# Rights and Wrong(s): Theorizing Judicial Decisions as Normative Choices

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# Abstract

This thesis explores Robert Cover's Jurisgenerative view of the law. Cover argues that the law's ability to compel social behavior depends on its normative force, which develops in reference to normative commitments that vary from person to person. As a result, the same law will be subject to multiple conflicting interpretations, each rooted in its own normative valuations. Since each interpretation flows naturally from the values which produced it, there is no universally acceptable basis of comparison or evaluation. Nevertheless, the need for a predictable basis of social interaction requires that the court fashions a single, authoritative statement by institutionalizing some interpretations and rejecting others. Because these interpretations are rooted in the values of those who hold them, Cover contends that the choice of which interpretation to enforce also constitutes a choice of which values to promote. In this way, Cover's theory suggests that legal decisions are also significant normative choices. However, most major theories of judicial interpretation focus exclusively on the interpretation of the state official, thereby obscuring the variety of interpretations held by the population. As a result, these theories fail to recognize the difficult normative decisions the court faces in choosing between them. In response, this thesis will lay down the basis for a theory of adjudication capable of responding to Cover's insights and providing judges with practical guidance in managing their selective function. Chapter One concerns Cover's view of the law, showing how judicial decisions constitute normative choices and exploring how other theories of interpretation fail to engage these issues. Chapter Two demonstrates the importance of this theoretical lacuna by illustrating the normative stakes involved in two Supreme Court cases: *Syndicat Northcrest v. Amselem* (2004) and *Delmaagukw v. B.C.* (1997). Finally, Chapter 3 explores Ronald Dworkin's model of the Law as Integrity and attempts to adapt it in order to provide the courts with a practical, defensible means of making the difficult normative choices that their office requires.

# Acknowledgments

# Table of Contents

# Introduction

The moral aspects of the law have received greater attention in recent times. Indeed, the positivist account of a strict divide between morality and law is becoming increasingly less fashionable, and the value-laden nature of judicial decisions is becoming much more widely recognized (Schauer, 1988, p. 510). However, even those theories of adjudication which recognize the moral content of the law tend to focus exclusively on the interpretation of state officials. Typically, these official interpretations are then generalized. Judges are presented as the moral voice of the community, or as an empowered discursive organization, or as expressing a sort of universally intelligible public reason, or something similar (Dworkin, 1998; Fiss, 1982; Rawls, 1987). This focus has proven useful because it implies that the community is in some sense the author of their own laws, even though these are imposed by the judiciary. As a result, citizens are thought to become committed to these laws on a personal, normative level. These commitments in turn give the legal system power as a mechanism of social control that exceeds its coercive abilities (Cover, 1995, p. 147). Essentially, citizens enforce the law on themselves because they are morally committed to it, often in the absence of any genuine threat of force. In this way, the efficacy of the law as a mechanism of social control depends critically on its ability to secure the normative commitment of its citizens by having them think of the law as a product of their own personal, moral values.

However, Robert Cover gives us strong reason to believe that this unitary account of law is unrealistic and in fact, has dangerous repercussions. It fails to explain, for example, why the same law can inspire support in certain groups while causing resistance in others, as is often in the case with say, gay marriage or abortion law. If the law represents a single, generalized social will, it seems unclear why a group would be willing to commit to certain decisions and not

others, or why some groups would commit to a decision while others do not. The only thing that explains this variability, Cover contends, is the fact that people with different values, cultural resources and linguistic backgrounds will interpret the same law differently, leading some groups to resist while others obey (1995, p. 131). In this way, it is not the law itself which compels behaviour, but our various interpretations of it. By focusing exclusively on the state official, many theories of interpretation draw our attention away from these competing interpretations.

I contend that this fractured view of legal meaning has enormous implications for legal theory. While the problem of adjudication is usually understood as the law being unclear or incomplete, this theory suggests there are actually multiple conflict laws. As a result, the activity of the judge is no longer to remove ambiguity by clarifying or filling gaps in the law, but rather to maintain some form of legal predictability by choosing between conflicting interpretations, enshrining one and rejecting the rest (Cover, 1995, p. 139). Since each interpretation is the result of the values, conceptual resources and linguistic categories through which the interpreter understands the world, however, each interpretation employs its own criteria of evaluation (Cover, 1995, p. 126). As a result, each interpretation inevitably considers itself supreme. This becomes deeply problematic for the practice of adjudication because no one, not even the judge is capable of escaping the limits of their own assessments - each is bound to evaluate the world according to their own criteria, and thus to prefer their own interpretation. Consequently, it is impossible to establish a neutral, objective interpretation or to develop any sort of universal metric on which they can be fairly compared (Cover, 1995, p. 126). Thus Cover's view suggests that differences in interpretation can be insurmountable, as there is no universally acceptable way to prove that any given interpretation is more accurate or more appealing than any other.

Nevertheless, stable, peaceful coexistence necessitates some form of predictability,

forcing the courts to maintain a single, authoritative interpretation while rejecting all others (Cover, 1995, p. 139). However, by enshrining certain interpretations in state law, the court ensures that the values and meanings central to those interpretations will survive into the future. As part of the canonical law, legal actors will make recourse to those values and judges will respond to them (Cover, 1995, p. 130). In this way, the classical liberal vision of a market place of moral ideas free from state interference is compromised (Appiah, 2005, p. 4). Rather than relying on their persuasive force alone, certain ideas can now rely on their institutional status for survival. In this way, the court effectively meddles in the free development of the normative environment and, moreover, does so without compelling justifications for its choices.

Thus Cover suggests that society finds itself in an intellectual environment where it must admit numerous equally valid interpretations (Cover, 1995, p. 142). Yet stable interaction necessitates predictability, forcing the courts to maintain a single, authoritative interpretation (Cover, 1995, p. 139). The choice of which interpretation this will be affects our moral landscape by ensuring the survival of certain ideas and not others. This choice also determines how various groups will respond, and thus defines the law's ability to secure the normative commitments on which it depends. In this way, Cover draws our attention to the court's necessary but problematic selective function, an aspect of adjudication completely obscured by narrow institutional focus more typical of legal theory. As a result, Cover has been one of the most widely cited legal scholars of recent times (Snyder, 1999, p. 1625). However, the literature seems united in its assessment that neither Cover nor anyone else has developed this compelling view of the law into an actionable theory of adjudication, one that can help provide judges with practical guidance in performing their selective function, rather than simply pointing out the difficulty they face (Snyder, 1999, p. 1627). Thus, Cover makes traditional theories of

adjudication less appealing without providing a ready alternative.

In an effort to begin bridging this gap, the following thesis will ask two related questions:

    1. Of the major schools of judicial interpretation, formalism, pragmatism, and interpretivism, which is best suited to addressing the issues Cover suggests?

    2. How can this view be adapted so as to provide the courts with practical guidance in performing their selective function?

Question 1 serves to facilitate question 2, and will not therefore be a major focus of this thesis. After a brief review of the major schools, I will argue that Ronald Dworkin's interpretivist theory of the Law as Integrity is conceptually well disposed to address the court's selective function. The bulk of this thesis will then focus on my second question, arguing that fusing Dworkin's theory with Cover's Jurisgenerative view, incorporating elements of Stone's depiction of Jewish law and Sunstien's Minimal Harm approach, can indeed provide practical model of adjudication capable of responding to Cover's concerns.

       This approach, which I will call the Law as Commitment, seeks to minimize the court's selective function by allowing multiple independent interpretations to coexist, each with a limited sphere of application. In this way, each interpretative community is able to live in accord with its own normative commitments and legal interpretations. This model is socially attractive because it allows the law to secure deep normative commitments from a wide range of disparate groups, thus increasing its efficacy. It is philosophically attractive because it minimizes the need for arbitrary normative decisions, increases the overall range of conceptual resources available to the law, preserves the free development of the normative environment, and most importantly, allows each group to experience a more fulfilling life, as they grow and evolve by working out the implications of their law, values and commitments, rather than having these imposed from

the outside. In this way, adapting our theories of adjudication to adopt Cover's fractured view of legal meaning contributes to a more effective and philosophically defensible judicial system.

My argument will proceed as follows. First, in Chapter One, I will explore the epistemic positions which make Cover's view of the law compelling (1.1), before explaining in more detail how the law suppresses and supports certain ideas and values (1.2). Then, I will establish what consequences this can have, arguing that the court's influence affects how individuals conceive of themselves, how groups and individuals relate to one another, and indeed, society's overall normative trajectory (1.3). Then, I will begin answering my first question by conducting a brief analysis of the basic assumptions inherent in each of the three major schools of contemporary judicial interpretation; formalism, pragmatism and interpretivism (1.4). Ultimately, I will conclude that Ronald Dworkin's interpretive theory of the Law as Integrity most closely mirrors Cover's vision of law and legal activity, and thus presents what seems to me to be the most promising model to develop in response to the court's problematic selective function (1.5).

Chapter Two aims to substantiate my claims concerning the normative influence of the judicial decisions by illustrating the selective function and its repercussions in two case studies, *Syndicat Iorthcrest v. Amselem* (2.2) and *Delmaguukw v. B.C.* (2.3). While establishing a direct causal relationship between these decisions and their normative consequences is beyond the scope of this thesis, I contend that a method of logical inferences supported by evidence from analogous situations allows me to illustrate the court's selective function in an analytically useful way. Together, I hope that these cases will establish that conflicting interpretations do indeed surface in the court room, that the court does in fact perform a selective function in adjudicating between them, that these decisions can have significant normative consequences, and thus that they ought to be theorized more rigorously.

Having thereby established the pressing need to operationalize Cover's insights into a practical theory of adjudication, Chapter Three will attempt to integrate his assumptions into Dworkin's theory of the Law as Integrity. This chapter will begin by reviewing Cover's Jurisgenerative view (3.1). In order to see how such an account might be put into practice, I will also explore two hermeneutic approaches advanced by other scholars in Covers name, one based on Quaker law and the other on Jewish law. While neither proves satisfactory in its present form, they do provide useful structure by revealing two diverging approaches to the Independent Hermeneutic, which I will call the Consensual and Diversity models.

Chapter Three will then summarize the most relevant points of Dworkin's theory (3.2), before comparing it with Cover's vision, noting several points of agreement, but finally concluding that a narrow concept of the relevant actors and materials prevents Dworkin from properly problematizing the court's selective function (3.3). As a result, I will suggest several adaptations which allow Dworkin's judge to view legal meaning more contextually, and thus to recognize her selective function and its normative implications (3.4). Having focused Dworkin's theory on the problem at hand, I will then seek to develop the Law as Integrity into an actionable, substantive version of Cover's Independent Hermeneutic using the Consensus and Diversity archetypes established above (3.5). Ultimately, I will contend that a blend of Dworkin's Law as Integrity and Cover's Jurisgenerative view, following the Diversity model and incorporating elements Sunstien's Minimal Harm approach, can provide a promising theory of adjudication.

My conclusions will summarize this model (4.1), and then explain how it might operate through two short analogies (4.2). Finally, I will conclude by recognizing the weaknesses of the model I have presented, and suggesting some avenues of future research which I feel would facilitate a more nuanced, sophisticated approach to the court's selective function (4.3).

# Chapter One: The Jurisgenerative Model of

# Law 1.0 - Introduction

Following Cover, this Chapter contends that the primary force of the law as a mechanism of social control stems from its normative, rather than coercive dimensions. Essentially, Cover argues that the law describes our reality, compares that reality to an image of justice, and then secures our commitment by presenting itself as moving us towards a more perfect reality (1995, p. 101). However, not all segments of society will find the court's preferred course of societal development attractive. Cover argues that this is why some laws occasion civil disobedience - the future they posit conflicts with the one certain groups would like to realize (1995, p. 147). In this way, judicial decisions help determine the efficacy of the law.

Cover therefore contends that legal meaning is always multiple, as the law is understood in reference to varying normative commitments (1995, 101). However, predictable social life requires some uniformity of legal meaning (Cover, 1995, p. 110). The role of the court is therefore to choose between socially generated interpretations, enshrining certain narratives in law and rejecting others so as to preserve the unity of the system. Because each interpretation is rooted in a committed project of social transformation, these decisions exceed the legal arena and shape our normative environment by deciding which transformations the court will promote.

This fractured, bottom-up view of legal meaning therefore suggests that judicial decisions constitute contingent normative choices which affect both the efficacy of the law and the content of our normative environment. Because each competing interpretation is supreme in reference to its own internal criteria, however, there can be no universal metric of comparison. As a result, judges are left with no objective basis on which to make the difficult decisions their office requires. Accordingly, Cover suggests that the theories which guide judicial interpretation and

regulate the court's selective function are seriously deficient.

This chapter therefore concerns itself with the role of judicial interpretation in our normative environment. It begins with the epistemic positions which make this view of the law compelling (1.1), before exploring in more detail how the law suppresses and supports certain ideas and values (1.2), and what consequences this can have (1.3). It then asks what theories of adjudication are best suited to engaging this problem, surveying three major schools, formalism, pragmatism, and interpretivism (1.4). Finally, I will argue that Dworkin's interpretive theory of the Law as Integrity most closely mirrors the Jurisgenerative view, and thus presents the most promising route of development in addressing the court's selective function (1.5).

# 1.1- Epistemology

This section explains the epistemology that makes Cover's fractured view of the law compelling.

## 1.1.1- Knowledge and Objectivity

During the enlightenment, humanity was able to achieve great advances in the natural sciences by assuming that the chaos of the natural world actually followed definite, universal, laws (Posner, 1993, p.463).This led in turn to the idea that human relations also followed objective laws, and that similar progress could be achieved in social affairs if these laws could only be deduced (Gadamer, 2004, p. 3, 4). In this way, Western conceptions of social knowledge have been heavily influenced by the scientific model. Importantly, this theory of truth depends on two things: the Cartesian assumption of the transparency of mind, whereby the operations of the intellect are apparent to itself, and the ability of evidence to disconfirm poor results (Gadamer, 2004, p.273, 285; Wachterhauser, 2002, p. 52, 76). These two elements are crucial

because they allow the intellect to inspect its theories in their entirety, compare them to objective evidence, and refine them accordingly, ultimately permitting objective reason. The application of this model to human affairs has enormous implications, as it suggests that there is a single "best" way of ordering social affairs, one based on a perfect understanding of human nature, and thus that all variations can be measured against this standard.

**1.1.2- History and Language**

However, there are strong reasons to believe that this is not a complete account of human understanding (Gadamer, 2004, p. 11). Hans George Gadamer points this out when he notes that every thought process is mediated by language, that is to say, that we think in words (Wachterhauser, 2002, p. 55, 57). As a result, the conceptual categories of the language we speak structure how we can think about things before those thoughts are even formed. To complicate matters further, it is by definition impossible to fully understand the influence of language on our own minds, because any thoughts concerning this influence are similarly filtered by the available linguistic resources (Gadamer, 2004, p. 299; Wachterhauser, 2002, p. 60, 62).

Gadamer also points out that we are born in a certain historical situation influenced by the past (Wachterhauser, 2002, p. 57). Or, perhaps it is more accurate to say that our situation has been influenced by our accounts of the past. Human history is imperfect, it is always selective, and involves as much forgetting as it does remembering (Booth, 2006, p. 52, 76; Wievioka, 2005, p. 166). Thus the history of a society always reflects certain biases regarding what is worthy of attention and what is not (Wievioka, 2005, p. 167), and we, as individuals, are not able to stand outside of these assumptions to judge for ourselves because the excluded aspects have already been forgotten and removed from view (Gadamer, 2004, p. 300; Wachterhauser, 2002, p.

62). In this way, our perception is also inescapably historical, and this too, lies beyond the scope of conscious introspection (Wachterhauser, 2002, p. 62).

The neutral, evidence based standpoint of the scientific model is not therefore a complete description of human understanding (Gadamer, 2004, p. 273). It overestimates our ability to understand and refine our own thought process in response to the evidence (Gadamer, 2004, p. 269). In this sense, a purely objective standpoint is impossible.

### 1.1.3- Self Consciousness and Interpellation

In the natural world, the prolonged influence of evidence does allow some degree of refinement, and thereby permits a degree of objectivity (Gadamer, 2004, 285). However, this process is much more complicated when applied to humans because human beings are affected by theories about them in a way that natural objects are not (Taylor, 2002, p. 127, 129, 131; Gadamer, 2004, p. 285). For example, in observing that humans are nasty and immoral, Hobbes may have encouraged some people to think of themselves that way, and thus to give in to their more primal urges when they would not otherwise have done so. In this way, the description helps to define the sentient object in a process called interpellation (Butler, 1997, p. 269). The object itself is, in this sense, fluid.

Consequently, humans cannot act as a strong corrective for false theories about them in the same way that say, a rock, can disconfirm false assumptions about itself. It is the static nature of the rock that permits comparison and refinement (Wachterhauser, 2002, p. 76; Taylor, 2002, p. 131). The fluid, interpellative nature of the human subject prevents this (Taylor, 2002, p. 128). As a result, evidence can only be a weak corrective to historic and linguistic prejudice in the social sciences (Taylor, 2002, p. 131). The worst theories may be disconfirmed, but it remains

highly likely that a variety of theories will fit the "evidence", such as it is. In fact, the interpellative force of a theory may actually make it accurate in some contexts and not in others.

The social implications of this theory of knowledge are also significant, as it suggests that humans from different contexts will reach different conclusions on the same social questions, and will be unable to use evidence to clear away their biases and establish which account is most accurate (Etxabe, 2006, p. 43, 57; Resnik, 2005, p. 30; Wachterhauser, 2002, p. 53). In fact, different answers may actually be correct in different contexts. Consequently, understanding in the social sciences can no longer be conceived as objective and universal, but rather must be thought of as deeply particular and contextual (Gadamer, 2004, p. 285).

### 1.1.4 - The Fusion of Horizons

To clarify, Gadamer suggests that the situated nature of individual minds can be thought of like a person standing on a hill, with their specific range of knowledge represented by the specific range of landscape that falls within their view (Taylor, 2002, p. 134). Their historic and linguistic constraints are represented by the horizon of this view. Similarly, cultural and temporal variations can be conceived of as different horizons, different standpoints which clarify and obscure different parts of the landscape (Taylor, 2002, p. 131). And, just as in real life, horizons can shift and overlap (Taylor, 2002, p. 131).

Thus no standpoint can reveal everything, and no amount of evidence can confirm our perceptions absolutely. However, the reverse is also true. Every standpoint reveals something, and each is confirmable to some degree (Wachterhauser, 2002, p. 73, 75). As a result, Gadamer suggests that the truth can be gradually approximated through a fusion of horizons. This process involves enlarging ones prejudices to understand those of another on their own terms (Gadamer,

2004, p. 304). Thus, while we cannot replace our own prejudices in order to switch perspectives with another completely, we can incorporate their prejudice into our own and come to understand them (Gadamer, 2004, p. 271). By offering a different view of the evidence, one distorted by different prejudices, the addition of a second perspective allows the participant to more clearly perceive which aspects of their own understanding likely derive from evidence, as indicated by agreement between the two perspectives, and which likely draw more exclusively on contingent prejudices (Gadamer, 2004, p. 278, 299).

Thus the fusion or horizons lessens the influence of prejudices and exposes them as contingent, preventing us from mistaking them for objective truths (Gadamer, 2004, p. 299). It is not, however, a matter of simply assuming enough perspectives to simulate objectivity and arrive at a probable "right" answer to difficult social questions. At least not in the human affairs, where theories help define their objects. Rather, the fact that people internalize theories about themselves actually makes the truth inherently variable. Thus it may be "true" that mankind is brutal and violent if one lives in Ancient Sparta, while the same statement is patently "false" in say, Angkor Wat. As a result, the fusion of horizons is not an attempt to simulate objectivity or provide "right" answers to social problems. Rather, it exposes which aspects of a perspective are contingent, and allows us to avoid mistakenly treating them as objective truths.

### 1.1.5 - Theories as Normative Choices

Thus the interpellative force of our perspectives prevents us from determining which is most based in human nature. As a result, Gadamer's theory of knowledge suggests that, from a societal perspective, the choice between theories or perspectives cannot be motivated by which is more accurate. Instead, the choice of theories must be founded in part in reference to our

evaluation of what sort of society a given theory would produce. Assessing these affects, however, necessitates a set of values against which the competing theories might be judged. In this way, the choice of theory is not neutral, objective or evidence based. It is always a normative choice, an inevitable appeal to subjective values.

# 1.2- The Jurisgenerative Model of Law

Gadamer's epistemology therefore suggests that we are psychologically incapable of developing any universal metric against which different perspectives might be evaluated. As a result, the choice of perspectives is always a normative choice. The following section will explore Robert Cover's Jurisgenerative view in order to illustrate the implications of this radical contingency for our theories of law.

### 1.2.1- Contextualization and Legal Efficacy

Because different linguistic and historic filters create different perspectives on reality, Cover suggests that they also lead various segments of the population to assign different meanings to the same law. This is so because individuals come to understand the law through a process of contextualization. Essentially, citizens situate the law relative to their own understandings of reality, their normative aspirations, and the actions that they believe will help realize this vision (Cover, 1995, p. 101). This psychological framework, which Cover calls a *nomos* or normative universe, dictates the efficacy of the law by allowing citizens to classify it as either contributing to or impeding their preferred course of societal development, thus telling them which events to support and which to resist (Cover, 1995, p. 102). Because their cognitive filters differ, so do their assessments of reality and alternity, and thus their understandings of and reactions to the

law in question. Legal opinions are not therefore isolated judgments, but the result of legal narratives, storylines which make general statements about society and morality (Cover, 1995, 96). These narratives are handed down through social communities, and then externalized as an object of commitment which in turn provides guidelines for normative action (Etxabe, 2006, p. 29). In this sense, commitment differentiates legal interpretations from mere visions or utopias – *legal* interpretations are those we are willing to truly commit to realizing (Cover, 1995, 144).

Ultimately, it is this commitment which gives law its force. To clarify, consider the meaning of *Roe v. Wade. (1973).* For some, the decision is a reason to march in celebration. For others, it's sufficiently repugnant to warrant bombings, murders and threats. Clearly, social behaviour is not determined exclusively by the coercive force of the state. Rather, the law's ability to structure behaviour depends inherently on the variable narratives and normative commitments of its subjects (Cover, 1995, p. 144).

Communal life, however, demands a certain degree of uniformity in legal evaluation in order to avoid constant, pervasive conflict (Cover, 1995, p. 108, 109, 112). In other words, people need to know how others, especially the state, will perceive their actions in order to form sensible plans of action (Cover, 1995, p. 110). Cover therefore argues that there is an essential dichotomy between the organization of law as meaning and the organization of law as coercive force (Cover, 1995, p. 111). While the former is cultural, informal, and inherently variable, the later is institutional, structured, and uniform (Cover, 1995, p. 112). In this way, the states need for stability and predictability create a drive towards uniformity in law which conflicts deeply with the reality of constantly diverging factual and normative interpretations.

**1.2.2 - Social Coherence and the Selective Function**

As a result, Cover contends that the major role of the judiciary is to maintain the coherence of the law in the face of differing interpretations (1995, p. 139). The essential dilemma of law is not therefore that we exist in a chaotic state without it, but that we have too much of it, too many interpretations all competing for social dominance (Resnik, 2005, p. 27). The role of the court is not to clarify the law where it is vague, but to choose between clear but conflicting interpretations (Snyder, 1999, p. 1633). In this way, the court performs what I will call a selective function, privileging some interpretations by enshrining them in formal law while suppressing others by systematically denying their legal claims (Cover, 1995, p. 140).

Cover therefore suggests that the legal system comprises two ongoing processes. The role of cultural groups is productive or Jurisgenerative, creating legal meaning, while the role of courts is suppressive or jurispathic. The result is a constant cycle whereby a law is laid down by the court, then fractured as it is interpreted differently by various communities, before being brought back to court where various interpretations compete for dominance, and finally resulting in a decision whereby one narrative is privileged and the coherence of the law temporarily restored before the process begins anew (Etxabe, 2006, p. 35. Cover.108). This is the sense in which the courts are jurispaethic - their role is to do epistemic violence to other narratives, to supress their plausibility as law (Becket, 2001, p. 3. Cover, 1995, p. 13. Resnik, 2005, p. 35).

This suppression is a double edged sword. On the one hand, Gadamer's epistemology implies that there is an inherent value in having more views, rather than less (Becket, 2011, p. 5. Etxabe, 2006, p. 58). In this sense, suppression is always regrettable. On the other hand, chaotic, unstructured conflict is surely to be avoided, and uniform legal systems have proven an effective means of doing so. Accordingly, the Jurisgenerative view suggests that some level of legal suppression is desirable – enough to facilitate peace, but no more (Cover, 1995, p. 144).

