of religion. The deep tension between the desire to celebrate diversity and also protect people from harm is what makes “freedom of religion” an interesting site to consider the value of proportionality review in addressing conflict.

My argument in the second chapter centers around the idea that the court is “binding,” bound and unbinding because of an “insular” approach to judicial review - an approach that avoids intersubjective judgment. Proportionality analysis “binds” in that as a form of section 1 analysis it is intended to bind or integrate minority groups into Canadian society under conditions where our political institutions are designed to construct and favour majorities. Section 1 is the basis for creating a multicultural society. I argue that while section 1 provides the ultimate normative basis for the social order, the language that legitimates the Charter and human rights review under section 1 in this way is largely without effect for a constructing a social order sensitive to diversity. Rather, beneath the language a form of review has been adopted that is actually unbinding because it does not allow the democratic voice of diversity to be heard. It leads to the fragmentation of society as people and groups sense that they must defend themselves from those with whom they live. The proportionality test, at least in its structure, does not facilitate the democratic voice of those appearing in the court under section 2(a) of the Charter and actually reifies the voice of persons who institute the laws religious groups challenge through the Charter. Finally, proportionality analysis as an insular practice also binds the court’s voice. The test does not orient the court to state clearly what its judgment of the social order is. This will ultimately undermine the court’s institutional legitimacy as the court enacts no effective function in Canadian government as an institution through which minorities can challenge the social order.

In the third chapter I suggest that perhaps there is a way that the court might be unbound. Two recent cases, *Multani v. Commission scolaire Marguerite-Bourgeoys* and *Alberta v. Hutterian Brethren* represent significant changes in the way that section 1 analysis and proportionality review is imagined and performed.³ I argue that in these cases the court is speaking more clearly because the court has found a way to bond across diversity rather than artificially bind, by adopting a deliberative reasoning process. These new forms of proportionality analysis are institutional habits that speak clear conceptions of desirable ways of being back to the public discourse in a way that is bonding.

³ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*]; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*].

Chapter One: Proportionality, Legitimacy and Insularity

Proportionality has become a basic feature of constitutional review in liberal democracies in the latter half of the twentieth century. It is used primarily in interpreting general limitations clauses – the clause under which rights are “balanced” or the limits of rights determined and rights made consistent with each other. Interpreting rights is a process of creating social order. It substantiates law and creates incentives and disincentives for acting in accordance with the new social order. The interpretation of rights will therefore affect diversity. In this chapter I show how proportionality is related to insularity and legitimacy. In the rights revolution the court becomes an institution whose legitimacy is partly dependent on whether it successfully offers a forum for the democratic voice of minoritized forms of diversity to challenge the social order. If the court can account for diversity it will preserve the democratic legitimacy of the given social order in that it will be a place in which minorities can find democratic voice. If the court can rule in such a way as to construct a valuable social order, it will preserve political legitimacy in that the effects of the order it produces are good. Political and democratic legitimacy are inseparable because the cognition of the social order as good depends upon one’s participation in the social order being experienced as valuable, or reflective of one’s aspirations about desirable ways of being. However, there is a way that in the face of diversity the legitimacy of the social order can be brought into tension with an attempt to recognize diversity where people seek avoiding the intersubjective judgment of others. I will particularly demonstrate this latter aspect in the next chapter. The attempt to avoid intersubjective judgment pervades proportionality review and to some degree attitudes towards religion, so I will begin with defining this theme.

The Insular Solution to the Problem of Language and Diversity

By intersubjective judgment I mean a process by which people share their identifications of each other with each other such that these identifications are brought into deliberative processes of mutual construction. By insularity I mean its opposite, the avoidance of these deliberative processes through the privatizing of our ways of being by keeping silent our identifications of the other.⁴ A good example of what I mean by insularity is the way in which we might regard a religious practice as harmful but not speak our identification of the practice as harmful because we regard religion as belonging to a person's private life such that we ought not to intervene, or perhaps because we fear their response to our action. The reasoning behind and consequence of the two perspectives are representable through some of Hobbes' thought and the discussion Quentin Skinner draws out between Hobbes and his "Democratical Gentlemen" opponents.⁵

In an insular perspective the authentic focus of a citizen's activity is on their own ways of being and without concern for the public effects of their activity. As Quentin Skinner describes, it is cognizable in Isaiah Berlin's interpretation of negative freedom. In Berlin's concept of freedom,

"the criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes.

⁴ The term "insular" stems from Robert Cover, "The Supreme Court 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97(4), who uses "insular" to refer to the autonomy of associational communities to create a distinct lifeworld that has public effect but is constituted in located community. I therefore use the term with some distinction to refer an attitude of indifference that results in a lack of awareness from within an association of person to the outside.

⁵ Quentin Skinner, "A Third Concept of Liberty," *Proceedings of the British Academy* 117: 2002, 247. This theme is also represented in the politics of tolerance versus the politics of identity. I prefer a Hobbesian orientation here because Hobbesian iconography is useful for understanding proportionality review, freedom of religion as defined by Dickson draws on themes from the same time period as well, and an historical orientation helps make clear that the theme of insularity is not temporally contingent in the way that "politics of tolerance" might be regarded as a fundamentally new way of engaging diversity in the early twenty-first century.

By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.”⁶

Berlin’s understanding of freedom is not necessarily insular, but an exclusive focus on it as a normative ideal can be. If freedom is solely privately oriented and an ultimate good, there is inherent inclination in the concept of freedom to adopt a public awareness. Skinner following Berlin observes that the contemporary re-understanding of freedom as “nothing other than non-interference” is perhaps first formulated by Hobbes. However, the dominance of the private orientation is perhaps due more to the vociferous, polemical nature of Hobbes’ argument against the concept of freedom espoused by the “Democratist Gentlemen.”⁷

In Hobbes’ *Leviathan* negative freedom is the freedom of the citizen or the freedom to self-determine a private sphere. Where there are conflicts between citizens there is the need to resolve them through some form of ordering which will be public. In *Leviathan* citizens give up their authorizing of the public order to the sovereign in exchange for the freedom of the citizen to have a modicum of respite from conflicting intersubjective judgment of others and to focus on their privatized ways of being. There is a sense in Hobbes in which the participation of citizens in the construction of the public order is incomplete or partially alienated in the “artificial man.” As Hobbes argues, liberty is consistent with actions induced by fear, including fear of the “state” or the enforced law that orders our conflicts. Free participation in the construction of the social order is consistent with action that is circumscribed or limited by fear. This way of understanding freedom is in direct opposition to the democrat’s conception.

As Skinner has developed the democrat’s concept of freedom, freedom is non-dependence or, freedom from the *arbitrary* will of others. The key is that one is unfree not only when someone interferes directly with what you would otherwise do, but also when you are

⁶ Quoted in Skinner, “A Third Concept,” 244.

⁷ *Ibid.*, 246-7.

aware that someone has the inclination to exercise their will without regard to oneself.⁸ In such a situation you become like a slave or you exhibit the characteristics of servility and are less free, because you constantly attempt to appease or act in spite of the arbitrary. Where people are slaves the social order they produce reflects the arbitrary and stifles people's wills. Therefore, for these democrats a free state can only be a state where all people are not servile and can have full participation in life together.⁹ The democrats of Hobbes' time were concerned about the prospect of a Hobbesian state where the sovereign could exercise discretionary powers because within it there could be no real citizenship or participation. Such a state amounted to the institutionalizing of arbitrary power.¹⁰

The democratic freestate requires something like intersubjective judgment because there is no source that ensures an essential concept of social order that all people can perceive univocally and conform their wills to. They had to converse with each other, sharing, contrasting and reconstructing their ways of being to create sufficient commonality for life together. The central pre-modern rhetorical skill of sharing concepts was that of *paradiastole* in which the rhetorician compared and contrasted concepts by showing that any given action could be redescribed to alter its value in the social order. In the time of Hobbes, Quentin Skinner argues, there was widespread concern that *paradiastole* operated as no more than subterfuge to get self-interested, or partially constructed actions that would be arbitrary to common construction of the social order redescribed as good.¹¹ Without the possibility of constructing a common social order there can be no democratic freestate. Hobbes' seems to have thought that it would therefore be better to construct the modern state than subject ourselves to the intersubjective

⁸ Ibid., 248. Hobbesian freedom is present so long as one can act in accord with one's will or has a choice in action.

⁹ Ibid.

¹⁰ Ibid., 254.

¹¹ Quentin Skinner, "Hobbes on rhetoric and the construction of morality" in *Visions of Politics*, Vol. 3, *Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), 87-141.

construction of new ways of being. Instead of resisting the sovereign it would be better to accept the law of the sovereign, certainly of the sovereign that most maximizes private freedom of choice. Set in context and for Hobbes the failure of conversation leads to war, particularly the English Civil War (1642-1648). He therefore writes *Leviathan* in 1651, complete with freedom compatible with fear and in opposition to the democrats “revolutionary” concept of freedom which would challenge the state, in hopes that the end of the civil war may not be temporary. For Hobbes, language cannot be commonly constructed and in response it is better to pursue an insular way of being that submits to and produces a public order that is partially constructed.

The orientation to avoid the intersubjective judgment of others structures contemporary human rights review under section 1 proportionality analysis. Where courts avoid intersubjective judgment of others, Charters and Bills of Rights simply facilitate drawing a boundary between the sphere of private sovereignty of those appearing under rights in the court and the realm of the state in a way that will circumscribe the democratic voice of diversity, as I will describe in chapter two. For this chapter what is important is how insularity shapes proportionality as a feature of institutional legitimacy and also fosters a tension between diversity and legitimacy.

Institutional Legitimacy

Proportionality is part of a new approach to creating social orders in liberal democracies in the latter half of the twentieth century and serves a purpose of institutional legitimacy in that new approach. By institutional legitimacy I mean the belief that a particular institution is serving an important function in the construction of the social order and that it is the appropriate institution to serve that function. There are two aspects to the Supreme Court’s institutional legitimacy as regards proportionality. First, the court is legitimate as protector of minority

rights. Secondly, the court is legitimate where it protects those rights through proportionality review.

The court's role as legitimate protector of minority rights is due to what is sometimes referred to as the rights revolution. The rights revolution refers to the widespread adoption of Charters and Bills of Rights to reinvigorate human rights review after World War II, creating new centers of power to redress concerns for abusive treatment of humans. The world wars, the civil rights movement and formal decolonization all made visible in different contexts the failure of old political systems to address basic concepts of human dignity. In Canada a further set of experiences led to a unique form of the rights revolution. The increased recognition of Canadian sovereignty after World War II brought pressure for constitutional reform as the distancing of British political institutions left a vacuum in determining the distribution of powers between Ottawa and the provinces. This provided extra occasion to revisit human rights law as well. Further, Canada had its own unique experiences of human rights abuses in the internment of Japanese Canadians and, as regards religion, the treatment of Jehovah's Witnesses under Duplessis in Quebec and the treatment of the Doukhobors in the west. It is the manifestation of these new identities as unfairly treated in the past social order that is the history which at least partly legitimates institutional reform in judicial review through Charters and Bills of Rights.¹²

¹² For purposes of institutional legitimacy the story can be more or less true of the role courts may have actually played in upholding human rights in any one moment and time. What matters is that to the extent the court preserves the democratic voice of those ostracized from the political order it will uphold its institutional legitimacy. See Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedom," *The Canadian Bar Review* 61, 1983 and Micheal Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, rev. 1994), ch. 1, for perspectives that argue that in Canada the Charter was sold to the Canadian public on the basis of the rights revolution story while the real motivations lay with the convenience of the charter of political strategy. Mandel argues that law has been used by politicians as "a way of getting around people" and representative institutions (37). The point of my argument here is as Russell's – institutional reform was at least partly legitimated on the basis of the Charter's capacity to solve the problem of minority rights, despite the understory. The institution can and has upheld human rights, or so I will argue, though it need not be the only institution to do so.

The new method of creating social orders, constitutional democracy, advances on a political order that constructs minorities. That advancement makes the function of supreme courts essential to the construction of a politically legitimate social order. In the new method we (at least partly) create our social orders through electoral politics checked by a judiciary who ensures that the majoritarian politics of the legislatures do not offend the rights of minorities. In elections we pick the representative which accords with our personal vision of a desirable social order without necessarily engaging deliberation with those we live beside, particularly if we are insularly oriented. To the extent that citizen's are unaware or unconcerned of the plight of their neighbours, to that extent they will also not canvass political parties to represent those concerns. In the new method political parties and representatives need not be concerned about issues that concern more than a majority of Canadians because the judiciary can take care of those who fall by the way side. The judiciary therefore contributes to the construction of the social order by regulating a forum in which those who cannot successfully have their concerns represented in legislative politics might have the opportunity to challenge the Canadian social order. Judges have always contributed to defining social orders, the granting of a charter is not new in that regard. Nor does formally recognizing human rights mean that Canadian political institutions prior to the Charter did not have their own ways of attempting to bring about the realization of a social order that enabled a valuable place for each individual.¹³ The Charter is simply a new political instrument initiated to solve the newly perceived inadequacies of old ones. As interpreter of the Charter, and supposedly independent of the majoritarian institutions of the

¹³ In the context of religion see David Brown, "Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights," *University of British Columbia Law Review* 33(3) 1999, 552-560; Patrick Macklem, "Freedom of Conscience and Religion in Canada," *University of Toronto Faculty of Law Review* 42, 1984: 50-81; David Moore, "Religious Freedom and Doctrines of Reluctance in Post-Charter Canada," *Brigham Young University Law Review* 1996, 1088-1100.

legislature and executive, where the court can portray itself as resolver of these problems it affirms its institutional legitimacy.

To some extent previous, definitional, forms of interpreting human rights documents, were discredited in the rights revolution, leading to the legitimation of proportionality analysis over definitional interpretation of rights as the appropriate way to adjudicate human rights in the rights revolution.¹⁴ The first step in the process of legitimating proportionality is the construction of limitations clauses. These are an explicit response to the American conception of human rights as inalienable and thus incapable of limitation. Inalienable rights are thought of as utterly unfringable by the state such that if a law were found to infringe upon a right the law must axiomatically be entirely void. The scope of rights must therefore be defined carefully to maintain systemic consistency. The idea of inalienable rights captures American revolutionaries' frustration with arbitrary colonial power, but the content of all rights are subject to such differentiation of definition that what one person thinks as constitutive of an inalienable right will not be the same as what another person imagines. This is particularly the case in regards to religion. As often noted, the definition of "religion" is notoriously contested such that there are no axiomatic ways of defining the content of religious freedom.¹⁵ Limitations clauses are a form of public acknowledgement that rights have no essential definition and a response to therefore define the extent of rights through specified principles or values.

¹⁴ Definitional forms of judicial review still exist and proportionality is not exclusively dominant, but it does become the expected form under section 1 at least in Canada, and is increasingly popular

¹⁵ See Arthur L. Greil and David G. Bromley, ed.s, *Defining Religion: Investigating the Boundaries Between the Sacred and Secular* (Amsterdam: Elsevier Science, 2003) for a valuable review of several different approaches, and especially Lori Beaman's chapter therein "The Courts and the Definition of Religion: Preserving the Status Quo Through Exclusion," (203-220) on the Canadian court's approach to defining religion. See also Kent Greenawalt, "Saying What Counts as Religious," in *Religion and the Constitution*, Vol. 1, *Free Exercise and Fairness* (Princeton: Princeton University Press, 2006) on American court's approach to defining religion.

Initially limitations clauses provided substantive guidelines for the conditions or principles upon which a right might be limited. For example, the limitation clause of the Universal Declaration of Human Rights (1948) reads,

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”¹⁶

Under a specified limitations clause the institutional legitimacy of a court can become akin to the definitional approach characterized in American jurisprudence. Here the court has to define the contents of the limits of a right rather than the right itself. It must ask what is “public order” and “general welfare”?

Canada is one of the first states in which specified limits are dropped and a *general* limitations clause is instituted. The general limitations clause comes about almost by accident. Initial drafts of the Charter included limitation clauses for each section of rights and freedoms. For fundamental freedoms, including that of religion, the relevant limits referenced were national security; public safety, order, health or morals; and the rights and freedoms of others.¹⁷ It was difficult for Justice Minister Jean Chrétien to encourage the provinces to arrive at an agreement about how rights would be defined because the nature of the specified limits implicated which level of government would be most impacted by the impending changes.¹⁸ Dropping the

¹⁶ *Universal Declaration of Human Rights* (1948), article 29, section 2. It should be noted that in the UDHR the general limitations clause is preceded by yet another limitations clause, “Everyone has duties to the community in which alone the free and full development of his personality is possible,” (art. 29, sec. 1). This leaves the text open to a more “general” approach to limitations, than one concerned with hermeneutics, though the phenomena of specified limits without such a clause is much more common. See Brian Dickson, “The Canadian Charter of Rights and Freedoms: Context and Evolution,” in Gérald-A. Beaudoin and Errol Mendes, *The Canadian Charter of Rights and Freedoms* (Scarborough, ON: Carswell Thompson Professional, 1996), 1-5, on the influence of international law on the general limitations clause.

¹⁷ “Charter of Rights, Report to Ministers by Sub-Committee of Officials, August 29, 1980,” in Anne Bayefsky, *Canada’s Constitution Act 1982 & Amendments: A Documentary History*, Vol. 2 (Toronto; Montreal: McGraw-Hill Ryerson, 1989), 683.

¹⁸ At one point the draft of s. 1 contained reference guarantees subject to “such reasonable limits as are generally accepted in a free and democratic society *with a parliamentary system of government*” (Bayefsky, 708).

substantive limits to rights proved politically expedient. The consequence however, was to leave no explicit conditions for the court in defining what would constitute the limit of a right. Notions of “public order” and “general” welfare are sufficiently nefarious that the court becomes uncomfortably “political” in defining them. Any set of interests and concerns become potential candidates for the limits of a right. Activism by minoritized groups in parliamentary hearings ensured that their interests would be forefront in defining limits.¹⁹ The claims of minority groups offer initial guidance to the court but also newly reveal the potential power of a court over the legislature as the institutionalizing of human rights in the Charter explicitly allows it to review all legislation. This tension will lead to the adoption of the proportionality test under section 1.

The general limitations approach to defining the practical scope of a human right or freedom is now a common feature of constitutional democracy and courts have widely settled on the test of proportionality to interpret them. The American interpretation of balancing interests has also merged with German tests of proportionality to develop an international conversation on the use of proportionality. The ubiquity of this form of analysis is what allows Beatty to consider it the “ultimate rule of law.”²⁰ He observes that proportionality is simply what courts around the world are in fact doing in the rights revolution, whether they explicitly use the test or not. Courts are weighing and balancing substantive claims to define the social order, rather than defining the essential right social order. The commonality of proportionality contributes to the legitimacy of courts in using the term – aberration from the use would raise questions about what the court was attempting to do. However, it does not indicate clearly the form of judicial review engaged under proportionality, though at least the structure of the test is common.

¹⁹ Lorraine Weinrib, “The Canadian Charter’s Transformative Aspirations,” *Supreme Court Law Review* 2d 19, 2003: 31.

²⁰ David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

Proportionality Becomes a Practice of Insularity

Proportionality is not uniquely substantive (or necessarily substantive). Definitional forms of judicial review can also be done substantively by comparing the various interpretations of the social order the parties in the court think that a right represents, but can also be done in what judges sometimes refer to as an “abstract” manner.²¹ The “abstract” manner can actually represent a series of methods, the key is that they are monological. Meaning is uncovered through the use of a universalizable method that determines what the outcome will be without necessary engagement with an alternative perspective. The ideal social order is of one nature and “out there” such that we can privately utilize theories and methods to make the order manifest. In judicial review a classic example is that of presuming the text of a law embodies some essence of the right social order. The right method requires judges to uncover the “technically correct, logical interpretation of a clearly worded document.”²² Or perhaps judges look to the intent of the founders, or they abstractly define for themselves what a right might entail. In each instance the claims of persons seeking validation of difference are not treated as sources for reconstructing the old ways of finding the meaning of a law. The result is that judges necessarily reify the past social order.²³ A monological approach is incapable of responding to new forms of differences because it fails to acknowledge the partiality of its approach and adopt an attitude of expectation that there might be something to learn from an alternative perspective.²⁴ It is effectively insularly oriented.

²¹ Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Oxford: Oxford University Press, 2001), 31-5.

²² Alan Cairns, “The Judicial Committee and Its Critics” *Canadian Journal of Political Science* 4(3) 1971, 302.

²³ Manfredi, 29.

²⁴ See James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995), ch. 3 and 4 for an account of monological constitutionalism and how diversity can only be facilitated through dialogical constitutionalism where the meaning of constitutional terms are sourced in the claims presented and compared and contrasted in a conversation to “stop the killing” of diversity through the imposition of one law over another (138).

The civil rights revolution in America was characterized by a rejection of a particular practice of “abstract” review. Law in the nineteenth century had moved from a common-law model which had used “community standards” (conceptions of the valuable social order provided by claimants and often constructed in association with religion and thereby having religious reference) to a “formalist” type of judicial review with a scientific, categorical approach to law. When adjudicating religion under a scientific approach, judges attempted to articulate the essence of religion by uncovering that which was common to all religion.²⁵ Perhaps reflective of the judges own backgrounds, or reflective of the paucity of commonality in religious practice, the essentialist approach to defining religion led to the sedimentation of a “civil religion” which reflected Protestant, “religion of the head” conceptions of religion. In this conception of religion the practices of non-Protestant religions were not as well protected because “general” religion could protect private beliefs, but was not very effective at hearing substantive challenges to the actual practices that produce the given social order.²⁶ Explicitly religious practices were reinterpreted as serving a public instrumental function. For example, Sabbath laws came to be understood as preserving a public holiday.²⁷ Challenges to such an order in the name of freedom of religion other than Protestant would be hard to hear. They would appear as an attempt to elevate a particular religion over the public order. The “Lochner” era of judicial review reacted to this definitional approach to law. It called for “attention to the context of the case” to incorporate the claims of diverse persons as sources of law.²⁸ Civil liberties groups particularly responded by revoicing the legitimacy of individual rights against the social order and the

²⁵ David Sikkink, “From Christian Civilization to Individual Civil Liberties: Framing Religion in the Legal Field, 1880-1949, in Christian Smith ed., *The Secular Revolution* (Berkeley: University of California Press, 2003), 312-315.

²⁶ *Ibid.*, 318.

²⁷ *Ibid.*, 320.

²⁸ *Ibid.*, 331.

“cultural hegemony of the Protestant establishment.”²⁹ The courts responded with a substantive form of judicial review where the state would only be justified in infringing a right if it could provide substantial reasons for preserving the challenged law by demonstrating the law’s good effects.³⁰

When the Supreme Court of Canada first interpreted the Charter it was with an institutional legitimacy need to reject the formalist adjudication as occurred under the *Canadian Bill of Rights* and was compared to the formalist judging of American judges.³¹ Like America, Canada had its own form of Christian hegemony that needed to be set aside to make room for diversity.³² So the court interpreted fundamental freedoms as expansively as possible, accepting the challenge to recognize and redress the substantive effects of the social order on diverse ways of being. However, substantive review presented a problem for the democratic legitimacy of the court in the context of a society that grounds democratic legitimacy in the legislature and regards the court as an institution of procedural review and not as a legitimately policy-making body. The nature of substantive review is to potentially unlimitedly empower the judiciary to review all legislation for its harmful effects on individuals.³³ All legislation inevitably imposes limits on individuals and if the court is empowered to review all such instances there is no sense in which the institution which represents the sovereignty of the people could actually be understood to be

²⁹ Ibid., 340.

