

The University of Ottawa

Department of Classics and Religious Studies

*Religion Drag: The Relevance of “Critical Religion” and Queer Theory to Canadian Law and  
Religious Freedom*

by

Gabrielle Desmarais

Ottawa, Ontario

January 14, 2014

© Gabrielle Desmarais, Ottawa, Canada, 2014

*Religion Drag: The Relevance of “Critical Religion” and Queer Theory to Canadian Law and Religious Freedom*

ABSTRACT

This dissertation analyses the use of the word “religion” in Canadian law and theorises the consequences of its use for the legal protection of religious movements in Canada. Chapter One establishes the problems of the word “religion” in academic discourse by providing an overview of work in the field of critical religion. This dissertation considers whether the critiques of the term “religion” by scholars working within critical religion are equally relevant when considering the role of religion in human rights law. Chapter Two turns an investigative eye toward Canadian case law using the word “religion”, from *Chaput v Romain* (1959) to *Alberta v Hutterian Brethren of Wilson Colony* (2009). The analysis highlights how the use of “religion” in Canadian law does indeed reflect academic concerns. Chapter Three uses queer theory to speculate the consequences of an unstable concept of religion for the protection of religious freedom, especially as it pertains to new religious movements. Judith Butler’s notions of performativity and drag are applied to theorise the performance of “religion” and its outcomes. Some suggestions for how to proceed conclude the dissertation.

## Table of contents

Introduction.....	5
Notes on Methodology.....	11
Chapter One: The Trouble With “Religion”.....	16
Critical Religion: An Overview.....	18
Chapter Two: Canadian Law and “Freedom of Religion”.....	35
Scholarly Perspectives About “Freedom of Religion”.....	37
Pre-Charter Case Law.....	40
<i>Chaput v Romain</i> (1955).....	42
<i>Robertson and Rosettani v R.</i> (1963).....	45
The <i>Québec Charter of Human Rights and Freedoms</i> (1975).....	48
The <i>Canadian Charter of Rights and Freedoms</i> (1982).....	49
Post-Charter Case Law.....	52
<i>R. v Big M Drug Mart Ltd.</i> (1985).....	52
<i>Zylberberg v Sudbury Board of Education</i> (1988).....	56
<i>Allen v Renfrew</i> (2004).....	57
<i>Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine</i> (2004).....	60
<i>Syndicat Northcrest v Anselem</i> (2004).....	64
<i>Multani v Commission scolaire Marguerite-Bourgeoys</i> (2006).....	70
<i>R. v Welsh</i> (2007).....	71
<i>Alberta v Hutterian Brethren of Wilson Colony</i> (2009).....	74
Concluding Remarks.....	77

Chapter Three: The Performance of “Religion”.....	79
Legal Ambivalence and New Religious Movements.....	82
The Church of the Universe.....	85
Wicca and Wiccan Churches.....	90
Contributions of Queer Theory.....	98
Performativity and Gender: An Overview.....	100
“Religion” as Performative.....	103
Subversion and <i>Religion Drag</i> .....	106
<i>Religion Drag</i> .....	108
What Do We Do With “Freedom of Religion”?.....	111
Conclusion.....	114
Works Cited.....	116

*Religion Drag: The Relevance of “Critical Religion” and Queer Theory to Canadian Law and Religious Freedom*

It is difficult to pinpoint the exact beginning of Religious Studies as a scholarly discipline. While biblical interpretation and criticism have existed for centuries, it is commonly accepted that the concept of studying religion from a non-theological point of view is relatively new. Some scholars, such as David Chidester, link the beginning of modern religious studies to the European colonization of foreign continents, which resulted in European explorers interacting with indigenous groups and reporting back about their practices.<sup>1</sup> Others, such as Timothy Fitzgerald, identify the beginnings of the concept of religion (which enabled its scientific study) within the era of the Protestant Reformation and the writings of John Locke.<sup>2</sup> It is difficult to distinguish which claim is more correct; the slow emergence of the “secular” field of religious studies from a previously explicitly theological endeavour makes a clear beginning nearly impossible to precisely identify.<sup>3</sup>

---

<sup>1</sup> David Chidester, “Real and Imagined: Imperial Inventions of Religion in Colonial Southern Africa,” in *Religion and the Secular: Historical and Colonial Formations*, ed. Timothy Fitzgerald (London: Equinox, 2007), 155.