### 1.2.3 –Contingency

Thus each law is subject to multiple interpretations. Each interpretation is supported by a narrative which tells its own story about reality, alternity, and the committed actions necessary to move from one to the other. Finally, each narrative is situated in its own horizon of meaning, drawing on contingent historic and linguistic resources. As a result, each interpretation is inevitably supreme according its own criteria (Etxabe, 2006, p. 43. Resnik, 2005, p. 30). Truth is, in this sense, determined by the worldview that produces it. Thus, "from an epistemic point of view, it is impossible to establish a clear hierarchy between narratives" (Goldoni, 2010, p. 8). As a result, it is impossible to justify any preference for one interpretation over another, even for that of the state over those of its citizens (Cover, 1995, p. 136). Thus, without any claims to objectivity or epistemic superiority, the state faces difficulties legitimizing its selective function. Nevertheless, social interaction requires that the court continue to choose. Since these choices help determine both the efficacy of the legal system and the development of our normative environment, they are extremely important. Ultimately, the court is forced to make highly significant normative choices without any universally compelling justification for its decisions.

### 1.2.4- The Independent Hermeneutic

Accordingly, Cover suggests that we are in dire need of a theory of interpretation capable of guiding these decisions, which he calls an Independent Hermeneutic (Cover, 1995, p. 162). Essentially, this hermeneutic tries to soften the court's juispaethic function. It recognizes both the necessity for and the tragedy of interpretative violence, and therefore seeks to maintain a given minimum without exceeding it.

This perspective is also, as the name suggests, distinct from that of the state, and thus would allow judges to see interactions between the state and its nomic communities from a critical distance, rather than assuming the view of one participant or the other *tout court* (Etxabe, 2006, p. 66). This distance allows the judge to wield the power of their office to prevent relationships of domination between the two (Etxabe, 2006, p. 65). Thus the Independent Hermeneutic forms part of a triadic model of justice, thereby avoiding a systematically biased use of the jurispaethic function (Etxabe, 2006, p. 66).

Cover also contends that whatever the normative decision of the court, judges should refuse to hide behind technicalities in explaining their decisions. Instead, they should openly engage the normative arguments before them and explicitly recognize contingent nature of their own decisions (Resnik, 2005, p. 34). This is important because decisions which are understood as mechanical or inevitable present the supressed narrative as flatly incompatible with existing law, thus destroying the realizability of its normative vision and undercutting its ability to secure the deep commitments it needs in order to survive into the future as an independent legal ideal. Conversely, decisions which make their contingent nature clear present the suppressed vision as a viable alternative which simply was not chosen, thus preserving its ability to bridge reality and alternity in a convincing manner (Resnik, 2005, p. 24).

Thus Cover suggests that a violence minimizing, independent, explicitly normative theory of adjudication can help attenuate the court's problematic selective function. However, Cover, and indeed the scholars who have followed him, have generally failed to give this Independent Hermeneutic a substantive content (Eskridge, 1995, p. 179. Etxabe, 2006, p. 67. Snyder, 1999, p. 1627, 1626, 1726). In fact, Snyder contends that "Cover had an insight, but he did not have a theory. He had a vision but, like many visionaries, he left it to others to fit his

vision into a framework for analysis" (1627). Yet even in the secondary literature, "few systematic attempts have been made to pursue this view as a comprehensive theory of law" (Etxabe, 2006, p. 7). Thus, theorists of the Jurisgenerative view have been largely content to point out the difficulties the judiciary faces without proposing further solutions (Snyder, 1999, p. 1627). Many even insist that the mere presence of an independent judicial standpoint produces social benefits by impeding patterns of domination and facilitating a normative response regardless of the specific content of that view (Etxabe, 2006, p. 62).

I agree, but I also contend that the particular substance of the Independent Hermeneutic will help define what sort of patterns will emerge in their place, and is that this is also of considerable social importance. Consequently, the following thesis can be read as an attempt to develop Cover's Independent Hermeneutic into a substantive theory of adjudication capable of providing judges with practical guidance in performing their problematic selective function.

### 1.2.5 – Groups, Individuals and Ontology

Before going further, a word on ontology is appropriate. In fact, a literal reading of Cover seems to suggest that each individual occupies a single *nomos*, which generates a single interpretation for all its adherents (Snyder, 1999, p. 1675). Under this reading, society is comprised of numerous atomistic groups which are both internally united and clearly distinct from one another (Snyder, 1999, p. 1686). However, it seems clear that individuals in today's society are frequently members of several nomic groups at once (Snyder, 1999, p. 1686). A Muslim feminist, for example, is both Muslim and Feminist, but her particular *nomos* is likely to be distinct from either collective, however defined. Thus, when I speak of groups as the source of law, I am not contending that groups generate a uniform worldview to which all its members

subscribe, as literal readings of Cover might suggest. Rather, I follow Snyder (1999) in contending that the group merely provides cultural materials from which a *nomos* will be fashioned. In this sense, groups produce resources which serve, in different ways and in different combinations, as important components of their member's essentially individual worldviews.

In order to combine these materials into a *nomos*, however, the individual must have pre-existing horizons of meaning which allow her to understand the significance of rejecting Islamic precept *X* in favour of feminist belief *Y*. The individual is not prior to these horizons. For this reason, Cover insists that normative meaning can never be purely individual (Etxabe, 2006, p. 12). Narratives are neither group possessions entirely external to the individual, nor personal beliefs entirely independent of the group. They involve an interplay between the two.

Thus, when I speak of a given narrative, I do not mean a uniform worldview, but a set of shared resources. When I speak of groups, I do not mean a unitary collective, but a lose assembly of people to whom these resources are significant. When I discuss the court's treatment of a narrative, I address the fate of these resources as a whole, such that particular affects are difficult to ascertain.

**1.2.6 - Summarizing the Jurisgenerative Model of Law**

For analytic purposes, the Jurisgenerative model can be loosely summarized. First, it focuses on the normative, rather than coercive aspects of social control. For this reason, it sees legal meaning as an interpretive, cultural phenomenon defined through a process of contextualization. Accordingly, this model sees the meaning of the law as inherently multiple, and understands the role of judges as choosing and suppressing, rather than creating law. Moreover, because each narrative is supreme according to its own criteria, this view emphasizes

the contingency of judicial decisions and the lack of any Archimedean point from which to ground

inter-nomos adjudication, thereby problematizing the court's selective function. Simialy, the

Independent Hermeneutic can be loosely defined by its independence from the state, its

recognition of the contingent nature of even technical, mechanical decisions, and its provision of

some means by which to minimize epistemic violence while still ensuring social stability.

## 1.3- The Normative Consequences of Judicial Decisions

I contend that the search for an adjudicative principle capable of guiding the court's

selective function is a worthwhile endeavour for two reasons. First, as we have seen, such

decisions help determine the efficacy of the law as a means of social control. Second, I believe

the impacts of judicial decisions also extend beyond the legal sphere, affecting our normative

universe more generally. In fact, I contend that the influence of the court on our normative

environment can be felt in at least three significant ways. First, these narratives help shape

individual identities by creating internalized images of self and other (1.31). Second, the success

and failure of various legal strategies and arguments can encourage some groups to reframe their

values according to a successful schema. In this way, judicial decisions can also affect social

relations within society by helping determine which groups will use which strategies, and to

what affect(1.32). Lastly, by institutionalizing certain values and stories over others, the court

makes certain normative and conceptual resources more potent than others. This in turn affects

the normative trajectory of society as a whole (1.33). The following section will therefore

provide further support to my contention that judicial decisions in fact constitute highly

significant normative decisions which require more careful theorization.

**1.3.1 – Individual Identities**

*Characters and Narratives* - In order to understand the effects of legal narratives on the individual level, one must remember that every story has characters, and that the context of their story defines how we perceive them. Jon Scieszka's (1996) "The True Story of the Three Little Pigs", which re-tells the classic tale from the wolf's perceptive and, predictably, re-casts him as the hero, is the perfect example of how the story being told defines the characters within it. In much the same way, legal narratives tell stories about society and make specific statements about the type(s) of people that society is composed of. A given narrative may even assign differentiated roles to various segments of the population. To take a simplified example, Marxists narratives could be understood as casting the worker in the role of the oppressed hero, and the capitalist overlord in the role of the evil villain (Research and Education Association, 2002, p. 51). When such narratives are embraced, worker identities are vindicated and the wealthy are made to feel uncomfortable with their success, which is framed as the result of exploitation. Conversely, the narrative of the Protestant work ethic might suggest that divine favour manifests itself through worldly success (Weber, 2003, p. 160). The promotion of this narrative would therefore make the rich feel secure and justified in their advantages, while denigrating the poor as impious, and thus unworthy of such rewards. In this way, the self image of capitalist and worker alike differ drastically according to which social narrative is embraced.

*Role Internalization* - There is also strong evidence to suggest that such narratives and the identities they espouse are, to some degree, internalized by their subjects. This is so the definition of self is dialogical, and therefore requires a definition of the other as somehow distinct (Taylor, 1997, p. 98). For this reason, the way we are perceived and presented by others

affects our conceptions of self. The most obvious effect comes when these identities are simply accepted and internalized. However, even when one rejects a term and affirms an alternative, that alternative remains shaped by the shadow of what was rejected (Derrida, 1974, p. 46). It cannot be fully understood except in reference to the original rejection. In this way, stories suggest models of the self, which we accept or reject. Either way, we must affirm an identity in response.

This is significant because our brains create psychological barriers against identity-challenging actions and in favour of identity confirming ones (Fanon, 2004, p. 18. Taylor, 1997, p. 98). In other words, it is simply less mental work to conform to ones self-expectations than to challenge them. Thus, like water seeking the path of least resistance, the subjects of social narratives tend, to varying degrees, to manifest what they expect of themselves. This gives the narrative the appearance of reality and reinforces the identities it suggests, which then re-assert their interpellative might anew.

Indeed, this process has been observed in a myriad of contexts. For example, in the colonial milieu, the establishment of an independent nation with its own founding narrative has been seen as crucial to the vindication of colonial identities and the success of the future society (Fanon, 2004, p. 98). In fact, Fanon suggests that the very psychological capacity for a people to govern itself depends critically on the rejection of colonial narratives, which define the native society as incapable of civilized rule, and their replacement with new identities based on independence and affirmed though bloodshed (Fanon, 2004, p. 11, 15). Fanon insists that violence is necessary not for political reasons, but because it serves as a psychological tool through which colonial identities can be remade (2004, p. 10). Without this step, he insists that even an independent state would remain in a position of de facto subjugation. In this way, the internalized force of the colonial narrative is a real, concrete barrier to effective social change

(Alfred and Corntassel, 2005, p. 598. Taylor, 1997, p. 98).

Thus, because identities are dialogical, people cannot help but respond in some way to the sorts of stories that are told about them. Accordingly, the definition of social actors as characters within a legal narrative can have serious effects on the self-definition of those actors, which they may subsequently manifest. Accordingly, "you have to be careful with the stories you tell, and you have to watch out for the stories that you are told" (King, 2005, p.10).

### 1.3.2 – Social Relations

*Strategic Reformulation* - On a more strategic level, which narratives Judges chose to accept and which they reject is significant because it establishes precedents for which sorts of stories will be successful in the legal arena. This encourages groups to reformulate their claims in terms they expect to be successful (Chan, 2005, p. 458), and this of course affects the content of the narrative itself.

For example, in *IRS v. Bob Jones University (1983),* the litigant was a religious university who refused to admit black students or allow interracial dating on the grounds that the bible forbade the mixing of races (Cover, 1995, p. 166). Their claim, as they understood it, can be paraphrased as "God has commanded that the races remain separate, and we will continue to enforce his will no matter what your secular government has to say". Lawyers for Bob Jones were no doubt aware, however, that this sort of narrative was unlikely to persuade the Court. Instead, they phrased their legal argument according to secular principles, mainly the freedom of religion. Thus their claim became something closer to "the laws of this land have promised us, as they have you, the right to live according to our own beliefs, and we hold that right dear". Note that this new claim makes no appeal to God, but rather implicitly accepts the secular view that

multiple religions can be permitted because none is true in a strict theological sense. Note also that this new claim is based in allegiance to the state, not opposition to it. In this way, the character of the claim has been fundamentally transformed from one of strong theological resistance to one of secular commitment and fidelity. This strategy likely made Bob Jones' claims more palpable to the Court. However, it did not come without a price, for by embracing the freedom of religion, the Christian community of Bob Jones University is forced to extend the same level of protection to other religions, even those it finds deeply abhorrent. Note that the original claim carried no such obligation. Thus the potential dream of a Christian state, of a society united under God, to take one example, is extinguished by this reformulation.

So, in consistently privileging a given narrative or type of narrative, in this case that of the freedom of religion, judges are also establishing precedents for successful litigation. Since groups seek successful strategies, this amounts to choosing the probable form of future claims, and thus to indirectly reformulating those claims as they are brought to bar.

*Engagement and Isolation* - However, some groups may hold the specific form of their narratives so dear that they refuse to reformulate them in this manner. In such cases, these groups may withdraw from the legal apparatus (Cover, 1995, p. 152, 126). In extreme cases, this process can encourage groups to withdraw from society altogether, seeking autonomy through isolation. Such is the case of the Amish, who have traveled country to country seeking a legal system that can accommodate their beliefs. When faced with challenges to their narrative, the Amish response has been withdraw or to leave (Cover, 1995, p. 122).

Conversely, those groups who find their narratives accepted will have better access to the clout of the state, and thus will be more strongly disposed to engage with it. This sort of

attraction can be seen in the upsurge of civil rights activism after the passage of the Canadian

Charter. The state had powerfully enshrined the narrative of individual rights and equality, and,

within a few short years, social movements like feminists, who had previously focused on the

legislative arena, began to focus their efforts on the courtroom, where their claims meshed well

with the new Charter's narrative (Smith, 2007, p. 33). In this way, an incidental convergence

between the narratives of the Charter and those of the feminist movement precipitated a

wholesale shift in their focus, as they moved from the political sphere to the courtroom as their

primary policy arena (Smith, 2007, p. 34).

In this way, the privileging and suppression of various legal narratives can also have

serious effects on the degree and manner in which a group interacts with society.


### 1.3.3- The Normative Trajectory of Society

*Orbits and Trajectories* - Lastly, the promotion of certain legal narratives over others has long

term, large scale social effects by making some conceptual resources more potent or more

available than others. This influence can be thought of as the logical consequence of the effects

noted in 1.31 and 1.32 over a protracted period of time. As groups are encouraged to adopt some

narrative strategies and to abandon others, they are encouraged to reformulate their legal claims

according to those terms. This acceptance reinforces the claims the successful narrative makes

about social actors and their identities, which are then, to some degree, internalized. This

internalization then reinforces the potency of the successful narrative, increasing its strategic

appeal, and so on. Over the long term, this positive feedback loop can cause society's values, and

the values of the groups within it, to orbit around successful value-strategies (Snyder, 1999, p.

1690).

This is not to say that societies become more uniform over time. Rather, the entire range of variation within a society moves, like the moons around a moving planet (Snyder, 1999, p. 1690). This is so because issues which fail to tap into a potent narrative will fail to resonate in the public psyche, and are thus unlikely to garner widespread attention. Conversely, those issues which are framed in terms of potent narratives will speak deeply to our self and social definition, and will more likely become locusts of debate. Thus, in determining which strategies will be successful and how the actors employing them will think of themselves, courts are also determining which values will resonate in the public psyche and act as long term nuclei for social debate. In this way, socially potent values and narratives shape the political discussion at the macro level, and affect the future trajectory of society as a whole.

*Influence of the State* - The exact influence of the state on this process is difficult to determine. As we have seen, normative meaning is generated culturally, rather than institutionally. Nevertheless, the state does enshrine certain narratives institutionally, and this does guarantee their survival by forcing the actors who engage these institutions to appeal to them. This ensures both the availability of the narrative, in terms of survival, and its potency, in terms of its ability to resonate with those actors who engage it. Conversely, narratives without institutional support face the possibility of fading from memory as its adherents are persuaded by other stories. Of course, not all informal narratives meet this fate. Some are extraordinarily successful and eventually replace their institutional counterparts. Nevertheless, a lack of institutional patronage does constitute an impediment. Thus, although the state is unable to control the normative landscape, it is able to exercise influence by picking guaranteed winners, which are almost certain to appear among the locusts of debate in society, even if they have company or even

competition from informal sources.

It is perhaps easier to isolate the influence of the state if we make it our independent variable by seeing what changes occur in the values of immigrant populations as they acclimatize to their new institutional environment. Will Kymlicka (2007) has studied the matter, and he asserts a conversion process of just the type this argument would suggest. Initially, he contends, some immigrant groups have values so radically distinct from the liberal host society that it occasions frequent discomfort on both sides (2007, p. 94). Over time, however, immigrant values become translated into liberal terms, and their claims of difference take on the characteristics on intra-liberal debate (Kymlicka, 2007, p. 139, 151). Claims of difference persist, but they are no longer threatening to the overall liberal narrative (Kymlicka, 2007, p. 95, 138). Thus it appears that the liberal narrative acts as a nucleus, using its institutional force and strategic appeal to draw social debates into its orbit. In fact, Kymlicka himself compares the process to a gravitational pull (2007, 95). In this way, the terms of social debates, the questions that seem pertinent and the answers that sound intelligible within a society all tend to follow a given trajectory over time (Snyder, 1999, p. 1690). State institutions have the capacity to help guide this development by putting their resources behind certain interpretations and not others. While this control is not total, allegorical evidence suggest that it is certainly significant.

## 1.4 - Major Theories of Adjudication & the Jurisgenerative View

It therefore seems clear that judicial decisions carry the potential for enormous and complex normative repercussions. Accordingly, I have argued that it is crucial that judges be able to draw on well-developed theories to adjudicate these debates. However, Cover and the theorists who follow him have failed to develop the insights of the Jurisgenerative view into a

substantive, actionable theory of adjudication. The following sub-sections will take the first steps

towards bridging this theoretical lacuna. First, it will review the main tenets of the Jurisgener-ative

model and the Independent Hermeneutic (1.4.1). Then, it will survey three major schools of

judicial interpretation, Formalism, Pragmatism, and interpretivism, in an attempt to determine

which view is most easily amenable to the Jurisgenerative model (1.4.2-1.4.6).

**1.4.1- The Jurisgenerative Model and the Independent Hermeneutic**

To recap from section 1.2 then, the Jurisgenerative model sees law as a primarily

normative, rather than coercive phenomenon (Cover, 1995, p. 101). In this sense, the law is an

interpretive exercise, and its meaning is defined culturally, not institutionally (Cover, 1995, p.

103). As a result, the role of judges is to choose between culturally generated laws, rather than to

create or apply law themselves (Cover, 1995, p. 141). Lastly, the Jurisgenerative model recognizes

that no legal narrative admits to standards outside of its own, and thus that no universal criteria

can serve to adjudicate between them (Etxabe, 2006, p. 43). As a result, this view is concerned

with how the court's selective function is exercised and justified. Together, these fundamental

assumptions allow the Jurisgenerative model to tackle issues surrounding the normative influence

of the court with clarity. Accordingly, theories that converge with, or can be readily made to

converge with, these assumptions are more promising than those that can not.

As we have seen, these assumptions also suggest a very broad solution in the form of the

Independent Hermeneutic. Essentially, this stance reacts to the problematic dominance of state

norms by trying to soften the jurispaethic aspects of judicial decisions. First, it insists that judges

develop a hermeneutic of their own, distinct from that of the state (Etxabe, 2006, p. 64). Second,

this Hermeneutic must present its own decisions as contingent normative choices, rather than

necessary mechanical results so as to preserve their continued viability. Third, it must provide some means minimizing epistemic violence.

### 1.4.2- The Main Schools of Judicial Interpretation

The following sub-sections will, in very broad strokes, summarize the fundamental jurisprudential debate of our time; that between Formalists and realists or Pragmatists, as well as the growing interpretive school which can be understood as a sort of middle ground between them (Dworkin, 1998, p. 94. Leiter, 2010, p. 111. Morris, 2007, p. 3. Posner, 1993, p. 25). While the exact parameters of this debate are often contested, its centrality is widely recognized. Of course, the discussion I provide will be only a partial and grossly oversimplified sketch of each school and the divisions between them. In my defence, I emphasize that the purpose of this analysis is only to assess the *prima facie* potential for each school to incorporate the Jurisgenerative model. As such, a comprehensive comparison is not necessary. In fact, since most incompatibilities will appear at a fundamental level, a broad approach is well suited to this analysis.

### 1.4.3- Formalism

For my purposes, the defining feature of Formalism is that it sees the law as an independent system of ideas, distinct from other social, moral or political concerns (Leiter, 2010, p. 111). As such, the law has no necessary connection to morality, but rather constitutes a logically closed sphere of activity that follows its own rules and conventions (Leiter, 2010, p. 111). Because validity is only assured internally, the closed nature of the system allows legal reasoning to proceed syllogistically (Leiter, 2010, p. 111). As a result, legal rules are generally taken to provide clear, correct answers to most if not all legal questions (Leiter, 2010, p. 132).

In this sense, the law aims to be a perfect logical system. Accordingly, judicial discretion amounts to an injection of foreign principles into a closed, self sufficient system, and ought to be avoided through methodological rigour. Thus, in the rare cases where Formalists admit that judicial discretion must come into play, it is presented as an unfortunate necessity, a failure of the system (Leiter, 2010, p. 132). Formalists legitimize their fidelity to this system by appeal to its democratic legitimacy (Morris, 2007, p. 39). Basically, the process is reified by its democratic credentials, and thus claims a legitimacy independent of broader social or moral assessments.

*Formalism and the Jurisgenerative model* - Obviously, this picture differs radically from Cover's. By presenting judges as passively applying self-evident rules, Formalism obscures the presence of multiple competing interpretations of law, and thus downplays the court's selective function. In viewing the law as a distinct, self referential sphere of activity, Formalism also overlooks the normative dimensions of the law. Moreover, by contending that the system produces clear, logical answers, Formalism effectively limits the application of judicial discretion to a very small percentage of cases, encouraging us to conceive of legal answers as mechanistic and necessary, rather than as contingent normative choices. For these reasons, the Formalist view of law as institutional, self-referential, mechanistic and logically necessary jars quite fundamentally with the cultural, normative, and contingency based view of the Jurisgenerative model.

*Formalism as an Independent Hermeneutic* - The question thus arises; what would have to change in order for Formalism to provide an Independent Hermeneutic of the kind the Jurisgenerative model suggests? First, the independent approach must be distinct from the logic

of the state. Thus the most apparent issue may be that the Formalist position seems inescapably statist. Indeed, because Formalists ground the legitimacy of their own system in the democratic legitimacy of the state and see their role as merely applying those rules with minimal discretion, it may be very difficult to develop a Formalist hermeneutic that is both independent and legitimate. Were Formalists to appeal to non-legal factors to justify the judicial role, however, they would cease to be Formalist at all.

Moreover, even if a non-statist justification for the judicial role could be found, Formalists still view the law as having one right answer, as dictated by logic, and an array of wrong ones, at least in most cases. This elevates the strict legal interpretation in a priori fashion, and blinds Formalists to the value of alternatives, thus obscuring the contingent nature of judicial decisions. Thus Formalism seems ill suited to take its impact on other systems of thought into account because it cannot view its own decisions as morally or epistemologically problematic.

In taking the Jurisgenerative view then, Formalists would be forced to abandon their hermeneutic privilege, recognizing that multiple legitimate interpretations may coexist. In so doing, however, they would also be forced to admit that the legal system does not produce clear answers to complex legal questions. This would allow Formalists to recognize the court's selective function. It would also force them to make reference to some external factor in order to justify its decisions. In this sense, such a theory would actually cease to be Formalist at all. As a result Formalism is poorly suited to address the normative concerns of the Juris-generative model. Indeed, it is necessarily blinded to them by its own fundamental assumptions.

### 1.4.4- Pragmatism

On the opposite end of the spectrum, Pragmatism sees the law as inseparable from wider

social, cultural, political, moral, and other concerns (Posner, 1993, p. 25). This has a number of important implications. First, it presents the legal system as conceptually open. This means that non-legal concerns can legitimately enter into the interpretive process (Posner, 1993, p. 25). Second, because the law is inherently a moral, cultural, and political affair, Pragmatism considers all judgments contingent, including its own. Accordingly, judicial discretion is seen as unavoidable, something to be directed rather than minimized. The role of the judges is, in a sense, to create law from wider social materials (Posner, 1993, p. 457). In response to this considerable and unavoidable discretion, Pragmatism encourages judges to reach their decisions on the basis of consequences (Posner, 1993, p. 467). Thus the right interpretation is not necessarily that which the formal rules of the legal system suggest, but that which produces the overall best results, as defined by the judge in reference to a variety of social concerns.