³⁰ Ibid., 346.

³¹ Manfredi, 31, 33. I follow his account of substantive review in Canada herein.

³² As evidenced in the fact that the first significant section 1 religion cases were about Sunday closing laws and rules around Christian religious education. See also particularly Lori Beaman, “The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada,” *Journal for the Scientific Study of Religion* 42(3) 2003:311-325 and “Aboriginal Spirituality and the Legal Construction of Freedom of Religion,” *Journal of Church and State* 44(1) 2002:135-149 on the Protestant and Catholic constitutional hegemony of Canada.

³³ Manfredi, 35-42. See also Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), ch. 4 and Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section 1,” *Supreme Court Law Review* (2d) 34, 2006 for similar reviews of the political difficulties for the court section 1 raised due to the expansion of judicial capacity.

sovereign. The undifferentiated limitations clause did not make the situation better. Moreover, in *Oakes*, section 1 was interpreted as placing the burden on the state to justify its incursion into individual rights so that the site of analysis would be on the intrusive legislation and presume the value of the action attempting rights protection. *Oakes* also set a “stringent standard of justification.”³⁴ While Brian Dickson J. provided a legal test to determine the justifiability of infringing legislation that was undergirded by an ultimate normative standard under “free and democratic society,” defining “free and democratic society” was also a nefarious affair for judges, especially insofar as Dickson suggested that freedom included issues of social justice and democracy which were traditionally considered the domain of the legislature.³⁵ It is the test rather than “free and democratic society” that courts have since focused on.

The introduction of the *Oakes* proportionality test served a purpose of shoring up the legitimacy of the court in conditions where its increased power vis-a-vis the legislature was in question.³⁶ The adoption of the test was intended to solve the “Millian Dilemma” of the fact that ways of being conflict painfully and must be limited with some “neutral normative method by which to provide determinate guidance for the choice between individual freedom and collective control.”³⁷ In conditions of expanded power the test provides some semblance of containment in that it adopts what Joel Bakan calls a “truth-based” method of judicial review. Legal tests are a

³⁴ *R. v. Oakes*, [1986] 1 S.C.R. [*Oakes*], at 65.

³⁵ Patrick Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law, 2002), 417.

³⁶ Errol Mendes, “The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1,” in Gérald-A. Beaudoin and Errol Mendes, ed.s, *The Canadian Charter of Rights and Freedoms* (Ottawa: Carswell Thompson Professional, 1996), 3-2. Discussions following changes in the test typically adopt an “objective” approach to the use of *Oakes* in spite of the fact it is widely by justices that objectivity is not the goal or value of *Oakes*. On the necessarily rhetorical and linguistically oriented aspects of section 1 see particularly Gold, “The Rhetoric of Rights: The Supreme Court and the Charter,” *Osgoode Hall Law Journal* 25(2), 1987 and Alan Hutchison, *Waiting for CORAF* (Toronto: University of Toronto Press, 1995).

³⁷ Mendes, “Crucible,” 3-4.

veneer that suggest the court is uncovering the truth which is true for everyone.³⁸ The *Oakes* test is a four part test that follows establishing infringement on a right and acknowledging the need to find its limits under section 1. The test evaluates the infringing legislation for a sufficiently important objective, a rational connection between the objective and means of the legislation, minimal impairment and finally, (but often skipped) proportionality between negative effects of the infringement and positive effects of the legislation. The architecture of the test is mathematical as opposed to normative. Instead of normatively evaluating the actual conflict or even the effects of legislation and describing a valuable social order, it ensures the amount of infringement is as small as possible and that the distribution of harm is equal. In rejecting explicitly defining its conception of a “free and democratic society” and turning to the test instead, the court adopts an insular mode of objectivity that hides its identification of the other and instead appears to attempt maximal pursuit of each way of being irregardless of what the court thinks the value of each way of being is. As an institution of the rights revolution, the test is meant to integrate those who are excluded in the past social order through the objective treatment of the balancing test. However, judges soon adjusted the test in terms of how stringently they would apply it and there has been no consistency in interpretation of the test since its inception.

There are typically two reference points used to explain the reformation of the *Oakes* proportionality test – context and deference. I will use Joel Bakan and Robin Elliot’s rendition as they explain how the two can be related. They argue that the court references context in adjusting the proportionality test when it is the effects of legislation that judges have particularly in mind. Rather than balancing the general purpose of a right against the general purpose of the

³⁸ Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 22-30.

infringing legislation which can be somewhat abstract, courts will compare the substantive value the legislation and right achieve in practice.³⁹ Depending on the context, more or less deference to the legislature may be required. Bakan and Elliot also point out that the courts use more or less deference depending on the clarity of social science evidence about the importance of the infringement and on the effort of the legislature to accommodate diverse practices.⁴⁰ If the test was meant to objectively define the balance between individual freedom and the state to limit the power of the judiciary in conditions of substantive review, it has not done so. The court is not being objective in the sense of not acting on their identifications of the normative nature of the case at hand and merely equally distributing to each way of being.⁴¹ The court adjusts the test to produce outcomes that it desires, leaving the Millian Dilemma without an objective resolution, and the test without the credibility of objectivity that institutionalized it.

Proportionality for Self-determination and Higher Law

Within the various interpretations of the test as legal commentators have developed them there are two distinctive streams which I represent here via reference to the Canadian

³⁹ Joel Bakan and Robin Elliot, *Canadian Constitutional Law* 3rd ed. (Toronto: Emond Montgomery, 2003), 763-4. See also Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the Charter," *Ottawa Law Review* 24, 1992 for the argument that the court adjusts the test according to the importance of the infringement to the court's stated values. See also Christopher Brecht and Adam Dodek, "The Increasing Irrelevance of Section 1 of the Charter," *Supreme Court Law Review* 2nd ed. 14, 2001 and Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms," *Brandeis Law Journal* 41, 2002 for arguments that the test is adjusted in response to substantive concerns and towards a return of internal limits adjudication.

⁴⁰ Bakan and Elliot, 773-4. See also Christopher Dassios and Clifton Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada," *Advocates' Quarterly* 15, 1993 who argue that variance in deference is related to the court's attempt to define its expertise relative to the legislature's expertise such that in time the two institutions will divide areas of competencies (307). Robin Elliot in "The Supreme Court of Canada and Section 1 – The Erosion of the Common Front," *Queen's Law Journal* 12, 1987 argues that deference is related not to substantive effects but to the judges own political philosophy particularly as regards liberalism as an inclination to maximize the scope of personal freedom.

⁴¹ The court's have often taken the opportunity of a public forum to point out that it is in the very nature of the Charter to require justices to make value judgments. Moreover, even before critical legal studies started theorizing the legitimacy of law in contexts of unstaid criteria of legitimacy, many legal theorists spoke in terms of the fairness of law rather than its objectivity. See Hutchinson, *Waiting for CORAF*, ch. 3 "The Crisis of Legitimacy" for a review that extends from formalist (or objective) positions to critical legal studies.

commentators David Beatty and Lorraine Weinrib.⁴² David Beatty is keen to emphasize the way in which proportionality is neutral between different perspectives, cultures or religious groups. His approach seems to absolve judges of intersubjective judgment, suggesting that the appropriate balance between ways of being can be struck through assessing the value of each perspective solely through how each way of being presents itself to the court.⁴³ Weinrib equally values general limitations clauses but she does so because they constitute recognition of a higher law to counter “the perceived inadequacies of majoritarian politics.”⁴⁴ Her approach acknowledges and values a normative role for judges but does not directly address deliberative processes of the construction of law.

Beatty has consistently been concerned to demonstrate that courts are or can be “neutral,” and in the *Ultimate Rule of Law* argues that proportionality review is the ultimate objective process of adjudication, capable of delivering a fair balance between all ways of being.⁴⁵ He is particularly concerned with judicial review’s democratic legitimacy vis-à-vis minorities. Under proportionality review he argues law itself is without a culture, and so can be exercised without creating incentives or disincentives to assimilate to any one culture.⁴⁶ Beatty has articulated at least two conceptions of proportionality review.⁴⁷ The first perspective emphasizes the fact-based nature of judicial review. The second perspective Beatty develops in discussion of

⁴² I do mean to indicate that they “roughly” follow tension between political and democratic legitimacy. In selecting analysis on proportionality these two emphases are helpful distinctions, but I am also choosing Weinrib and Beatty to introduce some of the variety of ways the test can be imagined, partly to show that even amongst legal commentaries proportionality is ambiguous in its reasoning.

⁴³ Beatty has a few interpretations of proportionality, but some of his interpretations are particularly oriented to preserving democratic legitimacy and these I highlight.

⁴⁴ Lorraine Weinrib, “Limitations on Rights in a Constitutional Democracy,” *Caribbean Law Review* 6, 1996, 439.

⁴⁵ Beatty, *Ultimate Rule of Law*, 170.

⁴⁶ *Ibid.*

⁴⁷ His latest book is a review of proportionality around the world, so he has numerous conceptions of proportionality, not all consistent. By proportionality Beatty often seems to mean merely substantive review, but he blends his analysis of substantive review with the test itself, and his language consistently implies the ideational structure of proportionality review that I will analyse in chapter two. I have here drawn out two emphases that best relate to his dominant themes of the neutrality of proportionality in the sense of its objectivity and its capacity to incorporate a diversity of ways of being. These two themes are what enable proportionality to be fair.

religion and culture. It is still a fact-based analysis, but its facts are the self-valuation by claimants as to the value of their culture.⁴⁸

Beatty develops his fact-based approach using the common apologetic that it is unlike the American tendency to apply a hermeneutically derived principle to a particular case instead of allowing the case itself to present the relevant ethical issues. By looking at the case itself the courts use proportionality to discern what is in fact at stake and which outcome serves the right set of interests. Beatty develops the fact orientation most consistently in regards to equality using an Aristotelian conception of equality where like objects ought to be treated alike in proportion to their similarity and unlike in proportion to which the objects are dissimilar.⁴⁹ However, Canadian judges do not always read the facts about like objects appropriately, says Beatty. For example, in *Egan* Canadian judges let their personal predilections about the traditional family get in the way of recognizing that same-sex partnerships are like traditional male-female partnerships such that both types of partnerships ought be able to access the same social security benefits.⁵⁰ In spite of this discrepancy, Beatty maintains the possibility of neutrality because proportionality is *supposed* to be and can in fact be fact-based. The value of a partnership is inherent to the partnership itself, in Beatty's imagination, such that our social orders are not the products of human language, of our giving title and value to things, but are properly the products of the value of things *in themselves*, or essentially. Every difference in treatment must be justified by reference to some essential and significant difference in the objects of comparison. This conception of proportionality has potential value in the way it

⁴⁸ For his earlier language and utilitarian focus see "The End of Law: ...At Least as We have Known It" in R. Devlin, ed. *Canadian Perspectives on Legal Theory* (Emond Montgomery, 1990). I am arguing that Beatty's commitment to self-determination means he has not completely excised utilitarianism on the social welfare model from his approach. For Beatty's use of the label see "The Canadian Charter of Rights: Lessons and Laments," *The Modern Law Review* 60, 1997, 491.

⁴⁹ David Beatty, "The Canadian Conception of Equality," *University of Toronto Law Journal* 46, 1996, 361-2.

⁵⁰ Beatty, "The Canadian Conception." See also Beatty, ch. 3 of *Ultimate Rule of Law*.

requires a justification of different treatment that is not superfluous but references effective differences between objects. The reason judges cannot read facts objectively is because the form of an object, its identity or nature, is always humanly ascribed.

Beatty develops his second conception of proportionality in reference to German constitutional law on religion and in relation to German constitutional theorists, notably Jurgen Habermas and Robert Alexy, as opposed to the Canadian commentary he usually references.⁵¹ It is Alexy's language that best initiates the feature of Beatty's perspective I wish to draw out here.⁵² Alexy understands proportionality on a model of economic rationality that assumes competition between discrete objects - in this case normative principles which represent the discrete interests of conflicting rights claimants.⁵³ Claims of individuals, groups or "the collective" appeal to a right (or a purpose in the case of the collective) which is represented in terms of a principle that ought to be maximized. Collective security and freedom of expression are two of Alexy's examples - call them P1 and P2 and the legislative means as representative of a higher norm, N. Where principles come in conflict (P1 vs. P2) the court is to consider which legislative option (N) best maximizes each principle (or realizes pareto-optimality). A norm will fail the rationality step if it furthers neither P1 nor P2 but infringes on one. In this case the principles are maximized if N is declared invalid. The necessity step, or minimal impairment, is a comparison of norms such that if N' better realizes P1 and P2 on the whole, N will be considered invalid. In the final step, proportionality *strictu sensu*, it must be shown that the "more intensive the interference in one principle is, the more important must be the realization of

⁵¹ Beatty, *Ultimate Rule of Law*, 44-9, 163. Beatty does not articulate the debate between Habermas and Alexy.

⁵² Beatty's two conceptions are inconsistent, so it makes most sense to draw on the clear enunciation of the perspective he had in mind in drawing up the second conception.

⁵³ Robert Alexy, "Jurgen Habermas's Theory of Legal Discourse," *Cardozo Law Review* 17, 1996, 1030.

the other principle.”⁵⁴ The implication is that the overall result of implementing N will consistently guarantee greater good for the society overall, though the distribution may be initially inequitable. This way of representing proportionality review emphasizes its ideational structure of equal distribution.

As Beatty uses this conception of proportionality in regards to liberty, particularly freedom of cultural or religious identification, proportionality is a neutral method of ensuring “mutual toleration.”⁵⁵ Echoing Alexy, he writes,

“neutrality insists that whatever limitations or restrictions state authorities impose on the religious liberty of its people, whether intentional or inadvertent, the burdens must not be ‘excessive’ or ‘unbearable...’ On the question of how much religion should be allowed in public schools, the German conception of neutrality requires the state to compare the affirmative freedom of worship with the negative freedom of those who are opposed to such public professions of faith. It must strive to ‘preserve to the extent possible,’ all the constitutional values and rights and try ‘to reach an optimisation of the conflicting interests’ that are involved in each case.”⁵⁶

The outcome of any weighing of competing principles, rights or interests will be determined by the value attached to each set. To maintain neutrality Beatty argues the value of each interest ought to be purely self-determined by the respective claimants and passively accepted by the judges. The “facts” of a case that a judge is to consider are the self-determined values. “When they stick to the facts, the personal sympathies of the judges towards the parties in the case never come into play... Like scales of justice, judges have no say on the worth of what is put on each

⁵⁴ Robert Alexy, “Rights, Legal Reasoning and Rational Discourse,” *Ratio Juris* 5(2), 1992, 150. Alexy acknowledges at this point that judges will invoke different values for P1 and P2, though he thinks that discourse theory could determine which principles the judges *ought* to weigh heavier. I will not engage for the moment whether discourse theory is sufficient in this regard. It should also be noted that this last step could be interpreted as a finding of social welfare. The justification for this step is the possibility of redistribution. See Amir Attaran, “A Wobbly Balance? A Comparison of Proportionality Testing in Canada, the United States, the European Union and the World Trade Organization,” *University of New Brunswick Law Journal* 56, 2007 for a demonstration of how proportionality has become a literal social welfare measure in European trade courts and arbitrarily reduces the capacity of political communities to define themselves.

⁵⁵ Beatty, *Ultimate Rule of Law*, 48.

⁵⁶ *Ibid.*, footnotes omitted.

side of the balance.”⁵⁷ Rather proportionality allows judges to “evaluate the intensity of people’s subjective preferences objectively.”⁵⁸ Therefore the government in Ireland is justified in creating laws that restrict access to abortions because those laws fit the moral self-determination of the community, whereas in Japan less restrictive laws are appropriate.⁵⁹ Differing vantage points are thought not to be brought into conversation with each other, or with the judges’ perspectives. Justice is blind in this perspective, mediating between antagonized identities.

Although Beatty attempts cultural self-determination, eventually he concurs that judges will have to use their own evaluation, but not in the sense that judges can only ever be drawing on their own experiences and knowledge. Rather, judges only use their own evaluation where one group exaggerates the effect of a particular mean on their identity.⁶⁰ As much as possible judges can allow a group to self-determine their worth. As Hutchinson has argued in his thorough critique of Beatty, Beatty is failing to fully account for the constructivist nature of language. In the least judges inevitably must apply their own evaluation of the interests involved because the objects compared are nonpecuniary.⁶¹ There is no way of representing the self-determined interest of one group and comparing it to another in a way that is free from a judges own understanding of the value of the objects a group finds is part of their interests. This does not mean it has not been tried. One example is that of Michael McConnell and Richard Posner who invoke the sincerity test popular in American courts and recently seen in Canadian religious jurisprudence in *Amselem* as one way of potentially comparing nonpecuniary interests. The costs of the claimed way of life can be demonstrative of the sincerity of belief and sincerity of belief in

⁵⁷ Ibid., 166,167.

⁵⁸ Ibid., 172.

⁵⁹ Ibid., 167-8.

⁶⁰ Ibid.

⁶¹ See in this regard particularly Hutchinson’s detailed critique of Beatty, “Waiting for CORAF (Or the Beatification of the Charter),” *University of Toronto Law Journal* 41, 1991.

turn represents the value the believer places on their way of life.⁶² The fact that a claimant risks losing their job to observe a holy day is demonstrative of the sincerity of their belief. Though sincerity might not foreclose the judges' own evaluation in balancing interests, it does provide a significant level of guidance, suggest McConnell and Posner. Sometimes the costs of a belief can even be measured in dollars, as when the Amish seek exemption from paying social security benefits because they provide their own forms of social security for persons of old age. In these instances the courts might be said to be fully relieved of personal judgment in balancing costs, the values have literally been passed over to them in the alienated representation of dollars.⁶³ Yet beneath the monetary representations, the court is still assenting in the real effects of the proposed distribution. As I will argue later, costs do not completely hide the court's choice.

Beatty has several representations of proportionality analysis, though the emphasis on both versions presented here is that the court can in some way neutrally cull the value of each party in the courtroom and then balance them on a scale, allowing the weightier interests to take the case. In adjudicating culture his perspective amounts to an emphasis on self-determination. Culture's ascribe for themselves the value of each of their practices. They then "exchange" practices such that a practice with greater self-determined weight, perhaps more central to the culture, will outweigh a non-substantive or less compelling set of interests of another culture. Judges merely act as overseers to ensure the exchange was fair and no-one exaggerated the value of their claim. This approach to proportionality is shaped by insularity in its attempt to suggest that proportionality merely mediates between cultures and that the judgments of judges do not themselves actually constitute a substantive law of their own, or that the way in which they

⁶² Micheal McConnell and Richard Posner, "An Economic Approach hto Issues of Religious Freedom," *The University of Chicago Law Review* 56(1), 1989, 51-3. For a similar Canadian perspective where sincerity of belief ought to be the only criteria to determine religious freedom see Pauline Coté, "From Status Politics to Technocratic Pluralism: Toleration of Religious Minorities in Canada," *Social Justice Research* 12(4), 1999, 268.

⁶³ McConnell and Posner, 54.

recognize the objects weighed depends upon the judges own *nomoi*. All of these recognitions do happen, but the form of presentation of proportionality as here described does not value making explicit the judges' conception of a valuable social order. This is perhaps best reflected in the way the test is described particularly by Alexy in the anomic language of math.

In contrast, Lorraine Weinrib's perspective values "law" as a normative commitment and the role of judges in ensuring not a neutral order of tolerance, but a substantively valuable social order. She regards proportionality as a way that judges revise the social order with values in order to bring about a more desirable social order.⁶⁴ She argues that "the courts are to forward an ideal of political ordering, one that reflects the very purpose for which rights are entrenched, even as they entertain arguments to justify limits upon those rights."⁶⁵ Her perspective captures the spirit of the turn to human rights review mechanisms in the post-war twentieth century as an attempt to make our political orders reflect some concept of human dignity that is sourced beyond the aggregate of each individual will as represented in legislative bodies, which she titles "political" as opposed to normative.⁶⁶ Legislatures, judges and even civil society after World War II particularly regarded as incapable of realizing respect for human dignity, she argues, so a higher law had to be empowered over the arbitrary political sphere.⁶⁷ The purpose and cause of

⁶⁴ On "constitutional democracy" as the appropriate title see Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution," *The Canadian Bar Review/La Revue de Barreau Canadien* 80, 2001, 747.

⁶⁵ Lorraine Weinrib, "The Supreme Court of Canada and Section One of the Charter," *Supreme Court Law Review* 10, 1988, 494.

⁶⁶ Lorraine Weinrib, "Human Dignity as a Rights-Protecting Principle," *National Journal of Constitutional Law* 17, 2005.

⁶⁷ See Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State," *Isreal Law Review* 33, 1999 for this argument in international focus and particularly (702) for civil society culpability herein.

human rights review mechanisms is to relieve the dependence of rights on the “good will, self-restraint and sensitivity to majoritarian, temporarily elected governments.”⁶⁸

A key distinction between Weinrib and Beatty is that Weinrib does not regard rights as discrete competing objects. In *R. v. Oakes* Dickson J. articulated not only a test but argued that the ultimate standard for determining the limit of a right are the values of a “free and democratic society.”⁶⁹ Weinrib focusses on this aspect of *Oakes* as the essential characteristic of a good section 1 analysis. (In her international commentary she notes that relevant values must at least point to a “higher law” based on a concept of human dignity, even though our concepts of such may vary).⁷⁰ Where rights are not discrete the value of a set of interests as represented by a right is determined by its relationship to other interests, it cannot be independently valued, or self-valued as in Beatty. The consequence of acknowledging the way “rights” overlap is apparent in her discussion of the distinction the court iterated in *A.G. v. Quebec Protestant Schoolboards* where the court distinguished between limits and denials of a right.⁷¹ As Weinrib articulates the distinction, a denial of a right occurs where legislation and a right are regarded as in direct conflict with each other, forcing a choice between the two. Under the notwithstanding clause the legislature is permitted the role of *denying* a right where stark opposition occurs between a right and legislation. A *limit* on a right, however, requires justification.⁷² The language of a limit is somewhat misleading in Weinrib because it does not necessarily make clear the distinction between a limit and a denial. “Infringement” may be more appropriate. The idea is that where a right and legislation overlap or come in conflict with one another, the overlap is an infringement

⁶⁸ Ibid., 705.

⁶⁹ *Oakes*, at 64.

⁷⁰ Ibid., 709.

⁷¹ Weinrib, “The Supreme Court of Canada,” 483. *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66.

⁷² Following also therefore, the distinction between definitional analysis and substantive.

by the state into the realm of the right.⁷³ The makeup of the social order in that zone of infringement needs to be justified according to the values of a free and democratic society.⁷⁴ Religious freedom cannot be self-determined in this imaginary not only because its scope is bounded by other rights, but because the scope of all rights is determined by an outside set of values. In any rights claim the rights claimant explains how their claim represents the relevant values of their society and under proportionality review the challenged legislation is justified according to how it embodies the same relevant values.

Weinrib's understanding of proportionality analysis is premised on *Oakes* so I need here only point out the distinctives of her analysis. First, Weinrib recovers the step of "prescribed by law" under section 1 analysis that is often comparatively unremarked upon by most commentators in regards to section 1 analysis and religion.⁷⁵ This step requires the state to show that the law has undergone the democratic and vetting process of the legislature, or alternatively is delved of common law and a record of its development must be extant.⁷⁶ In conjunction with the step in section 1 analysis where the state must demonstrate the purpose of the infringing legislation (for which there must also be a paper trail such that the purpose cannot conveniently be reinterpreted by the state at the courtroom door) these steps act as "preconditions" ensuring

⁷³ Weinrib herself preserves some of the atomistic language of rights such that rights are not imagined to entirely overlap. She speaks of "core and penumbra," such that in the gray zone of the penumbra ways of being may overlap, though there remains a form of atomism in the "core," ("The Supreme Court," 481, for example). I have used zone of infringement to remain consistent with my language throughout.

⁷⁴ *Ibid.*, 479

⁷⁵ Although, interestingly, it arises again with effect in *Alberta v. Hutterian Brethren*. Prescribed by law implies that a limit on a right must not be arbitrary, but be connected to a statute, regulation or common law (Mendes, 3-7). I take this to mean it must be in some way "officially sanctioned" such that the dispute is considered as public law and not private. Prescribed by law can also pertain to "vagueness," (as discussed in *Young v. Young*, [1993] 4 S.C.R. 3 [*Young*] in regards to the legal test of "best interests of a child). Vagueness implies that the law is incapable of interpretation by the court, or does not provide sufficient substance out of which the judiciary can discern the intent of a law (Mendes, 3-9), or have a meaningful debate as to the law's intent.

⁷⁶ *Ibid.*, 473. Weinrib, "Canada's Constitutional Revolution," 706.

the legislation has been vetted through a proper democratic process before a legislation can be vetted under section 1 values.⁷⁷

It is in the second, proportionality step, of a section one analysis that the distinctive focus of Weinrib's analysis is clearest. The proportionality step is where the actual limit is determined and Weinrib's argument is that following the language of section 1, the same values that guarantee a right ought also determine the limit. The proportionality test is only metaphorically a balancing mechanism, in practice the courts consistently apply the same values.⁷⁸ On her understanding "balancing" forms of proportionality review involve utilitarian calculations about the efficiency of a law and never actually review the values the law itself embodies.⁷⁹ Instead the court must first enunciate what the values of a free and democratic society are. The court needs to "elevate a coherent body of substantive norms" that enable the Charter to have a transforming effect on the social order.⁸⁰ It then returns to the purpose of a law and ensures the purpose is not trivial to these values. This is the step that ensures that the laws will be required to realize a desirable social order. Each further step of the proportionality test, rational connection, minimal impairment and proportionality, "tests the extent to which the impugned measure realizes a constitutionally significant purpose."⁸¹

These latter steps of the proportionality test cannot serve a significant function in Weinrib's analysis, although she reiterates each step in each of her accounts of the test. If the court is adjudicating according to a higher law and not for the efficiency of the procedure of the legislation it is evaluating, then there is no need to measure minimal impairment. Presumably the higher law applies both to the impairing entity and the entity impaired. If each step serves a

⁷⁷ Weinrib, "The Supreme Court," 499.

⁷⁸ Ibid., 493, 500.

⁷⁹ Ibid., 483-491.

⁸⁰ Weinrib, "The Canadian Charter's Transformative Aspirations," 18.

⁸¹ Weinrib, "The Supreme Court," 503.

function for Weinrib it must be to further the efficiency preconditions necessary for legislation to pass before it reaches the final step where the court applies *its* values. Yet, she is also arguing that the court applies values in each step of the test. There is arguably some confusion in Weinrib's analysis, although the intention is clear. Proportionality is intended to ensure that people treated inequitably by the social order might have recourse to a higher law.⁸²

The difficulty for Weinrib's analysis as regards diversity is going to be in how the content of the "higher" law is decided. Her perspective is comparatively non-insular compared to Beatty because it has the court rule explicitly according to the values of a free and democratic society. She is not interested in mediating tolerance between privatized ways of being, but in realizing a valuable social order in which each way of being is acknowledged as being in relation with each other. The orientation to a "higher law" however, risks failing to acknowledge that any judicial application of the "higher law" will be through the judges own particular conception of valuable law. Her perspective seems to suggest that judges somehow embody or have access to, through a method, a better form of law. Having the court as *another* law is valuable as it provides another forum for addressing forms of exclusion, but regarding the court's law as "higher" risks over-valuing the institution of the court. Judges contribute to the social order, but if they are regarded as the rightful, final arbiter, there will be few people to review and challenge their contribution. Weinrib's orientation to a higher law risks its own unique orientation to insularity in presupposing that some institutions are better capable than others in contributing to the social order and can be allowed a privatized pursuit of their function.

Weinrib emphasizes how proportionality can contribute to the legitimacy of the social order in terms of its "justness" or desirability. Beatty's emphasizes the preservation of self-

⁸² For a similarly "political" interpretation of section 1 see Monahan, (62-71). However, Monahan distinguishes between the test as intended for objectivity and its in fact political nature. The test has no effective function for Monahan in the way Weinrib attempts to preserve.

determination and one way of understanding democratic legitimacy. They both exhibit features of insularity and are not concerned with the way the test may or may not facilitate deliberation. In the face of diversity this is an oversight. If it is only judges who determine the social order or are the final arbiter of it, then the democratic legitimacy of the social order is circumscribed because not everyone participates or participates fully in its construction. This will circumscribe the order's legitimacy in terms of its "political legitimacy" or value as well. If one does not perceive the order as reflecting one's democratic voice is it because it does not reflect your perception of a valuable social order. The insular aspects of Beatty's and Weinrib's analyses and proportionality's inherent unconcern for insularity mean they risk overlooking diversity's sources for the construction of the social order. In the following chapter I look at the performance of the test in the court's actual use of the test for how it is intended as part of judicial review to respond well to diversity, but results in fragmentation and fails to hear the democratic voice of diversity.

Chapter Two: “Binding,” Unbinding and Bound

“The values that underlie our political and philosophical 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.”

*Justice Brian Dickson, R.v. Big M.*⁸³

The Supreme Court of Canada’s jurisprudence on section 1 in regard to one form of diversity – those practices captured by the right of freedom of religion - also exemplifies the tension in regards to legitimacy and diversity and particularly in regards to institutional legitimacy shaped by insularity. I argue in the following chapter that the institutional legitimacy of proportionality review binds the judges with a form of ruling that unbinds religious groups from the court and the larger Canadian polity. The method of this chapter is to look at proportionality analysis as a cultural tool. I also use the case of *B.(R.) v. Children’s Aid Society* as a focal point around which the first two steps of my argument can be understood.⁸⁴ There are three basic steps to the argument I wish to make. First institutional legitimacy constructs proportionality as a “binding” method of judicial review, but under “binding” language the court has adopted an unbinding form of judicial review. By “binding” I mean the way that section 1 as a general limitations clause implies substantive review and therefore also a form of review intended to be culturally sensitive and able to integrate minorities’ democratic voice into the social order. The second step explains how this tool is unbinding in the sense that it fosters fragmentation. Under proportionality analysis the democratic voice of minorities is not clearly engaged with. When ruled against under proportionality not only will minorities be made subject to the social order as iterated by the judges and legislation, they will also sense that the court is not interested in hearing their democratic voice and engaging conversation.

⁸³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*], at 123.

⁸⁴ *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*B.(R.)*].

Fragmentation occurs as minorities respond by privatizing their way of being as there seems to be no fair forum in which to engage conversation with others, at least not in the court. In the third and final step I focus on political legitimacy and on how modern freedom binds the court's capacity to speak clearly its concept of a desirable social order. The court's language appears not to judge, but in fact the court does act upon its conception of a desirable social order. The incapacity to speak will ultimately undermine the court's institutional legitimacy.

Institutional Legitimacy

Law's Culture and Speaking Habits

The valuable way to respond to the reality that the passing social order may not fit present diversity is to acknowledge that we all use partial language and produce remainders. This is the beginning of empowering the other to point out to oneself how one's way of being may be harmful to them. The fact that judges must use their own judgment does not mean a judge is necessarily biased – that is a term applicable to a bad judge in formalist terms of evaluation where there is purportedly a “right” law. What matters is how a judge *and* claimants and even the institutions that are the products of past actions might engage each other fairly in contexts of diversity where the ways of being of claimants challenging the social order might be granted a democratic voice.

In the Canadian context Benjamin Berger has been a forward legal scholar to look at law's relationship with religion as a cultural one. I think this approach to be particularly useful in considering proportionality's engagement with religion because viewing law as cultural rather than “tabulated formalism” is the beginning of acknowledging our necessary partiality. (By partiality, for purposes of this thesis, I mean simply that all our understandings of objectivity are particular to ourselves and dependent upon our personal experiences and within the context of

the actions of those around us and historically before us. Partiality is the acknowledgement of the impossibility of universally objective mastery of our world). Regarding law as cultural most importantly deconstructs the conception of rule of law as floating above culture. In Berger's description, "constitutional law is simply a given system of social ordering – an instrument – as opposed to religion, which is a culture. The law is not intrinsically committed to any particular goods or social ends and, as such, nothing should stand in the way of this instrument adapting to accommodate culture."⁸⁵ The rule of law acts as the neutral, procedural distributor ensuring equal distribution of goods to each culture. It is unconcerned with the content of a culture and assumes cultures will productively shape themselves towards some substantive good so long as law remains fair. Law cannot assimilate culture in this understanding because it has no culture.

The difficulty with the procedural approach is not only that law cannot be neutral in the sense that it might only be concerned with ratio and not form or identity, but law itself *is* constituted by a culture. As Berger continues to argue, despite law's unconcern for the content of a culture, law makes religion over in its own image. Law has a culture and it emphasizes primarily freedom as privatized autonomy of choice.⁸⁶ Intersubjective judgment constrains choice because it entails applying identities to each other which determine the way we will interact with each other. The way you relate with me, given how you identify me, *will* constrain my scope of freedom because you act in relation to me. If you refrain from identifying me and acting upon that identification, my scope of free action expands. Freedom of choice is the flipside to freedom from intersubjective judgment because the latter is the condition of expanding the former, or so modern freedom argues.

⁸⁵ Berger, "Understanding Law and Religion as Culture," *FORUM Constitutionnel* 15(1), 2006, 16. See also Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999).

⁸⁶ Benjamin Berger, "Law's Religion: Rendering Culture," *Osgoode Hall Law Journal* 45(2), 2007, 309-10. Berger distinguishes three features, individualism, autonomy and the private sphere, but together they constitute a "triptych" centered on what can be called modern freedom.

Law as cultural means that law is also capable of assimilation. Thus, Berger argues that law shapes religion in its own image according to modern freedom's triptych of individualism, autonomy and the private sphere. Canadian law is uncomfortable with the collective aspects of religion assigning rights ultimately to individuals. Berger best exemplifies this with *Amselem* where the court granted sincerity of belief and therefore religious freedom even though Amselem claimed access to a right that was out of conformity with the prevailing practices of his religion.⁸⁷ By autonomy Berger means that law is oriented to preserving or maximizing personal choice as the mechanism for self-realization.⁸⁸ Religion has value to law insofar as it is chosen by a person as part of their self-realization. As a source of self-realization religion also essentially belongs to the private sphere and is governed only by the acultural proceduralism of the public.⁸⁹ Below I use some similar themes of modern freedom to describe the process of proportionality analysis, though I will focus on the overarching theme of freedom from intersubjective judgment or insularity.

The underlying presumption of Berger's approach is that the process of adjudication ought to be understood as cross-cultural and as valuable insofar as cultural transformation, or the construction of some sufficiently common culture (a thin level of culture) is created. This is also McLachlin C.J.'s conception. For her, the court room ought to be a forum for the "dialectic of normative commitments" that melds the rule of law with extra-formal-legal worldviews.⁹⁰ The focus on Geertzian dialectical cultural transformation is necessarily limited because even after cultural transformation, the exercise of the new culture will continue to produce a constitutive

⁸⁷ Berger, "Law's Religion," 287. I would differ with Berger in any implied assumption that the court ought to protect group rights. Cultures have no essential boundaries meaning ultimately culture is particular to the individual. This will immediately suggest difficulties in the individual/collective rights distinction, though my position will become clear as I continue.

⁸⁸ *Ibid.*, 291.

⁸⁹ *Ibid.*, 301.

⁹⁰ Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in Douglas Farrow, ed., *Recognizing Religion in a Secular Society* (Montreal: McGill-Queen's University Press, 2004), 29.

outside. As Berger later argues, law is constantly the entity that makes the final decision over and against all other participants.⁹¹

The Geertzian cultural focus makes sense of conversation between cultures (or *nomoi* as I will later distinguish) in the courtroom but not fully of the way our institutions themselves are shaped by insularity. The fact that law is constantly the decider of an issue pertains perhaps more to institutional structure, even of proportionality itself.⁹² If proportionality were solely a cultural phenomenon on the Geertzian model it would follow that the pervasiveness of proportionality around the world is due to cultural assimilation, even if on friendly terms. This is partly plausible in that justices do sometimes cite each other's proportionality tests in international law. It does not comport with the history of the rise of proportionality review, however. As Amir Attaran describes, the process is more like "convergent evolution."⁹³ Proportionality is sourced independently but arrives at the same or significantly similar structure. The language of the test is different, even if structurally similar, and each form of the test develops in independent response to different historical contexts. In the United States it occurs in response to the civil rights movement, in the European Union in response to the political difficulty of conforming states' law with the Union's and in Germany it is a response to human rights abuses of World War II. I think it perhaps helpful to therefore regard the proportionality test as a response to deep antagonism, as we see in Hobbes. If intersubjective judgment is painful but we still believe in universal justice, then we might attempt to make the distribution of all goods equal without common assessment of the substantive identity of the objects and persons being distributed to and develop the anomic emphasis of proportionality characteristic of

⁹¹ Berger, "The Cultural Limits of Legal Tolerance," *The Canadian Journal of Law and Jurisprudence* 21(2), 267.

⁹² Berger develops his account of law's conversion moments in conjunction with section 1 analysis but not with an institutional acknowledgement.

⁹³ Attaran, 294.

Alexy's approach. Modern freedom might structure proportionality, but the nature of its culture is not that of the way we might think of religion as cultural as in "Buddhist," "Hindu," "Christian," or "Muslim." Rather, I think it helpful to think of proportionality as cultural in the sense that it is a product of human action. Nor is modern freedom culturally specific, but humans do produce institutions shaped by modern freedom. Law might be understood as cultural in two senses then. In its substance law is cultural in terms of the particular type of social order it aims to bring about. In this case we might speak about cultural transformation and inappropriate "conversion" attempts. Secondly, law is cultural as a human product but without necessary regard to a substantive culture. Here we can talk about how law or the rule of law is shaped by insularity in a manner that seems not to be necessarily inherent to any one particular substantive culture.⁹⁴

In the latter sense it is possible to talk about law's orientation to communication and therefore insularity. Rather than looking at the substance of a culture and whether religious groups are being made to become more secular, or non-Protestant religions more Protestant, I will also consider how the institutions of law itself set up the conditions by which the realization of diversity is hindered because of subjection or the silencing of the democratic voice of the sources of diversity that appeal to the courts to challenge the given social order. This will facilitate a different critique of the phenomenon that the court is constantly the decider of the social order. There are therefore two emphases in looking at law's approach to religion as cultural engagement. We can look at the moments where one culture dominates another, and we

⁹⁴ Benjamin Berger, "The Cultural Limits of Legal Tolerance," *The Canadian Journal of Law and Jurisprudence* 21(2), 2008, 253-267 on Geertzian conversion.

can look at the orientation of an institution and whether it is designed to inhibit the kind of communication that fosters a community of diversity.⁹⁵

The Construction of a “Binding” Court

Turning to the tools themselves, since *R. v. Jones*, one of the earliest religion judgments, the court has been using a form of proportionality test, sometimes under section 1 but not always, to define the limits of freedom of religion.⁹⁶ In chapter 1 I argued that the proportionality test is an attempt to objectively solve the Millian dilemma of the scope of private practice, regardless of the fact that justices acknowledge they cannot be objective. Objectivity is a veneer that contributes to the test’s institutional legitimacy. Here I will parse this phenomenon out to show how the test masks an unbinding experience for persons who challenge the social order through freedom of religion. Particularly I look at *B.(R.)* where the court delayed reasons precisely to re-evaluate whether the limits of a right ought to be found under section 1 or internally. The court reasserted the general limits defining nature of section 1 and in the process also reified the use of the proportionality test under section 1. The court since argues that section 1 and proportionality are the appropriate tools to use in finding the limits of rights and that it has never questioned the use of section 1 in resolving a section 2(a) infringement. A look at the case history shows the story is more complex. The court uses section 1 to invoke language of accommodating diversity but beneath the language the structure of section 1 analysis has become a fundamentally diversity impairing approach to jurisprudence. Proportionality has become a “binding” practice - it carries

⁹⁵ This would follow the distinction Patchen Markell makes in *Bound by Recognition* (Princeton: Princeton University Press, 2003) between the politics of recognition and the politics of acknowledgement. He argues that the politics of recognition orients political analysis to finding the same or right culture. He also finds this analysis unhelpfully accounts for the construction of the constitutive outside. The politics of acknowledgement fosters a reorientation to the limits of human culture by a constant attempt to let go of any one instantiation of a way of being through simply “having” our being or letting our ways of being interact with each other, or make claims on each other. The reorientation is precisely a turn from pursuing our own or the right way of being to hearing each others way of being.

⁹⁶ *R. v. Jones*, [1986] 2 S.C.R. 284 [*Jones*].

the institutional legitimacy of being the appropriate way of accommodating minorities, but as my example will show, for Richard and Beena in *B.(R.)* the use of section 1 analysis could only have been experienced as unbinding or a failure to integrate their way of being into the given social order. I demonstrate the construction of a “binding” court in two steps. The first considers how the test becomes sedimented under section 1 as a way for the court to assert its own voice against majoritarian institutions and the second looks at one example of the language that legitimates section 1 analysis as appropriate for diversity and shows how that language is without beneficial effect for diversity.

The first three freedom of religion cases decided in conjunction with section 1 cases show that the court is moved by public discourse while also being a participant in public discourse. The proportionality test is the tool the court has used in order to speak its own voice in resolving conflict between minorities and the social order as produced by legislation, the test is importantly and awkwardly shaped by the institutional structure of the court. In the first significant religion case, *Big M*, Dickson J. acknowledged that a section 1 analysis entails a form of proportionality test but he dismissed that particular case at the point of defining the purpose of the legislation under review and did not consider what would have been the “means” portion of a proportionality analysis.⁹⁷ It is importantly the historical-political context that can explain this singular dismissal of legislation at the point of determining purpose (in a religion case). The context of *Big M* is precisely that of the rights revolution and rise of the Charter as a tool to restructure the Catholic/Protestant hegemony of Canada to fit new diversity. The legislation in question was the *Lord’s Day Act*, a Sunday-Sabbath closing law that thus represented the Christian hegemony of Canada’s law. In the courtroom the law’s purpose was construed as compelling religious belief and conforming citizens to Christianity, therefore serving an

⁹⁷ *Big M*, at 139.

illegitimate end within the rights revolution.⁹⁸ It would have accorded with political legitimacy for the court to dismiss the *Lord's Day Act* at the point of its purpose. Shortly after *R.v. Big M*, in *R. v. Edwards Books*, the court again addressed Sabbath laws (now called Sunday closing laws), but this time faced a counsel that had prepared to show that the purpose of the law was *not* religious but public.⁹⁹ As the law was recent, an implicit question within the case was whether a legislature could be allowed to maintain a law that had deleterious effects on minority religions if the purpose was defined without regard to religion directly. The court conceded the value of the law to a public interest in ensuring a common pause day enforced by the government rather than voluntarily by employers as labourers may not be able to persuade their employers of the value of a common pause day.¹⁰⁰ The *effect* of the laws for religious diversity in both cases was largely the same. What changes is the public and legislative perceptions of the law. The court's judgment in both cases show that the court is engaged in public discourse.

Between *Big M* and *Edwards Books* the public was divided and so the court attempts to mediate a decision between the two perspectives, but not all cases are highly contentious and the lack of contention has its own consequence for religious diversity. In *Jones* a father who homeschooled his kids sought exemption from the *Alberta School Act* which required him to register his homeschool with the state and thereby acknowledge the authority of the state in a manner that violated his religious beliefs. In a relatively brief judgment the court found that the states' interest in educating children was patently reasonable and that clearly the most efficient way of ensuring this end would be through requiring those who wished to homeschool their children be the one's to initiate contact with the state rather than employ government officials to chase down every non-conformer. The court stated, "*no proof* is required to show the

⁹⁸ *Ibid.*, at 48-78.

⁹⁹ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*].

¹⁰⁰ *Ibid.*, at 141.

importance of education in our society or its significance to government... The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens.”¹⁰¹ A lonely Jones faced a court that had no need to seriously consider his claim because public consensus about the state’s overseeing role in ensuring “efficient” instruction of children was relatively uncontested. The court is a participant in public discourse mediating between contentious parties, or alternatively exercising the voice of a relatively uncontentious public over and against religious diversity.

Proportionality analysis figures differently in each of these cases. In *Big M* it is prefigured but pre-empted. In *Edwards* the court uses a full proportionality analysis under section 1. In *Jones* the court uses effectively the same test under section 1 but without referencing *Oakes* or distinctly engaging each of the steps of proportionality analysis. Significantly it is in the most contentious case, *Edwards Books*, that the fullest proportionality analysis is engaged. The structure of a courtroom is such that judges face what might be called an artificial choice set between *either* the rights claimant *or* the legislation. They must choose one or the other perspective, largely because they are not supposed to be a policy-creating institution.¹⁰² The choice set is artificial because it is unnecessary. We could solve the problem of the production of minorities through creating institutions that do not produce minorities, or through facilitating a court that could construct policy. Instead judges can only rule as to whether the legislation under review is constitutional or unconstitutional – they either side with the right or with the legislation. Contentious cases highlight the artificiality of the choice set in that they make obvious that there can be persuasive reasons for both sides of the choice set.

¹⁰¹ *Jones*, at 30. Emphasis added

¹⁰² In early decisions the court strongly emphasized that its role was one of “legal” review and not “political” such that the court was not to review the “wisdom” of legislation but only whether a right was violated. Particularly “balancing interests” in the form of determining fair or equal distribution was regarded as a legislative task (Patrick Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), 51-72).