*Pragmatism and the Jurisgenerative model* - In this way, Pragmatism sees the law as normative and cultural in so far as wider social concerns cannot be separated from legal ones. Moreover, this view recognizes the lack of a solid, universal foundation of adjudication and the inevitable presence of valid alternatives, as does the Jurisgenerative model. However, the moral content of the law is taken to be determined by judges alone, who effectively create law *ex nihilo* (Posner, 1993, p. 457). This image therefore obscures the role of the population in interpreting the law contextually. Still, the Pragmatist preoccupation with consequences allows it to show concern for suppressed interpretations, providing a potential mechanism through the court's selective function might be problematized.

*Pragmatism as an Independent Hermeneutic* - Clearly, Pragmatism is far more easily amenable

to the Jurisgenerative model than is Formalism. Pragmatists recognize, to a greater extent, the normative and cultural dimensions of the law, as well as the radical contingency of judicial interpretation. However, in presenting consequentialism as a method of adjudication, Pragmatists implicitly assume that judges do or can occupy an unbiased standpoint from which consequences can be fairly assessed. In this sense, the Pragmatist hermeneutic, although independent of the state, remains problematic in its claims to objectivity. Moreover, its ability to minimize normative suppression through consequentialism depends on the ability of the judge to foresee the consequences of their actions with some degree of accuracy (Butler, 2005, at 3). Indeed, there is a rich dearth of literature on the importance of scientific inquiry and statistical analysis as a means of justifying judicial Pragmatism (Posner, 1993, p. 100) (Butler, 2005, at 3). This may be appropriate if the consequences are primarily empirical. However, in the normative and especially the epistemic realm, it is often impossible, sometimes by definition, to know what we destroy or create (Resnik, 2005, p. 33). In fact, the interpretive role of the population means that judges will never be able to predict what their decisions will mean to others (Cover, 1995, p. 111). This makes consequentialism difficult to apply to the court's selective function.

Thus Pragmatism is far more promising than Formalism as an Independent Hermeneutic, and its basic assumptions are in much closer agreement with the basic assumptions of the Jurisgenerative model. However, its consequentialist theory of adjudication would need to be recast in a normative, rather than an empirical manner, and rooted in a more rigorous defence of the judicial perspective as a legitimate angle from which consequences may be assessed.

**1.4.5- Interpretivism**

The last major school of judicial interpretation is the interpretivist view put forward in

Ronald Dworkin's theory of the Law as Integrity. This view recognizes that the legal system does not produce clear answers because it, like everything else, must be interpreted (Dworkin, 1982, p. 180). Dworkin also recognizes that different people will produce varying interpretations. In this sense, Dworkin sees the court's selective function, and recognizes the difficulty inherent in choosing one interpretation over others. However, Dworkin argues that the efficacy of the law as a system of social control requires that the law be seen as the coherent actions of a community of principle, as this gives the law its normative force (Dworkin, 1998, p. 225). In order to preserve this coherence amidst multiple conflicting interpretations, Dworkin argues that Judges ought to consult the general principles which underlie the legal system, and deliver decisions which present these principles in the most coherent manner possible (Dworkin, 1998, p. 255).

In order to illustrate, Dworkin compares adjudication to writing a chain novel (1998, 228). Under this metaphor, previous decisions constitute previous chapters in an ongoing story, and new cases are new chapters being added on to the whole. Thus, just as a good chain-novelist is confined by the plot and characters of the chapters that came before, so the judge is confined by the principles of previous legislation (Dworkin, 1998, p. 231). A version of Snow White in which Prince Charming falls for another girl, for example, would not respect the character of the Prince as the previous chapters have defined him. This lack of coherence would make the overall story weaker. Thus, even if the judge feels that this version produces better consequences, warning young women not to rely on men for salvation, for example, their concern for the overall story would still prevent them from writing this ending (Dworkin, 1998, p. 233). In this way, the correct interpretation is that which paints the overall principles of the legal system in the most coherent light, regardless of consequences or formal rules (1998, 255).

In this way, Dworkin provides a hermeneutic which produces clear answers to most legal

questions and governed by an independent set of principles. However, this hermeneutic is not totally isolated from broader social concerns, and is seen as a pragmatic response to contingency, making Integrity a sort of middle ground between Formalist and Pragmatist approaches.

*Integrity and the Jurisgenerative Model* - This view of the law as principles, rather than logical rules or policy instruments recognizes the normative nature of the law, and the importance of its normative hold on the public psyche. Moreover, Dworkin's picture of judges as choosing between several interpretations seems to recognize the court's selective function. However, this interpretive prerogative is conceptually limited to judges, who are seen as the only actors relevant to the definition of legal meaning. Essentially, judges, acting as the moral voice of the community, fashion a set of values which society commits to in a more or less passive manner. Accordingly, competing theories are seen in abstraction, as the potential objects of judicial commitment, rather than the current object of cultural commitment. As a result, the suppression of these interpretations is recognized, but not problematized as the Jurisgenerative view would suggest.

*Integrity as an Independent Hermeneutic* - Integrity achieves independence to an extent by considering the coherence of the system as distinct from the goals of the government. In this way, the courts are more than the adjudicative arm of the legislature. However, this coherence model effectively employs the principles of the legal system as a standard of inter-nomos adjudication, thereby elevating the position of the law, if not the state, in *a priori* fashion. Similarly, the elevation of strictly legal principles leads Dworkin to claim that the law still produces single right answers. This effectively masks the contingent nature of these normative

decisions as an institutional necessity, thus making it difficult for the suppressed interpretation to survive as a viable concept of law. If these interpretations could be put in their social context, however, the principle of coherence could be readily expanded so as to provide a means of minimizing epistemic violence. A principle of coherence between the states view and those of its normative interlocutors is one such possible adaptation. This type of move would also allow Dworkin to expand his object of coherence beyond the views of the state, thus forging a more genuinely independent hermeneutic capable of more explicitly recognizing its own contingency.

In this way, Dworkin appears well equipped to provide an Independent Hermeneutic of adjudication. Integrity already contains many of the tools and assumptions the Jurisgenerative view suggests. However, Dworkin's focus on exclusively legal principles allows him to consider competing interpretations only as possible routes to coherence, rather than engaging them as self-contained systems of evaluation. As a result, these interpretations are seen as abstractions existing only in the mind of the judge, instead of the objects of real normative commitment. Ultimately, this prevents Integrity from problematizing the court's selective function, and thus prevents Dworkin from fully employing the tools at his disposal.

### 1.4.6- Assessment

In sum then, all three of the major schools of contemporary jurisprudence would necessitate serious revision before they could serve as an Independent Hermeneutic of the kind the Jurisgenerative model of law requires. Formalism jars with the main assumptions of the Jurisgenerative model so deeply that any revision sufficient to make Formalism plausible as an Independent Hermeneutic would also make it cease to be Formalist at all. In this sense, Formalism may be a dead end. Pragmatism proves far more amenable, but its consequentialism

becomes problematic when the law is reconceived as a primarily normative, psychological phenomenon with inherently unknowable results. Thus Pragmatism would need to become less empiricist, and would need to justify the perspective from which consequences are assessed. Dworkin's theory of the Law as Integrity provides the best fit with the Jurisgenerative model's picture of law and judging, but its concern for internal coherence fails to pay adequate attention and respect to competing normative visions. As a result, the principle of coherence would need to be re-cast in a more pluralist light.

Thus Integrity and Pragmatism both share enough of the Jurisgenerative model's basic assumptions to make them plausible as the basis of a new, Independent Hermeneutic. Nevertheless, the primary principle of adjudication, be it coherence or consequences, would need to be significantly recast. Reforming Pragmatism involves a shift from empirical to normative consequentialism, and a defence of the judicial perspective of assessment. Given that normative traditions are both self-referential and inescapably contingent, however, these are challenging tasks indeed. In comparison, reforming Integrity requires a move from a unitary object of coherence to a plural one, so as to recognize the committed nature of competing interpretations, and thus the problematic nature of their suppression. While such a shift may be difficult to conceptualize, nothing in our preceding discussion of Gadamer or Cover suggests inherent stumbling blocks. In fact, Gadamer's discussion of the fusion of horizons seems to mesh well with the coherence model. In this sense, Pragmatism's reliance on a position which is able to asses its consequences accurately and from a defensible perspective introduces additional epistemic difficulties that Dworkin's coherence model avoids. Accordingly, I may answer my preliminary question by contending that the Law as Integrity is the simplest, and therefore the most promising route towards an actionable, Jurisgenerative theory of adjudication. My primary

question may therefore be made more precise, as the remainder of the thesis will ask "how can the Law as Integrity be adapted so as to provide the courts with practical guidance in performing their selective function?"

## 1.5 ‑ Conclusions

To recap, the Jurisgenerative model suggests that law can be thought of as a primarily normative phenomenon taking the form of a moral narrative, and is inherently plural in nature. However, communal life requires a degree of coherence in legal institutions. As a result, Cover's theory suggests that judges are forced to privilege some storylines and suppress others. In the context of moral contingency, this becomes deeply problematic and points to the need for an Independent Hermeneutic of adjudication. Section 1.3 demonstrated that the choice between narratives can have significant consequences on individual identities, social relations, and even the overall normative trajectory of society. However, Cover and the scholars who have followed him have not developed a substantive version of the Independent Hermeneutic they support. Section 1.4 shows that the main schools of judicial interpretation fail to properly recognize the normative nature of judicial decisions, and are therefore unable to fill the conceptual void Cover leaves without serious alteration. Of these schools, Dworkin's theory of the Law as Integrity provides the most promising model because its basic assumptions most closely mirror the Jurisgenerative view, and because the necessary changes are less extensive and less complicated than those necessitated by the other models. In closing, this Chapter proposes to adapt Dworkin's theory of the Law as Integrity around the Jurisgenerative model in order to see how it could help provide an independent judicial hermeneutic.

## Chapter Two ‑ The Normative Consequences of Judicial Decisions

## 2.0 Introduction

Chapter One made the case for a Jurisgenerative view of law which sees the court as choosing between conflicting, value laden legal interpretations and the projects of social transformation that they suggest. This suggests that legal decisions are also normative choices with serious social consequences. This Chapter aims to illustrate the court's selective function and its influence on the normative environment. Ultimately, this demonstration will support my contention that the revisions I will undertake in Chapter Three are both warranted and desirable. Accordingly, this Chapter will begin with a word on methodology (2.1) before illustrating the court's selective function in two Supreme Court cases.

In the first of these cases, *Syndicat Iorthcrest v. Amselem (2004)* (2.2), an orthodox Jew sought to erect a ceremonial hut to fulfill a religious obligation, even though such constructions violated his Condo building's by-laws. I will argue that the outcome of this case turns primarily on a conflict between methodologically holist and methodologically individualist understandings of the freedom of religion, each of which suggests different requirements for religious freedom under section 2 of the *Charter*. In this way, the conflicting decisions of the trial Judge and the Supreme Court can be traced to conflicting narratives of religious freedom. By privileging the methodologically individualist narrative and suppressing its holist competitor, I contend that the Court has contributed to more instrumental personal relationships, less salient and authoritative groups, and a more progressive, radically uncontrolled social environment.

In *Delmaguukw v. B.C. (1997)* (2.3), two First Nations claimed sovereignty and jurisdiction over their ancestral lands by virtue of their native title. Because their claim rested on the historic occupation of those lands, which could only be established through oral histories, the

case turned largely on whether or not and to what extent these oral histories could be considered valid in the courtroom. Accordingly, I contend that the conflicting decisions of the trial Judge and the Supreme Court can be traced to their respective historical narratives. By showing equal respect for the First Nations model, I further contend that the Supreme Court helped provide a healthy basis for First Nations identities, reinforced conceptual checks on crown-First Nations relations, and helped equalize cultural diffusion between the two societies.

Together, I aim to use these cases to establish that conflicting narratives do indeed surface in the courtroom, that the court does in fact perform a selective function in adjudicating between them, that these decisions can have significant normative consequences, and thus that they ought to be theorized more rigorously.

## 2.1- Methodology

### 2.1.1- Case Selection

The method of case selection for this analysis was heavily influence by the nature of my hypothesis. This thesis does not contend that every case that comes to bar has serious normative dimensions. Nor does it make any general claims regarding their nature, cause or frequency. Rather, my hypothesis is limited to the contention that some cases do indeed have normative repercussions of a considerable nature. I believe that the significance of these effects, even if rare, still provides a compelling case for the development of appropriate judicial mechanisms. Accordingly, I do not believe that a large, representative sample is necessary in order to justify my project. Moreover, the normative repercussions of judicial decisions are often complex and their consequences can be difficult to ascertain precisely. As such, I feel that depth is more crucial to supporting my hypothesis than breadth. Accordingly, I have chosen to spend my time

and space on an in depth examination of two cases, rather than conducting a broader survey.

In deciding which cases to use, I have chosen cases that clearly demonstrate the presence of conflicting narratives, and that highlight their potentially enormous implications. In this sense, case selection for this thesis was not random, and makes no attempt at a representative sample of any kind. Instead, it reflects a series of pragmatic choices designed to facilitate an especially clear illustration of my hypothesis, thus providing the strongest possible justification for the sort of theoretical revision I will undertake in Chapter 3.

**2.1.2 - Analysis**

The analysis of these cases will begin with a presentation of the case facts, and then proceed render the competing narratives within them explicit. I will follow each case through the various levels of court, focusing on those moments and actors that best exemplify the narratives in question. I will then establish the final position of the Court relative to these narratives.

Establishing the consequences of these decisions is admittedly a largely theoretical exercise, as it would be extremely difficult to prove a direct causal link between a given court decision and a given shift in how people think of themselves, each other or their society. Moreover, court decisions are surely not the only factor affecting our normative environment. As such, it makes more sense to think of the court as contributing to or impeding social trends than directly causing them. Accordingly, I will outline, using what I hope the reader will find to be reasonable inferences, how the promotion of the privileged narrative is *likely* to affect the normative landscape. I will then provide empirical evidence that the trends my reasoning suggests are in fact occurring, or do occur in analogous contexts. While not establishing direct causality, I believe this method provides a plausible depiction of the court's influence, and thus provides a

compelling justification for revising our theories of adjudication in response.

## 2.2- Syndicat Iorthcrest v. Amselem 2004

### 2.2.1 Case Facts

In *Syndicat Iorthcrest v. Amselem*, four orthodox Jews were among the co-owners in a luxury condo building. During the Jewish festival of Succot, they attempted to construct "Succahs", or temporary huts upon their balconies in accordance with a perceived religious duty to reside in such dwellings for the duration of the nine-day festival (Amselem, 2004, p. 19). The Condo board objected that these constructions violated a building by-law that "prohibited decorations, alterations and constructions on the balconies" (Amselem, 2004, p. 3). Essentially, the Condo board felt the succahs lowered the aesthetic appeal and retail value of the building. After requesting their removal, the Board offered to allow a communal succah in the shared gardens instead (Amselem, 2004, p. 3). The respondents rejected this proposal, claiming their religion required individual succahs (Amselem, 2004, p. 13). The Condo Board then filed an injunction against them (Amselem, 2004, p. 8). Thus the critical question before the Court was "Do these restrictions [contained in the co-ownership agreement] infringe on the freedom of religion of the respondents"? (Amselem, 2002, p. 2).

After a lengthy discussion of the nature of the freedom of religion, the trial judge found that "freedom of religion can be relied on only if there is a connection between the right asserted by a person to practise his or her religion in a given way and what is considered mandatory pursuant to the religious teaching upon which the right is based" and thus that "how a believer fulfils his or her religious obligations cannot be grounded in a purely subjective personal understanding that bears no relation to the religious teaching" (Amselem, 2002, p. 8). The Court

went on to consider evidence from two rabbinical authorities, Rabbi Barry Levy and Rabbi Moïse Ohana, eventually concluding that "practising Jews are not under a religious obligation to erect their own succahs" (Amselem, 2002, p. 9). Accordingly, the Court found Amselem had no such religious obligation, and thus that the co-ownership agreement did not prevent him from fulfilling it (Amselem, 2002, p. 10).

The Supreme Court found that "The trial judge's approach to freedom of religion was incorrect" (Amselem, 2004, p. 6) because "first, he chose between two competing rabbinical authorities on a question of Jewish law", thus making the Court an "arbiter of religious dogma" (Amselem, 2004, p. 4). "Second, he seems to have based his findings ... solely on what he perceived to be the objective obligatory requirements of Judaism" (Amselem, 2004, p. 6). This approach conflicted with the Court's position that "In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment"( Amselem, 2004, p. 4). Using this personal, subjective approach to religion, the Court found that Amselem's personal belief that such a religious obligation existed triggered constitutional protection whether this belief was shared by others or not, and thus found in favor of the appellant (Amselem, 2004, p. 40). In this way, two competing interpretations of religious freedom ultimately decided the case.

**2.2.2- The Methodologically Individualist Narrative of Religious Freedom**

I will call the first of these narratives the methodologically individualist narrative, in contrast with the methodologically holist narrative which follows. I borrow these terms from Taylor in order to emphasize that my categorization operates exclusively on the ontological level, and does not entail a comparison of political positions (2003, p. 195). This division is not

that between liberals and conservatives, or individualists and collectivists, but rather that between atomists and holists (Taylor, 2003, p. 196). The relevant differences are purely ontological.

The methodologically individualist narrative has its roots in classical liberal conceptions of the self, and of self fulfillment. In classical thought, the self was often defined in reference to its contribution to or role in the polis (Theobald, 1995, p. 7). Liberal thought, however, took a turn away from this social model with"Augustine and the ascendancy of Christendom, [whereby] an individual's identity took on meaning through the internal connection one made with God" (Theobald, 1995, p. 7). In this way, the site of self definition became internal, not external.

With the scientific revolution, however, the significance of the divine began to fade from liberal conceptions of self fulfillment, and "modern anthropocentrism began to replace a feudal theocentrism as a central feature of the European world view" (Theobald, 1995, p. 7). This led many liberal thinkers, who would eventually find their most influential expression in Rousseau, to connect identity to an inner voice or nature (Taylor, 1991, p. 27). As a result, classical-liberal conceptions of identity became entirely self referential. This idea dovetailed with thinkers like Descartes, who, following Plato, began to posit a universal human characteristic, reason, as the defining property of the self (Theobald, 1995, p. 7). This effectively amplified classical-liberalism's inward turn by suggesting that whatever role communities may play in defining the self, humans are always defined universally on a more fundamental level through reason, and thus, possess a certain basic uniformity regardless of cultural context.

This philosophical shift towards individual reason also coincided with Reformation and enlightenment pressures against dogmatic assumptions and in favor of individual rationality to produce a strong case for autonomous choice (Taylor, 1991, p. 37). After all, if the self is

defined by reason, than self-development means the development of rational thought. Accepting dogma does little to advance this cause, but individual choice does (Taylor, 1991, p. 28, 65). Thus any individual choice becomes preferable to any externally imposed choice, not because the former are better choices in and of themselves, but because their status as choices facilitates self-development in ways that imposed decisions cannot (Appiah, 2005, p. 14: Mill, 1869, p. 86). In other words, choice became a procedural good, valuable regardless of its content (Taylor, 1991, p. 37). Its role was, in this sense, instrumental in the service of rational self-development.

Thus certain strands of liberal philosophy came to posit a self who is defined internally through reason and developed through autonomous choice. This is the methodologically individualist position. The liberal state has since evolved around these concepts of self and self fulfillment, and hence is strongly oriented around choice maximization as a means of individual fulfillment. This can be clearly seen in the methodologically individualist view of religious freedom. For methodological individualists, the purpose of the freedom of religion is not to protect religion *per se*, rather, it is to facilitate individual development by protecting personal choice (Chan, 2005, p. 457. Berger, 2008, p. 272). In this way, the freedom of religion essentially draws on the same justification as the broader freedom of conscience – there is nothing inherently *religious* about it. In fact, the specific religions themselves become almost interchangeable, as each is conceived only as the instrumental means to a universal end. Ultimately, these assumptions allow the methodologically individualist narrative to valorize choice while trivializing the content of that choice, facilitating a procedural approach to the freedom of religion that is really nothing more than a general freedom of conscience.

**2.2.3- The Methodologically Holist Narrative of Religious Freedom**

The methodologically holist narrative is constructed in opposition to the methodologically individualist model, and is based on the objection that by placing such emphasis on the individual, methodological individualists imply that "human fulfillment could be achieved merely through the exercise of reason, rendering outside sources or connections nonessential" (Theobald, 1995, p. 8). Ontological communitarians contend that ignoring the role of the wider community in self fulfillment "is fundamentally shortsighted because of its neglect of the fact that humans only come to make sense of their world, and their place in it, through social interaction" (Theobald, 1995, p. 9). In this way, ontological communitarians believe that methodological individualists paint an incomplete picture of self fulfillment, emphasizing personal agency at the expense of the context in which agency is exercised (Taylor, 1991, p. 39). While the value of community has not been explicitly denied, it has not been a major focus of the methodologically individualist ontology.

Conversely, methodologically holist narratives focus on the community, contending that they provide an initial way of understanding the world, and that individual choices can only be made meaningful in reference to these communal understandings (Taylor, 1991, p. 39). In this sense, culture is the context in which choice becomes possible (Kymlicka, 2007, p. 168). A feral child, for example, can hardly make meaningful social choices in such a way as to further their self-development. They lack the social and cultural resources necessary to understand those choices and give them meaning. Reason, in this sense, requires horizons of meaning. Without such meaning, there is no way to determine what is reasonable or not. Thus ontological communitarians contend that self-development is actually an interplay between individual choices *and* social resources (Appiah, 2005, p. 19). In this way, there are two components to self-development; individual choices, and the communal horizons of meaning which render them

significant (Taylor, 1991, p. 39). "Fulfillment, in other words, comes from shouldering the burden of unconditional relationships, not from escaping them" (Theobald, 1995, p. 11).

This two-part concept of self and self-development also gives religious institutions a new relevance, suggesting that they help provide the horizons of meaning which define rationality, and against which choices become meaningful. Consequently, the methodologically holist position suggests that situated beliefs like religions are not only instrumental goods, but also intrinsic goods, because of the shared horizons they provide (Taylor, 1991, p. 52). As a result, the freedom of religion can no longer be conceived of as merely a variety of the broader freedom of conscious. Its role is not exclusively to protect individual choice. Rather, religious freedom takes on an additional value by also protecting the horizons against which those choices occur. In this way, the two-component image of self-development implied by the methodologically holist ontology leads to a two-component justification of religious freedom.


**2.2.4- Assessment of the Decisions**

In the context of the *Amselem* decision, I believe that the approach of the Trial Judge and the dissenting Supreme Court opinion of Justice Bastarache can be seen to represent the methodologically holist view of religious freedom. For example, the trial judge ends his discussion of religious freedom by concluding: "freedom of religion can be relied on only if there is a connection between the right asserted by a person to practise his or her religion in a given way and *what is considered mandatory pursuant to the religious teaching upon which the right is based*. To be sincere, a belief must be supported by the existence of a religious precept." (Amselem, 2002, p. 8. Emphasis added). By invoking the authority of religious institutions and teachings themselves, rather than Amselem's freedom to interpret them, this passage shows a

concept of religious freedom that exceeds the freedom of conscience.

In fact, the trial implicitly contrasts the freedom of religion to more general freedoms of conscience when he contends that:

> "a religious rite is imposed through religious teaching and/or interpretation by religious authority. *These elements are external to the believer.* We may not properly speak of the "sincerity of the belief" based on an individual and therefore subjective concept. To adopt such an approach would inevitably lead to situations beyond any control, where *freedom of religion would be **replaced with** the freedom of each individual to do anything at all in the name of his or her own concepts*" (Amselem, 2002, p. 8. Emphasis added).

This distinction suggests the Judge considers religious freedom distinct from freedom of choice.

Justice Bastarache, writing for a three-judge minority, appears to agree, opening his dissent by stating that "a nexus between the believer's personal beliefs and the precepts of his or her religion must be established" (Amselem, 2004, p. 8). Accordingly, "expert testimony will be useful, as it can serve to establish the fundamental practices and precepts of a religion the individual claims to practice" (Amselem, 2004, p. 9). These statements show a sensitivity to horizons of meaning, and thus to the contextual, situated nature of religious knowledge.