Perhaps this is partly what made the use of a full proportionality test sensible – it maximized the appearance of careful review, though there is another reason. Proportionality can be understood as an attempt by the court to strike a midpoint between the two sides as a way of reflecting what the court regards as valuable in both perspectives. The mid-point more typical of American law (definitional adjudication) is to strike-down a law for a class of persons, granting exceptions for example, to persons who can demonstrate sincerity of religious belief.¹⁰³ In *Edwards Books* the *Retail Business Holidays Act* had built-in accommodation procedures for persons who observed a non-Sunday sabbath. The court found that it was desirable to avoid “state-sponsored inquiries into any person’s religion” in the courtroom, given the opportunity, and therefore advantageous to accept the legislation’s attempts to define classes of persons that might be exempt from the law.¹⁰⁴ With attempts at accommodation built into the legislation, the *Oakes* test allowed the court to construct a different type of midpoint. Under the *Oakes* test the court understood itself to be reviewing the *Retail Business Holidays Act* for whether the act made sufficient effort to accommodate the interests of non-Sunday sabbath observers.¹⁰⁵ Under the test legislation ends up sufficiently accommodating where it is minimally impairing. A mid-point is therefore constructed between the choice by measuring minimal impairment of the legislation. It is disconcerting that this is the same test applied to the lonely Jones where the court used language not of accommodation but of administrative efficiency.

In these three early cases the court states its mode of melding the rule of law with the claims of diversity. The proportionality test is a response of the court to its institutional role of

¹⁰³ American courts also consider proportionality tests as well, but exemptions are a more common preoccupation of American courts. Proportionality and exemptions will be related however, as if legislation is found to be disproportionate, the court must then decide whether to strike down the law in its entirety or to create an exemption for a class of persons. There are a number of complex cultural-historical reasons for the greater focus on exemptions in American jurisprudence, though these reasons can be said to agglomerate around the presence of an anti-establishment clause in the American constitution and the lack therewith in the Canadian.

¹⁰⁴ *Edwards Books*, at 142.

¹⁰⁵ *Ibid.*, at 148.

adjudicating human rights for minorities in the conditions of institutional structures shaped by insularity. However, these cases make clear that the response is not simply an attempt to develop an objective, “truth-based” form of judicial review. Policy-making belongs to the legislature because the alternative is “government by judges” where each citizen is ruled by the arbitrary identifications of the court because they are thought to have no say in the construction of the court’s interpretation of a law. To avoid the resulting artificial choice set, the court measures minimal impairment.

Whereas the first step to constructing a “binding” court is the use of the test to construct a midpoint that attempts to incorporate diversity, the second step shows how this test is sedimented under section 1 and under language intended to incorporate democratic voice and minorities. The language will be without such effect in *B.(R.)*, however. Using section 1 allows the court to appear to grant maximal deference to the claims of diversity under section 1. Section 1 is also associated with substantive review as a valuable way of protecting diversity and therefore also particularly with incorporating the context of a case as one of the benefits for using section 1. “Context” is the particular example of the language that legitimates section 1 and the test that I will deconstruct.

The reasons for why the court ruled under section 1 in *B.(R.)* are set up in *Young v. Young* and *P.(D.) v. S.(C.)*.¹⁰⁶ All three cases address the rights of Jehovah’s Witness parents in regards to their children and their religious practice. Canada’s history of freedom of religion is well-marked by litigation involving Jehovah’s Witnesses. Particularly, debates surrounding the courts’ fair treatment of religious minorities at the beginning of the rights revolution pertained to

¹⁰⁶ *Young v. Young*, [1993] 4 S.C.R. 3 [*Young*]; *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 [*P.(D.)*].

cases involving Jehovah's Witnesses.¹⁰⁷ *B.(R.)*, *Young* and *P.(D.)* would have been regarded as significant indicators by those watching the court's jurisprudence of freedom of religion and by the Jehovah's Witness community as to whether the court would treat religious minorities well under the Charter.¹⁰⁸

Young and *P. (D.)* is a joint decision that addressed access rights of non-custodial fathers to their children. In both cases what was particularly at issue was the mothers' objection to the fathers' passing on of the Jehovah's Witness' religion to their children and engaging the children in Jehovah's Witness' religious activities. The central feature of these two cases that is important to *B.(R.)* is that they are decided under an internal limits analysis in a way that seemed to ignore the effects of the legislation on the father's Jehovah's Witness religion after the court had made clear that it found the father's religion to be harmful to children. In both *P. (D.)* and *Young* the father made a section 2(a) claim and in both instances, in all sets of reasons, the court used an internal limits analysis of freedom of religion to find that the fathers' rights had not been infringed. The internal limits analysis made a hierarchy of rights and elevated the child's above the father's.¹⁰⁹ Once the hierarchy of rights was established the lower rights, the fathers, could be effectively ignored.

Most awkwardly, the court's version of the hierarchy of rights occurred in the context of portraying the father's religion as harmful to children. The court cannot determine policy or its own vision of a desirable social order, so the best interests of a child test will tend to orient the

¹⁰⁷ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, *Saumur et al. v. Procureur général du Québec*, [1964] S.C.R. 252, and *Chaput v. Romain*, [1955] S.C.R. 834 are the significant Jehovah's Witnesses litigation cases.

¹⁰⁸ The Watch Tower Bible and Tract Society of Canada formed part of the respondent in *Young* where the arguments were designed to heighten constitutional applicability as it avoided the Quebec Civil Code and included freedom of expression as well as freedom of religion. The Attorney Generals of Ontario, Quebec, Manitoba and British Columbia and the Seventh-day Adventist Church in Canada intervened in both cases, as did the Law Society of British Columbia in *Young*.

¹⁰⁹ *Young* 53; *P.(D.)*, 12. McLachlin is less clear in this regard and may be understood to have in mind a balance between the father's right and the child's right as she emphasizes balance between the rights, but then argues that it is only injury to the child that is of concern in this case (*Young*, 68).

court to find evidence of actual harm. Social workers thus presented evidence that the child was disturbed by her father's religious activities because "she repeated up to 15 times a day on returning from visits with the appellant that [translation] it is 'Jehovah [who] made [child's name], [who] made the room, [who] made the stars, [who] made everything.'"¹¹⁰ As another example, in finding that this constituted harm L'Heureux-Dube cited a lower justices reasons that

"a young girl 3½ years old must be able to benefit fully from her childhood without being constantly bothered by conflicts, namely whether God is in heaven or in her heart, whether or not she should put on a clown's costume for Halloween, and so on. At that particularly vulnerable age, where, as everyone knows psychological and emotional traumas often prove to be irreversible, there is no need to wait for such traumas to occur before intervening. The risk is unacceptable and the proposition that she should run the risk before being protected is inadmissible."¹¹¹

The practices that L'Heureux-Dube cites are markers of Jehovah's Witness religion, but they are not practices exclusive to Jehovah's Witnesses. To the Jehovah's Witnesses the construal of their religious practices would have appeared as discriminatory and an attack on their religious identity. Certainly Jehovahists do not regard these practices as harmful and rather see them as important expressions of a valuable life.

The decisions of *Young* and *P.(D.)* were both split decisions with most of the judges differing about how the evidence for "best interests of a child" ought to be interpreted, but the outcomes of the cases were different and not determined by evidence. The judges who made the difference in outcomes were Iacobucci and Cory. In *P.(D.)* they deferred to the trial judge and thus found against the father and Jehovah's Witnesses on the basis of the lower judge's better capacity to read the character of the father in the courtroom.¹¹² In *Young* Cory and Iacobucci had noted that the father had agreed to accord with the wishes of his children and desist from engaging his children in the practices of Jehovah's Witness religion, though he might still talk

¹¹⁰ *P.(D.)*, 33.

¹¹¹ Quoted in *P.(D.)*, 60.

¹¹² *P.(D.)*, 36.

with his children about his religion.¹¹³ The difference in judgments between *P.(D.)* and *Young* thus turn on an assessment of character by Cory and Iacobucci in which good character was exemplified by refraining from religious practice in a manner reminiscent of how law in the pre-*Lochner* era protected the most generalizable features of religion and thereby appeared to favour mainline Protestant religion. Cory and Iacobucci suggested to Jehovah's Witnesses that good religion is private, unpracticed and chosen such that the father in *P.(D.)* had no effective right to pass on his religion to his children.

To Jehovah's Witnesses the court's decisions in *Young* and *P.(D.)* would have suggested that the court is insufficiently capable of responding respectfully to diversity. Freedom of religion in these two cases had been re-relegated to a place of private belief and non-expression and properly limited by the judge's and legislature's conception of harm. Leading up to *B.(R.)* the court is in a tense relationship with Jehovah's Witnesses and particularly in regards to determining the rights of a child vis-a-vis the religious freedom of their parents, and with regards to whether section 2(a) would be of any effective consequence for Jehovah's Witnesses or if they would become subject to the state's law. Interestingly, the internal limits analysis performed centered on the best interests of a child *test* and whether it minimally impaired the father's rights.

In *B.(R.)* the claimants, Richard and Beena, were Jehovah's Witness parents whose daughter, Sheena, was born three weeks premature and needed significant medical treatment if she was to survive. At Richard and Beena's request doctors had avoided giving Sheena blood transfusions because the parents thought blood transfusions would make Sheena "defiled in the eyes of God."¹¹⁴ For Sheena's parents a blood transfusion compromised life after "death" for Sheena and therefore the value of the blood transfusion to Sheena's life considered in mere

¹¹³ *P.(D.)*, 61.

¹¹⁴ *B. (R.)* at 213.

physical terms was vastly outweighed to the value of restraining medical treatment preserving eternal life. On August 1, 1983 doctors determined that Sheena was at risk of congestive heart failure without a blood transfusion and hospital administration initiated proceedings for the Children's Aid Society to gain wardship of Sheena so that a blood transfusion could be administered. On August 23, 1983, Sheena was given a blood transfusion as part of an exploratory surgery for infantile glaucoma, a procedure necessary to save Sheena's sight, not her life. The Supreme Court was asked to consider whether the *Child Welfare Act* by which the Children's Aid Society had achieved wardship of Sheena infringed the parents' freedom of religion, and if so, whether the act was a justified limit on freedom of religion under section 1.

Given the way *Young* and *P.(D.)* had potentially called into question the capacity of the court to create a good space for minority religions in the given social order from the perspective of Jehovah's Witnesses, it was particularly pertinent that the court make clear that it was capable of fairly adjudicating minorities. The court attempted to reverse the optics of *Young* and *P.(D.)* by returning to the language of substantive review. In *B.(R.)*, the respondents (the Children's Aid Society itself) argued in the manner of *Young* and *P.(D.)*, constructing a hierarchy of rights such that "infant's rights were paramount to those of the appellants and, on that basis alone, state intervention was justified."¹¹⁵ In *B.(R.)* the court attempted to resist this argument. In addressing best interests of a child, the court made a point of stating that any intervention of the state must be understood as an *intervention* of the parents' rights and this would require the use of a section 1 analysis. As Dickson J. had argued in *Oakes*, the importance of section 1 is that it "constitutionally guarantees the rights and freedoms set out in the provisions which follow... [A]ny section 1 inquiry must be premised on an understanding that the impugned limit *violates*

¹¹⁵ *B.(R.)*, at 86.

constitutional rights and freedoms.”¹¹⁶ La Forest argued that while we now acknowledge that the state can intervene for the best interests of a child, “such intervention must be justified,” it is not *presumptively* within the sphere of the state to determine the best interests of a child.¹¹⁷ The court was not going to allow the rights of a child to axiomatically trump the rights of the parent such that the state could freely intervene whenever the best interests of a child were at issue, or so it argued.

In turning to section 1 the court invoked the legitimating language of the substantive model of review, but the language used to justify section 1 analysis in earlier cases will not have the effect it was intended to offer in this case. The most important reason La Forest cites for turning to section 1, and the reason often cited by justices, is “context.” Context refers at least partly to Dickson’s argument in *Oakes* that section 1 involves two contextual factors, a guarantee of rights and criteria for their limit. In academic literature and in earlier judgments “context” is fleshed out to invoke some more powerfully legitimating factors vis-à-vis diversity.

In La Forest’s reference to context it is Wilson J.’s judgment in *Edmonton Journal v. Alberta* which he cites and that Shalin Sugarinisi also observes is the generally acknowledged origin of the argument from context.¹¹⁸ In this case the *Edmonton Journal* sought to have overturned legislation that would prevent the *Journal* from publishing certain forms of information about legal proceedings, including personal details about the marriages of those involved in the court proceedings. Both La Forest J. and Cory J. acknowledged that the legislation infringed freedom of expression and provided a section 1 analysis but the two justices differed in their outcomes. Wilson attempted to explain the difference in outcomes by reference

¹¹⁶ *Oakes*, at 63. Emphasis added.

¹¹⁷ La Forest in *B.(R.)*, at 85.

¹¹⁸ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 [*Edmonton Journal*]. Shalin Sugarinisi, “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability,” *Dalhousie Law Journal* 22, 1999, 129.

to context. First she evoked a form of proportionality analysis where “in each case courts will be required to balance the interest of society with those of individuals and groups.”¹¹⁹ This is done by comparing and contrasting the differing purposes of the pieces of legislation represented by claimants in the court. She then argued that both justices engaged balancing the purpose of a right with the purpose of legislation, but did so at two different levels of generality. La Forest balanced the rights in context. He asked whether an “open court process should prevail over the litigant’s right to privacy” rather than balancing freedom of expression generally against the state’s interest in protecting privacy.¹²⁰ Wilson found that Cory’s interpretation of freedom of expression was too general because it emphasized the value of expression as the most important right in a democracy and did not address the particular dispute at hand. Cory’s judgment evaded a substantive approach.¹²¹ The difficulty for La Forest’s argument in *B.(R.)* is that both the abstract approach and the substantive approach in *Edmonton Journal* occurred under section 1. La Forest’s actual ruling in *B.(R.)* was not contextual in the manner of his ruling in *Edmonton Journal*. In *B.(R.)* he balanced general principles of a child’s best interests and freedom of religion and made the same analysis ultimately as Iacobucci who did not use section 1.¹²²

Shalin Sugaranisi argues that the longstanding value of Wilson’s contextual focus is the role it played in moving legal hermeneutics from finding the “plain meaning” of a text to finding the intended meaning of the text, which in turn facilitates the “enlargement of mind” that enables

¹¹⁹ *Oakes*, at 70.

¹²⁰ *Edmonton Journal*, 31.

¹²¹ *Ibid.*

¹²² It might be noted that even La Forest acknowledges that “this approach does not logically preclude the presence of balancing within s. 2(b) – one could avoid the dangers of an overly abstract analysis simply by making sure that the circumstances surrounding both the use of the freedom and the legislative limit were carefully considered” (at 110). Here La Forest cites Dickson in *Keegstra* commenting on Wilson’s reasons (*R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*], 41). Dickson suggested in *Keegstra* that section 1 was especially well-suited for a contextual balancing analysis but engages a review of the legislation’s constitutionality and not the actual expression (as would seem to be necessitated by a contextual analysis (50, 66-94).

a judge to transcend her own initial background and accommodate difference.¹²³ This way of understanding the value of context is closer to Lamer's reasons in *B.(R.)* about interpreting section 7 where he cites *Hunter et al. v. Southam Inc.*, one of the earliest and most important rulings for interpreting section 1.¹²⁴ Lamer argued that considering historical and legislative context was important to understanding the purpose of a right or piece of legislation, following Dickson's addition of contextual analysis in *Big M* to his reasons in *Southam*.¹²⁵ In *Southam* Dickson argued that a right ought to be interpreted according to its purpose and as "a living tree" capable of "growth and development over time to meet new social, political and historical realities unimagined by [the constitution's] framers."¹²⁶ A right ought therefore be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give individuals the full measure of the fundamental rights and freedoms referred to."¹²⁷ In these connections contextual analysis facilitates a purposive approach to rights interpretation that allows a constitution to renew itself and respond to new forms of diversity by giving individuals the "full measure" of a right rather than circumscribing a right with the "tabulated" legalism of formalist reasoning I described in chapter 1 as the pre-*Lochner*, scientific approach to law.¹²⁸ An expansive interpretation of the purpose of a right conceptually enables a fuller analysis of the effects of a law and a move away from tabulated legalism ensures that the very particular effects of a law in the particular situation at hand will be considered. In

¹²³ Sugurani, 134, 174. Sugurani also connects contextual analysis to substantiveness or orientation to the effects of a law, which is an approach that is not necessarily connected to the dialogical "enlargement of mind" approach, though Sugurani treats them as related.

¹²⁴ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 [*Southam*].

¹²⁵ *B.(R.)*, at 17; *Big M*, at 117.

¹²⁶ *Southam*, 155, 156.

¹²⁷ *Southam*, 157, citing Lord Wilberforce in *Minister of Home Affairs v. Fisher* [1980] A.C. 319, who was ruling on the Bermuda constitution.

¹²⁸ McLachlin states in *Young*, "The court has held on occasions to numerous to require mention at this point that it will consider both the purpose and the context of a right when determining whether there has been an infringement of the Charter" (50). The ubiquity of the connection between purpose and context seem to further suggest that context is not simply about a hermeneutical tool, but does reference the purposive analysis advocated in *Southam*.

referencing context La Forest invoked the legitimacy of the Charter as a new opportunity to enable a type of judicial review that would respond well to diversity in order to persuade his audience that in using section 1 he would be engaging the type of judicial review that would give Sheena's parents the largest benefit of the doubt.

After reviewing Iacobucci's reasons La Forest makes clearer his reasons for preferring section 1. He argues that without section 1 Iacobucci's reasons "may be understood as supporting a parents' rights being overturned simply because a professional thinks it is necessary to do so. I would be very much concerned if a medical professional were able to override the parent's views without demonstrating that necessity."¹²⁹ La Forest is referencing a problem of the ruling's appearance that *Young* and *P.(D.)* initiated where deciding an issue solely in the realm of the child's rights makes the case appear as though freedom of religion is not being accounted for. What the court is doing in turning to section 1 is borrowing the legitimacy of substantive analysis that looks at the effects of legislation and the legitimacy of deferral to religious practice involved in expansively defining a right. LaForest's actual ruling, however, was the same analysis as Iacobucci's. The ruling of *B.(R.)* cemented a process by which the legislation and the parents' rights are not reconciled under the values of a free and democratic society, but by the *purposes* and *efficiency* of the legislation itself, as I will detail in a moment. In later judgments the court goes back and rereads *Young* as a section 1 balancing analysis, further sedimenting the role both of section 1 in adjudicating religion and, more particularly, the proportionality test as the method by which the limits of a right are to be found.¹³⁰

Section 1 allows the court to first say under section 2(a), that Sheena's parents have freedom of religion before the court then rules that actually they do not have freedom of religion

¹²⁹ *B.(R.)*, at 115.

¹³⁰ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [*Ross*], at 74. *Young* involved a section 1 analysis but this pertained to the prescribed by law portion of section 1.

to deny blood transfusions. Section 1 analysis achieves institutional legitimacy for the court in using a form of test that is expected. Under section 1 the court is also at least seeking democratic legitimacy in attempting to both appear to hear Sheena's parents and in using the language of substantive review where context is supposed to indicate attention to the particular effects of legislation and not to abstract formalism. The use of section 1 and of the proportionality test act to construct the court's ruling as the correct ruling and hide the tension between the court and Sheena's parents. It is what Marc Gold calls "applying authority" – it "is a creative act of judgment and interpretation... to help portray the decision as being independent of the values of the Court."¹³¹ The court does not have much of an alternative, however, to engaging in this creative construction of authority *in some format* as they are also speaking to the legal community which expects to hear the language of tests and a public which expects to hear that the court is fair and objective. Further, the court is doing this in the conditions of an institutional makeup that make it difficult for the court to explicitly construct policy. Having gleaned some tacitly derived meaning from the conversation in the courtroom, the court must issue judgment in a limited text intended to be read by diverse audiences with very different ways of understanding the terms the court uses. The court's rhetoric in *B.(R.)* is obfuscating however. Richard and Beena would have experienced the court's rhetoric in the way Hobbes regarded paradiastole. The court's rhetoric hides the court's partiality and attempts to demonstrate its perspective as right, but Richard and Beena would have seen the partiality very clearly. To them the court would have been ruling in its own self-interests and withholding the construction of a beneficial social order to Richard and Beena. Richard and Beena would have heard an essentially arbitrary

¹³¹ Marc Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada," 7, 1985, 487. "In moments of candour," Gold notes, judges will admit that they often decide a case "rather intuitively, and then seek ways to justify that decision in terms of the relevant legal materials," (Marc Gold, "Moral and Political Theories in Equality Rights Adjudication," in Robin Elliot and Joseph Weiler, *Litigating the Values of a Nation* (Toronto: Carswell, 1986), 97).

court. The effect will be to “unbind” Richard and Beena and Jehovah’s Witnesses from the persons and groups represented in legislation and the court’s ruling. The ruling could not have integrated minorities, not only because the court ruled against Richard and Beena but because the court appears to be self-interestedly insular, attempting to hedge it’s judgment with objectivity. The proportionality test itself significantly contributes to the sense that the court hides its self-interests.

An Unbinding Court: Proportionality as a Practice of Insularity Reprised

The Extent of the Test’s Respect for Diversity

I here return to a more detailed account of proportionality analysis to show just how it stifles democratic voice. While in chapter 1 I looked at some of the theories of proportionality analysis, in this instance I draw on some of the institutional and cultural context of the test to explain how it can act as a fundamentally diversity-silencing instrument.¹³² The “theory” has real effects. As a feature of institutional legitimacy the theoretical structure of proportionality analysis sets constraints or expectations on the actions of all individuals in the courtroom and without, and on judges’ capacity to speak clearly. The structure of proportionality silences minority’s democratic voice and results in fragmentation or unbinding. Each entity and way of being is treated as pursuing privatized ways of being and subject to their own recourses in preserving those ways of being. Most importantly, the structure of the test amounts to an institutional habit that unnecessarily perpetuates confused conversation and can unintentionally

¹³² I am aware that anthropomorphizing law risks masking the sources of law’s construction in human action (to the extent that the “modern freedom,” atomistic aspects of law are humanly constructed rather than perpetuated). This is partly deliberate. I hope in anthropomorphizing law to indicate the way law as proportionality analysis has become alienated. The alienation of law is what makes possible the binding of the court in the next section.

facilitate the silencing of democratic voice where judges do not take care to think differently than the way the structure of the test would imply they ought to think.

I will begin with an account of the “practices” that makeup the courtroom of law’s encounter with religious groups because it is through a practical account that one can see what the democratic voice of minority groups is. A practical vision of the relationships in the courtroom begins with a conflict between people. In *B.(R.)*, the conflict in the courtroom is at least initially between Sheena’s parents and the doctors and staff that make up the hospital administration. As the case progresses the conflict expands to lie between Jehovah’s Witnesses and the Canadian polity who empower the law that in turn empowers the doctors and staff, and eventually the courts and legislature who also exercise power over and against Richard and Beena. Each party is competing with the other for the construction of the social order as regards Sheena.¹³³ They are contesting over what constitutes a valuable way of being for Sheena. Sheena’s parents regard Sheena as a child of God on a Jehovist conception such that blood transfusions will compromise a desirable way of being for her because they will close off her access to heaven whenever she dies. The hospital administration regards Sheena as a patient who needs a blood transfusion to enable a desirable way of being in the form of a longer (this-world) life. The differing visions of Sheena are conflictual because the realization of one requires the subjection of the other.