Taken together, these statements reveal a model of religious freedom which endorses the view that: "religions are necessarily collective endeavours... no religion is or can be defined purely by an act of personal commitment...Instead, all religions demand a personal act of faith *in relation to a set of beliefs that is historically derived and shared by the religious community.* It follows that *any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief*" (Amselem, 2004, p. 74. Emphasis added).

Under this view, the meaningful, sincerely religious nature of a belief is only possible in a cultural context. It is the existence of others and their shared commitment to the same ideals, elements firmly "external to the believer", that makes such sincerity possible. In fact, the trial judge dismissed the case by noting that Amselem was "the only one who saw the obligation to erect a succah on his own property in terms of a divine command" (Amselem, 2004, p. 27). Thus the sort of beliefs an individual can hold in isolation are not considered worthy of the same sort of protection as those which are held communally. I contend that this distinction between individual beliefs and communal ones cannot be sustained unless communal beliefs are believed to play a separate role in facilitating self-development. This position suggests two components to the freedom of religion; first, the protection of choice also present in methodologically individualist thought, here embodied by the test of "sincere belief", and second, the protection of religious institutions, here embodied by the requirement of a "religious precept". The trial judge, finding only the first component, was thereby obliged to reject Amselem's claims, which, to his eyes, were insufficiently religious to attract the specific protection of section two. For these reason, I believe that we can locate the position of Trial judge and the dissenting Supreme Court Justices along an methodologically holist religious narrative.

Conversely, the approach of the Supreme Court Majority, and the precedent cited from *Big M Drug Mart (1985)* by the Court of Appeal, cast the relationship between self-fulfillment and religion in universal terms, as one of autonomous choice and rational development. This view marginalizes the importance of horizons of meaning, and hence produces a procedural freedom of religion rooted exclusively in the value of choice. In fact, Justice Iacobucci, writing for the Supreme Court majority, opened his statements with the claim that:

"In essence, religion is about *freely and deeply held personal convictions* or beliefs

connected to an *individual's* spiritual faith and *integrally linked to his or her self-definition and spiritual fulfillment*, the practices of which allow *individuals* to foster a connection with the divine... *irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials*." (2004, p. 4. Emphasis added).

The Supreme Court goes on to explain that:

"This understanding is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and *is a function of personal autonomy and choice, elements which undergrid the right*" (Amselem, 2002, p. 34). Accordingly, "the focus of the inquiry is not on what others view the claimant's religious obligations as being, but what the claimant views these personal religious "obligations" to be" (Amselem, 2004, p. 5).

In discussing limits on the freedom of religion, the majority cites John Stuart Mill ""The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" (Amselem, 2004, p. 42). Similarly, the precedent cited by both the majority and the Court of Appeal states: "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 neighbors or their parallel rights to hold and manifest beliefs and opinions of their own" (Amselem, 2004, p. 33). This position accords no status to the religious institution itself.

In this way, the Supreme Court's justification consistently emphasizes the role of individual choice while marginalizing the role of religious groups, texts and authorities. The

Supreme Court fails to make any mention of the intrinsic worth of these institutions or the shared values they embody, as the Trial judge does. Moreover, the sort of individualized protection the Court is advocating would surely undercut the unity of larger groups, and thus their ability to provide shared horizons. Together, these factors reveal a one-component model of religious freedom. As a result of this view, The Supreme Court concludes that "It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection" (Amselem, 2004, p. 4), and thus that the court's "role is [merely] to ensure that a presently asserted belief is in good faith, neither fictitious nor capricious" (Amselem, 2004, p. 5). I contend that this one-component approach to religious freedom, in concert with the fact that the Supreme Court consistently marginalizes religious groups and authorities in favor of the individual when it speaks of its justification, show a lack of concern for horizons of meaning. This explains why the Supreme Court did not feel compelled to require the existence of a religious precept. It sees no need to protect the integrity of religious institutions themselves because its one-component model of self-development suggests that they play an exclusively instrumental role. Since this assumption denies any fundamental role for religious institutions, it lead the Supreme Court to reject the requirement of a religious precept. Consequently, I believe that the Supreme Court's position represents a prioritization of the methodologically individualist narrative over its methodologically holist competitor.

**2.2.5- Consequences: Individual Identities**

In terms of individual identities, the methodologically individualist narrative encourages people to conceptualize themselves as essentially self-contained. Since the source of personal fulfillment is rational, autonomous choice, people are taught to look inward, rather outward to

find meaning (Theobald, 1995, p. 7). As a result, external sources of meaning such as religion, ideology, and even the opinions of significant others are cast as non-essential, or even as infringements on individual autonomy (Taylor, 1991, p. 65). Their very presence can become "a threat to one's originality and only stand to impede the authentic realization of one's true self" (Theobald, 1995, p. 9). Thus, individual who have internalized the methodologically individualist account are predisposed to view external factors in their lives as secondary, instrumental means to an inherently individual end.

Conversely, the methodologically holist narrative encourages people to think of themselves as essentially situated. Because social context is thought to provide the horizons of meaning through which choices become meaningful, "no individual can possibly find an identity apart from others" (Theobald, 1995, p. 9). As a result, external sources of meaning are recast as valuable, indeed necessary components of individual self-development. Accordingly, people are encouraged to perceive external obligations, relationships and systems of belief as opportunities for engagement, enrichment, and personal development. Consequently, methodologically holist assumptions promote a greater degree of participation, deliberation and cooperation (Taylor, 1991, p. 52).

In this way, the duelling narratives of the *Amselem* decision speak to how individuals are encouraged to conceive of their selves and their self-development, and thus how they relate to various sources of meaning and belief. While methodologically individualist narratives seem to encourage an internally focused self with instrumental relationships, and little concern for popular morality, methodologically holist narratives seem to promote more social, deeply imbedded selves who view their community and values as essential to who they are, and thus participate actively in their development. In fact, Taylor has suggested that the growth of

instrumental reason has contributed heavily to the recent decline in citizen participation, leading to a sort of political complacency, or "soft despotism" (1991, p.9).

Jean Bacon's study of intergenerational change amongst Indian Americans provides an excellent means of confirming this expectation. By allowing us to pin point the influence of an increasingly methodologically individualist environment (America) on a more methodologically holist community, this study lets us reason by analogy about the effects of a similar turn in decisions like *Amselem,* and thus allows a preliminary test of my analysis. 1st generation Indian's, Bacon suggests, are rooted in an Indian world view whereby the self is defined contextually in a social milieu (1996, p. 20). This model assumes that people are not united by some larger essence, common to all humanity. As a result, "people are not fundamentally the same but instead are fundamentally different kinds of human being" (Bacon, 1996, p. 18). Nor is the essence of each person fixed. Instead, "ones fundamental nature changes over time depending on what one gives and receives, with whom one exchanges, and the context one is in" (Bacon, 1996, p. 18). Thus the Indian self is both fluid and variable. As a result, Indian identity is not defined internally, but rather performed socially. In this sense, one must actively be the sort of person that they are, there is no ontological separation between one's identity and their actions: "to remove a person...from the web of social relationships then, is to take away...their identity"(Bacon, 1996, p. 19). The result, Bacon contends, is a "Socio-centric" model of association where ones internal character must be constantly maintained through social performance (1996, p. 20). Identity is, in this sense, not a result of rational introspection, but of lived experience. Since these performances gather meaning through recognition, formal organizations, ranks, and rituals become central to individual identify (Bacon, 1996, p. 19). The self is, in this way, deeply social. Thus, by insisting on the centrality of horizons of meaning in

individual identities, the Indian worldview draws close parallels with the methodologically holist narrative.

Bacon contrasts this worldview with the American model in which the self is conceived of as internally defined, atomistic, unitary, and enduring over time (1996, p. 18). This view also presents humanity as united by some common essence, as somehow fundamentally the same (Bacon, 1996, p. 19). As a result of this static, internal concept of self, society becomes conceptualized as a mere aggregate of individuals, and organizations, no longer implicated in identity, become instrumental in nature:

> "In the western traditional, we think of these empirical agents as discrete individuals, separate and autonomous, whose "rights are limited only by the identical rights of other individuals". They owe no man anything and hardly expect anything from anybody. They form the habit of thinking of themselves in isolation and imagine that their whole destiny is their own hands" (Bacon, 1996, p. 18).

Ultimately, Bacon contends that this worldview creates a contractual, consensual model of association she calls "congregational". "[I]n the congregational perspective, community is constituted by individualism; the congregation is created [and characterized] by the consent of individuals" (Bacon, 1996, p. 21). In this way, the internal model of self based on a universal human nature marginalizes the role of social organizations in defining identity, and thus closely mirrors the methodologically individualist narrative.

Ultimately, Bacon's study concludes "the organizational life of the first generation owes much to the Indian view of the social world...second generation voluntary associations, in contrast, reflect an American sensitivity about the nature of group life" (1996, p. 20). Thus, while "the first generation used ethnic associations to construct the collective identity that is the

foundation for the Indian community" (Bacon, 1996, p. 44), the second generation displays "individualized attitude towards organizational life" (Bacon, 1996, p. 55). "Again and again, second generation organizations deal with salient issues by personalizing and individualizing solutions" (Bacon, 1996, p. 56). Thus Bacon concludes that "overall, in the discussions and choices that are part of organizational life, the individualism of the American ethos is paramount [in the second generation]" (Bacon, 1996, p. 57). In general then, second generation groups place less emphasis on social status and position within the community, and do not concern themselves to the same degree with constructing and projecting an identity to the outside world (Bacon, 1996, p. 53). Instead, they place more emphasis on autonomy and self-interest. "Both leaders and members wanted the group to fulfill the needs of the members. They were not terribly cognizant of or concerned with the organization as end to itself" (Bacon, 1996, p. 54). Thus, because "Members of the second generation do not construe their organizational behavior as contributing to a grand conversation about "who they are" "(Bacon, 1996, p. 58), "community life is not built around organized groups. Rather, organized groups are there to serve and enhance the lives of the individuals" (Bacon, 1996, p. 54).

Bacon summarizes this change by contending that the 2nd generation is inward directed, or oriented towards their own lives and concerns, while the 1st was outward looking, and concerned primarily with constructing common horizons (Bacon, 1996, p. 55). In this way, the 2nd generation's orientation towards social organizations has shifted from a primarily Indian view which implicates them strongly in the construction of fluid and hierarchical identities, to a more instrumental view which takes identity as a static given, and thus focuses on instrumental achievement. Ultimately, Bacon attributes this shift to the growing influence of American (or methodological individualist) culture on the Indian (or more ontologically communitarian)

worldview inherited from the 1<sup>st</sup> generation (1996, p. 57). While it is difficult to pin point the normative effects of a judicial decision with this degree of precision, it seems reasonable to assume that the additional support methodologically individualist narratives receive from decisions like *Amselem* will push society in a similar direction. In this way, *Amselem* and decisions like it can shift the way individuals conceive of themselves and others. While methodologically individualist modes promote more instrumental, less intense relations, methodologically holist narratives suggest a more connected, participatory orientation.


**2.2.6- Consequences: Social Relations**

   Of course, these varying ways of relating to groups within society also affects the character of the group itself. As we have seen, in methodologically individualist model, the group is, at best, a contractual sort of association between free individuals organized around some incidental convergence in interest or belief. The association is has been formed for a given purpose. Once the association is no longer conducive to that end for a given individual, they are under no obligation to continue their involvement. In this way, the group is not an essential part of their identity, it is merely an instrument. As a result of these concepts of group and self, the balance of power between a central organization and its members is seriously one sided. The authoritative pronouncements of the center are not, after all, binding. Rather, they can be rejected by any member for any reason at any time with little cost because that member's identity will remain essentially unaffected. The power, in this sense, lies with the individual, to whom the authorities must cater in order to maintain the group.

   Conversely, in methodologically holist narratives, groups provide the cultural materials at the base of individual development (Kymlicka, 2007, p. 166). Because groups provide

fundamental conceptual resources, rather than a mere cooperative forum in which to pursue interests, the conceptual costs of opting out of one's group are much higher. After all, it is no easy task to adjust to a new set of fundamental beliefs, or to acquire literacy in a new historical and cultural currency (Kymlicka, 1996, p. 89). In this way, the relationship between group and member is no longer instrumental and incidental. Instead, the group becomes, at least in a thin sense, a part of who its members are. With this concept of self, the authority of the center is much more significant, because the cost of rejecting its pronouncements and leaving the group are conceptually so very high. Similarly, the value placed on deliberative, communal decision making as an aspect of self-development is also considerably higher, providing a stronger incentive for members to voice their dissent from within, channelling it through the appropriate structures rather than rejecting the group outright. The power, in this sense, lies primarily with the central authority, with whom group members must negotiate in order to maintain their identities.

If these inferences hold, we would expect environments where methodological individualism is becoming increasingly prominent to be characterized by less salient, less authoritative groups. Europe's nascent Muslim communities provide an excellent example with which to test these assertions. If my analysis holds, we should expect the influence of a loosely individualist environment on a more methodologically holist community to produce both a more individualist believer, and a decline in the authority of religious institutions.

On the individual level, "in the West, Cesari insists that the normative Islamic tradition transforms and dissolves as Muslim communities settle and 'a Muslim individual' emerges" (Peter, 2006, p. 106). The result is the development of "an Islam where the believer decides autonomously which elements of Islam (s)he considers to be binding or not" (Peter, 2006, p.

106). Accordingly, this change "is best understood not as the decline of religion, but as the declining scope of religious authority" (Chaves, 1994, p. 750). Together, these changing attitudes suggest that the Muslim individual feels increasingly secure in the morality of personal, individual positions, and less tied to the moral position of the community.

In his general review of religious authority in European Muslims, Peter finds that "most studies put the emphasis on the relative decline of imams" (2006, p. 111), "and religious institutions in general" (2006, p. 107). This study "converges with the general results of many other studies which, broadly speaking, highlight the ongoing fragmentation of authority structures (Peter, 2006, p. 107). Yukleyen agrees, stating that "There is a general agreement that Islam is becoming "European"... through the individualization of religious authority" (2010, p. 3). Cesari further "underlines the declining role of traditional sources of authority", while Roy "emphasizes the fragmentation and democratization of religious authority" (Yukleyen, 2010, p. 3). Peter goes on to call the trend "an almost unquestioned truth in research on Western European Islam" (2006, p. 107). Conversely, in its native, historically Muslim milieu, Cesari argues that "judgement and analysis have too often been the exclusive privilege of religious authorities" (2004, p. 44), stressing an "iron grip of Muslim states on Islamic tradition" and arguing that while individualism exists in Islamic countries, it "never reaches the level of a general cultural trend" because power is centralized in officials and institutions (Cesari, 2004, p. 46). In this way, Islam in Muslim countries is communal in a way that Western Islam is not (Cesari, 2004, p. 45). Most authors therefore conclude that the influence of a methodologically individualist milieu is promoting a more independent, atomistic Muslim believer and a less salient, authoritative religious organization.

Nor is this phenomenon limited to Islam, as Chaves notes that:

"In the U.S., only Catholics are a large enough group to investigate the scope of a specific religious authority with survey data. The evidence clearly shows a substantially narrowing scope for Catholic religious authority over Catholic individuals.... To rephrase, there is religion, but there is little effective religious authority...Thus, although mere religious activity (as indicated by belief in God, church membership, and church attendance) apparently has been quite stable in the twentieth-century U.S. (see Hadaway, Marler & Chaves 1993), religious authority's capacity to regulate actions of individuals has indeed declined" (Chaves, 1994, p. 769).

Together, these trends suggest that the individualization of religious belief and the consequent decline of religious authority, which occur in a variety of individualizing environments, can be traced to the growing influence of methodologically individualist thought, and thus of individualized concepts of self and group. In this way, analogous evidence suggests that the relative potency of methodologically holist and methodologically individualist narratives also affects the balance of power within religious and other communities. Logically, we could expect the added support methodologically individualist narratives draw from decisions like *Amselem* to have similar repercussions, making groups less salient and less authoritative.

**2.2.7- Consequences: Normative Trajectories**

These narratives also suggest different normative trajectories and, just as importantly, different ways of setting this trajectory. Clearly, the methodologically holist narrative promotes values such as commitment, deliberation, and the common good while the methodologically individualist narrative focuses more strongly on autonomy, rights, and individual development. In this sense, they represent two diverging trajectories, two opposing nuclei for public debate,

and will likely result in the promotion of two different sets of policy. The ongoing debate within liberal theory regarding the place of community is ample evidence of this (Taylor, 2003, 195). However, the relative potency of these values also affects that manner in which that trajectory will be set and followed.

For example, the methodologically individualist narrative, by making the individual the ultimate arbiter of matters of conscience, promotes a radically uncontrolled, egalitarian, atomist, and rhizomatic normative environment. A "marketplace of ideas", in which the privilege of tradition and authority are removed. Such an environment encourages a great diversity of opinions, and a great fluidity between them (Appiah, 2005, p. 19). In theory, a sort of intellectual Darwinism serves to separate the best ideas from the weak ones, creating an invisible hand which always guides society in a desirable direction, as defined by the aggregate desires of its members (Appiah, 2005, p. 4). Its proponents suggest that this "marketplace of ideas" model, by encouraging the widest possible range of options is also the best method of finding successful options (Mill, 1869, p.57). In this way, methodologically individualist narratives are thought to facilitate rapid social innovation (Mill, 1869, p. 74). However, because this is a trajectory with no predefined direction and no barriers to the free diffusion of ideas, it is also a trajectory that changes frequently and unpredictably, and that escapes the direction of any single actor.

Conversely, the methodologically holist narrative, in emphasizing the role of intermediary groups as sources of common values and commitments, is conducive to a more centralized normative environment. First, this deliberative, community based model should logically produce a smaller variety of more widely held beliefs. Second, by encouraging groups to perceive themselves as fundamentally distinct, this view promotes relatively self-contained and inward oriented associations, which in turn slows the rate of diffusion between groups

(Strang and Meyer, 1993, p. 496). Third, as we have seen, within these communities, the methodologically holist model affords group elites a greater degree of normative authority. This acts as a barrier to rapid change because such institutional elites have a considerable vested interest in the preservation of the current structure (Zald and Ash, 1966, p. 327). In this way, the very presence of strong groups channels attention towards the conditions of their social reproduction. Thus the presence of strong groups slows the rate of change by decreasing the number of independent social actors, creating in group oriented subjects, and empowering status quo oriented elites. Theoretically, the result should be a less innovative, more stable normative environment.

Indeed, studies of the institutional factors affecting the diffusion of new ideas and values strongly support this reasoning. First, Strang and Meyer note that "perceived similarly increases diffusion" (1993, p. 491). In other words, we learn most easily from those we perceive as similar. As a result, "diffusion becomes more rapid and more universal as cultural categories are informed by theories at higher levels of complexity and abstraction. For example, the elaborate theorization of the individual... should produce rapid diffusion in contrast to relatively slow diffusion among "natural," untheorized entities such as the family or religious communities" (Strang, 1993, p. 493). Thus, by establishing a basic ontological similarity between all citizens regardless of group membership, methodologically individualism expands the community of similar individuals, from whom we absorb ideas most easily, to encompass all of society. This facilitates diffusion more easily than methodologically holist narratives which stress differences between groups. Accordingly, "the more societies are organized as nation-states (and not as "primordial" religious or ethnic groups) the more social structures diffuse among them" (Strang and Meyer, 1993, p. 501).

Second, "the impact of modernity on diffusion seems to go beyond the simple effect of standardization. It has to do with the substance of the sociological vision embodied in the modern [read individualist]" (Strang and Meyer, 1993, p. 503). In fact, "The cultural construction of empowered actors carrying ultimate values seems especially favorable for diffusion. Such actors are assumed to have the capacity to innovate and reform; they also have the moral duty to do so. And as highly valued entities, actors can sensibly look to one another as models for their action. In the *more liberal*, more egalitarian, and more reductionist versions of modernity, actors are powerfully drawn to copy each other" (Strang and Meyer, 1993, p. 503. Emphasis added). Thus "at the individual level, the rise of expanded and unified notions of citizenship, capacity, and moral worth... leads individuals rapidly to adopt attitudes and practices from each other" with the result that "forms of political participation grounded in the rights of the individual will diffuse more rapidly than ones grounded in the rights of social collectivities" (Strang and Meyer, 1993, p. 501, 502).

From this we can conclude that methodologically individualist narratives do indeed contribute to more rapid social change. This fact, combined with the lack of central organization creates a highly unpredictable, but highly innovative, normative environment. Conversely, the presence of powerful groups and strong commitments in more methodologically holist societies narrows the range of available options, slows the rate of diffusion, and creates institutional barriers to change. In this way, the analogous evidence suggests that the relative potency of each narrative affects not only which values will act as nuclei for long term social debate, but also the very process by which that trajectory is set and followed. It therefore seems reasonable to assume that the normative support the methodologically individualist narrative draws from the *Amselem* decision will help it to wield similar influence on any normative trajectory.

**2.2.8- Conclusions**

Thus, the trial judge, operating from a methodologically holist perspective, understood religious freedom as justified not only in reference to individual autonomy, but also geared towards the preservation of communal norms. Consequently, he interpreted the freedom of religion as requiring both a sincere personal belief and an objective religious obligation, ultimately rejecting Amselem's claim. The Supreme Court took a more methodologically individualist approach to religious freedom. Consequently, the Supreme Court saw the freedom of religion as justified exclusively in reference to free choice, and thus limited its inquiry to the existence of a sincere personal belief and upheld Amselem's claims.

In so doing, the Court empowered methodologically individualist narratives over more methodologically holist ones. This encourages individuals to conceive of their identities as internally defined, and only tangentially related to the groups to which they belong. This instrumental image of self-group relations also makes social groups less salient and authoritative. As a result, this narrative encourages a radically uncontrolled normative environment. In this way, the *Amselem* decision is far more than just a legal decision concerning the proper criteria for section 2 protection. Rather, it is a normative choice between two fundamentally conflicting ways of understanding the relationship between group and individual, and between the transformative projects that they each suggest.

# 2.3 Delgamuukw v. B.C. 1997

**2.3.1 Case Facts**

Like *Amselem, Delgamuukw* can also be understood as a contest between two narratives

and the social visions that they suggest. In brief, the plaintiffs, a groups of 51 hereditary chiefs,

represented the Gitksan and Wet'suwet'en First Nations of Northern B.C (Delgamuukw, 1991, p.

1). Together, they sought a declaration of "sovereignty, ownership and jurisdiction" over

approximately 58,000 square kilometers of territory in northwest British Columbia

(Delgamuukw, 1991, p. 1). While they recognized crown title to the land, the Chiefs argued that

their native rights entitled them to occupy and govern it in an exclusive manner (Delgamuukw,

1991, p. 1). Consequently, the plaintiffs sought compensation for the portions of that territory

which had been transferred to third parties, and for the resources that had been extracted from

them (Delgamuukw, 1991, p. 1). This argument hinged on the continued sovereignty of the

Gitksan and Wet'suwet'en people, and hence relied on two critical claims. First, this argument

requires that their ancestors had occupied the territory in question in an exclusive and organized

manner prior to colonization, thus creating an original right to sovereignty over it (Delgamuukw,

1997, p. 1). Once proven, the continued legitimacy of this right requires that it was never ceded,

voluntarily or otherwise, to the Crown (Delgamuukw, 1991, p.2). If successful, these claims

would create an obligation underwriting crown sovereignty, and giving the Gitksan and

Wet'suwet'en their cause of action.

In order to establish their case, the Gitksan and Wet'suwet'en submitted the oral histories

and cultural traditions of their people, and contended that they demonstrate their exclusive

occupation of the lands in question since time immemorial (Delgamuukw, 1997, p. 26). Against

the claim that those rights, if they existed at all, had been extinguished, the plaintiffs argued that

the extinguishment of all aboriginal rights cannot be inferred as a "clear and plain" intention of

the colonial government, as its statutory scheme relating to land grants was not fundamentally

incompatible with the concept of native title (Delgamuukw, 1997, p. 38). Since the province had

not explicitly stated its intention, and since the consequences of extinguishment are grave, the plaintiffs argued that the honor of the crown, a legal principle whereby crown actions are always interpreted in good faith (Hurley, 2000, p. 3), required the Court to reject the provinces claim (Delgamuukw, 1997, p. 122). The most fundamental challenge in Delmaguukw was thus establishing an initial aboriginal title on the lands in question.

The argument, then, was largely historical, as the Gitksan and Wet'suwet'en peoples submitted the oral history of their nations, including the Gitksan "adaawk", a collection of stories about the nation and its territory, and the Wet'suwet'en "kungax", a spiritual dance representing the connection of each house to its land (Delgamuukw, 1991, p.33). The crown objected that these oral submissions did not constitute real history, but rather fell under the same evidentiary category as hearsay, or oral contentions which are inadmissible because they cannot be verified through cross examination (Delgamuukw, 1991, p.49). In this way, the trial came to turn on whether or not, and to what extent, oral evidence could be accepted as historical evidence. The Province asked the Court to draw a "distinction between what European-based culture would call mythology and "real" matters" (Delgamuukw, 1991, p.41), while the plaintiffs demanded the recognition and validation of their historical model and the worldview it represents.

Justice McEachren, the trial judge, was ultimately unpersuaded by the Gitksan and Wet'suwet'en claim, and "gave no independent weight to these oral histories" because they "included some material which might be classified as mythology" (Delgamuukw, 1997, p. 66). Consequently, he found "that the appellants had not demonstrated the requisite degree of occupation for "ownership" (Delgamuukw, 1997, p. 6). In this way, the Trial Judge applied the traditional standards of Western history and was led to reject the oral histories of the plaintiffs, which conformed to their own cultural standards. The Supreme Court, however, found that "the

trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it" (Delgamuukw, 1997, p.5) because a strict application of the Western model risks ""undermining the very purpose of s.35(1) by perpetuating the historical injustice suffered by aboriginal peoples" (Delgamuukw, 1997, p. , 94). Accordingly, the Court set itself to "adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts" (Delgamuukw, 1997, p. 60), concluding that "proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each" (Delgamuukw, 1997, p. 95). Ultimately, the Supreme Court ordered a new trial. In this way, I contend that the case was decided largely by the implicit historical standards of the court.

### 2.3.2- The Western Historical Model

Here, the approach of the trial judge can be associated with the standard Western model of history. Traditionally, this conception draws a distinction between myth and history as two antithetical modes of explanation and description (Heehs, 1994, p. 1). Like the model itself, this dichotomy has its roots in the Enlightenment, when great advances in the natural sciences lead historians to replicate the observation based ideal of the scientific method (Cruikshank, 1992, p. 26). Under this approach, history became associated with science, and took on the form of a bare, neutral, observation based account of events as they actually occurred (Rüsen, 2002, p. 24). Just as in science, the goal became elucidating general historical laws or propositions about human nature from unbiased historical observation (Rüsen, 2002, p. 24).

Conversely, myth became associated with dogma, or the biased, self-serving accounts of

traditional authority (Heehs, 1994, p. 3). Myth, in this sense, relies on authority rather than

reason. Indeed, "Since the time of the Greeks, mythos (the word as decisive, final

pronouncement) has been contrasted to logos (the word whose validity or truth can be argued

and demonstrated). "Basing ourselves on this philosophical and critical sense of "myth," we may

define it as a set of propositions, often stated in narrative form, that is *accepted uncritically* by a

culture or speech-community and that serves to found or affirm its self-conception". (Heehs,

1994, p. 3. Emphasis added). As such, myths were seen as biased, pragmatic, instrumental, and

bearing little relation to the truth. History, conversely, is seen as free from overt bias, static, and

unresponsive to changing social conditions.

This central dichotomy between neutral, observation based reason and self-serving,

functional authority is in turn the source of a number of the defining characteristics of the

Western model. For example, the observation based ideal gives western historical the

correspondence model of truth, whereby history is true if and only if it corresponds to events as

they actually occurred (Rüsen, 2002, p. 23). As a result, there can be only one true history, and

any variation can only reflect imperfect information, rather than legitimately differing

perspectives. This correspondence model also creates a written bias whereby recorded history is

considered more reliable than oral history, which is prone to minor modifications which each

retelling (Cruikshank, 1992, p. 35). Since these modifications are made by people who were not

actually present during the events described, they are assumed to be less accurate than the

original description. The self-image of observation based reasoning also implies the concept of

historical progress, or the idea that each new form of organization is usually better than the last,

as it has the benefits of additional observation and refinement (Chandler, 2010, p. 64. Rüsen,

2002, p. 17). As a result of these dichotomies, myth and history have come to correspond

loosely to the traditional distinction between value and fact (Rüsen, 2002, p. 23). Indeed, "The general trend of post-Enlightenment historiography has been the eradication of myth from the record of "what really happened." Hence the most prevalent use of the word "myth" among historians: an interpretation that is considered blatantly false" (Heehs, 1994, p. 2).

Were the courts to accept this view, the dynamic, oral, often supernatural nature of First Nations' histories could be categorized as myth and would not be given any historical weight. Accordingly, the courts would not feel compelled to consider their evidence, the Gitksan and Wet'suwet'en people would have no means of establishing their previous occupation of the lands in questions, and would therefore be left without grounds for action.

### 2.3.3- First Nations Historical Models

Broadly speaking, First Nations historical models[1] can be distinguished most clearly from their western counterparts by their rejection of these dichotomies. First Nations historical models generally recognize the important relationship between story and story teller, and thus the inseparability of fact and perspective (Cruikshank, 1992, p. 37. Erasmus and Dussault, 1996, p. 33). Rather than seeing history as fact divorced from value, First Nations cultures generally see description and evaluation as a unified process (Erasmus and Dussault, 1996, p. 33). In this sense, the story of the historian is no less biased than any other. In fact, their "objectivity" is recast as a pretentious attempt to fix meaning once and for all in the frame of their own, equally biased perspective (Erasmus and Dussault, 1996, p. 33). Instead of emulating neutrality, First Nations historical models typically view the past pragmatically, not as a disembodied reservoir of knowledge, but as a tool with direct application to the present (Erasmus and Dussault, 1996, p.

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[1] Unlike the Western model and the individualist/holist camps discussed in *Amselem,* Native historical models are quite diverse. Since I have no desire to present them as unitary, I will refer to First Nations models in the plural.

33).Accordingly, flexibility and change are seen not as problems obscuring historical truth, but as tools preventing history from becoming associated too strongly with any single point of view. Under this schema, it is not problematic if a story fails to reflect events "as they really happened", nor is it problematic if the story changes with each telling (Erasmus and Dussault, 1996, p. 33). In fact, this flexibility becomes desirable, as it allows a story to be meaningful and useful in a variety of contexts.

In this way, the foundations of the written bias are removed, and the way for an oral bias is paved. Moreover, this model opens the door to the possibility of multiple legitimate histories (Erasmus and Dussault, 1996, p. 33). Since no version of events claims to correspond directly to reality in the first place, there is no longer a need to establish which is "true". Rather, several stories about the same event could all be true, providing they all illuminate the present. In this way, the correspondence model is replaced with a sort of practical model of truth. This practical approach also challenges the linear concept of history, for if stories are to be judged substantively based on their application to the present, it is entirely possible that a very old story may in fact be best (Erasmus and Dussault, 1996, p. 33). For this reason, First Nations' concepts of historical progress are generally loosely circular, rather than linear (McNab, 2000, p. 275).

Under this model, the oral histories of the Gitksan and Wet'suwet'en peoples, which help them understand themselves and their relationship to the land, must be placed on equal footing with the records of European settlers, which help them do the same (Asch, 2011, p. 30). Both reflect a situated bias and neither can claim to correspond directly to the past. Accordingly, there would be no basis upon which to preclude oral history.

**2.4.4- Assessment of the Decisions**

The trial judge, confronted with these two different theories of historical evidence, decided to admit some oral history, but only as an exception to the general rules of evidence (Delgamuukw, 1991, p.48). He found that oral history could generally be considered hearsay, or secondary evidence, inadmissible because the original source cannot be cross-examined (McNeil, 1998, p. 1281). However, he found such evidence admissible under the exception of necessity, that is when no other evidence exists regarding the events in question (Delgamuukw, 1991, p.49). In this way, the trial judge accepted much of the plaintiff's evidence without actually accepting their historical narrative. His position, despite allowing oral evidence, effectively reinforced the traditional hierarchy between history, where the original text remains present for cross examination and thus can be fairly assumed to reflect actual events, and oral traditions, which, by virtue of their dynamic, subjective nature, cannot. The implication of the exception of necessity is that historical evidence which meets certain procedural standards is best, while oral evidence carries only a secondary importance (McNeil, 1998, p. 1282).

This approach, "rooted in nineteenth century positivism, is a simplistic progressive evolutionary model with his [the Judge's] own society occupying the apex (Cruikshank, 1992, p. 26). Indeed, "Judge McEachern consistently distinguishes between "fact" which he uses to refer to written historical accounts, and "belief" which he attributes to the plaintiffs" (Cruikshank, 1992, p. 33).

> "He uses words like "idyllic" (p. 32) and "romantic" (p. 48) to describe the plaintiff's position, and announces that "certain documents "speak for themselves" while others fail to do so. Those that do, in his view, are written documents, notably the records of Hudson's Bay Company traders in the region during and after the 1820s. Those that do not, come from oral history" (Cruikshank, 1992, p. 31).

In this way, the trial judge affirms the fact/value distinctions, evolutionary model and written bias of the Western tradition. "History, the court appeared to suggest, is simply a set of external facts that, once presented in the court room, will lead to an objective evaluation of the past" (Fortune, 1992, p. 86). Under this view, there can be only one truth. Thus, by applying the standards of Western history, "the judge seems to be putting oral tradition, itself, on trial. He concludes that, compared with the written documents, oral traditions do not constitute historical evidence adequate to meet the requirements of the court, or "literal truth." (Cruikshank, 1992, p. 37). Clearly, the trial judge rejected the equalizing terms of First Nations historical models in favour of the traditional hierarchies of the Western model. Ultimately, this lead him to weigh the Crown's evidence more heavily, and thus to find against the Gitksan and Wet'suwet'en.

Conversely, the Supreme Court found that, because this decision relied exclusively on the standards inherent in Western history, it belittled the value of the First Nations' histories in an *a priori* manner (Delgamuukw, 1997, p. 67). This stance recognized the unique nature of claims involving intercultural disputes (Delgamuukw, 1997, p. 57), and stated that "The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards" (Delgamuukw, 1997, p. 59). In so doing, the Supreme Court problematized the standards themselves, rather than the Gitksan and Wet'suwet'en failure to meet them rigorously. While recognizing the difficulties presented by the subjective, practical nature of oral histories (Delgamuukw, 1997, p. 62), the Court found that the two must be engaged as separate and equal, rather than placed along a unified hierarchy (Delgamuukw, 1997, p. 91), and thus rejected the evolutionary assumptions of the trial judge. This "two equal model" approach also appears to open the door to multiple legitimate historical perspectives, and can thus be more closely tied to the First Nations' conception.

In fact, the Court devotes significant space to discussing how various legal concepts must be adapted in order to apply fairly to First Nations societies (Delgamuukw, 1997, p. 96). This move recognized that Western and First Nations historical models constitute distinct, incommensurable theories of history, and that no evolutionary assumptions can justify imposing one over the other.

> "Accordingly, a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each" (Delgamuukw, 1997, p. 59).

Thus the Court ordered a new trial where the evidence of the Gitksan and Wet'suwet'en people was to be given equal weight. In so ruling, the I contend that the Supreme Court rejected several key assumptions in the Western model, namely, that only one valid history can exist, that historical models exist along a progressive continuum, that written sources are preferable to oral ones, and most importantly, that history constitutes an objective endeavour.

## 2.4.5 - Consequences: Individual Identities

This picture of inter-cultural equality suggests that members of both societies should enjoy comparably productive, stable and culturally fulfilling lives on their own cultural terms. Conversely, the traditional representation of the First Nations individual in Canadian discourse presents aboriginal cultures as less developed stages along the chain of cultural evolution (Francis, 1992, p. 54). The concept of "progress demanded that the inferior civilization of the Indian had to give way to superior White civilization" (Francis, 1992, p. 58). In this way, the First Nations individual was cast as backwards and inferior, her culture was represented as an

impediment to success, and assimilation was presented as the only way forward (Francis, 1992, p. 217). In this way, the First Nations model encourages native peoples to feel secure and validated in their cultural identity, while the Western model suggests a need to reject it.

Indeed, Chandler et al. (2003) argue that individual identities, and in particular, an individual's sense of continuity over time is modeled on broader assumptions regarding cultural identity and continuity (1). When cultural integrity is undermined, these assumptions can be challenged, leaving individuals without firm foundations on which to model their own personal identities (Chandler, 2003, p. 2). Deprived of this model of continuity, many individuals experience a similar difficulty establishing their own inner continuity, which is an essential component of moral responsibility and development (Chandler, 2003, p. 21). Thus, Chandler et al. contend that a cultural crisis can become a crisis of individual identity as people begin to lose their sense of moral personhood (Alfred and Corntassel, 2005, p. 599. Preston, 2005, p. 55). Accordingly, we would expect the depreciatory images of First Nations culture in traditional Canadian discourse to have produced a crisis of identity among First Nations populations leading to psychological problems. Conversely, we would expect contexts where First Nations cultures have been valued more highly to show the opposite trends.

Indeed, there is widespread support for the idea that such an identity crisis can help explain the poor mental health of First Nations individuals who have fallen into patterns of unusually high unemployment (Statistics Canada, 2001, p. 5), low education and income (Statistics Canada, 2001, p. 6), high rates of incarceration and recidivism (Statistics Canada, 2001, p. 10, 11), high rates of drug and alcohol abuse (First Nations, 2007, p. 67) and unstable mental health (First Nations, 2007, p. 8). In fact, Chandler's study of youth suicide suggests that it and other self-destructive tendencies can be decisively tied to a failure of cultural continuity

(2003, p. 36). Conversely, "communities that have worked successfully to promote a measure of "cultural continuity" linking their own traditional past and building a collective future might also enjoy especially low levels of suicide among their youth" (Chandler, 2003, p. 36). Moreover, "efforts by Aboriginal groups to preserve and promote their culture are associated with dramatic reductions in rates of youth suicide" (Chandler, 2003, p. 21). Alfred and Corntassel support this line of reasoning, arguing that a revitalization of First Nations culture is essential to curing their social woes (2005, p. 612).

In this way, the evidence seems to confirm that the perceived value of a culture does indeed affect the psychological health of its members. This suggests that, by placing First Nations' cultures on equal footing with European ones, the Supreme Court helped to provide a basis within the dominant discourse whereby First Nations individuals can come to re-value their traditional cultures and accept them as a legitimate source of personal identity.


**2.4.6- Consequences: Social Relations**

This picture of inter-cultural equality also has the theoretical effect of problematizing European colonization and the legitimacy of Canadian sovereignty over previously occupied lands (Asch, 2011, p. 31). Under the schema of European superiority implied by the Western historical model, Canadian sovereignty was easily justified as the replacement of an inferior society with a superior one (Erasmus and Dussault, 1996, p. 131. Slattery, 2005, p. 434). In this sense, crown sovereignty would be totally unproblematic, and in no way constrained vis a vis First Nations. Indeed, in discussing the Royal Proclamation, the Court's *Sparrow* decision confirms this historical conception, noting "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the

Crown" (1990, p. 30). In fact, this basic narrative has characterized crown-aboriginal relations for most of Canada's legislative history (Mathias and Yabsley, 1991, p. 35. Slattery, 2005, p. 434). Under a model of cultural equality like the one suggested by the Supreme Court, however, sovereignty becomes something that was stolen from First Nations communities by sheer force of arms without any notions of cultural evolution to justify the theft (Slattery, 2005, p. 435). Thus, when First Nations and European cultures are reconceived as equals, Crown sovereignty becomes problematic (Slattery, 2005, p. 435). I believe the court's more recent use of the terms "assumed" or "implicit" sovereignty reflects this problematization (Haida, 2004, p. 16, 21).

There are also several legal and conceptual mechanisms surrounding aboriginal peoples which serve to curtail Crown sovereignty. I believe that these can be fruitfully explained as an attempt to buttress the legitimacy of Crown sovereignty in the face of an increasingly powerful narrative of inter-cultural equality. In fact, when speaking of these constraints, the Court repeatedly emphasises the need "to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (Ward, 2004, p. 1). Indeed, the term reconciliation is ubiquitous in the court's discussion of aboriginal rights in *Delmaguukw* and its precedent, *Van Der Peet (1996),* leading Walters (2008) to assert a "constitutionally sanctioned and court driven jurisprudence of reconciliation" (166). Moreover, Roy (2001), in her impressive study of Crown sovereignty in aboriginal litigation, finds that the court consistently dodges threatening questions of sovereignty (49), and uses legal mechanisms and images of bilateral cooperation to gloss over and legitimize an essentially unilateral power relationship (78, 96). I contend that this preoccupation with reconciliation and the mechanisms which have been developed to pursue it are only intelligible if the original assertion of sovereignty is perceived as problematic. Given that the Western model discussed above provides a strong ideological defence for unlimited

sovereignty, I contend that the presence of these mechanisms must reflect a problematization of the evolutionary model in the face of increasingly powerful claims of inter-cultural equality.

A strong example of this drive towards reconciliation is the fiduciary relationship between the government and aboriginal groups. Because "the relationship between the government and aboriginals is trust-like, rather than adversarial", "the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples" (Hurley, 2000, p. 3). In this way, the government does not enjoy carte-blanche with respect to First Nations populations as it does in respect to other groups, with whom its relationship is purely adversarial. Legally, this relationship is embodied by the concept of the Honour of the Crown. Because "the honour of the crown is at stake in its dealings with aboriginal peoples...the special trust relationship...must be their first consideration in determining whether the [infringing] legislation or action is justifiable" (Hurley, 2000, p. 3). Thus, the concept of a special relationship has been developed as both a conceptual and legal check on government conduct, ultimately giving the court new grounds on which to overturn government action.

Another example is aboriginal title, a form of land claim underwriting the title of the Crown and limiting Crown sovereignty over those lands. Aboriginal title "includes a right to exclusive use/occupation of the land" subject only to the limit that "land use must be compatible with the nature of the connection with the land" (McNeil, 1998, p. 9). This substantial right also entails that lands held under aboriginal title cannot be dispossessed except to the crown, in order to prevent exploitation by third parties (McNeil, 1998, p. 8). The protective justification of this proviso further creates an obligation for the government to consider First Nations' interests, active or latent, in any plans regarding land surrendered to it by aboriginal peoples and to consult them about said interests (Hurley, 2000, p. 3, 6). "In this way, The Province's title is not

absolute, but is subject to the land related rights of the Aboriginal peoples" (Guide, 2004, p. 5).

Thus Crown sovereignty is now limited conceptually by the fiduciary relationship, legally by the honour of the crown, and politically by burden of aboriginal title (Borrows, 2008, p. 183). These mechanisms limit the Crown's discretion, but I believe they are also intended to justify what remains of it in the face of increasingly persuasive claims of cultural injustice. In this way, the relative potency of the Western and First Nations historical models also contributes to wider shifts in the forms of permissible, legitimate social interaction between the two cultures and their institutions. Accordingly, we would expect *Delmaguukw's* role in reinforcing this image of cultural equality to similarly reinforce the Court's jurisprudence of reconciliation, and the conceptual mechanisms that facilitate it.

### 2.4.7- Consequences: Normative Trajectory

Lastly, the relative value assigned to each culture should also affect the direction and strength of cultural diffusion or acculturation, which is the process whereby cultures in close contact begin to influence and adopt ideas from one another (Berry, 1999, p. 7). This process can be seen as a sort of competition between ideas whereby those that are most useful or that encounter the least resistance become widespread (Kroeber, 1940, p. 1). In this competitive environment, the perceived utility of the idea or system is theoretically of the utmost significance, as its ability to compete with and replace other ideals depends heavily on it being perceived as more useful (Kroeber, 1940, p. 1).

However, Henrich (2000) suggests that this picture of diffusion as a simple cost-benefit analysis exaggerates our ability to assess ideas in a detached, objective manner (p. 2). Instead, Henrich contends that prestige, among other factors, is interpreted as an indicator of utility

(2000, p. 9). In this way, perceived status acts as a substitute for utilitarian calculus, and thereby seriously impacts the rate of cultural diffusion. Accordingly, cultures perceived as inferior should find their ideas, even the good ones, less able to compete with those of the supposedly superior culture. Thus Roman culture was more heavily influenced by the Greeks, who were seen as intellectually and culturally advanced, than it was by the Gauls, who were seen as backwards and barbaric (Ward, 2003, p. 50). Similarly, we would expect the evolutionary assumptions of the Western historical model, which portray Western society as the apex of civilization, to discourage the absorption of ideas from other cultures, especially First Nations cultures which are perceived as under-developed. Likewise, when First Nations communities accept this historical narrative, they would be powerfully drawn to conform and assimilate. Conversely, if both groups were to accept the equality suggested by First Nations models, we would expect a more even diffusion of ideas between the two. In this way, the relative potency of the Western and First Nations historical models helps determine the prestige and perceived utility of each, affecting their relative influence. Ultimately, this influence helps define society's normative trajectory by making some ideas, practices and values more readily diffusible than others.

In fact, in his study of acculturative influence, Berry concludes that "there has been an imbalance in acculturative influences" as "generally, Aboriginal peoples have been changed substantially, with serious erosion of their cultures and identities" (Berry, 1999, p. 1). Furthermore, "National survey data show[s]... major behavioural cultural identity loss (or perhaps identity denied) with degree of EuroCanadian contact" (Berry, 1999, p. 13). While acknowledging the influence of First Nations on European society, Berry contends that "this interaction has not been egalitarian... While some aspects of non-Aboriginal society did change, the vast majority of the cultural changes took place among Aboriginal peoples" (1999, p. 29).

In one of the few studies examining the influence of First Nations culture on Canadian society, Saul (2008) supports this line of reasoning, and further contends that a lack of respect for First Nations cultures has actually blinded Canadians to the contributions they have already made (5). "Non-Aboriginals...cannot see...how much of what we think of as our way, our values, our collective unconscious, is dependent on what we slowly absorbed living with them" (Saul, 2008, p. 6). Saul continues to suggest that many of the particular strengths of Canadian society, multiculturalism, for example, may be aboriginal in origin, and that our failure to understand, generalize and employ them effectively may be linked to our shaky conception of their heritage (2008, p. 4). Thus Canadian perceptions of First Nations individuals as underdeveloped appear to curtail their contributions, just as the diffusion literature would suggest.

Although few studies examine cultural diffusion in conditions of inter-cultural equality and mutual respect, the Royal Commission on Aboriginal Peoples contends that the acculturative relationship between First Nations and European settlers was considerably more egalitarian when Europeans first arrived in North America and were highly dependent on the First Nations' knowledge for their survival (Erasmus and Dussault, 1996, p. 96). Thus "relations were established in a context in which Aboriginal peoples initially had the upper hand in population and in terms of their knowledge of the land and how to survive in it... [and] these factors contributed to early patterns of co-operation and helped to overcome the colonial attitudes and pretensions" (Erasmus and Dussault, 1996, p. 95). In this way, perceived utility acted as a counterweight to the evolutionary assumptions of the Western historical model. As a result, the relationship between the two cultures was initially "based on principles of equality, peace and mutual exchange" (Erasmus and Dussault, 1996, p. 120). Just as we would expect, this period saw considerable cultural evolution on both sides, including the development of "an economy of

interdependence from which both sides derived benefits through the exchange of foods, clothing, manufactured goods and technologies" (Erasmus and Dussault, 1996, p. 123). Indeed, "both societies exchanged technologies and material goods that made their lives easier in their common environment" (Erasmus and Dussault, 1996, p. 95) as "ordinary people adopted each other's foods, clothing, hunting or transport technologies as they proved useful" in a process which "brought substantial changes to both societies" (Erasmus and Dussault, 1996, p. 99).

However, as Europeans established themselves, won military victories, grew numerically and learned to survive in and dominate their new surroundings, the perceived utility of aboriginal culture declined, and Europeans began to posit their cultural superiority more forcefully (Erasmus and Dussault, 1996, p. 131). In fact, the Royal Commission characterizes this period through increased attempts at assimilation and the deliberate destruction and abandonment of First Nations culture (Erasmus and Dussault, 1996, p. 123). "To justify their actions, the non-Aboriginal settler society was well served by a belief system that judged Aboriginal people to be inferior (Erasmus and Dussault, 1996, p. 131). As a result, the cultural relationship between the two nations became more one-sided, unidirectional and conflictual, eventually shattering "the formal nation-to-nation relationship of rough equality that had developed in the earlier stage of relations (Erasmus and Dussault, 1996, p. 132). In this way, the declining utility of First Nations culture allowed the settlers to return more forcefully to their evolutionary historical assumptions, and thus to establish the unbalanced patterns of cultural diffusion that Berry observes today.