Initially the parties are propitiary to each other, letting their own conceptions of a valuable way of being for Sheena flex. The doctors try Richard and Beena’s way of being, refraining from administering transfusions even where they might have employed them had

¹³³ The conflict need not be over the identity of a person. Often they are not. Conflicts may also pertain to the identity of land, for example, the nature of the relationship to it that we determine for it being indicated by the label we ascribe to it. Conflicts are about differing visions of the desirable social order, how things can be well understood and by implication, well treated.

Sheena been their own child. Richard and Beena opted to place themselves within the ways of being that construct the hospital and engage conversations with doctors to negotiate a compatible way of being with each other. Sheena's health worsens such that doctors now recognize Sheena as a patient at imminent risk of dying and in need of a blood transfusion while the parents continue to regard Sheena in their own terms of her valuable way of being. At this point the conversation begins to break down and each party begins enlisting outside authority to enforce their perspective for fear of what will happen if their understanding of a valuable social order is not invoked. The doctors and hospital administration enlist the power entailed in the *Child Welfare Act* to indicate the value of their perspective. In turn the parents enlist their own lawyers, doctors, and legislation to insist on their terms of a valuable social order. As the case progresses each party invokes further sources of law, more doctors, more evidence, "better" interpretations of law, and higher courts to resolve their conflict. When the case reaches the Supreme Court, the court is asked to define the appropriate way of recognizing Sheena and the appropriate way of treating her - each party hoping the court might see the matter their way. In this practical reading of *B.(R.)* we see that the parents and hospital administration are using the law and the courts as a way of invoking outside power and authority to conclude the conflict over the identity of Sheena.

At the end of the day the court rules against Sheena's parents and their way of being is further subjugated. The result is twofold: unbinding and distorting (as regards diversity). The Jehovah's Witness community will be reinforced in their perspective that they cannot live successfully in close engagement with much of Canadian society and will stop pursuing relationships outside of their community, thereby cutting down the communication lines that enable diverse ways of being to inform each other of the indirect effects of the private pursuits of

ways of being, resulting in further fragmentation or “unbinding.” As communities become insular from each other, they might also be said to be distorted by the seeming arbitrariness of the indirect effects of others’ ways of being. People will pursue their ways of being with side calculations about how the other might potentially intervene with them. Resources will be redirected from the direct pursuit of the things they find valuable to defence mechanisms, precisely as the Jehovah’s Witness community has done in becoming a religious group adept at using litigation to protect their way of being, or at tracking down doctors and hospitals that will allow them to avoid blood transfusions.¹³⁴

Proportionality analysis itself works to breakdown the conversation and facilitate the enforcement of the state’s conception of a valuable social order over and against Richard and Beena. However, there is a certain extent to which section 1 analysis might be understood to respect diversity, at least by making visible the claims of minorities. The steps of representing the claims of minorities under Charter rights is valuable, so let me acknowledge this first. I will follow the argument of James Tully in *Strange Multiplicity*. He argues that a valuable form of constitutionalism vis-a-vis diversity must be dialogical as opposed to monological in the way that I described above. In a dialogical mode of constitutionalism citizens follow the principle of *audi alteram partem*, “always listen to the other side.” There can never be an end to dialogue here because the nature of the dialogue is not an assimilative spiral or “dialectic of normative commitments” that purifies to a final end. The value of *audi alteram partem* is in fostering an attitude of expectation that one’s perspective is partially constructed that thereby also fosters

¹³⁴ See Pauline Coté and James T. Richardson, “Disciplined Litigation, Vigilant Litigation, and Deformation: Dramatic Organization Change in Jehovah’s Witnesses,” *Journal for the Scientific Study of Religion* 4(1) 2001. See also Cover, (40-44) for a similar account of what he calls the “jurispathic” function of the courts where judges “kill” the law of identity groups, their conceptions of a valuable social order, in the process of judging. See also Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2008), 126-133, for an account of how the experience of religious groups with liberal democracy leads to fragmentation.

deconstruction of the entrance conditions to the constitutional forum.¹³⁵ Section 1 analysis affords an opportunity for the court to explicitly engage a process of *audi alteram partem*, recognizing the claimants as legitimately participating in the mutual construction of our social order by treating their claims as forms of law.¹³⁶

The claims that each party in the courtroom are making are a form of law in that they are a *nomos*. A *nomos* is our normative universe made up of the identities we apply to things and what those identities mean in terms of how that thing ought to be treated. *Nomoi* are dependent on our past experiences because it is our experiences that provide the context in which the meaning of a term can be built. *Nomoi* are as valuable as “formal” law because formal law is dependent on *nomoi*. “Formal law” cannot have meaning without using words and the meaning of words depends on the experiences and the web of relations and words therein that each of us acquire differently. Formal law thus represents the extent to which a collective of *nomoi* overlapped enough to create the institution of a texted law (and the institution of a court) meant to facilitate the action of the court’s judgment (and as sifted through the *nomoi* of judges). Formal law is a *nomos*.

It is *nomoi* that are in conflict in the court. The way Sheena is identified depends on our past experiences and histories, how we have previously identified and been taught to identify someone or something. *Nomoi* can conflict because the identity we ascribe to someone or something entails a certain understanding of how that person or object ought to be treated. In *B.(R.)* the contesting conceptions of ways of being for Sheena articulate a different set of

¹³⁵ Thus Tully’s term is “aspectival reasoning.” Aspectival reasoning makes it possible to make re-visible different ways of seeing the social order because it does not anticipate or determine what the unknown other might be.

¹³⁶ A second value of the approach to constitutionalism that Tully is arguing for here is that the mode of reasoning is consistently acknowledged as substantive. Substantive reasoning (“aspectival” in Tully’s words) depends on the capacity to recognize pattern and differentiation, or cognizing what one has known and what is unknown and new. It is a valuable approach to reasoning in contexts of diversity because it allows new experiences to inherently upset past knowledge. One’s response to the new is not determined by substantive reasoning, however. As per chapter 3 I think a valuable response to the new reconstructs ways of being to find a valuable place for everyone and thing.

relationships between Sheena, the doctors and parents. In the one Sheena becomes a ward of the state, excised from her parents, and the doctors administer a blood transfusion. In the other the doctors refrain from administering a blood transfusion and Sheena's parents are the sole authority over the shape of Sheena's life. In other words, the articulation of an identity for Sheena constitutes a claim on those with whom the articulator relates. Each conception entails an expanding series of claims on the web of people with whom the claimant relates - eventually including the hospital administration, the Ontario legislature and all persons who affect the possibility of the conception's realization – to ultimately involve a fairly intricate conception of a desirable social order that is captured in the label applied to Sheena.

At the Supreme Court the *Child Welfare Act* and the *Charter* are the two pieces of law through which the conflicting claims are articulated. In *B.(R)*. under section 2(a) analysis the court first allows the courts' past definitions of religion to expand in acceptance of the definition of religion proffered by Richard and Beena. La Forest cited the definition of freedom of religion given by Dickson C.J. (as he then was) in *R. v. Big M* as,

“the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice of by teaching and dissemination.”¹³⁷

La Forest J. then went on to concur with L'Heureux-Dube's assessment in *P.(D)*. that freedom of religion also includes the right of parents to raise children in accordance with their religious beliefs. He then furthered her definition by including the parents' claim for a “right to choose medical treatment for their infant according to their religious beliefs” and notes that the *Child Welfare Act* does not disallow “the freedom of *Jehovah's Witnesses* to choose medical treatment

¹³⁷ *Big M*, at 94. Dickson's definition is much more expansive than the quote provided in *B.(R)*. Courts have used various portions of the definition according to their convenience. Here the portion left out are Dickson's negative definition (freedom from compelled religion) and substantive definition (a society that can “accommodate a wide variety of beliefs...”) (*Big M*, at 94-95).

for their children, including the freedom to *refuse a blood transfusion* on religious grounds.”¹³⁸

With this move the court allows Dickson’s definition of freedom of religion to adjust in response to the new meaning of “freedom of religion” offered by the parents. The court has given visibility to Richard and Beena’s perspective in a manner that definitional forms of judicial review or “tabulated formalism” do not. The expansion facilitates the court’s taking into consideration new forms of diversity it otherwise had not known. The court then furthers this “aspectival” mode of reasoning by incorporating the hospital party’s perspective under the *Child Welfare Act*.¹³⁹ Up to the point that the court has assessed freedom of religion and defined the legislation, the court has engaged a form of analysis that is non-definitional and oriented to at least giving voice to the other’s perspective. It is in the resolution between these two perspectives that the conversation ultimately breaks down.

The Structure of the Test Over and Against Diversity

In *B.(R.)* the court attempted to argue that it was not ignoring the rights of Sheena’s parents as they seemed to have done in *Young* and *P.(D.)* but were rather merely *limiting* them and therefore respecting section 1’s guarantee of a right. Under the proportionality test occurs a process of limits defining where the court uses the *state’s* law to define the scope of religious freedom. There are two basic concepts, modern freedom and harm, that explain how the state’s law is used over and against the claimants accessing section 2(a). While Dickson gave a number of substantive examples of freedom in *Oakes* to define freedom, it is the modern concept of freedom that actually structures the test. Freedom sets up the test to be designed to define the limits between a private sphere and a public sphere. Harm is the boundary concept that polices

¹³⁸ *B.(R.)*, at 106. Emphasis added.

¹³⁹ *Ff. Tully*, 171.

the limit between the two spheres. Under the proportionality test harm will be essentially defined by the state.

The process of limit defining is dependent on the modern approach to freedom. Incorporating a general limitations clause in the Charter is reflective of one readjustment in our conception of rights and freedom - it is a frank acknowledgement that rights are not “insular or discrete” (as judges often repeat from Dickson’s *Big M* judgment) and therefore not completely free from interference and inalienable. The court can talk freely now of infringing a right, the question is simply what constitutes a legitimate infringement. The underlying concept of freedom for freedom of religion remains the same, however.

The concept of freedom of religion that is consistently repeated in the religion cases comes from *R. v. Big M*. In *R. v. Big M* Dickson draws the modern concept of freedom from the time period of Hobbes all the way forward to today to shape the meaning of freedom in freedom of religion under the Charter. Using purposive analysis as partly determined in the historical context, (as suitable for “living tree” constitutional interpretation for Dickson) Dickson finds the origins of the demand for freedom of religion in the religious wars of post-Reformation Europe and in the claims of Independents during the Rump Parliament that the state was improperly coercing religion in creating laws demanding strict observance of a Sunday sabbath. As Dickson recalls,

“many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State’s coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures.”¹⁴⁰

¹⁴⁰ *Big M*, at 120.

The discussion in *Big M* centered on compelling Christian belief through the *Lord's Day Act*. As invoked by Dickson's allusion to the Independents, in uncompelled belief the actions of others must find some concordance or order with one's own, they must not be arbitrary. It is impossible to be entirely free from the effects of others' ways of being, so it is best to pursue conversation with each other to find ways of being that will allow everyone to live harmonically together. Saying that the state was enforcing the "wrong" set of beliefs can be a way of saying that the state was enforcing a disordering set of beliefs, beliefs that conflicted with one's own, and that there was need for conversation to find a new order. This is akin to the concept of freedom espoused by Hobbes' democrats.

However, as Dickson continues to develop the concept of freedom of religion he will implicitly invoke a concept of religion as free only within a private sphere. He states,

"viewed in this context, the purpose of freedom of conscience and religion becomes clear. 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."¹⁴¹

Reflecting Mill's liberty principle, Dickson here argues that one can have freedom up to the point of harm.¹⁴² Implicitly at the point one's practice interacts with others practice and is regarded as harmful by some party, the extent of one's private freedom will be met. As in Hobbes it is the state that governs these interactions, but the extent of the interactions are manifest. If the state is allowed to infringe at the point of harm, the notion of a private sphere becomes an illusion. Our ways of being collide constantly, as evident in the way I have presented the conflict between Sheena's parents and the hospital administration, and the web of

¹⁴¹ *Big M*, at 123.

¹⁴² The court often speaks about freedom in conjunction with Mill's harm principle. Consistently the implication is that legislation is the legitimate entity for defining harm.

relations and claims each party's ways of being entail. Section 1 attempts to solve the problem of the potential inexistence of the private sphere by requiring demonstrable justification of reasonable limits. However, the setup of section 1 analysis in regards to freedom of religion means that the limit between the private sphere of rights and the state as represented in the legislation before the court, will be defined by the legislation.¹⁴³ The Millian liberty principle constructs a private and public sphere about which those who enter the court under freedom of religion will lose their democratic voice at the point the court finds some aspect of their practice public.

The *Child Welfare Act* defines harm under the proportionality test and therefore the limit of Richard and Beena's free exercise of religion. In proportionality analysis it is the state's perspective that is examined by virtue of the fact that it is the means and ends of the legislation that are examined and these are never explicitly compared to the means and ends of the claimant's *nomos*. The use of the proportionality test is often justified by reference to placing the "onus of the burden of proof" on the state and in that way the test makes it appear as though maximal deference has been given to the sphere of rights, but the argument depends on a false presumption. The false presumption is that there is one correct way of defining the social order such that if the means and purpose of a piece of legislation define harm accurately, whatever remainder is left will be the just scope of freedom of religion. In other words, it assumes a monological order.¹⁴⁴ If it is always the state's definition of harm that defines the zone of infringement, there will be no room for the parents' democratic voice.

¹⁴³ By section 32 of the charter, human rights review applies to legislation and governmental action. Governmental action is capable of creative interpretation (see discussion of *Multani* below) but typically sec. 32 has been interpreted to entail a review of legislation or administrative orders.

¹⁴⁴ Peter Hogg indirectly observed this in "Section 1 Revisited" *National Journal of Constitutional Law* 1 (1991), 23-24, when he said that the fourth step of the proportionality test, proportionality *strictu sensu*, was redundant. The three step and four step proportionality tests are potentially conceptually distinct if and only if there is a shadow

The silencing of the parents' democratic voice in proportionality analysis begins with the way that harm is defined and remediated through the whole of a society. Freedom from intersubjective judgment will lead harm to be defined by legislation and justified through a science that has no persuasive meaning for Richard and Beena. I will begin at the point that the legislation, the *Child Welfare Act*, is justified in the courtroom. In the courtroom the *Act's* purpose is justified for its capacity to identify and remediate harm to children. "It contemplates different situations where state intervention is mandated in order to ensure the protection of children."¹⁴⁵ The act's identifying markers for a child in need of protection is the identification of

"a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately."¹⁴⁶

As the act is interpreted harm is defined by the judgment of a doctor whose institutional position constrains the doctor to provide evidence of the physical or biological threats to Sheena's life. The *Act* is designed to appeal to a sufficient number of people to ongoingly uphold the act because they have common evaluative criteria about the meaning of harm and therefore regard each other's identification of harm as objective. The legislation recognizes a particular node of overlapping consensus about the nature of harm.

In the initial hearing Richard and Beena do not present their own doctors to provide evidence as to how Sheena is harmed. The judge grants a shorter wardship to the Children's Aid Society to enable the parents to "present further evidence and submissions" but at the provincial

proportionality test applied to Richard and Beena's *nomos*. See the discussion in chapter three on *Hutterian Brethren* for the importance of the conceptual distinction.

¹⁴⁵ *B.(R.)*, at 88.

¹⁴⁶ *Ibid.*, at 209, citing *Child Welfare Act* sec. 19 (1)(b)(ix).

court the parents again do not call expert witnesses.¹⁴⁷ Patently their criteria for “treatment necessary” are not those incorporated into the *Child Welfare Act*. In the appeal trials Richard and Beena have learned they will have to fight the legislation on its own terms and begin to attempt subverting its criteria of objectivity. They present an overwhelming number of doctors, enough for several of the judges to remark on Whealy Dist. Ct. J.’s comments. Whealy Dist. Ct. J. stated that to him the first appeal trial “proceeded in a most unusual fashion and laborious manner for all concerned, and [he was] not aware of any case where a first level appeal from a decision of a trial judge has gone this circuitous route and ended up with the appeal being transformed into what amounts to a re-trial on fresh evidence.”¹⁴⁸ Richard and Beena’s doctors constantly challenge the respondents’ doctors’ assessments that Sheena was at risk of congenitive heart failure, that treatment would require a blood transfusion, and that alternative forms of treatment were marginal to the “medically accepted standard of practice.”¹⁴⁹ Finally, at the Supreme Court the parents use the opportunity of raising questions of fact to point out that “there was no right or wrong answer.”¹⁵⁰ The parents’ attempt to upset the criteria of objectivity ultimately fails. The court uses its position of “trier of fact,” an oversight authority to ensure proper procedure was followed, to reify the legislation’s process of identifying a child in need of protection.

There is an important popular history by which the state has become the legitimate determiner of fact in this scenario and that the judges repeat to justify the *Child Welfare Act* without recognizing its particularity. First the court finds that the realm of the family is an object of the parent’s rights. “The right to nurture a child, to care for its development, and to make

¹⁴⁷ Ibid., at 48.

¹⁴⁸ Ibid., at 158.

¹⁴⁹ Ibid., at 56.

¹⁵⁰ Ibid., at 68.

decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent... The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.”¹⁵¹ This concession acts to construct the *idea* of a sphere for freedom of religion where persons can practice their ways of being free from state interference. The court then continues the popular history saying,

“This liberty interest [of parents in determining the raising of their children] is not a parental right tantamount to a right of property in children. (Fortunately we have distanced ourselves from the ancient juridical conception of children as chattels of their parents). The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere.”¹⁵²

The private sphere was once a place of *absolute* right but “fortunately” we no longer think like this and have constructed the state to intervene when necessary. “As society becomes increasingly cognizant of the fact that the family is often a very dangerous place for children, the *parens patriae* jurisdiction assumes greater importance.”¹⁵³ The state can intervene at the point that it recognizes vulnerability.¹⁵⁴

¹⁵¹ Ibid., at 83.

¹⁵² Ibid., at 85.

¹⁵³ Ibid., at 219. The ideas of the absolute private family and then of this family as tyrannical are popular histories. To recomplexify the history: there of course have been times in western history where the family was governed beneficially by a wealth of community-derived standards. See Steven Ozment, *When Fathers Ruled: Family Life in Reformation Europe* (Boston: Harvard University Press, 1983) for an account of this type of family government in early modern Germany that also realized lauded roles for male and female genders and where men could be titled “housefathers” and women were uncloistered. Notably his account sets this family in the context just prior to the rise of the modern state as typically associated with Hobbes where the community-derived standards that governed this family are made subject to the absolute, arbitrary authority of the state. See also James Tully, *Discourse on Property: John Locke and his adversaries* (Cambridge: Cambridge University Press, 1980), for an account of Locke’s theory of property which partly argues that Locke’s concept of property is inappropriately associated with an unlimited rights theory, albeit the idea of private property as a realm of absolute right is part of Locke’s historical context. The family for Locke was not a realm of the father’s absolute government. “Children, like God’s children, do not require their father’s consent to individuate their common property” (where the use of property is oriented to the end of supporting all that is about you) (134). Parents would not have had an absolute right to rule their child.

¹⁵⁴ In suggesting that the court is oriented to defining vulnerability I am pre-empting a discussion that both Berger and Beaman argue structures the adjudication of religion (Berger, “Law’s Religion,” 291-301; Beaman, *Defining Harm*, 100-39). The pre-emption partly follows from the particular case I have chosen to focus on so I would like to make a note of the discussion and point to how it can be reconstructed. Berger and Beaman note that the court’s identification of harm is first about preserving autonomy in the form of freedom of choice. It is only where a person

Before the state can intervene it must recognize the *nomos* of Sheena's parents as less valuable than its own. It identifies Richard and Beena as bad parents according to its own legislative schema. The popular history legitimates stripping the parents of their *nomos*, it reinforces the institutional legitimacy of the state and then intervention into the private sphere of lesser law. Its effect is not merely to legitimate the court's intervention in this particular case, but to reify a bifurcation in the production of our social orders generally, where the best law, the best means of ruling our conflicts, is through the state and where religion is made the "toothless other."¹⁵⁵ The court's reasons, as a publicly authoritative document, set up the conditions by which in the next conflict Jehovah's Witnesses have with the local hospital they will again be made subject to the state. The popular history's moment of legitimating the authority of the state over and against rights claimants is also, unfortunately, a necessary feature of all proportionality analysis by virtue of the fact that proportionality analysis justifies and applies the legislation's identification schema. Under the right the court says "we see your claim as valuable." Under the legislation the court says, "but, we need to view these things as harmful and provide these

is thought to be incapable of choice that the court then intervenes. Culturally this is often indicated by being an adult of the magical age of 18 or 19, making children the easily cognizable category of incapacity of choice. The orientation to choice however, often means children are the only cognizable category of incapacity of choice. The phenomenon is perhaps best expressed in *Ross v. New Brunswick* where a community failed to address the anti-semitic speech of a public school teacher until they could establish that the speech constituted harm to children, rather than persons of Jewish identity or even society more broadly. Hate-speech can be understood as an arbitrary form of speech that thereby exhibits a disinclination to foster an appropriate respect for a diversity of valuable ways of being and therefore ought to be discouraged (in some way). Speaking in terms of freedom of choice is to speak in anomic terms of modern freedom. We all have some scope of freedom of choice. While court's might speak of freedom of choice, a court will only cognize a person as incapable of choice at the point that they recognize the person as falling into a category pre-cognized as incapacitating a *valuable* choice, such as insanity or being a child still appropriately subject to the guidance of their parents (in which instance the court is actually recognizing the child's guardians as incapable of exercising valuable guidance), or where the court newly recognizes a choice as constitutive of an invaluable way of being and constructs a new category for identifying someone as incapable of making good choices for themselves (as exemplified in debates about euthanasia). In each instance it is how the court identifies a person and their actual choices that determines whether they will regard the person as capable of autonomy or not.

¹⁵⁵ Russell McCutcheon, "The Category 'Religion' and the Politics of Tolerance," in Arthur Greil and David Bromley, *Defining Religion: Investigating the Boundaries Between the Sacred and Secular* (Amsterdam: Elsevier Science, 2003), 159.

remedies” and when the court rules against the rights claimant, it is saying “and you are it. You are the source of harm and therefore deserving of our coercion.”¹⁵⁶

Defining harm depends on overlapping criteria of objectivity, but the lack of it in this instance will lead the court to attenuate its justification. The approach of the court (and as led by the legislation in *B.(R.)*) is to define harm through measuring physical health because physical health is the general enough conception of harm by which legislation can be passed.¹⁵⁷ It is also insular, evidence of an attempt to avoid identifying or revealing the court’s judgment (and therefore conducive to constructing majorities). By measuring that which is “actually” physically demonstrable we attempt to avoid labelling a scenario as desirable or undesirable in accord with how we partially define them.. We use theories and methods to cull, categorize and count information from things in themselves as though we could avoid the fact that our theories and methods are a product of our personal reconstruction of our pasts and traditions. However, the identification of physical health depends on our own experiences of our physicality *within* the contexts by which that experience could be understood as desirable or undesirable, or give it meaning. It depends on our particular *nomos*. Hunger in contexts where one can and does work productively but cannot “eat” what one makes is understood as unjust. Hunger that is self-induced for purposes of occasioned self-discipline or redistribution is understood as valuable. We can only identify the denial of a blood transfusion to Sheena as undesirable by virtue of the context in which the denial occurs and how we identify that context and relate it to our own

¹⁵⁶ Thus Richard Moon’s reference to the schizophrenic language of the court where the court speaks well of claimants under the rights and negatively under the law (38-9). Moon sources the language in the way modern freedom sets up two spheres that must be defined, between the private that is not to be interfered with and the public. I find also that the schizophrenic language is ultimately a function of the fact that the court faces an artificial choice set in ruling, which in turn is related to the way our institutions are shaped by modern freedom.