In this way, the case specific evidence seems to support what the more general diffusion literature suggests, that the perceived value of First Nations culture has seriously affected its ability to contribute to Canadian society. Accordingly, by promoting an image of inter-cultural equality, decisions like *Delmaguukw* should help to equalize the rate of diffusion between First

Nations and Western societies, restoring a balance once destroyed by colonialism, and thus seriously impacting their respective and collective normative trajectories.

**2.4.8- Conclusions**

In sum, the Trial judge, operating from an exclusively Western conception of history, applied evidentiary rules relying on a number of strict hierarchies to produce a single, unitary truth. Finding that Gitksan and Wet'suwet'en histories did not conform to these standards, the Trial judge assigned their oral evidence only a secondary weight. Conversely, the Supreme Court recognized that First Nations histories adhere to their own standards rooted in their own, radically different concept of historical truth. Consequently, the Supreme Court ordered a new trial that would apply more inter-cultural evidentiary standards. By privileging more egalitarian First Nations models over the more hierarchical Western tradition, I contend that the Court helped provide a basis for the revitalization of First Nations identities, contributed to the development of conceptual checks on the relationship between cultures, and helped equalize their respective cultural influence. In this way, *Delmaguukw* is far more than a simple land-claim case. Rather, it represents a normative choice between two visions of history and the models of cultural interaction that they suggest.

## 2.5- Conclusions

The preceding cases demonstrate the presence of competing narratives in the legal arena. They illustrate how diverging interpretations of law can often be traced to more fundamental narratives, and how the Court is forced to arbitrate between these conflicting normative projects. The cases above also involve contradictions between various levels of court, making it clear that

the judicial arena is more than a simple gladiatorial ring where the most potent narrative wins. Nor do the confines of the legal system always suggest a clear winner. Rather, these cases suggest that the court plays an extremely active role in accepting, rejecting, or blending the narratives before it, as evidenced by its frequent oscillation. Accordingly, I believe that these cases illustrate the court's selective function.

Of course, it would be simplistic to claim a direct causal relation between a given case and a given change in social affairs. Nevertheless, logic does suggest that these decisions would contribute to certain trends, and empirical evidence from analogous cases, while not establishing causality, appears to support these expectations. I therefore contend that these cases also provide good reason to believe that judicial decisions can seriously influence the normative environment.

As a result, I believe that these case studies provide a compelling rationale for revising our theories of adjudication in order to address the court's normative role more directly.

# Chapter Three – The Law as Integrity as an Independent Hermeneutic

## 3.0 Introduction

Chapter One of this thesis explored the Jurisgenerative view of the law, which suggests that legal decisions can be understood as contingent normative choices. Chapter Two continued to demonstrate the importance of these choices for our normative environment. Chapter Three now turns to what theory may guide us in making them.

This chapter will begin by reviewing the Jurisgenerative view and its assumptions about the nature of law (3.1.1). I will argue, as I did in Chapter One, that this view takes a normative, bottom-up view of the law which emphasizes the contingency of interpretation and thereby problematizes the court's selective function. Then, I will outline the poorly defined ideal of the "Independent Hermeneutic" (3.1.2). Cover suggests that this openly normative, independent, violence minimizing theory of adjudication could help soften the court's jurispaethic role. However, I will reiterate my argument that Cover never gave his hermeneutic a positive, substantive content or developed it into an actionable theory of adjudication.

Accordingly, I will explore two hermeneutic approaches inspired by Cover's work. The first of these, based on the Quaker model (3.1.3), aims to maintain the unity of law through consensus, thus replacing coercion with persuasion and deproblematizing the court's selective function. The second model, based on Jewish law (3.1.4), minimizes violence by embracing diversity. This downplays the selective function without legitimizing it. However, neither approach is without its problems, as Consensual models depend on problematic assumptions concerning the commensurability or universality of values, while the Diversity model ultimately necessitates some further form of systemic stability. Neither model proves satisfactory. However,

they do reveal two opposite approaches to the Independent Hermeneutic, which provide a useful framework for my adaptations of Dworkin.

Having explored the Independent Hermeneutic, this Chapter turns to Dworkin's theory of the law as Integrity. First, I will briefly summarize the most relevant points (3.2). Then, I will compare and contrast the Law as Integrity with the Jurisgenerative view, noting several points of considerable agreement, but concluding that a narrow concept of legal meaning prevents Dworkin from truly problematizing the court's selective function (3.3). As a result, I will suggest several adaptations which allow Dworkin's judge to view legal meaning more contextually, and thus to recognize her selective function and its normative implications (3.4.1). Having focused Dworkin's theory on the problem at hand, I will seek to develop it into an actionable, substantive version of Cover's Independent Hermeneutic using the Consensus and Diversity archetypes established above (3.4.2 and 3.4.3 respectively). Ultimately, I will conclude that a fusion of Cover's Jurisgenerative model, Dworkin's Law as Integrity, and the Jewish Diversity approach can provide the seeds of practical theory of adjudication capable of responding to the court's selective function in a more defensible manner.

# 3.1 The Jurisgenerative Model and the Independent Hermeneutic

### 3.1.1 The Jurisgenerative Model

To recall our earlier discussion in Chapter One, the Jurisgenerative view sees the law primarily as a mechanism of social control. Using the example of civil disobedience, Cover (1995) argues that the efficacy of the law does not rely primarily upon the threat of coercion, but rather on the varying normative commitments of the population (147). Only these normative commitments can explain why some laws inspire resistance while others inspire obedience,

despite both being backed by the coercive force of the state. Thus Cover sees the law as a deeply normative phenomenon. The example of civil disobedience also makes clear that the normative meaning the law depends on is not defined exclusively by the judiciary. Rather, Cover contends that legal meaning is created primarily during the stage of interpretation, when individual citizens contextualize the law in reference to their own moral values (1995, p. 101). This explains why some segments of the population will resist a law while others will not – the normative meaning they assign to the law is different, and therefore provokes different reactions.

Cover further contends that this process of contextualization involves three elements: an assessment of one's present reality, a vision of some better alternative, and a set of committed actions posited to move society forward from point A to point B (1995, p. 102). In this way, a citizen's reaction to a particular decision depends on that decision's perceived place in her preferred social trajectory. If it contributes to the realization of her ideal, it will likely inspire enthusiasm, if seen as counterproductive, resistance will ensue instead. In either case, the law is emplotted[2] in a cultural narrative, given normative meaning, objectified as an external demand, and committed to by those who hold it (Cover, 1995, p. 144). Indeed, Cover holds commitment to be essential because it differentiates law from utopia. In this sense, law is more than a mere vision, its' story is that of a realizable program of social transformation, limited in nature to those actions to which we are willing to commit (Cover, 1995, p. 102).

Since these stories largely determine the law's ability to compel social behavior, Cover contends that such narratives are the essence of law. As we have seen, however, these narratives are not the exclusive purview of the court (Cover, 1995, p. 103). Rather, legal meaning is always multiple, and always multiplying, taking on a new meaning every time it is contextualized through a new set of normative valuations. This is the principle of jurisgenisis, whereby cultural

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[2] To emplot something is to situate it along the plot of a story. See Goldoni (2010), page 5.

groups and the norms they create are seen as the true source of law (Cover, 1995, p. 106).

However, this radical diversity of legal meaning threatens the stability of the normative environment by undercutting the minimal common meanings needed for predictable, peaceful coexistence (Cover, 1995, p. 108). As a result, Cover argues that the court must play a jurispaethic role, providing a counter weight to the jurispotency of cultural communities by routinely establishing one and only one interpretation as binding (Cover, 1995, p. 139). The function of the court, then, is not to create or define law, but to perform a "selective function" by choosing from the competing meanings society generates on its own in order to establish a single authoritative interpretation (Cover, 1995, p. 139, 110). Cover calls this the imperial function of the courts (1995, p. 108). However, this unity of meaning is always temporary, it is always destroyed the instant it is achieved as communities immediately begin to fit the decision into their own particular normative categories in a process of judicial mitosis (Cover, 1995, p. 103).

In this way, the legal universe is characterized by two ongoing processes: 1) the process of jurisgenisis or interpretation ensures the constant fragmentation of the law into different normative frames, while 2) the jurispaethic role of the courts systematically privileges some narratives over others in order to provide a predictable, shared foundation of legal meaning (Cover, 1995, p. 110). Thus Cover's central insight is that there is a radical dichotomy between the organization of the law as force, which is wielded exclusively by the state, and the organization of law as meaning, which is inherently multiple, social and anti-hierarchical (1995, p. 112). Moreover, in rejecting some interpretations in favor of others, the court enshrines certain narratives in the canonical law of the state, and thereby supports the committed projects of social transformation that they suggest. Thus, as seen in Chapter Two, the choice of which narratives to suppress and which to privilege can seriously affect the normative environment,

making some visions and values more powerful than others.

However, because each narrative is rooted in its own particular set conceptual resources and values, each interpretation is inevitably correct in reference to the criteria of assessment it employs, which it of course takes to be fundamental (Cover, 1995, p. 126). This becomes deeply problematic for the practice of adjudication because no one, not even the judge is capable of escaping her own interpretation (Cover, 1995, p. 156). As a result, it is impossible to establish a neutral or objective interpretation. Similarly, any scale of comparison would involve criteria of assessment, and there is no agreement as to what these should be. As a result, it is also impossible to develop any sort of universal metric on which different interpretations can be fairly compared. Accordingly, there is no way to definitively establish that any given interpretation is more accurate or more attractive than any other. This poses a problem for the selective function of the court, which therefore lacks a solid, universally valid basis on which to make the difficult normative decisions its office requires. In this way, the Jurisgenerative emphasizes the normative aspects of judicial decisions, which are obscured by most other theories of adjudication.

### 3.1.2 The Independent Hermeneutic

Accordingly, Cover contends that the challenge we face is "the need to maintain a sense of [common] legal meaning despite the destruction of any pretense of superiority of one nomos over another" (Cover, 1995, p. 144). Yet Cover also contends that this situation "need not have the largely state-serving implications it generally does today" (1995, p. 153). Rather, judges can act according to an "Independent Hermeneutic" which would facilitate some level of interpretive justice, even in the absence of universally accepted standards (Cover, 1995, p. 59).

In discussing this hermeneutic, Cover tells us that epistemic violence is always

regrettable as an impoverishment of the normative universe (Beckett, 2011, p. 5; Etxabe, 2006, p. 58). He exhorts us to invite new worlds, to stop limiting our normative experience (Cover, 1995, p.172). In this way, he implies that normative diversity ought to be embraced, and imperial violence rejected in so far as is possible. Some authors have even suggested that he aims for a law "untainted by state violence", contending that "Cover's aim appears to be to reconfigure the function of the court so that its legitimacy depends on meaning divorced from power", or that "Cover's main worry is that the state court's interpretation is backed by state violence whereas he seems to think that it should carry conviction by virtue of its intrinsic merits." (Alder, 2005, p. 2). However, his discussion of violence also accepts that some level is necessary and even desirable as a means of facilitating predictable social interaction (Cover, 1995, p. 144). "If let loose and unfettered, Cover seems to fear that the worlds created would be unstable and sectarian. This is when, in order to manage all this unruliness, the ordering force of law becomes necessary" (Etxabe, 2006, p. 75). In fact, "Cover argues explicitly that ...every nomos necessitates the activity of two opposite generative impulses: one expansive, the other contractive, which are both necessary for a healthy body politic" (Etxabe, 2006, p. 76). Thus "The legitimacy of [Cover's hermeneutic]...has to be found, indeed, in its capacity to *reduce at a minimum the effective exercise of legal violence*, so as to let plural orders develop and flourish (Goldoni, 2010, p. 2. Emphasis added). The prohibition on violence has therefore been qualified. In this way, Cover makes clear that a suitable hermeneutic should aim to do enough normative violence to maintain unity and facilitate predictable interaction, but no more.

Cover also insists that the normative content of this hermeneutic must be, as the name suggests, independent of all other views, especially those of the state (Cover, 1995, 162). Such a view, by virtue of its independence, permits what Etxabe (2006) calls a "triadic formulation of

justice" by which the court evaluates the views of the state and the views of the nomic

community from an independent third perspective (p. 66). This allows the judiciary to achieve a

"triangulation of justice, and thus to overcome the bilateral structures of domination in which

violence operates" (Etxabe, 2006, p. 79). In this sense, equity requires that the court be detached

from both positions it is being asked to judge. Thus:

> "The importance of judges developing their own normative determination (without
>
> collapsing into that of the State) lies not so much in the particular narrative they happen
>
> to articulate, but in that doing so they facilitate the symbolic triangulation of justice. In
>
> other words, judges' hermeneutic is important not in and of itself...but as an *enabler* of
>
> said configuration" (Etxabe, 2006, p. 69).

Ultimately, this configuration results in a "concerned reflexivity, characterized by a

predisposition to shift from one personal perspective to the next, while retaining the critical

ability to reflect upon one's own momentary position" (Etxabe, 2006, p. 83). Essentially, Cover

suggests that a satisfactory hermeneutic, whatever its specific form, should prevent domination

by facilitating a triadic, rather than a hierarchical formulation of justice (Etxabe, 2006, p. 70).

Lastly, Cover argues that the violence of judicial decisions is compounded when judges

do not explicitly recognize the contingent nature of their endeavour. This is because decisions

which are understood as mechanical or inevitable present the supressed narrative as flatly

incompatible with existing law, thus destroying the realizability of its normative vision, making

it more like utopia, and thus undercutting its ability to secure deep normative commitments.

Conversely, decisions which make their contingent nature clear present the suppressed vision as

a viable alternative which simply was not chosen, thus preserving its ability to bridge reality and

alternity in a convincing manner (Resnik, 2005, p. 24). As a result, Etxabe suggests that "a

distinction can be drawn between bureaucratic (mechanical, hierarchical, blind, and systematic) and hermeneutic (articulate, horizontal, self-conscious, and individualized) forms of violence" (Etxabe, 2006, p. 77). While the former undercut the foundations of the supressed vision as a realizable program of law, the later open a normative dialogue through which the disadvantaged group is able to respond to the imposition of external norms (Etxabe, 2006, p. 69). Cover therefore suggests that whatever decisions they make, judges should refuse to hide behind technicalities and openly engage the contingent nature of their decisions (Resnik, 2005, p. 34).

In sum, Cover insists that his Independent Hermeneutic must be explicitly normative, independent, and oriented towards minimizing, but not eliminating, legal violence. These vague principles, however, fail to provide any concrete guidance in particular cases. Yet Cover fails to develop this hermeneutic into an actionable, substantive theory of adjudication. As a result, Synder (1999) contends that "Cover had an insight, but he did not have a theory. He had a vision but, like many visionaries, he left it to others to fit his vision into a framework for analysis" (1627). In fact, one of the only ubiquitous themes in discussions of the "Independent Hermeneutic" seems to be that "the "Independent Hermeneutic" is not made really clear" (Goldoni, 2010, p. 13). Even in the secondary literature, "few systematic attempts have been made to pursue this view as a comprehensive theory of law" (Etxabe, 2006, p. 7). As result, Cover does not so much provide a theory of adjudication as he points the way towards one. He has identified the problem, he has hinted at the characteristics of satisfactory solution, but the work of developing this solution into a practical, applicable method of adjudication has been left to others. While most authors stop where Cover did, urging us in a more pluralist direction without further specification (Snyder, 1999, p. 1627), several authors have tried to carry this project further, and have proposed models inspired by Cover's insights.

### 3.1.3 - The Quaker Model as an Independent Hermeneutic

For example, Bradney (2005) suggests that Quaker law may provide an alternative to the imperial functions of the court (p. 10). This model is based on the idea of "God being in everyone", such that each individual opinion represents an aspect of larger divine will (Bradney, 2005, p.5). In this way, each opinion is becomes equally valuable as a component of the larger truth. This fundamental concept of equality produces a model of decision making which seeks to determine God's will through consensus, synthesizing interpretive disagreements to reveal the larger truth behind them (Bradney, 2005, p. 7). In this sense, interpretive disagreement is not understood as an adversarial debate or competition, but as a collaborative attempt to access a greater truth which both parties have failed to fully understand (Bradney, 2005, p. 7). Ultimately, the presence of consensus indicates that all aspects of God's will have been properly considered, while the persistence of disagreement indicates that God's will has not been fully understood. As a result of these assumptions, Quakers have no priests or hierarchy. Rather, discussion continues until a unanimous decision is taken (Bradney, 2005, p. 7). If disagreements cannot be smoothed over, the issue is postponed and no decision is made (Bradney, 2005, p. 7). Bradney argues that this is a model of law without violence because no one stands in a privileged position, and no one is forced to accept a position she disagrees with (2005, p. 10).

This model achieves independence from any particular view by limiting itself to issues of consensus. Essentially, the law becomes a sort of normative compromise, occupying only those positions to which every adherent can agree. In this sense, it remains inherently distinct from the particular perspective of any given participant by refusing to take contentious positions at all. The concept of synthesis also allows the Quaker model to avoid denying the plausibility of any

interpretation. Even if the eventual result is masked as objective or automatic, each person is able to see their own commitments reflected in it. Lastly, the Consensus model aims to minimize epistemic violence by replacing coercion with persuasion. Basically, the epistemic violence that consensus requires is deproblematized because those committed to the narrative that is to be suppressed are actually convinced to shift their commitments to the one that will be privileged. In this way, the *nomoi* that are destroyed have first been emptied, and the privileged *nomoi* can claim every member among its supporters. Thus, by refusing to enter into areas of strong normative disagreement, Quaker law is able to employ persuasion rather than coercion, and is therefore able maintain its moral appeal to all members of the community without doing violence to their particular normative visions. For these reasons, Bradney contends that the Consensus model provides a hermeneutic capable of satisfying Cover's demands (2005, p. 11).

However, several theological assumptions compromise our ability to universalize this approach. First, Quakers must assume that every opinion, no matter how disparate, can be synthesized in some larger, divine truth (Bradney, 2005, p. 11). If we assume a God who can conceive of ideas infinitely more nuanced than our own, this makes sense. It is difficult to imagine, however, how a secular legal system could assure itself of the universal commensurability of values. Similarly, the Quaker's ontological assumptions concerning the presence of God in each of us effectively reify the Consensus model as a metaphysically valid route to truth, making its results unquestionable. It would be difficult to imagine how a secular system could reify its own methods in so unassailable a manner. Thus the theological underpinnings of the Quaker model facilitate a confidence regarding the possibility of mutually acceptable positions that secular systems cannot easily replicate.

In fact, if these assumptions are rejected, the Consensus model becomes highly

problematic, as the presence of two irreconcilable values now becomes a possibility. As a result, the Quakers would be forced to choose between incompatible narratives. However, the Quaker model, by virtue of its assumptions, must present the eventual decision as an objectively correct course of action, thus denying that there were ever really options at all. In this way, the Quaker hermeneutic, when deprived of its theological assumptions, fails to openly engage the contingent, normative nature of its own decisions. Moreover, even if the disadvantaged party has been convinced to abandon her original position, the unitary nature of the law continues to deal a form of epistemic violence by narrowing the range of available normative meaning. Consent to this violence does not render it nonviolent, as the decision continues to affect the normative landscape. Thus, even if the disadvantaged party is satisfied with the process, it remains a contingent choice between two incommensurable options, and thus continues to be difficult to justify. However, Quaker law, in its search for a single, unitary truth, has no mechanisms through which this narrowing might be minimized. Furthermore, in its pretension of synthesizing disparate truths, this model actually serves to co-opt the competing narrative, which is now presented as expressing an aspect of the truth of the eventual decision. In this way, the capacity of these interpretations to survive into the future as independent normative ideals with autonomous transformative projects is seriously curtailed. As a result, the Quaker model serves to limit the range of possible interpretations in an even more insidious way than the flat out rejection of the secular model, which at least facilitates resistance and response. Nevertheless, this Consensus model does appear independent from any particular position.

Thus the Quaker hermeneutic provides independence through consensus, minimizes violence through persuasion, and engages its decisions as transformative normative projects. However, its ability to do so depends on theological assumptions concerning the possibility of

consensual truths and our ability to unearth them. Without these assumptions, the Consensus model appears as a mechanism through which difficult normative decisions can be masked while dissent is co-opted in support of epistemic violence which is only partially minimized. For these reasons, Bradney may overestimate the appeal of the Quaker model as an Independent Hermeneutic, at least in its present form.

### 3.1.4 - The Jewish Model as an Independent Hermeneutic

In a similar vein, Stone (1993) contends that Jewish law can be seen as "an archetype for Cover's vision of the nature of the law" (827). This contention stems firstly from the institutional structure of Jewish law, which has evolved without a state or autonomous means of coercion (Stone, 1993, p. 828). As a result, many authors contend that Jewish mechanisms of adjudication have evolved in such a way that they do not depend on violence, but rather constitute "a case study in the redemptive possibilities of legal interpretation" (Stone, 1993, p. 819).

This assessment is also linked to the interpretative attitude of the Jewish model, which draws on a biblical tale where two competing schools of law appealed to the heavens to tell them which interpretation was true, and were told that both were the word of God (Stone, 1993, p. 828). According to Stone, this lead Jewish law, like the Quaker model, to develop a theory of truth whereby competing interpretations are seen as illuminating different aspects of a larger divine will (Stone, 1993, p. 835). Unlike the Quaker model, however, this final understanding is never achieved (Stone, 1993, p. 836). Rather, revelation is understood as deliberately vague so as to facilitate a process of interpretation which brings us closer to God (Stone, 1993, p. 850). Thus the law is not conceived of as a system of truths or even a determination of God's will, but as an ongoing, collaborative process of enhancing our understanding of that will (Stone, 1993, p. 836).

As a result, Jewish judges have a capacity to think in "oppositional or paradoxical inter-dependencies", maintaining contradictions as aspects of the same truth without seeking their reconciliation. Jewish jurisprudence therefore allows a variety of coexisting, even contradictory legal interpretations (Stone, 1993, p. 887). This facilitates a wide range of interpretative divergence within the system. It also makes the law inherently transformational. Its *telos* is evolutionary, such that revision is inherent to the system (Stone, 1993, p. 831).

Thus, while the Quaker model seeks to create a legitimate unity within the legal system by synthesizing disagreements into a larger truth, the Jewish model, by permanently postponing the final synthesis, embraces and institutionalizes legal diversity. Rather than deproblematizing violence through persuasion, this model minimizes violence by permitting multiple interpretations to flourish simultaneously. In this way, the Jewish model achieves independence from any particular view by embracing several at once. However, Stone contends that many authors overstate the lack of violence that such a system embodies, noting that the Jewish legal corpus underwent periodic canonization in order to restore unity to an overly disparate system (Stone, 1993, p. 854). In this sense, the epistemic violence of the system is not minimized so much as it is distributed differently, coming in short, intense bursts of reconstruction, rather than regular, small scale maintenance. Moreover, it is a mistake to think of this interpretive diversity in abstraction, as if Jewish citizens are thereby free to join whatever interpretive community approximates their beliefs and are therefore subject only to their own interpretations. Even if there was a jurisdiction for each interpretation, jurisdiction operates on a geographic basis, meaning that each community will likely contain a great diversity of opinions. In this way, the mere fact of diversity in the overall system does not minimize violence within each community. Again, violence is not so much minimized as distributed at a more local level. Still, the

transformative *telos* implied by an ever greater understanding of what the law requires allows

suppressed interpretations to hold on to hope that they may eventually be authoritative, thus

preserving their ability to generate strong normative commitments and survive into the future.

Thus the Jewish model takes a different approach to the Independent Hermeneutic,

seeking to minimize, rather than legitimize legal violence by allowing multiple interpretations to

flourish. This approach does not depend on problematic assumptions. However, the demands of

predictability and stability effectively reintroduce violence in different ways. This undercuts the

appeal of the Jewish model as an Independent Hermeneutic, at least in its present form.


### 3.1.5 - Conclusions

In sum, Cover's model of adjudication has been insufficiently developed, providing only

vague suggestions rather than an actionable theory, and the models advanced in his name have,

each in its own way, failed to truly grasp the inevitability of violence in legal interpretation.

Nevertheless, these models represent opposite reactions to the court's selective function, and

thus illuminate two broad approaches to the Independent Hermeneutic.

The Quaker model, in employing a consensual approach in order to persuade rather than

coerce the adherents of dissenting narratives into conformity, places a high premium on unity

and attempts to deproblematize the violence necessary to obtain it. Essentially, it positions the

law as a sort of minimal compromise between *nomoi*, thereby securing their respective support

with minimal coercion. However, the viability of this approach depends on assumptions

concerning the existence of consensual truths and our ability to reach them. If these assumptions

cannot be sustained, the concept of consensus becomes an illusion masking the problematic

nature of the court's selective function. In this way, unitary consensus based approaches are

ambitious, but face serious challenges in supporting the assumptions on which they depend. Rather than seeking to legitimize judicial violence, the Jewish model recognizes the depth of interpretive diversity and tries to embrace it instead. By allowing multiple interpretations to flourish, each group is able to live by its own commitments. However, the need for predictable interactions between groups ultimately reintroduces violence through canonization and jurisdiction. In this way, models aimed at institutionalizing diversity will also require mechanisms for unity, which may prove equally problematic. Ultimately, it is my hope that Dworkin will provide a means of resolving at least one of these difficulties.

## 3.2 The Law as Integrity

This section explores Law as Integrity, which I hope will eventually provide the foundations of more satisfactory approach to the Independent Hermeneutic.

### 3.2.1 Summary

For Dworkin, the enterprise of Law is essentially to justify the coercion necessary for communal life (Rosenfeld, 2005, p. 375). In order for this coercion to be justified, however, the law must be experienced as something more than a coercive force - it must be experienced as a moral obligation (Dworkin, 1998, p. 216). Accordingly, the legal community must become more than an aggregate of individuals. It must become a moral association like friendship or family, which can in turn create binding moral obligations for its members (Dworkin, 1998, p. 198). In order for this to happen, Dworkin contends that people must understand the law as expressing a coherent principle to which they are all committed (1998, p. 225). In this way, the community comes to conceive of itself as something conceptually more than that group of people which

submits to a given authority, it comes to see itself as a community of principle capable of generating reciprocal moral obligations (Dworkin, 1998, p. 201). By allowing the legal community to conceive of itself as a community of principle, the law transforms itself from a brute command to an associative obligation, thereby justifying its coercion (1998, p. 190). In this sense, principle is at the heart of law.

However, Dworkin also recognizes that our legal traditions are piecemeal. They do not reflect a single, coherent ideology, but rather illustrate the competition of ideologies throughout the history of the polity (Dworkin, 1998, p. 179). Accordingly, the canonical law often fails to provide clear answers to difficult legal questions (Dworkin, 1982, p. 180). Ultimately, this lack of coherence undercuts the law's ability to produce morally binding claims, making it appear more a coercive result of political contingency than a principled object of mutual commitment. Thus Dworkin suggests that Judges must do what legislatures have not, and render the law into a coherent set of principles capable of generating moral obligations. In order to provide this coherence in the face of contradiction ridden precedents and legislation, Dworkin contends that judges ought to seek unity in the moral principles that underlie the system (1998, p. 255). In this way, the judge seeks to explain a contradictory set of decisions and laws as the expression of a coherent set of deeper principles.

Thus, when faced with contradictory precedents or legislation, each of which suggests a different legal outcome, Dworkin's judge would examine the principles underling each approach (Dworkin, 1975, p. 1064). She would then consider which set of principles best explains the overall legal system, including the conflicting portions, as an expression of a coherent set of values, and rule accordingly (Dworkin, 1998, p. 195). In this way, judges are not motivated by the best answer to a single isolated case or legal question, but rather by the most coherent

portrayal of the system as a whole (Dworkin, 1975, p. 1064). Dworkin calls this model the Law as Integrity. Essentially, it aims to always present the law in the most coherent fashion so as to let the community to understand itself, insofar as possible, as a community of principle.

However, given the depth of interpretive divergence, it is entirely possible that two conflicting theories of law will both recognize that the case at hand ought to be decided in reference to the legal principle of, say, equality, but nevertheless posit different accounts of what "equality" really means (Rosenfeld, 2005, p. 387). Dworkin therefore distinguishes between concepts, like equality, and specific conceptions of what that concept means (substantive equality and equality of opportunity, for example) (1975, p. 1080). In order to decide which conception ought to be given force, Dworkin provides the tests of fit and justification. The "fit" test, Dworkin contends, can be conceptualized as concentric circles moving outwards from the case at hand and gradually encompassing more and more legal material (1998, p. 231). Thus the theory must first fit the relevant precedent or legislation, in that the conception it puts forward must explain them in a compelling, coherent way. Then, it must seek further support from within the proper domain of law or government policy, and then from precedents in other fields of law that concern the same concepts, and so on (Dworkin, 1998, p. 250). This concentric approach is called the principle of local priority, and allows for some divergence between fields of law (Dworkin, 1998, p. 250). Nevertheless, even tangentially related elements of the legal system exert a sort of "gravitational pull", lending additional support to the theories with which they cohere (Dworkin, 1975, p. 1090). The theory which ultimately "fits" the most legal material, that is to say, which is capable of presenting that material in a coherent manner, is best. The test of justification then asks how well a given theory justifies the results that it advocates in reference the conception that it has presented (Dworkin, 1998, p. 231).

Essentially, whichever theory renders the law *most* coherent wins, even if both are somewhat plausible and neither is perfect. Accordingly, Dworkin contends that legal questions have single right or best answers, even if it is not always possible to objectively determine them (Rosenfeld, 2005, p. 363). However, these answers are right for Dworkin in the sense of being the best way to maintain a community of principle, rather than being morally valid. Thus "The proposition that there is some "right" answer to that question does not mean that the rules [or morality] are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants" (Dworkin, 1975, p. 1082).

However, it is also theoretically possible that two theories will incorporate exactly the same amount of legal and moral material in equally convincing manners. In these exceptional circumstances, Dworkin admits that the personal political and moral positions of the judge come into play, as the judge must decide what she believes that the law requires (1998, p. 259).

**3.2.2 – The Chain Novel Metaphor**

To clarify this model of adjudication, Dworkin suggests that the role of the judge can be compared to that of the chain novelist (1998, p. 229). In this sense, the body of existing law can be thought of as a chain novel written by many authors over a long period of time (Dworkin, 1998, p. 229). This metaphor reflects both the freedom and the constraints of judging. While the present author is free to progress the story, she is also limited by the existing plot, characters, style etc (Dworkin, 1998, p. 233). Too radical a departure from these structures and the story will suffer (Dworkin, 1982, p. 184). A final chapter of Romeo and Juliet featuring the two lovers losing interest, for example, would not be consistent with the characters and concepts of love established earlier in the story. It would, in this sense, lessen the integrity and coherence of the text overall. Thus, even if the author thinks an unhappy ending is a better, more accurate picture

of love, her concern for the story overall will prevent her from writing this ending (Dworkin, 1998, p. 233). Just as a novelist must consider the overall coherence of the story in choosing which path to take, so the judge must consider the coherence of the legal system. What is essential is that Law as Integrity demands that it be the overall coherence of the legal system, rather than the perceived best answer to an isolated question, which motivates the judge.

In sum then, the Law as Integrity can be understood as an attempt to create a community of principle capable of generating moral obligations by imposing a single coherent voice onto the piecemeal legal traditions of the political community. This unity is achieved by recourse to the principles underlying the system, and is pursued through the tests of fit and justification.

# 3.3 - Law as Integrity, the Jurisgenerative View, and the Independent Hermeneutic

This section compares the Law as Integrity and the Jurisgenerative view of law (3.3.1), and assesses Dworkin's ability to provide an Independent Hermeneutic (3.3.2).

### 3.3.1 - Law as Integrity and the Jurisgenerative View

In light of our previous discussion of the Jurisgenerative view, four things about Dworkin's model seem especially striking. First, the idea of appealing to background moral concerns in answering legal questions is hugely appealing. Second, Dworkin's view of the law as a narrative expressing normative commitments captures the laws psychological and moral aspects nicely. Third, his vision of judges choosing between competing theories makes Dworkin well-disposed to consider the implications of the court's selective function. However, the fourth

thing that strikes me is that, despite this initial compatibility, certain aspects of Dworkin's thought encourage him to conceptualize both the law and judge in theoretical abstraction. I believe that this distracts the Law as Integrity from the commitments of the population, and thus prevents it from truly grasping the problematic nature of the court's selective privilege.

I contend that a more contextual image of adjudication could make Dworkin sensitive to these concerns, thus allowing the law as Integrity to function as the sort of independent hermeneutic that Cover's thought requires. For example, Dworkin clearly sees the law as a normative rather than coercive phenomenon (Dworkin, 1998, p. 225). His model of adjudication recognizes that the law is not exhausted by technical legal materials, but rather is built from pre-existing concepts and principles. These insights lead Cover to focus his attention on non-state actors as the primary source of law. Conversely, Dworkin focuses on the canonical law of the state and therefore limits the actors and conceptual resources he considers to those contained within the legal system. As a result, Dworkin reacts to these ideas quite differently than Cover, focusing instead on the normative and cultural aspects of the formal state-law.

This narrowed focus effectively presents the creation of legal meaning as an abstract process whereby a judge, acting alone, combs through the legal corpus, combining legal materials and principles so as render the law coherent, and then presents this vision to community. This may offer an excellent description of the role of politics, background morality and practical reason in judicial interpretation. However, it also suggests that the community receives legal meaning passively, committing to whatever vision the judge offers provided only that it be sufficiently coherent. In this way, Dworkin obscures the role of the population in interpreting the judicial decision and situating it along their particular cultural narratives.

Interestingly, this remains true even though Dworkin recognizes a sort of selective or

suppressive element of judicial interpretation (Dworkin, 1998, p. 258). Indeed, Integrity posits

that theories of law will never encompass all legal material, and that multiple equally convincing

theories are a distinct possibility (Dworkin, 1998, p. 256). It is also aware that any decision

between theories will affect the moral landscape (Dworkin, 1998, p. 310). However, his narrow

conception of the process of legal meaning creation leads Dworkin to see these theories in

theoretical abstraction, as mere hypothetical possibilities waiting to be given normative

substance by a judge, rather than the objects of real, preexisting personal and collective

commitments. As a result, Dworkin is not led to problematize their suppression.


**3.3.2 - The Law as Integrity and the Independent Hermeneutic**

As a hermeneutic of adjudication, the Law as Integrity is clearly independent in the sense

of being capable of ruling against the state, should its theory prove less coherent than its

competitors. In this way, the process of adjudication is presented as a principled endeavour

independent of other branches of government, as Dworkin makes clear when he insists that the

court be motivated by principle alone, leaving policy concerns to the legislature (1975, p. 1059).

Dworkin also explicitly rejects theories of interpretation modeling the role of the courts upon

that of the legislature, arguing that Integrity constitutes a distinct and more appropriate model for

issues of principle (1975, p. 1058). Dworkin further rejects all models of original intent in

adjudication, arguing that the meaning of the law is not frozen by its enactment, but rather is

determined in reference to the evolving norms of the system (1998, p. 348). In this way, the Law

as Integrity provides a principled, uniquely judicial hermeneutic that resists collapsing into the

views of the state and potentially facilitates a triadic formulation of justice.

Dworkin also presents the law as defining a common set of principles with considerable

influence on the future of the polity (Dworkin, 1998, p. 310). He recognizes the presence of several potentially equal theories of law (Dworkin, 1998, p. 256). In this way, Integrity seems to have the proper conceptual foundation to present the law as an area of explicitly contingent decisions. However, Dworkin's narrow and unitary concept of legal meaning creation allows him to contend that such decisions, difficult as they may be, ultimately have single right answers (Dworkin, 1975, p. 1082). The eventual decisions are presented as the inevitable results of an objective, almost mechanistic process of coherence, rather than a regrettable choice between incommensurable values. In fact, even when Dworkin admits that determinations between conceptions will ultimately be made in reference to the judges own understandings of these concepts, he assures us that their normative positions will never be engaged directly, but rather will be filtered through the mechanistic process of Integrity and will, in this sense, continue to prove objectively correct (Dworkin, 1975, p. 1096). This portrayal masks the normative violence Integrity deals as bureaucratic violence, thereby undercutting the suppressed vision's continued ability to garner the strong normative commitments on which it depends.

As a means of minimizing epistemic violence, the Law as Integrity seems seriously deficient. Its coherence model explicitly seeks to minimize diversity and achieve unity in legal meaning. Such a monological approach obviously involves the regular and systematic suppression of competing visions. Indeed, Dworkin's theory even involves a doctrine of mistakes whereby inconsistent components of the system can be effectively marginalized (Dworkin, 1975, p. 1097). Thus, by seeking absolute unity through a single principle, Dworkin's system actually employs violence without hesitation.

Again, Dworkin seems conceptually well equipped to provide an Independent Hermeneutic. However, his self-contained portrayal of legal meaning, and the blind spots in the

Jurisgenerative view that this produces, ultimately prevent Dworkin from properly problematizing legal violence. As a result, the principle of Integrity actually maximizes the court's selective function, while the single right answer thesis masks its contingency.

## 3.4- Adapting the Law as Integrity to the Jurisgenerative View: Novelists and Storytellers

As we have seen, the primary impediment to Dworkin's theory taking the Jurisgenerative view appears to be his rather narrow conception of the actors and materials relevant to the creation of legal meaning. I contend that Dworkin's chain novelist metaphor is largely responsible for this conception, as it portrays judicial activity as isolated within the legal sphere. After all, the novelist is a solitary figure, alone with her work. Yet these are the only two components on the model: the book and the judge. As a result, this image implicitly confines the relevant corpus to the canonical law, and presents judges as the only relevant actors. In this way, the meaning of the law is presented as evolving in a sort of social vacuum, isolated from the variable commitments that, as we have seen, give the law its force. Instead, legal interpretation is presented as the exclusive purview of the judge, while the population is assigned a passive role. Even when the judge is confronted with several theories, these are seen as mere hypotheticals without connection to the real world. In this way, the Chain Novel metaphor leads Dworkin's judge to see her selective function merely as an academic exercise in the pursuit of coherence, without recognizing its normative implications.

Instead, I would like to suggest that the judicial figure could be reconceptualized as not as a novelist, but as a storyteller. While the role of the chain-novelist is to keep faith with the text, the role of the storyteller is to connect with her audience. While a novel is static, a story is

dynamic. Thus the image of an oral story emphasizes the presence of an audience and its active role in listening to and interpreting the story being told. It emphasizes that judges are not the only relevant legal actors, and that legal theories are not empty abstractions, but the objects of real normative commitment. Accordingly, a shift from a chain novelist to a storyteller model serves to take the meaning of the law and the activity of judging alike out of their theoretical isolation, allowing judges to see the theories before them as objects of real commitment, and thus to problematize their suppression.

Furthermore, the dynamic nature of an oral story suggests that the particular way in which a story is told ought to be determined in part by audience at hand. A good storyteller must adopt the styles and conventions of her audience, after all, rather than sticking stubbornly to the conventions of her discipline. In this way, the storyteller model encourages judges to engage the social and moral concerns of their audience in order to tell a more convincing story, allowing them to consider normative resources which were previously obscured. This encourages Judges to wield the violence of their office in an articulate, explicitly contingent manner.

Ultimately, this change allows Dworkin to move past his isolated and self-referential image of law in order to see the legal process as a normative phenomenon. As a result, the storyteller model opens up new spaces in which to theorize and allows us to explore the Law as Integrity as a potential Independent Hermeneutic.

## 3.5 ‑ The Law as Integrity as an Independent Hermeneutic

As seen in section 3.1, previous attempts at theorizing a more appropriate organization of judicial violence have revealed two broad trajectories, one based on legitimacy and consensus, the other on deference and diversity. While the former faces difficulties supporting the

assumptions that ground its legitimacy, the later has trouble establishing defensible stabilizing mechanisms. An enlarged version of the Law as Integrity may help solve at least one of these dilemmas. This section therefore represents the cumulation of my thesis, finally answering my central question: "how can the Law as Integrity be adapted so as to provide the courts with practical guidance in performing their selective function?"

### 3.5.1 - Consensus Models

The Consensual approach, embodied by the Quaker model above, represents an attempt to maintain the uniformity and stability of the law by grounding its suppressive force in a universally acceptable foundation. For example, the Quakers accept that all opinions can be synthesized into a larger divine truth. This reified process provides a stable foundation for law which does not depend primarily on selection and coercion, but on synthesis and persuasion.

This approach can also be likened to more secular models, most notably John Rawls' concept of an overlapping consensus. Under his model, the various moral positions in society are seen as a sort of Venn diagram, and the law would ideally represent the center point, embodying those minimal principles to which every position can subscribe (Rawls, 1987, p. 1). In this way, each moral position significantly exceeds the content of the consensus, which is limited to issues of agreement (Rawls, 1987, p. 8). Thus, "we can no longer speak of an identical account of justice" between citizens (Kilan, 2009, p. 23). Instead, the overlapping consensus "refers to a special kind of agreement by which the same principles and ideals of the political conception are going to be affirmed for different reasons from the standpoint of each comprehensive doctrine" (Kilan, 2009, p. 23). Citizens "endorse the politically liberal principles of justice, not on the basis of a comprehensive view which they all seem to share, but grounded

in the moral, religious and philosophical reasons that are specific to their own conceptions of the good" (Kilan, 2009, p. 23). Thus, while Rawls does not posit that all positions can be synthesized to produce a larger truth, as the Quakers do, his contention that certain principles are in some sense universal plays a similar role in legitimizing the judicial process (Rawls, 1987, p. 2). Because the process is rooted in universally acceptable notions, each citizen can be understood as adhering to their own morality, rather than having one imposed from the outside. "Since different premises may lead to the same conclusions, we simply suppose that the essential elements of the political conception...are theorems, as it were, at which the comprehensive doctrines in the consensus intersect or converge" (Van de Putte, 1995, p. 9).

*3.5.1.1 Universal Consensus* - Following this approach, we could conceive of the Law as Integrity as operating in much its present form, except that it would take all principles into account, rather than just those found in the legal system. Just as judges once identified the principles implicit in the legal system and sought a theory that rendered them coherent, they would now identify the principles implicit in society as a whole, and seek a law that renders them coherent. The activity of judging remains much the same, but the object to which legal theories must cohere expands beyond the legal sphere. As a result, the test of fit and justification would operate at two levels. First, a theory would have to both fit and justify the present legal system. This requirement can be justified because those that do not are not plausible, and cannot be the objects of the deep commitments Cover describes (1995, p. 102). However, this step would be limited to a threshold test of sorts. Provided a theory could fit and justify a sufficient minimum of legal material, it would proceed to step two. In step two, theories which fit and justify a sufficient amount of legal material would now be asked to fit and justify as much moral material

as possible. In this way, each plausible theory of law tries to take into account the diversity of moral positions and debates within society, and tell a convincing story presenting them as the actions of a community of principle, or at least a mutually acceptable compromise. Whichever plausible theory of law does this best would be privileged.

Thus, when a certain moral position cannot be taken into account, it is because this position cannot be sensibly integrated with the rest of society's norms. In this case, its suppression would be justified as necessary to preserve the minimal degree of common meaning needed for peaceful interaction. If two theories take into account equal but opposite clusters of moral positions, whichever set of opinions is itself most coherent might be justifiably privileged on the basis of putting common understandings on more stable foundations.

In this way, the story of the law is always pushed in the most widely acceptable direction. This effectively confines the content of the law, insofar as possible, to issues of considerable consensus. Just as in Quaker law, widespread agreement with the basic content of the law is taken to justify its violence. However, it seems completely unfeasible to ask any judge, even Dworkin's Hercules (Dworkin, 1998, p. 239), to consult the entire diversity of moral positions within a polity. There are simply too many positions to consult, and, even if time were not an issue, there is no well-defined corpus from which to access them. In this sense, a completely universalist approach may be so utopian that it can be quickly dismissed.

*3.5.1.2 Limited Consensus* - However, more modest versions of the Consensus model remain available. For example, we could reasonably assume that not every moral position need be consulted on every question. When it comes to regulation of First Nations' fishing rights, to take a random example, I would be quite comfortable with a decision based on the positions of the

First Nations, the fishing community and the Crown, rather than one which takes every subgroup into account. This is not least because most of these groups will not have strong or well thought out positions on First Nations' fishing rights. Similarly, I think we can reasonably assume that there are many instances when various groups would consent to being left out of the discussion. As a result, we could take a more modest approach and limit the range of moral positions that a judge must take into account to those actually surfacing in her court. This would include the plaintiff and defendant of course, as well as any interveners. Anyone who failed to intervene would be understood as consenting to have her voice left out of the moral discussion. The judge would then attempt to understand each interpretation on its own terms, before producing a decision which is morally intelligible to as many of those positions as it can. In this way, the court maintains an issue specific consensus that deals as little violence as possible.

This model also allows different issue areas to reflect the differing concerns of the parties most interested in them. Thus labour law may gradually come to reflect worker and entrepreneurial narratives more strongly than say divorce law, which might emphasize the moral contributions of traditional and feminist values. This allows groups to live by their own commitments in the areas most important to them. The first step of our revised fit and justification criteria would, of course, ensure that each new decision in any given field would also maintain the overall coherence of the system.

This approach is significantly more modest than the universal Consensus model, and may not place unrealistic demands on the role of judges. However, even this specific consensus assumes that the interested parties will usually be similar enough in moral disposition that a mutually intelligible decision is possible, and that judges will usually be able to identify it. Indeed, some form of this assumption seems essential to the Consensus model. While the

Quakers support this notion with the belief that all opinions represent aspects of larger truth, Rawls does the same by assuming that every moral position in society will accept toleration as a value (Kilan, 2009, p. 26). Conceivably, groups could reject this entire concept and insist that their morality, being objectively right, ought to be enforced universally (Kilan, 2009, p. 26). In fact, Rawls admits that such groups may exist, and are essentially outside of the social consensus (Kilan, 2009, p. 26). In this way, the universality of the overlapping consensus depends on certain values and concepts which Rawls readily admits are historically contingent (Rawls, 1987, p. 22). When these assumptions are not shared, the universality of the consensus is compromised. Without this universality, consensual models are unable to solve Cover's basic dilemma, as they continue to supress certain positions on the basis of culturally contingent, majoritarian assumptions which they present as universally legitimate.

*3.5.1.3 Minimal Harm* - The possibility of total incommensurability seriously undercuts both the Universal and Limited Consensus models. However, Cass Sunstein's concept of minimal harm may provide an interesting alternative. Sunstein takes the incommensurability of values as his starting point, and argues that no "middle ground" solution will be possible or even desirable between them, as it would create an all or nothing system that is not appropriate to the judicial role, and moreover, would often fail to satisfy one party or both (1994, p. 860). He argues that judicial decisions ought to aim not to synthesize incommensurable goods nor to find some common ground between them, but to minimize the harm done to each (1994, p. 857).

For example, in considering the question of surrogacy, Sunsteins judge would recognize two distinct methods of valuation, one which insists on an economic metric, and therefore suggests that a wages can provide sufficient compensation for birth, and one which insists that

children are an entirely different sort of good than money, and thus that it is inappropriate to exchange them (1994, p. 858). In order to deal minimal harm to each point of view, Sunstein suggests his judge might not criminalize surrogacy, but neither would she enforce the contract if a mother changed her mind (1994, p. 858). In this way, the minimal harm approach allows mothers who do feel that birth and money are comparable to sell their labour without damaging the ability of mothers who see their children as unique goods to treat them as such.

This approach allows the law to maintain itself as a sort of mutually acceptable compromise between diverse positions without assuming any common basis between them. Every group therefore has good reason to support this method as a matter of self-preservation. However, Cover suggests that this kind of procedural commitment can never be deep enough to allow the law to reach its full potential (1995, p. 107). While most groups may accept the law, many may do so half-heartedly, especially when the results, although minimally harmful, are not particularly attractive from their perspective. Consequently, this approach may have difficulty garnering the especially strong normative commitments which give the law its force.

Moreover, each decision would depend on the particular narratives present in that particular courtroom. Given the endless combinations in which these may arise, Sunstein's approach may also compromise the element of predictability that the law hopes to provide.