¹⁵⁷ The *Child Welfare Act* indicated that if a parent were to act against a medical prognosis they could be understood as acting against the best interests of a child, and therefore the use of doctors was foreclosed in *B.(R.)*. The use of social and medical science is almost universally a feature of these cases, even where not indicated in the legislation. In each case it is a function of attempting to assert a majorities’ criteria of objectivity over and against the minority.

experiences. To the extent that the way we identify physical health in context is not derived of meanings we share there can be no criteria of objectivity. Counting physical pain will necessarily be an “inexact” science therefore. It will lead the court’s justification for its intervention incomplete and in need of an unexplained “top-up” that in an insular manner hides the context of the court’s “science” that gives its assessment meaning.¹⁵⁸

In *B.(R.)* a “top-up” moment happened when the court acted as “trier of fact” and found the statistics sufficiently counted, the one set of doctors outbalancing the others. The parent’s objections to this leap over a gap then force the court to attenuate its justification and switch to another concept under which to justify itself, not just necessity but the general well-being of Sheena. Recall that Section 19’s benchmark for a child in need of protection refers to “treatment *necessary* for the child’s health or well-being.”¹⁵⁹ The parent’s strategically emphasized necessity and argued that necessity constituted emergency. The *Child Welfare Act* was therefore unnecessary because common law already allowed doctors to intervene in the case of an

¹⁵⁸ Not simply inexact, but not a science at all. An inexact science simply produces mistakes from time to time which can be identified and corrected because the criteria of objectivity are already held in common. See Sujit Choudhry, “So What is the Real Legacy of *Oakes*” for an argument from a more “scientific” orientation that adjustments in the section 1 test are due to the fact that all legislature’s create law under conditions of imperfect social science evidence. The problem of what type of evidence and analysis would qualify under section 1 pervades early section 1 analysis. Eg. *Southam*, at 34-45; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R., 169-70; and *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at 68-9 (where the court said utilitarian evidence would not count, yet that is precisely what they accept in the end). Ironically the case used authoritatively for s.1 analysis today heard no evidence on s.1 interpretation as no indication had been provided that the case would be decided under section 1. See also Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) on the pervasiveness of the sound that is not clear when rights and legislation collide (38). See also Lori Beaman, *Defining Harm* (Vancouver: University of British Columbia University Press, 2008) ch. 3, on language of “excess,” “risk” that signifies this similar “top-up” move in another Jehovah’s Witness’ blood transfusions case. If there is a distinction that I would like to make clear between our perspectives is that I do not think the notions of “normalcy” and “excess” can be transcended valuably. They are a function of the fact that language and our scripts of normalcy are a product of human culture. It is not clear that Beaman would deny this, I wish simply to point out that I think the appropriate response is to ask how we might expand the criteria of objectivity such that the identification of risk is common. The “risk paradigm” (Beaman, ch. 1) is not culturally particular,, it is a function of all culture. I might add that the identification of risk does not necessarily determine response in the form of subjecting the source of risk, thus there is also the question of the appropriate response once risk is identified. My discussion in chapter 3 pertains to this response.

¹⁵⁹ *B.(R.)*, at 88. Emphasis in original.

emergency, an instance imminently life-threatening.¹⁶⁰ La Forest J. responded by emphasizing the health and well-being part of the law, never mind the doctors' evidence and the fact that the court and legislation had oriented itself to say it would hear the evidence of doctors. "This section is not limited to situations where the life of the child may be in jeopardy. It encompasses situations where treatments might be warranted to ensure his or her health or well-being."¹⁶¹ The *Child Welfare Act* legitimated the state's intervention on the basis of testimony that Sheena was at immediate risk of congenitive heart failure. Under the state's custody she is given a blood transfusion in the process of exploratory surgery for infantile glaucoma. The state's judgment was based not only on maximizing health, but depended on a contextual assessment about Richard and Beena's beliefs and how they inclined Richard and Beena to treat Sheena. The court does not reveal this assessment. As Elizabeth Povinelli has observed in a similar context, the court takes on a "state of shame."

"Liberal democratic societies are now haunted by the spector of mistaken intolerance. They now know that in time their deepest moral impulses may be exposed to be historically contingent, mere prejudices masquerading as universal principles... [E]very moment of moral judgment is potentially a moment of acute personal and national embarrassment... [L]iberal members of democratic societies stumble, lose their breath, panic, even if ever so slightly, when asked to say why, on what grounds, according to whom, a practice is a moral, national limit of tolerance."¹⁶²

The state's reasons become attenuated. It can intervene not only when it cannot objectively define harm, not only where there is no emergency, not only where a child's sight is at risk, but for the health and well-being of a child generally. There is no sense left in which parental authority or freedom of religion can have any meaning for Richard and Beena, in spite of section 1's capacity to preserve a scope for such freedom by requiring the limit to be

¹⁶⁰ *Ibid.*, at 89.

¹⁶¹ *Ibid.*, at 88.

¹⁶² Elizabeth Povinelli, "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship," *Critical Inquiry* 24, 1998, 578.

demonstrably justified. The form of justification is incapable of persuading Richard and Beena and the phrase “demonstrable justification” of no force or effect for them. Richard and Beena would have heard the court say in its reasons that not only are they bad parents, there is no way they could ever be good parents or have scope within which to exercise *any* of their parenting practices.

The omnipotential for the state to intervene is first premised on the fact that we create legislation to apprehend harm, having once acknowledged that a particular scenario was undesirable and in need of remedy. In *Young v. Young* and *P.(D.)* the court compared two tests for harm as the basis for which to grant child custody. One test was harm proper and the other best interests of a child. The court preferred the latter because this would enable it to ensure that those it recognized as most vulnerable would not bear the burden of the court and legislature’s inability to perfectly anticipate harm.¹⁶³ Defining harm strictly, L’Heureux-Dube argued, “places any risk of miscalculation in the degree of stress or conflict occasioned by such decisions squarely on the back of the child, depriving the child of any presumption in his or her favour... To wait until harm has occurred to correct the situation is not only to waive the benefit of prevention, but also to increase the possibility of error.”¹⁶⁴

The whole of legislation can be understood to be about apprehending and preventing harm. We create formal law in order to collectively organize society to counter what is either experienced as a problem or anticipated as a problem by a critical mass capable of enforcing legislation. This can be demonstrated simply by reviewing the categories under which religious groups find themselves represented in the court. The two categories under which religion generally appears in the Supreme Court in Canada are multiculturalism and children. Under

¹⁶³ Following also Choudhry’s conclusion in explaining *Oakes*’ deferrals (524).

¹⁶⁴ *Young*, 90.

multiculturalism would fall Sunday closing laws, education policy cases and a series of workplace reasonable accommodation cases. These cases arise in the context of new valorization of religious pluralism, multiculturalism, and the change from understanding the relationship between English and French cultures of Canada as partly characterized by negotiating religion to being largely defined by language. They therefore arise in the midst of recognizing new classes of vulnerabilities. In the latter category of children are again the education cases, the *B.(R.)* blood transfusion case (of which there are many lower court parallels) as well as a series of custody cases. It does not matter how these cases are decided. The point is simply that the legislative schema of Canadian society is capable of picking these particular issues up and that they are oriented to classes of people about which we feel some sort of collective action needs to be undertaken because we identify them as vulnerable. Each case has to do with a contest of identity and the nature of the web of relationships that identity entails in the way that the contest over Sheena's identity implied different sets of action. Even where not particularly oriented to protecting what one might think is a clear category of a vulnerable person, legislation is designed to conduct action, is thus authorized by some set of persons, and oriented in accordance with those persons' identification schemas.¹⁶⁵

The omnipotential of the state's intervention then secondly depends on the way legislation carries no common meaning for Richard and Beena because they have not participated in the law's constitution. The rights revolution has not extended so deeply as to revolutionize the political institutions with which we construct the legislation that determines harm in the courtroom. After Sheena was given a blood transfusion Richard and Beena sought to get the *Child Welfare Act* amended so that it would list the specific situations under which a

¹⁶⁵ At this point the language of vulnerability breaks down. Identification schemas are not just motivated to avoid harm, we build up what we identify as good as well. My focus on vulnerability is merely pragmatic.

child could be taken from their parents in a hospital, thus making it easier for other Jehovah's Witnesses to know when they should avoid going to a hospital. Their requests were "turned away" and so Richard and Beena appealed to the courts.¹⁶⁶ We do not know exactly the process by which Richard and Beena were declined in the legislature and I would not want to suggest that the legislature ought to have axiomatically accepted their request. It is significant that Richard and Beena could and did appeal to the legislative forum because it places their request in a comparatively more deliberative forum than the courts where it is easier to engage creative solutions. Nevertheless, our institutions are imperfectly structured for the type of dialogue that may ameliorate the conflict between Sheena's parents and the local hospital.

Our political institutions are oriented to pluralist politics where political parties aggregate interests to find a general level of consensus and these common interests are then represented in the legislature. Even though parties can be imagined otherwise, as representative of *identities* and dependent on the prior construction of substantive goals and ways of being, the institutional structures which could support this are not present as represented in the fact that voting is an individually and secretly engaged process of culling, categorizing and counting that tells the state what to do.¹⁶⁷ Nancy Rosenblum argues that liberal democratic thought perpetuates this reality in regards to religion by constructing rules about "public" reason that require public reasons be absolved of identifiably religious material (whoever defines what that is), or by ignoring the fact that political parties *are* dependent on the prior identifications and values we form in our day to day lives together.¹⁶⁸ On the first hand our culture acts as though we use universal identification categories, on the second as though we do not identify objects at all. A legislature is incapable,

¹⁶⁶ *B.(R.)*, at 159.

¹⁶⁷ Nancy Rosenblum, "Religious Parties, Religious Political Identity, and the Cold Shoulder of Liberal Democratic Thought," *Ethical and Moral Practice* 6, 2003, 37.

¹⁶⁸ *Ibid.*, 44, 49.

or institutionally disinclined, to hear a religious claim because the claims of Richard and Beena are oriented to particular, substantive ends ungeneralizable to the full polity. They ask for particular forms of policy accommodation that apply to themselves alone.

The point in *B.(R.)* at which the engagement becomes deliberative and not bureaucratic is at the legislature and not in the hospital, which may have been the best forum of all. The full root of the problem occurs in the moment that we identify vulnerability and instead of speaking to what we see as the source of the vulnerability, find an ally who shares our criteria of objectivity and then another ally to the point that we have become the critical mass capable of creating an institution, such as the hospital or legislature, that can exercise power over and against the individual (and the allies they have collected in the meantime) we saw as the original source of the problem. The conversation between Richard and Beena and the doctors broke down at the point that time began to run out, but the bureaucratic structure of the hospital itself would also have aggravated the scenario and facilitated the state's intervention. The hospital is structured by administrative policies also shaped by a resistance to intersubjective identification. It culls, categorizes and counts information to inform our legislative schema about what is the appropriate form of action in this instance. (I should note here, because I am no longer speaking solely of the state as represented in formal law, that the same phenomenon happens within religious institutions as well. They too create their own ways of sedimenting the right law, theological point and ways of accessing authority). Most importantly, within the hospital are people who then choose when and how to exercise the administrative tools available to them. It is at the moment that one reaches away from one's conversant and up for the form to tick the box the persons' claim can be categorized in that the attenuated justification of the state has begun.

Following Charles Taylor's argument that in a multicultural society the negotiation of difference requires a "presumption of equality" that entails something like a leap of faith, a willingness to let go of our way of being (and the entailed claims that way of being makes on another and as represented in law), and reconstruct our ways of being to create harmonious ways of living together, the proportionality test in section 1 analysis is imperfect already at the point of determining purpose.¹⁶⁹ It does not permit the claims of diversity an opportunity to speak back to those who authorize legislation. It implies treating the *nomos* of minority groups as lesser law. It orients the court, the judges and lawyers, and the readers of the court's publicly disseminated reasons to examine, understand and speak back to the legislation's purpose and not the claims of diversity. Finally, it is the embodiment of a collective action shaped by insularity and exercised over and against a minority that is labelled and treated as "bad parents" in spite of the ways that they inevitably are good parents and in spite of their democratic voice. The test presumptively treats minority identities as unequal and violates the spirit of human rights as always having opportunity to challenge the given social order. The result of the attenuation of the justification of the state's intervention is that the state begins to fall in on itself at the point it cannot truly cross the gap in objectivity and Sheena's parents and the Jehovah's Witness' community speak out about the court's democratic legitimacy failure. The more the court uses attenuated justification the more it will undermine its institutional legitimacy as subjugated minorities seek alternative institutions and pick up allies who will support them in their way of being, nevermind the indirect effects this new consortium of allies might have on those represented in the diminishing state.

¹⁶⁹ Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed. *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), 66.

As for the last three steps of the test, rational connection, minimal impairment and proportional effect, I will treat them together as the “means” portion of proportionality analysis. The main function of this part of the test has been to determine whether the legislation under review “minimally impairs.” The court asks if the policy is reasonable (or approximates reasonable, they will allow the legislature not to be perfect) in the sense that there is no other policy that could achieve the same objective without taking more from the rights claimant. The latter half of the test consistently amounts to measuring administrative efficiency. This follows necessarily from the presumption of the monological order. The legislation provides means to its goal, “distributing resources” in the sense that it fosters or hinders various ways of being according to its own identification schema. Where the means achieve the ends with more effort than necessary the legislation ought to be scaled back.

R. v. Jones is an example worth returning to as this case makes explicit the orientation of the test to administrative efficiency. Thomas Jones educated his children and several others in a church home-school program and found it against his religion to register his children with the Department of Education as the Alberta *School Act*, R.S.A. 1980 effectively required him to. While this case was heard shortly after *Oakes* the court skips an expansive definition of freedom of religion and employs a compelling interest test through a nominal section 1 reference. The test does not formally measure rational connection, minimal impairment and proportional effect, but it is essentially the same as the proportionality test in that it examines the legislation for its reasonableness according to the conception of the state. La Forest J. found that it was demonstrably justified to require those who did not send their children to the regular school system to register their children with the Department. If the purpose of the legislation required Jones to deny his beliefs by initiating contact with the state, “such requirement constitutes a

minimal, or as the trial judge put it, peripheral intrusion on religion. To permit anyone to ignore it on the basis of religious conviction would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education.”¹⁷⁰ Evidence is not “necessary to establish the difficulty of administering a general provincial educational scheme if the onus lies on the educational authorities to enforce compliance.”¹⁷¹ It would simply be too expensive to accommodate Jones’ religious beliefs.

In *Singh* the court rejected this “utilitarian” type of consideration where a policy could be found to be too expensive if it were to accommodate the claimant’s requests. (At issue in the case was whether the Ministry of Employment and Immigration had treated the Singh family fairly when they failed to give the family an opportunity to defend their immigration application). The court argued that

“the issue in the present case is not simply whether the procedures set out in the *Immigration Act, 1976* for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee claims which does not accord with the principles of fundamental justice... No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but such an argument, in my view, misses the point of the exercise under s.1.”¹⁷²

It would be “fundamentally repugnant” to defend legislation on the basis of its practicality because it justifies the indirect effects of a law, the way it violates the Singh’s claims, on the very basis of the laws stated purpose.¹⁷³ The argument is circular because the test does not allow the legislation’s effects to be challenged.

To really review the conflict the alternative to administrative efficiency is to actually review the moment and reasons engaged at the point someone enacts the administrative

¹⁷⁰ *Jones*, at 28.

¹⁷¹ *Ibid.*, at 30.

¹⁷² *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [*Singh*], at 69-70.

¹⁷³ As the court also argued in parallel *Big M*, at 140.

handbook. The parallel in *B.(R.)* would have been to judge the decision to grant custody to the Children's Aid Society. Instead the court did as it did in *Jones*, and examined whether the legislation entailed procedures that minimally impaired Richard and Beena's freedom of religion. La Forest argued,

“the process contemplated by the Act is carefully crafted, adaptable to a myriad of different situations, and far from arbitrary. The Act makes provision for notice to be given, for evidence to be called, for time limits to be imposed upon Crown wardship and other orders, as well as for procedural protections to be afforded to parents. The restrictions the Act imposes on parental rights are, in my view, amply justified.”¹⁷⁴

Whether the argument is presented directly in terms of costs, or indirectly by finding procedures to be reasonable, at bottom it is the same. The state is saying that it does not find it sufficiently valuable to adjust its procedures, but it means that the administrative handbook embodied the right action. Behind dollars are people who decide what to do with those dollars and what is valuable. When the state says a particular policy is too expensive it is simply saying that it will not change its values and identification of the objects to which those values are directed.¹⁷⁵ All language that says “more” or “less,” “increasing” and “decreasing” and uses the suffix of “er” necessarily indicates a monological perspective because it is the same values measured. It will require overlapping criteria of objectivity for a collectivity to understand and concur that something is too expensive. Neither Thomas Jones, Richard and Beena, nor the Singh family could have understood why their requests were too expensive or the procedures sufficiently reasonable. As they understood the appropriate order of priorities at hand the state ought to reorganize its values to fit their requests.

¹⁷⁴ *B.(R.)*, at 113. The review of procedures had partly to do with the fact that most of the court's reasons pertained to a review of section 7 whose internal limit are the “principles of fundamental justice.” This limit is often interpreted procedurally, though it need not be. Review of procedures under section one is not unusual, however. *R. v. Jones* is an example of proportionality review of procedures.

¹⁷⁵ See also Weinrib, “The Supreme Court,” 490.

From the perspective of the rights claimant proportionality review looks like a process to ensure efficient imperial administration. The state is still the one choosing the ends, defining the means, and reviewing the means for efficiency. We might use Beatty's description ironically, pointing to the measuring language,

“laws that can't pass the necessity test constitute *gratuitous infringements* on people's constitutional rights because they are broader and *more* burdensome than they need to be. There is no (rational) reason, no (legitimate) interest for not pursuing a *less* restrictive and *less* draconian alternative which would accomplish all the *Government's* objectives, while *lightening* the burden on, or discrimination of, those they adversely affect.”¹⁷⁶

In the means step the unequal presumption is apparent – no one asks if the rights claimants minimally impair the state.

The extent to which the anomic language of minimal impairment hides the conflict between hospital and parents, and later state and minority, beneath the measured zone of infringement can be represented in the catalogue of minimal impairment outcomes Jeremy Gunn provides. Gunn has categorized the conditions under which one can predict whether the state will rule with the rights claimant or with the legislation in proportionality analysis. I will not repeat all the categories here, a couple will serve to show the anomic language. The court is more likely to rule with the claimant where there is an “alternative that would be *less* of an infringement on rights,” or where “the law is *narrowly* targeted to eliminate a real problem, but the punishment is *overly* severe.” The court is more likely to rule with the state “where there is a real but small infringement on rights,” and “where there may be a significant infringement on rights, but there is a compelling community need.”¹⁷⁷ The categories approach an economic function measuring the level of power of each party under different conditions to determine the various tipping points at which one party will have the most efficient margin of power necessary

¹⁷⁶ Beatty, *Ultimate Rule of Law*, 164. Emphasis added.

¹⁷⁷ Jeremy Gunn, “Deconstructing Proportionality Analysis.” *Emory International Law Review*, 2005, 495-9.

to purchase and determine the zone of infringement. The court's language sometimes represents this phenomenon in speaking of a "threshold" beyond which the state will then be legitimated in intervention.¹⁷⁸ Richard and Beena are allowed to be imperfect parents up to a particular point the point at which state intervention becomes "compelling" and the reasons having sufficient purchasing capacity to determine the zone of infringement. The form of reasoning presumes and legitimate private pursuits of ways of being and lets the most powerful in the form of that whose reasons are most weighty according to the state, to own and determine the object of conflict.

Many of the freedom of religion cases that make it to the Supreme Court do pertain to vulnerabilities that I for one have some sympathy with. It can be hard to understand the way in which the structure of the proportionality test can be imperfect if it consistently produces outcomes that seem, on the whole, to be good. On balance Sheena gets her sight and that seems to be better than the alternative. There is an alternative way of thinking which I will consider in chapter three. In closing this section however, I would like to note the way in which the test habituates insularity. It is important to consider the habituating effects – a court reaching for a staid and true test *as it now does* under section 1 is parallel to our reaching for allies who share the same criteria of objectivity, or reaching for the administrative handbook to tell us how to cull, categorize, count and then act. Because it does not inherently foster communication it is an arbitrary moment in the way of our caring for each other – it is incapable of forcing the court and its public audience into self-reflection by listening to the other side. Without self-reflection the state will never know the moment that it has begun to ensure maximum efficiency of the imperial state simply by habit. The test also fosters insularity in that it legitimates the process of not making clear our identifications of the other and thereby fosters the process by which citizens

¹⁷⁸ For the threshold argument in *B.(R.)* see at 86. "Core and penumbra" and "compelling" interest represent the same type of argument.

might habitually turn to our personal concepts of right and enforce them without knowing because we are not oriented to hearing the other.

A Bound Court

In facing the closed choice set between rights and legislature the court attempts to strike a midpoint using the proportionality test, but this midpoint still chooses one over others. When the court chooses judges will rule according to what they think contributes best to a desirable social order. This is valuable because the institution of the court does serve as a potentially powerful institution for minoritized people to challenge the social order and judges rulings can facilitate that challenge. In *B.(R.)* the actual outcome of the court's ruling I think is valuable because I think it frees Sheena and children like her for a fuller life, but the ruling provides no reasons that could foster further cultural transformation. The court's judgment might be based on a renewed understanding of the world having heard Richard and Beena's experiences under section 2(a). (Supposing that these experiences were presented in the court, which is not entirely clear and not something that can be presumed to have happened if the appellants adopted an argument that their claims ought to be protected simply because they were religious claims). However, proportionality does not expose the court's normative reasoning process. Thus the performance of the court's ruling is conflicted. It fosters the realization of a social order that frees some people, children, but not Richard and Beena, nor those engaged in conversation with the court's rulings. The court has reasons for ruling as they do, but the imperfect tools of anomic language in the very structure of the test binds its capacity to speak them.

Part of the court's meaning is still legible enough if one looks beneath the function and returns to the practical vision. In *B.(R.)* the court ruled that the procedures of the *Child Welfare Act* were good and followed well, but in choosing the Act the court also implicitly stated that it

found the effects of the *Child Welfare Act* to be good. La Forest justified the legislation on the basis of the welfare of Sheena (eventually), but by this too he did not mean the conception of welfare that Sheena's parents espoused. In the least what La Forest is saying is that *he* thinks it would be good to allow Sheena and children like Sheena to have a blood transfusion. He is saying that he concurs with the administrators who enacted the law and the polity that constructed the legislation that the way the parent's religion inclines them to treat Sheena is harmful on the basis that it does not result in the good of providing a blood transfusion for Sheena. The proportionality test does not orient La Forest to explain what his experience of the world is such that he thinks it good and valuable to give a blood transfusion to Sheena and why he does not think there is a need to withhold a blood transfusion. La Forest does not share his experience and understanding of the world and his resulting *nomos* such that Richard and Beena might learn why La Forest thinks as he does. La Forest provides no basis on which Richard and Beena might be enabled to judge differently for themselves a valuable way of being. In the same way La Forest has failed to encourage internal debate within the Jehovah's Witness community about the value of blood transfusions. Without facilitating internal transformation La Forest has furthered the conditions by which the state will constantly monitor and intervene in the Jehovist community and the relations between the two entities become increasingly antagonized. Without disclosing its reasons the court preserves for itself the role of being final arbiter.

Proportionality contributes to the binding of the court. The court is bound by the collective angst against intersubjective judgment that creates the institutions of laws and courts whereby judges are required to be the final determinant of the valuable social order but do so in the face an *artificial* and highly antagonized choice set. It is a choice set of people's making who passed on conversing with the other and creating new ways of identifying the object of

contention when we turned to administrative practices and the realm of formal law and courts. When we no longer trusted the legislature to provide good legislation we created human rights review as a counterbalance, but the court was never sufficiently freed enough to genuinely create policy so it attempted the awkward midpoint tool of proportionality. The midpoint of proportionality analysis still facilitates the exercise of the state's law over and against diversity, shaming the court into using anomic language. The anomic language makes the court's judgment genuinely final as opposed to simply the last word of the moment, because it does not foster further communication. The court then fosters fragmentation and the insularity that will foster a repeat of the attenuated justification of the state.

Chapter Three: Authorial Bonds

Perhaps we might give the Emperor his clothes back. Like the tailor and villagers in the story of the Emperor's New Clothes, we are just as much a part of the attenuation of the state's justification as the Emperor himself. There is no hero and no villain here. Most of the conceptual tools necessary are at hand, plus there are several judgments that exemplify distinct modifications of proportionality analysis that also give evidence to an alternative way of ruling. There are two preliminary steps to looking at the alternative judgments themselves. First, we will need some understanding of intersubjective judgment that can be experienced as good and not mere rhetoric. Second, and this will follow naturally from the first, institutional legitimacy will need to be reunderstood.

Words that Bond

Reasoning that faces a choice picks the right choice, asking which function (like Gunn's catalogue of minimal impairment scenarios) arrives at the most productive outcome. It fails to acknowledge that the choice made reflects the particular perspective of the person making the choice. Following Anthony Laden's work in *Reasonably Radical*, another approach to "choice" pre-empts the orientation to make the right choices with calculation by engaging deliberative reason or the offering of creative solutions as part of a deliberative process of sharing creative solutions. Deliberative reason refuses to choose one side of an artificial choice set because it presumes that given identities can be reconstituted valuably. As Laden describes deliberative reason, it is not about calculating the right choice but about the practices of reason-giving in and of themselves and is experienced as freeing and therefore good.¹⁷⁹ The way in which deliberative reason is a freeing process can be helpfully explained using some of the iconography

¹⁷⁹ Anthony Laden, *Reasonably Radical* (Ithaca, NY: Cornell University Press, 2001).

I have already alluded to. I will begin my explanation there and then return to further explanation of deliberative reason.

The frontispiece of Hobbes' *Leviathan* shows a citizenry lined up parallel to each other and facing the king. They no longer live in the hamlets in the valleys below the king where life was communally constructed. Their relationships have become antagonized, as inevitable in a world that constantly changes and as happened in the hospital between Richard and Beena and the hospital administration. But the citizens have stopped conversing with each other as they turned to face the king. In their antagonism they have opted to know very little about each other, and they can be represented in numbers or atoms, or under the selectively information retaining laws of section 2(a) and the *Child Welfare Act*. The citizens are represented uniformly and without faces. The atoms clash, but because the citizens know little about each other and are disinclined to learn more through conversation, they turn to the administrative king who then measures the zones of infringement between atoms. The king is produced in the moment we bend to fear of the other and the intersubjective judgment that is part of conversing through our conflicts with each other and collect allies who share our criteria of objectivity. The citizens have passed on their natural right of authorizing the *nomoi* that enable them to identify their neighbours well and engage action with them well, to the king. The king's way of enabling citizen's freedom is to ensure that the size of each citizen's anomic atom, the space in which they can practice freely and the amount of resources they have to do so, is equal. But the omnipresence of harm and infringement between ways of being makes the equal size of our atoms very small if existent at all when we do not authorize the king's *nomos* as our own. There is no scope of freedom undetermined by the king in processes of redistribution due to harm when citizens do not face each other. To free the atoms up turning to the king must be unnecessary.

Iconographically what happens is that citizens turn back to each other, fill the spaces between them with caring conversation that always expects another side and together author their lives, producing numerous *nomoi* as the individual concepts of what is good to each citizen are shared with each other and brought to fruition in a mutual process of expanding each other's *nomos*. The zones of infringement between atoms no longer clash but melt into each other as conversation facilitates new ways of being that can overlap and are therefore larger and freer.

Deliberative reason is reason that always expects another side in contrast to rational reason which measures options as in the proportionality test. It is an appropriate form of reasoning for the context of producing our social orders in conditions of diversity. This is because it is a non-monological form of reasoning, it does not presume concerted orientation in action. Rational reason is valuable where criteria of objectivity are shared and where an activity is being pursued in concert. Deliberative reason is valuable where we do not share criteria of objectivity and are thus pursuing our activities in conflict.¹⁸⁰ In rational reason we ask how best to pursue our ends. In contrast, deliberative reason is evaluated for whether the rights set of reasons have been considered.¹⁸¹ In the context of diversity these will be whether we have engaged the reasons of others, if we have properly taken into account that our reasons are not the only set of reasons to consider.

Laden makes three points that distinguish deliberative reason from rational reason. First, deliberative reason is an activity done together rather than independently and side by side. For this reason it is more concerned about the "character" of reasons than the quantity. It is concerned with which set of reasons have been engaged.¹⁸² Second, rational reason is a tool to find *my* way in the world, versus a process through which we can enable divergent ways of being

¹⁸⁰ Cf. Laden, 74.

¹⁸¹ Ibid., 75.

¹⁸² Ibid., 75-6.

to live together. It undoes what I have called insularity because of the first point. With expectation that there are other reasons to be heard we have turned to face the other. The third distinction that Laden makes is in the way reasons take on authority. Under rational deliberation reasons “count as points in a game.”¹⁸³ One might say, the more and better reasons one has, the more likely you are to be able to purchase and determine the zone of infringement. What will be considered will be predetermined by the ends pursued, and only considered because they pertain to the ends pursued. All else is unnecessary. In practical reasoning we exchange claims with each other about how we would like ourselves and our world to be related to us. A particular, contextualized claim will take on the normative authority of a reason where the claim is accepted by the person on whom the claim is made as appropriate to the relationship (even as it changes) between claimant and claimee.¹⁸⁴ Where we recognize the other as a citizen like ourselves we recognize them as reason-givers who ought to be heard. We “uptake” their reasons (using Laden’s language) by hearing them and then responding to their communication. We engage the other’s reasons as constituting the kind of reason that needs a reply. Measuring administrative efficiency constitutes a form of denying the other’s reasons as the reasons of a citizen or reason-giver. Richard and Beena challenge the employment of the law itself and provide reason as to why they cannot consent to the law. Where the court measures efficiency of the law it fails to recognize Richard and Beena’s challenge to the law as a counter-claim and part of a deliberative process across conflict where criteria of objectivity are not shared.

I think that the crucial move that enables the distinctions between rational and reasonable deliberation has to do with our orientation to ourselves and our own way of being. In rational deliberation we approach the hospital scenario between parents and administrative staff with our

¹⁸³ Ibid., 77.

¹⁸⁴ Ibid.

own orientation or ends pre-decided. We then measure choices according to which best meets our end. (Precisely what occurs in minimal impairment analysis: the court measures the legislative policy according to its capacity to meet predetermined ends). As Laden points out, this approach ends up treating the people and objects with whom one engages as “the furniture of the universe.”¹⁸⁵ In deliberative reason we approach deliberation under the presumption that our ends must be treated as common in some way. In a world where our ways of being overlap this is an imminently appropriate assumption. Our ways of being *do* have effects on other ways of being and therefore the ends *are* shared. When we deliberate in practical reason we are attempting to concert our individuated ends to facilitate each other’s freedom. We deliberate under the assumption that we are related and therefore our ends may need to adjust in the process of deliberation. Similarly, in Laden’s account of deliberative reason, “being reasonable... makes it possible for people with divergent ends and interests to live together in ways that preserve their autonomy.”¹⁸⁶

Deliberative reason is the first and most important conceptual tool for freeing up the court to speak clearly and it can be experienced as good. In continually giving reasons we will preserve the freedom of others’ ways of being. The court avoids directly labelling a practice as harmful because it implies labelling Richard and Beena’s and other rights claimants ways of being as in some (albeit partial) way constitutive of harm on a conception of harm that they *know* to be partial to their understanding. It is valuable to make these identifications public because their publication can be freeing. This value can be demonstrated by emphasizing the relational nature of reasons-giving, as Laden does. In a relationship claimsmaking is fundamentally freeing because it deprivatizes or uninsulates the pursuit of our divergent ways of being,

¹⁸⁵ Ibid., 76.

¹⁸⁶ Ibid., 76-77.

relieving us of the arbitrary indirect effects of others ways of being. To imaginatively expand on the *B.(R.)* case, hospital staff at some point cognized Richard and Beena's actions in relation to Sheena as harmful. If they speak directly to Richard and Beena about what they recognize, they allow Richard and Beena the opportunity to give reason back, thus expanding the opportunity for democratic voice. It might perhaps seem possible for the staff to avoid identifying Richard and Beena's way of being altogether, but that will constitute tacit consent to the way that they treat Sheena. Eventually, say as the need for a blood transfusion becomes more apparent to the hospital staff, the staff will make clear their judgment in reaching for the administrative handbook. Expressing their recognition of harm from the beginning thus constitutes a way of acknowledging *audi alteram partem* and of expanding freedom for Richard and Beena's way of being as they are invited to find ways of being together where the different ways of being can overlap with each other. Resources would be pulled from defense mechanisms to direct pursuit of desirable ways of being as Richard and Beena counter a reason with reasons of their own.

Judges facilitate a minority group's freedom if they speak clearly their understanding of what they think would be good in the very particular context at hand. Instead of ensuring minimal impairment between the various parties, the court might attempt to make clear their normative judgment. We might say that the court is not "judging" but speaking their identifications of the other, just as citizens who do not face the king but live in hamlets do. They are facilitating the conditions by which their last word is not the final word. In speaking clearly the court continues the public discourse inviting both minority groups and the general polity to continue to deliberate over a desirable social order.¹⁸⁷

¹⁸⁷ Thus a dialogue larger in scope than that between the legislature and judiciary. See Peter Hogg and Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures," *Osgoode Hall Law Journal* 35(1), 1997, for the classic representation of dialogue between legislature and judiciary. As regards section 1, Hogg and Bushell argue that a section 1 analysis invites the legislature to revisit and rewrite legislation in response to a court's finding that

Speaking the judges' identification schema in a contextual analysis, or as a form of common law, also allows new labels to be formed to identify the subtle differences in each case. The greater the subtlety in labels the greater the capacity of a society to interact with an individual according to their very unique way of being, thus further expanding freedom for that person. A court that speaks its recognition in the form of reasons about what they believe is a desirable social order for the particular case at hand also facilitates deconstructing compunctions about intersubjective judgment in the broader society. By fostering the value of intersubjective judgment the court fosters the creation of subtle distinctions in identification schemas in the broader society. The court will image the value of rejecting insularity. Further, through revealing what it has learned in the courtroom, it also allows the uniqueness of the case at hand to determine a new label. This is important for a society that allows notions of freedom as freedom from interference to blind ourselves to the vulnerabilities we see about us that do not fit the categories of children or constitute physical harm, or incline ourselves to mediate all our intersubjective relations through the state.¹⁸⁸

I have focussed on the actions of the state and communities surrounding minority groups, but before continuing I should acknowledge more clearly that the inclination to avoid intersubjective judgment and assert our own criteria of objectivity is of course a mutual phenomenon of both religious groups and those represented under "state" legislation in the court. Our histories do not always make it easy to dissemble the orientation to "right" in our engagements with each other. The religious groups who find themselves in the courts are often

legislation does not minimally impair (84-87). See *Hutterian Brethren* for an example in recent freedom of religion review where a dissenting opinion explicitly suggested the courts allow the Alberta legislature a year to remake legislation in conjunction with the Hutterian community whose religious practice came in conflict with new Alerbtan legislation regarding drivers licenses and with LeBel's own suggestion as to what was inadequate in the legislation (177). Judiciary/legislature dialogue is limited most importantly in that it does not encourage citizens to take on responsibility for their ways of being effects on others, or act upon the forms of vulnerability they see about them.

¹⁸⁸ Thus in hopeful response to Monahan's observation that "judicial fiat... [and]... elitist politics breeds only a mob; to produce citizens, one needs democracy" (138).

what Robert Cover has called “insular” communities. These communities are oriented to preserving their way of being and often not directly concerned for state-oriented construction of the broad social order until it indirectly affects their ability to live their way of being.¹⁸⁹ In proportionality analysis it would not be of much concern to these groups whether the purpose of their *nomos* is represented in the court’s reasons or not. They are more likely to be concerned merely about the indirect effects of the state’s private pursuit of its way of being on their own. I have suggested it is good to acknowledge and publicize how we identify the other. As Jurgen Habermas has recently well stated in “Religion in the Public Sphere,” the new recognition that public reason is partially constructed means that we will need to mutually bear the newly acknowledged fact of cognitive dissonance (lack of overlapping criteria of objectivity). Both secular modernity and religion have inappropriately asserted the rightness of their ways of being for all people.¹⁹⁰

In speaking its experiences the court might incite a religion that it thinks is operating harmfully to reveal its assertion of right. Religion, like the state, sometimes subjects people and is allowed to do so by a polity that believes in avoiding intersubjective judgment. There are often tools within religious communities that enable them to find common ground with liberal forms of politics that seek autonomy for citizens in the sense of freeing people’s ways of being, *if* the state is willing to speak in ways that are actually freeing of diverse ways of being.¹⁹¹ I

¹⁸⁹ Robert Cover, “Nomos and Narrative” *Harvard Law Review* 97(4), 1983, 26. Cover is wrong to assert that Anabaptist communities are entirely unconcerned for the construction of the social order. Amish communities have created some of the fastest-reacting disaster response networks in North America, nevermind what their alternative conflict reconciliation practices have contributed to the social order. They are simply not interested in *state*-centred constructions of the social order.

¹⁹⁰ Jurgen Habermas, “Religion in the Public Sphere,” *European Journal of Philosophy* 14(1), 2006, 15.

¹⁹¹ Cf. Lucas Swaine, “Institutions of Conscience: Politics and Principle in a World of Religious Pluralism,” *Ethical Theory and Moral Practice* 6, 2003. In the least, as Swaine notes, religious communities are founded on the basis of freedom of conscience particularly what he terms the “principle of affirmation,” that “one’s conscience must be free to accept the good” and therefore also the capacity to distinguish between the good and bad (99). The orientation of religious communities and liberal in this sense is both towards a certain type of freedom.

suspect that in speaking what the court thinks of what it learns in the courtroom, the court can help free the subjected from underneath the arbitrary power of a religion that asserts “right” as those subject to “right” find in the court’s words reasons for no longer believing they need be subject to their community’s former concept of right as the best option of life for them.¹⁹² They will have been told there is a better world possible and can continue the conversation.

Understanding judgment as the sharing of our identifications of desirable ways of being leads to the second conceptual tool, that of reunderstanding institutional legitimacy. Institutional legitimacy as I have been using the term refers to the practices of the court that allow people to understand the court as engaging a valuable function in the construction of our social orders. I would like to add to this definition. The practices of a court that secure institutional legitimacy will foster communication and not measure minimal impairment as this latter method was unbinding and fostered insularity. I think that speaking of what it thinks of as good can be constitutive of the court’s capacity to maintain its institutional legitimacy, or to “maintain its state” to use an older language.¹⁹³ I am not suggesting that the court needs to be justified and that there is something necessary or essential about the institution of the Supreme Court. There are a wealth of alternative ways of solving our conflicts that do not require turning ultimately to the court. These are often much more valuable because they are familiar to the conflict itself and foster the capacity to identify each other that is necessary to our becoming the type of citizens

¹⁹² Cover cites the example of Bob Jones University who abandoned their commitment to excluding unmarried black persons from admission when the IRS threatened to withdraw charitable status. The community did not fight the threat and therefore Cover interprets their adjustment as due to the community’s weak commitment to the principle (Cover, 51). The action of the IRS acted as the instigator for the community to review itself and acknowledge that its principle was not of good value. This example is in distinction to his later extension of the Bob Jones story where the court used the American proportionality test and the analysis he gives parallels mine on *B.(R.)*, (64-67).

¹⁹³ One could also speak parallelly in this regard of people maintaining their state. I intend what is said of the court to stand also for individual citizens and not just the citizens embodied in the court. Citizens too feel shame and fear about our engagements with each other and need to know they can speak freely.

that can respond well to diversity. I mean simply to say that to the extent that the institution can maintain its legitimacy valuably it will speak like a citizen and not a state.

Laden argues that institutional legitimacy depends on three criteria which in turn concord with institutional legitimacy as dependent on fostering communication.¹⁹⁴ These criteria are perhaps atypical as regards legitimacy because they do not articulate a particular instantiation of a just order. For example, he does not argue that the legitimacy of the social order depends on its realizing a particular conception of human nature and its capacities, that all humans must be afforded 12 years of education, food, shelter and so on, though these may very well be good things. Rather, he offers criteria that if satisfied might constitute a social order that embodies these types of substantive reasons and that citizens can regard as authoritative or in accord with their *nomos*. The first criterion is that an institution must embody a shared will in the sense that my participation in that institution, the exercise of my will, concords with the function of the institution.¹⁹⁵ The second criterion is that an institution must leave room for individual freedom.¹⁹⁶ I take this to imply an undoing of the omnipresence of the state's intervention as in *B.(R.)*. An institution must provide room for other institutions such that no one way of being determines all others. Finally, the third criterion is stability of the social order which will occur where "members come to identify with their roles in it through growing up and living their lives within its institutions."¹⁹⁷ That is, it must be bonding, or be a place in which citizens find a home, a place where their "fundamental ends and interests are met."¹⁹⁸ An institution that recognizes section 2(a) claimants as citizens or reasons-givers and itself as a citizen embodies a

¹⁹⁴ Which he draws roughly from Hegel, (53-58).

¹⁹⁵ Laden makes a finer distinction herein that in order to maintain freedom in participating in an institution my will must be shared with the wills embodied in the institution or else I determine myself to be slave to another's will. I act in the institution in accordance with another's will and therefore subjugate my will to theirs (54).

¹⁹⁶ *Ibid.*, 55.

¹⁹⁷ *Ibid.*, 56.

¹⁹⁸ *Ibid.*, 57.

shared will of reasons-giving. The institution places a higher value in the process of reason giving than in substantive ends, thus valuing deliberative reason over rational. Such an institution also recognizes that it is not the sole source of meaning. It can therefore be bonding.

Participation in the institution allows oneself to will oneself as free because it recognizes oneself as a reason-giver and thereby realizes one's fundamental ends and interests as an entity whose being in fact produces the social order and produces the social order well to the extent that its claims within the order came into concert with other claims through ongoing processes of reasons-giving. An institution might therefore maintain its state where it exudes the spirit of human rights – that it is possible for all persons to participate well in the ongoing construction of the social order.

This way of understanding institutional legitimacy necessarily depends on creating overlapping criteria of objectivity. As *nomoi* are paideic overlapping criteria cannot be expanded through demonstrating right. Demonstrable justification will depend on sharing our experiences and partially constructed experiences of our world. The question is whether in speaking honestly the partiality of their understanding of what is good, the court can actually instigate an expansion of the overlap in criteria of objectivity and thereby make the experience of “judging” bonding. One way of looking at this question would look at whether the court can be freed up in its capacity to speak as a response to citizen's speaking of the possibility of living well together amidst diversity. I will look primarily at how in one particular case especially, the court's speaking quelled the level of conflict in the society.

Citizen's Clothing

The people who told the story of the Emperor's New Clothes thought it valuable to respond to their state of shame by giving the Emperor clothing like their own. They dressed the

emperor with an authority to speak like every other person, without attenuation to a universal recognition of nobility. I think that in *Multani* and in *Hutterian Brethren* the court spoke like a citizen in the manner that the villagers of the Emperor's New Clothes concluded was appropriate and unattenuated.¹⁹⁹ A court's capacity to speak clearly will partly depend on whether the citizen's themselves have begun to speak with other and think it valuable to speak their identification schemas. In *Multani* and *Hutterian Brethren* it is less clear exactly the role public discourse played in freeing the court.²⁰⁰ However, the court does take the opportunity of a public discussion on reasonable accommodation in *Multani* to initiate a very different form of proportionality analysis. *Hutterian Brethren* similarly exemplifies a continued further change in the way proportionality analysis is engaged. I will pull these changes out because they form the beginnings of a plurality of new institutional habits that facilitate deliberation and are therefore constitutive of a valuable form of institutional legitimacy. I do not mean to suggest that Canadian courts ought to do more of exactly what the Supreme Court in these cases has done.

¹⁹⁹ In attributing citizenship to the court I am invoking a perhaps unconventional concept of citizenship. I do not mean to apply to the court a right of citizenship or personhood in the sense that the court as an institution ought to be given equal resources as a person. I mean in the least to point to the phenomenon that the court in fact does contribute to the construction of the social order in the way that citizen's do with their *nomoi* and that the label of citizen therefore appropriately applies to the court as it produces the social order.

²⁰⁰ For a valuable case study in proportionality analysis where it is clearly the action of citizens that free the court see *The State v. T. Makwanyane and M Mchunu*, CCT/3/94[Makwanyane]. *Makwanyane* is an international status, South African proportionality case under the transition constitution of 1994-1996 that addressed whether the death penalty was appropriate for a break and entry that concluded in murder. In its proportionality analysis the court worked loosely from the Canadian version of the proportionality test. However, they modify the test in a way that almost makes it look like a five-step dialogical form of a test and even then they largely reject the test. The argument of the court is consistently reasoned with the concept of "umuntu" doing much of the work in the performance of the case, arguing against retributive justice and the death penalty in a race related case. The connection to citizens is in the freedom cry "abantu," a slightly different substantiation of "umuntu." Bantu dialects have somewhat retained a substantive orientation typically lost in translation to English where an infinitive tense is added to Bantu nouns. "Umuntu" means something like "humanness" and is replaced by "freedom" in the second constitution. The concept allows one to see beyond a given people (abantu) to that which invites abantu to reconstitute itself. Seeing umuntu occurs by surprise, it cannot be anticipated. With the substantive orientation of the language the whole society is oriented to see and respond to the other that actually exists but had not been known. That the court could then use the concept to say that Makwanyane and Mchunu were also human and "one of us" and therefore the death penalty was inappropriate, means that the community was oriented to identify the other with care. It is the citizenry's concern to see the other and find ways of being that allow people to live together without sacrificing some to the aims of others which provided the court the opportunity to use the concept of umuntu to find an appropriate way of incorporating Makwanyane and Mchunu into a new abantu.