*3.5.1.4 Conclusions -* To clarify matters by returning to my primary metaphor, I believe that we can fruitfully conceive of both the Limited and Universal Consensus approaches as a special type of storytelling; a political speech. Such a speech is geared towards a large audience with diverse interests. The speaker knows that not everyone will care equally about every issue, and that no position is likely to receive universal support. Nevertheless, her goal is to secure support by

persuading each member of this large and varied audience that whatever specific issue they may care about is also an important part of her plan for the future. However, the astute politician also recognizes that some positions are polarizing. They will attract some supporters but alienate others. For this reason, she avoids contentious topics, seeks consensus, and speaks in broad terms, avoiding undue attachment to any particular position. The Consensus Model judge must tell a similar story, seeking to draw support from a variety of positions for a variety of reasons by occupying a conceptual middle ground between them. In this sense, Universal Consensus models can be seen as nationally televised speeches. Limited Consensus models follow the same approach, but are slightly more particular, akin to a town hall meeting. Lastly, Sunstein's Minimal Harm approach does not really tell much of a story at all. His judge speaks more like the moderator of a debate, careful not to take sides and devoid of positive content.

All three approaches seek to minimize epistemic violence by persuading their subjects to accept the legitimacy of the adjudication process as an aspect of their own narrative. In this way, each *nomos* can understand itself as living in accordance with its own law, rather than an external imposition. Because this consensus is distinct from any particular position, it achieves independence. Because it employs persuasion over coercion, it minimizes violence, and because it views the law as the subject of ongoing moral debate, it is also explicitly normative, even if its' results are masked as automatic or unassailable.

However, the legitimacy of the Universal and Limited Consensus methods relies on the assumption of universal commensurability. If values are in fact incommensurable, the consensus will always be partial. As a result, groups standing beyond the consensus will be coerced into conformity illegitimately. Without the assumption of commensurability, the Consensus model's mechanism for minimizing violence through persuasion is no longer effective, and in fact, serves

to compromise the explicitly contingent nature of the decision by disguising it as the unassailable result of a reified process. When we attempt to recognize the possibility of incommensurability through the Minimal Harm approach, however, the law endangers its ability to generate strong normative commitments. In this way, the assumption of commensurability is essential to the Consensus method's appeal.

Without this assumption, these models are independent, but they are neither explicitly contingent nor especially effective in minimizing judicial violence. In fact, seeking a single interpretation which appeals to disparate moral positions may prove unrealistic, and indeed, may miss Cover's most basic point. In the end, legal interpretation will always be multiple, conflicting and uncontrolled. Seeking to predict this process in advance and design decisions which will be interpreted in a desired way may therefore be seeking an unrealistic level of understanding and control, pushing the imperial virtues beyond their capacity. As a result, I do not believe that Consensus models can readily provide the sort of hermeneutic Cover envisions.

### 3.5.2 – Diversity Models

The second broad approach outlined above can be termed the "Diversity model". Rather than seeking a single legal story which would be intelligible to all social actors, this approach tells multiple stories to multiple audiences. In this way, the unity of legal meaning is sacrificed and the diversity of interpretations is embraced. This model is exemplified by the "both these and these are the words of God" doctrine, which recognizes that even conflicting interpretations can reflect equally valid aspects of the same concept (Stone, 1993, p.828). By deferring the final synthesis of interpretations and denying the necessary presence of any overlap between them, this approach abandons the pursuit of perfect unity.

Since this model attempts to preserve the internal integrity of multiple interpretations, rather than balancing or compromising between them, the object of coherence is neither the totality of moral positions in society nor some cluster of interested moral actors, but rather is defined by the specific narrative in question on a case by cases basis. When a judge encounters a committed interpretation, she would seek to understand the narrative before her on its own terms, and would render a decision consistent with that narrative's interpretation of the law. Importantly, this process does not consider the position of that narrative relative to any others. It does not seek consensus or agreement between positions. Rather, this model seeks to give every community the opportunity to live by its own interpretation without compromise in the name of others. In this way, the law becomes both explicitly contingent and minimally violent. By taking multiple positions, it also becomes independent from each. However, this model faces an obvious problem, as allowing multiple bases of interpretation destroys the predictability that the legal system aims to provide. Indeed, this basic problem is what led the Jewish model to reintroduce violence through jurisdiction and canonization. In this way, the Diversity model's violence minimizing mechanisms may in fact prove too effective.

*3.5.2.1 Limited Gravitational Pull* - However, Dworkin's concept of gravitational pull may provide a means of ensuring stability. In seeking coherence, Dworkin explains, judicial narratives must fit as much legal material as possible. This implies that some material will not fit, and must be explained as a mistake on the part of the community. Laws assigned this status, Dworkin contends, retain their enactment force, or their specific force as legislation, but lose their gravitational pull, or their right to be considered among the materials to which a new decision must cohere (Dworkin, 1975, p. 1099). Similarly, we could conceive of a sort of limited

or specific gravitational pull, whereby the case at hand is only a relevant precedent for other cases rooted in the same legal narrative. Thus the Amish, for example, would have their own jurisprudence, rooted in Amish narratives and governed by precedents set in Amish cases. This would provide a stable basis for Amish-state interactions without affecting the law as a whole.

Should an individual wish to have this interpretation applied to her, she must simply demonstrate deep commitment to it. Thus the tests of fit and justification operate as a threshold test, just as in the Consensus model. They ensure that a give narrative can sensibly explain the legal system in a coherent and therefore realizable manner. However, we must now add the test of commitment, which determines if a narrative warrants respect as an important part of the normative universe of its adherents. Provided the theory proves both minimally plausible and normatively significant, the judge would render her decision in agreement with its precepts, and its gravitational pull would be limited to cases rooted in the same narrative. In this way, Dworkin's coherence principle is inversed: instead of seeking the most coherent theory, an approach which inadvertently maximizes epistemic violence, we now seek a minimal degree of coherence so as to produce the opposite effect, a maximum of diversity. Because each interpretation is understood as a different conception of a shared concept which is never fully understood, the polity is nevertheless able to understand itself as a community of principle working out the implications of its law collaboratively.

This model undercuts the unity of the law by allowing multiple interpretations to coexist. However, the tests of fit and justification continue to tie each jurisprudence to a central corpus, which imposes certain constraints on interpretation (Goldoni, 2010, p. 9). Moreover, as Gadamer makes clear, the court will never be able to engage these narratives directly. The best it can do is to achieve a fusion of horizons whereby a given narrative is understood through and in turn

expands the court's own conceptual categories. As a result, each interpretation remains unified in the sense of having been constrained by the same text and filtered through the same cognitive matrices. I believe that this common center provides a degree of overall stability, while the requirement of internal consistency provides additional stability within each jurisprudence.

Furthermore, because each fusion necessarily enlarges and enriches the court's perspective, this system eventually creates an imperial[3] center with an extremely wide horizon of meaning. This model of a particular perspective enlarged from several directions is distinct from a model of consensus between perspectives in that its specific content may not be the object of widespread agreement. It does not therefore deproblematize epistemic violence in the same way. Nevertheless, when faced with two conflicting narratives, the court, having its own perspective enlarged by both theories, will more often be able to render a decision that preserves the viability of both as theories of law.

*3.5.2.2 A Hermeneutic of Conflict* - In this way, the state cedes its own interpretative prerogative to committed communities, allowing each to experience the law as a direct result of their own values, while the tests of fit and justification provide overall stability. Of course, this will not always be possible: sometimes conflicts will arise between two groups, rather than one group and the state. Here, the state cannot practice deference, it must articulate a hermeneutic of its own. This returns us to our central question. However, the Diversity model's multi-narrative court seems a strong candidate to handle adjudication fairly because its broad judicial horizon has been effectively untethered from any particular perspective, and indeed, is accustomed to switching between perspectives and adopting a critical eye towards its own foundations, much as

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[3] Here I mean imperial in Cover's sense of a legal system that depends on proceduralism and coercion, rather than deep normative commitment. (1995, p. 109).

Etxabe suggests (2006, p. 86). As such, it is at least well positioned to prevent relationships of domination between the two parties.

Thus, when incommensurable narratives collide, the court could articulate its own jurisprudence of conflict management. Drawing on multiple perspectives, the court would establish another sort of limited precedent to be applied only in cases of conflict. In this way, the epistemic violence of the court is truly minimized in that it is exercised only when incommensurable conflicts occur. The violence itself does not become less problematic, but it does become more explicit, less frequent and less one-sided.

Given its specific purpose, a version of Sunstein's minimal harm approach may prove appropriate as a hermeneutic of conflict. Under this approach, a judge would fuse her horizons with each narrative before referring to her own enlarged horizon for a solution which deals minimal overall harm to both. I rejected this approach earlier because it empties the law of definite moral content, rendering it procedural and undercutting its ability to generate strong commitments. Here, however, I do not propose harm minimization as a general strategy of adjudication, but as a last resort in rare cases. As a result, groups will still be able to commit whole-heartedly to the vast majority of legal decisions.

Moreover, these cases involve particular conflicts and are likely to be unique in nature, or at least to pose problems which do not generally arise. As such, this principle would not significantly destabilize the system by providing variable answers to similar and recurring questions. Rather, it would deliver particular answers to what are in fact particular and unusual questions. In this way, a more limited application allows Sunstein's principle to minimize harm without seriously compromising the normative appeal or the overall predictability of the system.

*3.5.2.3 Conclusions-* Accordingly, the Diversity model can be compared to a very different sort of storytelling. It is more akin to a ghost story or a personal anecdote. Rather than telling a single story to a large audience at one time, this approach reflects a broad storyline being told and retold countless times to countless audiences, changing which each retelling. In this way, the teller takes into account the particular audience and the specific circumstances in which the story is told, and modifies it accordingly in order to generate the maximum effect. Rather than avoiding contentious or particular values in favor of more universal ones, this approach embraces strong, particular meanings and uses them to give its story force, albeit in a more limited context. When forced to address a more varied audience, this approach becomes more consensual, employing a minimal harm principle so as to continue to generate the most overall support.

In this way, the Diversity model achieves independence from the state, and indeed from any particular *nomos* not by creating a conceptual middle ground between them, but by engaging each narrative on its own terms. It also articulates a hermeneutic of conflict rooted in an enlarged horizon of meaning which is distinct from any of the particular narratives which inform it. This hermeneutic of conflict implies that the court's own assessment is engaged only when ruling on the basis of the narrative in question is not possible. In this way, the court's selective function is presented as a regrettable last resort, making the contingent nature of such decisions clear and protecting the continued viability of both visions of law. Lastly, by limiting the selective function to cases of incommensurable conflict, this model deals only so much violence as is necessary for peaceful coexistence. For these reasons, the Diversity model shows a strong initial potential to provide an actionable, Independent Hermeneutic capable of responding to Cover' concerns.

## 3.6 Conclusions

This Chapter has explored Ronald Dworkin's model of the Law as Integrity and attempted to adapt it to Cover's Jurisgenerative view. After noting several promising aspects of Dworkin's theory, I have concluded that a narrow concept of the actors and materials involved in the legal process ultimately prevents Dworkin from seeing the problem at hand, and thus from applying his conceptual tools to their full effect. As a result, I have suggested broadening Dworkin's concept of legal meaning through a storyteller model of adjudication, which allows the Law as Integrity to recognize the role of the population in legal interpretation, and thus to problematize the court's selective function. I have then explored two ways in which Dworkin could manage this function justifiably, either by seeking consensus or by embracing diversity.

While Consensus attempts at deproblematizing judicial violence entirely are extremely attractive, I have argued that their ability to do so rests on the problematic assumption of commensurability. When incommensurable conflicts arise, the model either becomes violent or empties itself of its normative content. Conversely, the Diversity model represents a less ambitious approach, seeking to minimize violence without legitimizing it. This modesty allows the Diversity model to maintain predictability, thus offering practical improvements to help fulfill Cover's demands without overstating its own abilities. As such, I believe that the Diversity approach represents a more profitable avenue of development.

In fact, I may now answer my primary question by contending that Dworkin's theory of the Law as Integrity can be adapted to provide a practical, theoretically defensible way of regulating the court's selective function by adopting a storyteller model of adjudication and incorporating elements of Cover's Jurisgenerative view, Stone's depiction of Jewish Law, and Sunsteins Minimal Harm principle. In this sense, my thesis ends on an optimistic note – the challenges for legal theory may be daunting, but the conceptual tools to address them do exist.

# 4.0 Conclusions

While Chapter One introduced the Jurisgenerative view, Chapter Two demonstrated its significance. In Chapter Three, I attempted to amend Dworkin's model of the Law as Integrity to respond to the challenges that this view suggests. Here, in my conclusions, I will summarize the model I have developed (4.1), before elaborating on its potential form through the roughly analogous examples of *sui generis* relationships and coordinate constitutionalism (4.2). Finally, I will discuss several areas which remain theoretically underdeveloped, suggesting some useful avenues for future research on the topic (4.3) before concluding my thesis (4.4).

## 4.1 - The Law as Commitment

The model I have described is a fusion of Dworkin's Law as Integrity, Cover's Jurisgenerative View, Stone's depiction of the Jewish model, and Sunstein's Minimal Harm principle. This view accepts the plurality of legal interpretation, and seeks to bolster the law's ability to structure social behaviour by harnessing the rich normative meaning inherent in this multiplicity. This makes the law more efficacious and makes adjudication more defensible.

Under this model, judges would continue to interpret the law by whatever metric they see fit in the vast majority of cases, acting, in this sense, as the interpretive voice of the community, much as Dworkin suggests (1998, p. 225). When faced with a strong alternative interpretation, however, this model follows Cover and encourages the Judge to show deference, substituting its metrics of evaluation and adopting its view of the relevant principles in lieu of her own. In this way, the state cedes its interpretative prerogative to the committed community or individual. For this reason, I will call this model the Law as Commitment.

Of course, not every interpretation is plausible candidate for judicial enforcement, nor is

every interpretation the object of commitments strong enough to warrant this. For these reasons, the Law as Commitment employs three tests inspired by Dworkin: fit, justification, and commitment. The fit test ensures that the interpretation explains a sufficient amount of the legal system in a sufficiently coherent manner. The test of justification then asks how well this interpretation justifies the result the committed party is advocating. Finally, the test of commitment determines whether or not the interpretation constitutes a significant component of the committed individual's normative universe. Should an interpretation pass all three tests, the principle of deference would be triggered. As a result of this principle of deference, numerous interpretations of the same law are allowed to exist side by side, just as in Stone's depiction of the Jewish model (Stone, 1993, p. 835). This allows each community to commit to the law more deeply, and to experience its own liberty more completely.

In order to preserve the predictability of the legal system, cases decided in this way are then given a special, limited application as precedents. Essentially, they will be considered relevant and binding only in other cases involving the same committed interpretation. In this way, the general, predictable structure of the law is insulated from, rather than destabilized by particular instances of deference, which essentially create independent sub-divisions within the law. Each of these divisions also has its own internal coherence, while the fact that each interpretation is rooted in a common corpus and given voice and shape by a common judiciary provides for a degree of coherence between them. In this way, the court and the cannon of state law act as a common center which influences every interpretation dialogically, and therefore provides a degree of uniformity between them without assuming their commensurability.

Inevitably, however, cases will arise when two committed interpretations conflict. In such cases deference is not possible, and the Law as Commitment must become violent. In order to

minimize this violence when it does infrequently occur, the Law as Commitment employs Sunstein's Minimal Harm approach, seeking to understand the values that are at stake for each party, and then rendering a decision that does minimal harm to both. Such decisions remain violent, but this violence at least minimized and detached from any particular position.

In addition, this constant engagement with other interpretations gives rise to frequent fusions of horizons on the part of the court. As a result, the court develops an extremely wide vantage point, able to critically analyze any perspective from a number of others. This helps the court render minimal harm decisions more effectively, but it also increases the court's own conceptual resources. In this way, the general jurisprudence of the court is enhanced by its encounters. The court may even find that interesting legal mechanisms develop within the mini-jurisprudences that this model creates, allowing them to act as sources of judicial innovation.

### 4.1.2 – The Law as Commitment as an Independent Hermeneutic

The Law as Commitment achieves independence in two ways. First, it defers to numerous committed interpretations whenever possible, thereby distancing it from any single interpretation, especially that of the state, which systematically subordinates its own position. Second, the constant fusion of horizons creates a hermeneutic of conflict with no resemblance to the views of the government, or any other single group, for that matter. This perspective thereby prevents bi-lateral relationships of domination. The principle of deference also makes the normative significance of judicial decisions clear, while the Minimal Harm principle underlines the lack of any Archimedean point from which to make them. In this way, the Law as Commitment refuses to hide its decisions behind the language of technical necessity, instead embracing the contingency of its endeavour. Lastly, the Law as Commitment effectively

minimizes normative violence in two ways. First, the principles of deference and limited

gravitational pull allow the jurispaethic office of the courts to be engaged as infrequently as

possible. Second, when conflicts do arise, the court resists reliance on its own normative

evaluations in favour of a Minimal Harm approach, thus minimizing the degree of violence, as

well as its frequency. Accordingly, I contend that the Law as Commitment is able to meet the

demands Cover makes of his Independent Hermeneutic, and thus allows the court to manage its

regrettable but necessary selective function in a more nuanced, effective and defensible manner.

## 4.2 - Application

In order to clarify how this model might operate in a concrete setting, this section will

explore two roughly analogous approaches; *Sui Generis* Legal Relationships (4.2.1), and

Coordinate Constitutional Orders (4.2.2).

### 4.2.1- Sui Generis Legal Relationships

First, this model is similar in many ways to the Supreme Court's approach in

*Delgamuukw*, where the Gitksan and Wet'suwet'en relied on a jurisprudence rooted in their

unique normative relationship with the Crown. This fact allowed them to rely on their own

interpretations, concepts and values. Indeed, the case involved everything from special native

rights and crown obligations to unique forms of land ownership rooted in First Nations culture,

and ultimately created special standards of evidence and models of history, even insisting on a

two equal perspective approach. In this way, *Delgamuukw* showed great deference to the

traditions and cultural understandings of the Gitksan and Wet'suwet'en peoples. However,

because the relationship between First Nations communities and the Crown is considered *sui generis*, or

totally unique, the application of cases like *Delgamuukw* as precedent is limited. It may be invoked only by other native communities. In this way, the Court did not need to remake the system entirely in order to do justice to the particular claims of the Gitksan and Wet'suwet'en, it merely had to carve out a separate jurisprudence specially suited to resolving their concerns. The Court's two equal perspective approach can even be seen as a basic form of the Minimal Harm principle, as it insisted that elements of both historical models be accepted as equal despite their incommensurable assessments of the evidence, thus dealing minimal harm to each system without assuming any common ground between them.

This approach provides a practical, defensible means of governing intercultural conflicts between the Crown and the First Nations without destabilizing the wider legal system. I see no reason why the courts could not generalize this approach, establishing *sui generis* relationships with non-native communities, thus treating every normative relationship as totally unique.

**4.2.2- Coordinate Constitutional Orders**

In much the same vein, Sabel and Gerstenberg (2010) describe the current horizontal ordering of the European Legal sphere as a situation where common values are given variable interpretations (p. 520). Essentially, the EU establishes a framework of general rights, but allows each member state to interpret them independently (Sabel and Gerstenberg, 2010, p. 524). When the decisions of National Courts are brought to the EU for review, the EU resists applying its own interpretation of the rights in question, asking instead whether the relevant national system provides, as a whole, a comparable level of rights protection (Sabel and Gerstenberg, 2010, p. 518). If it does, than the EU cedes its authority, deferring to the interpretation of the member state even if it conflicts with the EU Court's own interpretation (Sabel and Gerstenberg, 2010, p.

519). In this way, the EU allows a margin of appreciation for national differences, allowing numerous distinct interpretations of the same principles to coexist (Sabel and Gerstenberg, 2010, p. 520). The EU Court only acts on its unifying prerogative when one interpretation exceeds this margin (Sabel and Gerstenberg, 2010, p. 521). Thus the EU agrees to defer to national rights traditions provided they maintain certain minimal standards, which are set relative to an evolving continental norm. When EU decisions are appealed to National Courts, the national body shows the same deference, provided the decision meets certain minimal standards set relative to the national norm (Sabel and Gerstenberg, 2010, p. 524). In this manner, two horizontally arranged legal orders practice mutual deference based on the mutual guarantee of certain basic minimums (Sabel and Gerstenberg, 2010, p.517). This approach maintains as much unity as is necessary for a predicable legal experience throughout the union, but no more.

In much the same way as the EU model, the Law as Commitment practices deference subject to certain basic minimums, which are ensured by the test of fit. Similarly, the committed group or individual accepts judicial authority subject to a guarantee of minimal respect for its own principles, as embodied in the principle of deference and the Minimal Harm approach. Thus, while the numerous bodies, levels of government, and distinctive institutions that characterize the EU make it a rather unique case, this example provides further support for the idea that diversity based approaches like the Law as Commitment are not automatically destabilizing, and indeed, can provide a functioning basis for predictable social interaction. Accordingly, I believe that there is good reason to believe that something like the Law as Commitment can help provide the type of Independent Hermeneutic Cover envisions.

## 4.3 Suggestions for Further Research

However, this model still remains critically underdeveloped in a number of ways. This section therefore concludes my thesis with several suggestions for further research.

### 4.3.1 Definition of the Legal Corpus

First, Judges will need a stable set of materials to refer when evaluating the narratives before them. However, many normative traditions lack a well-defined corpus, and many more lack consensus as to its content. This model would therefore benefit from a more developed, realistic picture of how the confines of a legal tradition might be established.

### 4.3.2 Group Unity and Hierarchy

This becomes even more difficult given that every community has internal disputes regarding its own narratives, corpus, criteria of commitment, and so on. Rather than simply deciding what is relevant for "the group", the court must also consider who has the power to define relevance within that group. This theory would also benefit from a more nuanced account of how and to what extent groups can be considered salient, what degree of authority they can legitimately wield over their members, and what rights to dissent those members may have.

### 4.3.3 Individualism

The issue of group hierarchy also draws attention to the fact that this model does not automatically preclude individuals from forwarding interpretations of their own, with no basis in a wider community. Whether the Law as Commitment should protect such interpretations is unclear. The model would benefit from a more detailed explanation of why narratives deserve protection, and to what extent this depends on their communal nature.

### 4.3.4 Testing Commitment

These issues surrounding the identification of legitimate legal narratives also raise the inverse possibility, namely that groups and individuals may use interpretative diversity instrumentally, forwarding a given interpretation simply because they believe it will produce a more favorable result, absent any genuine normative commitment. Thus the tests that ensure commitment would need to be rigorous. However, the Supreme Court seems uncomfortable with this sort of inquiry, showing sensitivity to the oscillating nature of belief (Amselem, 2004, p. 9). Future theorists would do well to consider how commitment could be ensured in a manner that is sufficiently rigorous without imposing unfair demands on the claimant.

### 4.3.5 Commitment Bias

The issue of commitment tests also raises the possibility that this model may be biased towards certain groups who more easily fulfill Cover's criteria, which simply state that narratives are usually communal, rooted in a common corpus, possessing a common means of education into that corpus, and backed by intense collective commitments (1998, p. 108). Groups like the Amish, for example, will have no trouble fulfilling such criteria. However, less historically salient, geographically concentrated, and ideologically unified positions, those of folk religions or secular ideologies, for example, may have much greater difficulty establishing their interpretations as law. In this way, the criteria themselves may act as new sites of normative violence, allowing certain forms of narrative to claim to court's protection while others cannot. This theory would therefore benefit from a more in-depth treatment of those criteria.

## 4.4 - Final Conclusions

Originally, this thesis set out to bridge a gap in legal theory. I argued that Cover's insights about the normative nature of the law point to serious deficiencies in our current theories of adjudication, which effectively obscure the court's selective function. In response, this thesis sought to follow Cover's critique through to its conclusions by developing a practical theory of adjudication capable of managing the court's selective function in a more defensible manner.

The result of my inquiry, a theory that I have called the Law as Commitment, is a combination of Cover, Dworkin, Stone and Sunstein. My model is far from perfect. It has not been fully developed, and it fails to definitively resolve the problem of normative violence in law. Nevertheless, by minimizing the frequency and intensity of the court's jurispaethic function, making the contingency of its decisions clear, and preventing relationships of domination, I contend that this model is, at the least, more defensible than current practices.

Socially, I believe that this endeavour is worthwhile because it allows the law to secure strong normative commitments from a wide range of citizens, thus increasing its efficacy as a mechanism of social cohesion. Philosophically, this model is attractive because it allows the state to avoid arbitrary choices, because it protects a wide range of normative and conceptual resources, and most of all, because it facilitates lives that are fulfilling and rich in normative meaning, allowing citizens to grow as they work out the moral implications of their own interpretations rather than simply bowing to a superior coercive force.

As such, my thesis represents a tentative first step down a path that I hope will become more heavily traveled. By theorizing the law as a moral commitment, it is my hope that such efforts eventually will facilitate a public sphere that is not only stable, peaceful and predictable, but also rich, meaningful, and fulfilling.

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