Rather, as a citizen speaking both to a citizen's court and other citizens I mean to say that there are other ways of ruling that perhaps we can continue to pluralize through expanding these communicative habits.

Multani was decided in 2006 amidst a public debate in Quebec on reasonable accommodation. As the Taylor-Bouchard commission on reasonable accommodation records, the debate originates as early as a 1985 ruling on reasonable accommodation in the workplace for a Seventh-Day Adventist who wished not to work on Friday evenings or Saturdays. The *Multani* affair began in 2001 at École Sainte-Catherine-Labouré when Gurbaj Singh, an orthodox Sikh, dropped his kirpan on the school playground. Concerned for the safety of children, the school board asked as a form of "reasonable accommodation" that Gurbaj's parents ensure his kirpan was sealed and secured within his clothing when he was at school. Gurbaj's parents found that this was an acceptable form of accommodation. However, the school's governing board, constituted by the parents of other children in the school, did not ratify the agreement and requested that Gurbaj wear a kirpan-pendant rather than a real kirpan to school. This was a form of accommodation that another school had made with another set of parents in Quebec in 1998, when there would have been less public debate on the value of reasonable accommodation. Perhaps the governing board felt that this latter form of accommodation would be the right form of accommodation and that there was no need or reason to allow the Multanis the form of accommodation they requested. However, accommodating minorities in Québec also threatens the strategic efficacy of using French identity vis-a-vis a federal English government. The parents rejection of the accommodation procedures that suited the Singh family occurred amidst angst and feelings of insecurity post September 11, 2001, and debates in Ontario on

accommodating sharia law.²⁰¹ The latter would have portrayed reasonable accommodation as a feature of English production of the social order. The reasonable accommodation debate became particularly deeply antagonized in response to the Superior Court of Québec judgment on *Multani* in 2002 that allowed Gurbaj Singh to wear his kirpan to school.²⁰² At the height of the debate the Supreme Court of Canada makes a very interesting ruling in *Multani*.

The most important adjustment the majority makes in its proportionality analysis is to insist that it is reviewing the *decision* of the school's council of commissioners who upheld the governing board's decision disallowing Gurbaj to take his kirpan to school if it was sheathed and secured.²⁰³ The majority was not interested in reviewing the rule itself under which the decision was made (parallel to reviewing legislation itself), but the moment of its application. Charron J., speaking for the majority, argued,

“...the administrative and constitutional validity of the *rule* against carrying weapons and dangerous objects in issue... Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of commissioners when it upheld the decision, infringed Gurbaj Singh's freedom of religion under the *Canadian Charter*... With respect, it is of little importance to Gurbaj Singh – who wants to exercise his freedom of religion – whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule.”²⁰⁴

In reviewing the decision itself the court began to undo the unequal presumption built into proportionality analysis by not reviewing whether proper administrative procedures had been followed, but by reviewing the administrative decision itself. It treated the Council of Commissioners as citizens, people who in fact make their own judgments according to their own *nomos* and reviewed the reasons which led the Council to reach for the administrative handbook.

²⁰¹ *Building the Future*, 50–60.

²⁰² *Ibid.*

²⁰³ *Multani*, at 1.

²⁰⁴ *Ibid.*, at 19-21.

The commissioners did choose to apply the law and in so doing did exercise their own conception of the desirable social order.

The consenting opinion objected to the recovery of the commissioner's *nomos*. To Deschamps and Abella JJ. at issue was whether administrative decisions could count as "law" under section 1 of the Charter precisely because doing so moved away from a textual account of law to a normative one.²⁰⁵ They cited Errol Mendes' account (and behind this Dickson J.'s in *Big M*) that to allow the purpose of a law to expand in this manner constitutes a form of double deference away from the rights claimant.²⁰⁶ It would make it easier for the law to pass the purpose portion of proportionality review, thus deferring to the legislature, and then allow the court to utilize its own judgment in interpreting a vague purpose, thus deferring to the judiciary itself.²⁰⁷ The argument depends entirely on the presumption that the court and legislature ought not actually use their own judgment in assessing the particular scenario at hand, as though there could and should be a state that absolves them of this role. They pointed out that "to suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process."²⁰⁸

This is precisely however, the condition of expanding the criteria of objectivity. Appeal to section 1 is an appeal to the value of human rights, freedom and equality as the possibility of another way of being beyond the ways that are currently instantiated and resulting in conflict.²⁰⁹ It is an appeal to the possibility that there might be good ways of being for all people together.

²⁰⁵ Ibid., at 118.

²⁰⁶ Ibid.; Mendes in "Crucible," 173.

²⁰⁷ *Multani*, at 118.

²⁰⁸ Ibid., at 120.

²⁰⁹ As Weinrib describes, it is an appeal to a "higher law," ("Human Dignity," 326-329). Of course, insofar as there can be a "higher law" it will still reflect our own *nomoi*, as we are the one's who describe and enact it. Thus the way I have worded the appeal.

No one will conceptualize section 1 values in quite the same way, but they are certainly broad enough to capture whatever normative orientation an administrator might have. An administrator will invoke the *Oakes* test at least in its substance when they make their decisions because they will use their conception of a desirable social order and such conceptions might easily be captured under the terminology of a “free and democratic” society. When Charron J. insisted on applying *constitutional* review instead of administrative review he expanded the scope to which section 1 review could apply to pre-empt evaluating legislation for minimal impairment. In reviewing the decision he will make clear that by constitutional review he also means to recover under section 1 the spirit of human rights where everyone participates in the construction of the social order.

In the proportionality test the majority opinion really did review the decision of the council of commissioners to employ the administrative handbook and not the administrative handbook itself. The court acknowledged that section 1 was established as the institutionally legitimate tool under which to decide section 1, re-envoked the language of “context” and referenced *Oakes* as the test applicable to section 1.²¹⁰ Under this language the court made three significant and valuable adjustments in expected action. First, the court actually did engage a contextual analysis. It did this by virtue of the fact that it reviewed the decision itself and not the legislation, nor abstract principles of freedom of religion or school safety unsubstantiated. For example, the court considered the demonstrated capacity for responsibility of Gurbaj Singh himself, and not children his age.²¹¹ Similarly, the court also dismissed evidence presented by the respondents that compared airplanes to schoolgrounds on the basis that unlike in the airplane cases the school environment “permits relationships to develop among students and staff. Those

²¹⁰ *Multani*, at 26-30.

²¹¹ *Multani*, at 54, 57.

relationships make it possible to better control the different types of situations that arise in schools.”²¹² A contextual analysis allowed the court to return to a practical vision and the most local of considerations, the quality of the relationships between the child, school and parents. In this particular case those happened to be very good.

Second, the court referenced a method sometimes used under minimal impairment where counsel is requested to provide evidence of a “range of reasonable alternatives” as policy options so as not to make it impossible for the legislation to be justified. However, the court then associated this language with reasonable accommodation.

“The correspondence between the legal principles [minimal impairment and reasonable accommodation] is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it.”²¹³

The court’s authority on reasonable accommodation was José Woehrling, who picked up on reasonable accommodation in human rights legislation as requiring accommodation up to the point of undue hardship, and in *Edwards Books* as a question of whether the Ontario legislature had “done enough to accommodate.”²¹⁴ The transition is subtle but valuable. The site of analysis has moved from the legislation to the actual actions of the one accommodating, from the state to the citizen, and is reaffirmed in the court’s following actual analysis. The court announces the action of the council of commissioners as “establish[ing] an absolute prohibition against Gurbaj Singh wearing his kirpan to school” and then reviews it.²¹⁵

Finally, and most usefully, in reviewing the commissioners’ decision the court spoke like a citizen. Under the reference to *Oakes* Charron recited the argument of the court made in

²¹² *Ibid.*, at 65.

²¹³ *Multani*, at 53. (Referencing workplace reasonable accommodation cases who test for undue hardship as opposed to *bona fide occupational requirement*).

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, at 54.

Dagenais v. Canadian Broadcasting Corp. that principles of the common law be developed “in a manner consistent with the fundamental values enshrined in the Constitution...’ For this purpose... the Court held that a common law standard that ‘clearly reflects the *substance* of the *Oakes* test’ was the most appropriate one.”²¹⁶ Substance is the word the court creatively picked up on. Under “minimal impairment” the court went through the same *decision making process* as the Council of Commissioners did, reviewing each of their arguments and assessing them from their own perspective. Their final statement said, “[in] my opinion, the respondents have failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh’s rights.”²¹⁷ The court spoke self reflectively rather than objectively, “minimally impair” refers to the commissioners’ action and not the legislation, and where demonstration in *B.(R.)* led the court to regard itself as a “trier of fact” here the court treats demonstration as necessarily dependent on personally constructed criteria of objectivity. On the basis of his own criteria of objectivity Charron found the decision not to be reasonable and so spoke like a citizen.

Besides reviewing the decision itself, the court made two other useful moves that effectively finish the dismantling of the unequal presumption of proportionality analysis. First, the court utilized the proportionate effects step of proportionality analysis to make its own contribution to the reasonable accommodation debate in Quebec. The section opens and closes in a rhetorical envelope that says in the opening that the court had already made its decision and did not need to consider proportionate effects, and then in its closing provided a twist on the usual balance of effects on the basis of the abstract values of “freedom of religion” and “showing

²¹⁶ *Ibid.*, at 30.

²¹⁷ *Ibid.*, at 77.

respect” for minorities.²¹⁸ What mattered most was the material spoken in between. The majority said that it thought the decision of the commissioners would have “stifle[d] the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.”²¹⁹ They endorsed reasonable accommodation, making this part of their understanding of a desirable social order. This step also allowed the majority to consider how the decision made in the focused context considered in the first three steps would contribute to the social order all people and all things participate in. The majority reasoned that recognizing Gurbaj Singh’s religious practice would be contributory to a desirable social order not just for the web of relationships closely connected to Gurbaj’s school, but for the web of human relationships that extends indefinitely beyond that school to the extent at least of “our society.”²²⁰

Charron’s statement under proportional effects and his review of the evidence in reviewing the decision itself amount to speaking the possibility of life together amidst our differences even where this may require us to reconceive how we identify the item contested beneath the zone of infringement. He found no reason to fear accommodating a kirpan in the context at hand. As the Taylor-Bouchard commission later found, much of the negative orientation to reasonable accommodation that fostered the hype of the debate was unfounded. When looking at the actual practices of accommodation the commission found that accommodation did not constitute a crisis because many of the conflicts were in fact successfully locally remediated.²²¹ In reviewing the evidence Charron found that not only was there no

²¹⁸ Ibid., at 79.

²¹⁹ Ibid., at 78.

²²⁰ Ibid., at 79. See also the court’s comments at 70-1 that rejected the respondents claim that the kirpan was a symbol of violence. The court found no substantial evidence to corroborate the association of the kirpan with violence (71). The effect of the court’s judgment is to identify the kirpan as an object that symbolizes the value of respecting difference.

²²¹ *Building Our Future*, 18.

evidence that kirpans had been used violently in a school environment, (and very few incidences that they had been used violently ever in Canada), for Gurbaj the kirpan was part of a sincere religious practice that not only did not treat the kirpan as a weapon but also entailed pacifism as a way of life.²²² The identity that Gurbaj applied to the kirpan meant that his relationship to the kirpan was not one that would make it meaningful for him to use the kirpan violently. While in the public discourse there were perspectives that viewed the kirpan as an instrument of violence, there was no need to assert that perspective because the one who wielded the object could be trusted to wield it well and in concert with the collective of divergent ends which Gurbaj's actions would affect. There is nothing essential to the identity of a knife that necessarily makes it violent. Its use is ascribed by persons. Charron can be said to have spoken truth to the arbitrary power of the commissioners who allowed the fear instilling the society about them to guide their action over and against the locally, pacifically created accommodation practice the school and the Singhs had created. The Supreme Court's judgment initiated a further heightening in the public debate, but as the Taylor-Bouchard commission facilitated further discussion and dissemination of the court's reasons the turmoil quelled within a year.²²³ Perhaps Charron really had managed to expand the criteria of objectivity.

The court will need a way to provide a suggestion for an alternative solution or a forum for constructing an alternative solution rather than picking between one or the other option. This happens too in the *Multani* judgment. In the second of the two last useful moves the court recovered a way to provide a remedy and finish speaking the possibility of life together. Charron J. recovered an argument in *Eldridge v. British Columbia (Attorney General)* that constitutional review could apply to the *application* of a law, in which instance the law may be upheld as valid

²²² *Multani*, at 59-75.

²²³ *Building Our Future*, 53.

but a different remedy found under s. 24(1) of the Charter. Section 24(1) is simply an enforcement clause, but it importantly does state that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction *to obtain such remedy* as the court considers appropriate and just in the circumstances.”²²⁴ This move very helpfully deconstructs the bifurcation in our political institutional make-up between the moment of judging and the moment of creating new policy and finding new ways of living together. In this particular instance Gurbaj was no longer attending Sainte-Catherine-Labouré and so the court did no more than point out that it *could* state a remedy if it so chose. Interestingly, the court would have had at hand a remedy already understood as acceptable to those most local to the original conflict precisely because the school board and the parents had good relationships with each other and did not turn to the administrative handbook. It was the general board and the council of commissioners who turned to invoke concepts of right over and against both the school and the Singhs. In *Multani* the Supreme Court found no reason for the antagonism of the conflict between the Singhs and the parents of the other school-children. By speaking its own *nomos* the court recovered itself as a citizen and by refraining from acting like a state, initiated an institutional habit that can preserve democratic voice and the spirit of human rights.

The freeing of the court continues in the next significant religion case the Supreme Court decides under section 1, *Alberta v. Hutterian Brethren* as the court uses the precedent *Multani* set. *Alberta v. Hutterian Brethren* addressed the claims of the Hutterian Brethren Wilson Colony that a regulation made by the Alberta government under the *Traffic Safety Act* infringed their freedom of religion. The regulation required all driver licenses to be issued with photo ID, partly to harmonize Alberta’s security procedures with international standards, but also to prevent

²²⁴ *Canadian Charter of Rights and Freedoms*, Sec. 24(1), emphasis added.

identity theft. The legislation infringed on the Hutterian Brethren's religious practices because having their pictures taken voluntarily violated a religious rule. Without drivers licenses the community's rural way of life would be threatened because they would not be able to drive beyond the colony to do occasional business as necessary. Unlike most of the other cases I have considered, in this case the conflict lies directly between a religious group and the Alberta government itself. Continuing the strategy of reviewing the decision means that the action to be reviewed will be the creation of legislation. Challenging the very process of constructing formal legislation might be a bit difficult, so the court turns to evaluating the legislation itself but will do under a very different type of proportionality test. There are a series of institutional habits initiated in this case that further foster democratic voice, though due to the different location of the conflict the tools are slightly different and therefore useful to review. Most importantly, the court offers an alternative interpretation of the proportionality test for the context of evaluating legislation.²²⁵

McLachlin C.J., speaking for the majority, offered a fundamental reinterpretation of the means part of the proportionality test which she simply titled a question as to whether the *limit* on the right was "proportionate in the sense that it is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects."²²⁶ In this case, compared to *Multani* the court goes on to actually talk about minimal impairment, but the reinterpretation of minimal impairment as about reasons remains for future use. More important for the type of conflict at hand is that the court acknowledges that the means step of the proportionality test has been monological. Minimal impairment amounts to an "internal"

²²⁵ The key alternative tool provided in this decision occurs in Abella J.'s dissenting opinion and concerns another way of reading "prescribed by law." Her remedy returns the decision back on the conflicting parties, giving them a year to create for themselves another solution. This is another creative solution to the problem of the artificial choice set and bifurcation in judgment between assessing and creating new ways of being.

²²⁶ *Alberta*, at 47.

analysis “that the government choose the least drastic means *of achieving its objective.*”²²⁷ In the form of proportionality analysis utilized before *Multani* the proportionality test became monological at the moment that the court justified the legislation’s purpose. This made proportionality *strictu sensu* effectively redundant because proportionality between negative and positive effects were necessarily consistent. The government’s purpose, the positive effects, required and made most efficient the amount of infringement, or negative effects.

It might be helpful to conceptualize the move the court is making in *Alberta* as running a parallel proportionality test on the rights’ claimants *nomos* because the court has not yet chosen which purpose will determine outcome. Minimal impairment is then about ensuring the efficiency of both the claimant’s and the state’s *nomoi*. Not until proportionate effect does the court decide which party’s claims are most valuable. Under this conception proportionality analysis allows the court not just to measure efficiency, but whether the state ought to “give up more” in contrast to the rights claimant’s *nomos*.²²⁸ The all important moment of decision is moved to the final step and is a moment of comparing *both nomoi*, pre-empting the monological orientation of the old test due to the presumptive better value of the state’s purpose. This seems to be what the court has in mind in its minimal impairment analysis. The majority considered not just the state’s proposal, but recovered the claimant’s proposal. It then noted that the two proposals are not coincident and that the court ought not to proceed at this point “on the assumption that the state goal is valid.”²²⁹

When McLachlin turned to balancing salutary and deleterious effects she consistently gave reasons for her perspective without anomic language and between the lines provided her own idea of a creative solution. She very much so spoke like a citizen beneath the merely

²²⁷ Ibid., at 54.

²²⁸ Ibid.

²²⁹ Ibid., at 61.

surface language of balancing, costs and weighing. Like in *Multani*, the majority adopted a truly contextual and case-by-case approach. The court reviewed the actual arguments of each party, effectively making the decision over again. In *B.(R.) Richard and Beena* were left with no assurance that there was any sense in which their parental authority could be understood to have any meaning. The state appeared omnipresent. In considering the deleterious effects of the legislation under review in *Alberta* the court carved out a scope of free practice for religion by subtly reinterpreting the charter value of liberty from the “right of choice on matters of religion” to a “meaningful choice to follow his or her religious beliefs and practices.”²³⁰ The right of choice is the freedom that Richard and Beena were told they had, yet found they had not.²³¹ In this particular case McLachlin found that a scope of meaningful choice remained for the Hutterian community in spite of the infringing effects of the legislation. Most legislation does not directly compel religion but falls into the gray zone of infringing effects and can be measured in terms of comparative costs. Assessing costs are indicative of having to make a choice, but McLachlin spoke a creative solution underneath the costs language. The Hutterians can maintain their religious practices, it will simply “cost” them a bit more. Namely, McLachlin said, the costs of hiring drivers or asking a favor of a third party.²³² The same assessment might have been made of the Alberta legislature. The logic is akin to a costs-benefits analysis between policy options between Alberta and the Hutterian, except that the costs to each party are named. When the court chooses between the two parties whose costs it has actually given name to it has effectively said that they think a fair and desirable way of solving the conflict would be for the Hutterian to reconstitute their way of being somewhat to accommodate the societal interests represented in the Alberta legislation. The court is still choosing, but it has spoken clearly what

²³⁰ *Ibid.*, at 88.

²³¹ Berger, “Law’s Religion,” 301.

²³² *Hutterian Brethren*, at 97.

it thinks a desirable way of resolving the conflict might be. In *Alberta* the court has found a way to begin speaking clearly even in the situation where it faces a choice between legislation and human rights. In recovering the proportionate effect step the court found a way to review each party's arguments and evidence not for minimal impairment, but according to how the court valued each argument. In speaking a choice between the two the court stated clearly what outcome it had in mind and effectively redistributed goods by ascribing new identities.

There is a way where the process by which it is the court that seems always to make the final decision under section 1 analysis can be understood as other than an assertion of the court's or the judges' culture over the claims of diversity. If one looks at the institution of the court as an institution of the modern state where the final determination of harm and therefore of the laws of identification schemas belongs to the state alone then the words of the state will always be regarded as exercised over and against some one of the parties represented in the court under legislation or freedom of religion. I think it valuable to regard judges as citizens such that the words they speak might be the last words spoken in the court, but are not the final words in the public discourse. Words spoken by any entity have the effect of conducting action, they incite a response and usually a limited set of responses constitute reasonable responses to a given action. Words do not incite arbitrary action where they successfully convey meaning. Understood this way and the court's judgment cannot constitute a final judgment except where the court actually fails to pass on its assessment of the case at hand. Where this happens, as in the forms of proportionality engaged prior to *Multani*, the court treats the judgment of the legislature as the final judgment and denies the opportunity of rights claimants to challenge the social order. *Multani* and *Hutterian Brethren* provide two alternative interpretations of proportionality that

refuse to regard the court's judgment as both last and final. These are just two new forms of judicial review regarding specifically proportionality – there are more methods of pluralizing judicial review beyond proportionality, even in *Hutterian* alone. Where the court rejects insularity the act of identification can be a freeing and bonding experience as the court signals that it is a site where diversity will be heard and its challenge of the social order engaged with and empowered where the court's *nomos* overlaps with the *nomoi* that challenge the order.

Conclusion:

The law's identification schema makes visible those things which we or our elders found to be harmful. It can be applied without violence only where citizens have overlapping criteria of objectivity. Our societies evolve and the identification schemas of our elders represented in our *nomoi* and formal laws create constitutive outsides where they no longer accord with new diversities of identification schemas. Where this happens it is appropriate to seek integration of difference and relaxing of the attenuation in criteria of objectivity so that we might pursue our different ways of being in concert with each other - without courts and without creating the painful indirect effects of the private pursuit of ways of being. Using the courts necessarily signals a failure in creating harmony. It is disputes that have become antagonized and the habitual administrative practices of asserting right in response to antagonism that create the institutions of the state that result in a court who is asked to decide an artificial choice set. Where there is no need for choice and thereby the possibility of recreating our life desires together, there is no need for attenuated courts.

I began with a musing on the effects of the metaphor of "balance" under section 1 of the Canadian Charter. Understood anomicly the metaphor only fosters unbinding. Nevertheless, there is perhaps something intuitively valuable to the metaphor. A creative approach to artificial choice does in a sense take some from each and redistribute, except there is no method or theory to the redistribution but for that which we create together almost as a byproduct of conversation. In conversation we each give of our past ways of being and rearticulate our relationships with each other to resolve the conflict. We each give and receive to construct a new balance between the extremes on each side of one way of being made entirely subject to and distorted by the other. Further research most importantly needs to follow the balancing metaphor into the trade

courts and international courts of the world. These are the places with significant monopoly on the social order and where anomic language is most likely to predominate. Proportionality is also a common feature of much trade review. If it simply takes deconstructing the anomic language of the gross domestic product to recover the proposed conception of the common good, there is significant opportunity within proportionality analysis to expose power to dialogue and challenge within the spirit of human rights.

In *Multani* I have seen a court that spoke as a citizen in a way that resolved conflict and fostered bonding across diversity. In *Makwanyane* I have seen a citizenry with humility that understands the court to be asking for help in the recreation of our *nomoi*, and speaks back to the source of arbitrary powers they see about them rather than enlisting allies and mechanisms of the state. I have seen and known the byproduct of these exchange practices - the freeing of diverse ways of being and a florid language that identifies and responds well to the uniqueness of each person and thing about us. I think it may be possible that through caring to hear and exchange claims for the realization of our ways of being we can recreate our criteria of objectivity in an ongoing practice of reordering our individuated ways of being.

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