<sup>2</sup> Timothy Fitzgerald, “Encompassing Religion, Privatized Religions and the Invention of Modern Politics,” in *Religion and the Secular: Historical and Colonial Formations*, ed. Timothy Fitzgerald (London: Equinox, 2007), 212.

<sup>3</sup> I have put terms such as “religion”, “religions”, “secularism” and “the secular” in quotation marks to signify their contested status. I do not wish to use them without due reflection; however, since their meanings are intertwined, it is sometimes appropriate to use the word “secular” to mean “separate from religion”, whatever that is perceived to be. For the purposes of my dissertation, all further uses of these terms will be written without quotation marks (unless appropriate), to avoid tedium. I understand these terms to be contested, and my dissertation premises itself on the fact that these words are deeply problematic and have no stable referents.

It appears that the concept of a secular (i.e. non-theological) study of religion began to emerge sometime in the nineteenth century.<sup>4</sup> A notable early step toward a more objective, empirical perspective on religion occurred in 1870, when Friedrich Max Müller (a renowned scholar of Sanskrit) delivered a series of lectures that introduced his audience to the idea of “the science of religion”.<sup>5</sup> Until this time, scholars had been mainly engaging in theological studies or “comparative theology”, fields that were not considered sciences.<sup>6</sup> The shift toward a scientific study of religion seems to have occurred in response to Enlightenment-era ideals, principles that valued objectivity and rationality above all else. Tomoko Masuzawa, a historian of religion who has written extensively on the “world religions” discourse that is so prevalent in modern religious studies, argues that

In its heyday in the latter half of the nineteenth century, comparative theology was a very popular, highly regarded, and respectable intellectual-spiritual pursuit. The proponents of the science of religion in the twentieth century and thereafter, however, have been careful to keep their own practice at a distance from this once prolific enterprise, while reserving the privileged term ‘science’ for studies based on objective appraisal of empirical data, supposedly unmixed with pious sentiments or partisan denominational interests.<sup>7</sup>

---

<sup>4</sup> Tomoko Masuzawa, *The Invention of World Religions, or: How European Universalism was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005), 21.

<sup>5</sup> Masuzawa, *The Invention of World Religions*, 24.

<sup>6</sup> *Ibid*, 23.

<sup>7</sup> *Ibid*, 22.

Scholars of religion thus began, slowly, to examine religious phenomena in more empirical ways, and to separate themselves from theological perspectives; they now often employ the methods of specific social-scientific disciplines, such as anthropology, sociology, psychology, or history. The quantity of different perspectives from which scholars can now approach the topic of religion is vast. Today's religious studies departments permit, and even encourage, researchers to be multi-disciplinary in their approaches. The unity of these programs is not centered on a common methodology, but instead revolves around a shared object of study: religion.

The most vexing aspect of contemporary religious studies is the consistent disagreement that occurs between scholars regarding the object of their study. Despite focusing on a singular topic, "the field has never attained a secure identity; simply put, largely because of such undefended, implicit theories, no one really knows precisely what the study of religion is, what constitutes its data, and what are its goals."<sup>8</sup> The problem becomes glaringly obvious in textbooks and introductory university courses, in which dozens of definitions of the word "religion" are offered, but none are put forward as exhaustive or completely accurate. Notwithstanding the efforts of many theorists, there is no single, widely accepted universal definition of "religion". Far from stifling research projects, as one might imagine, this inability to pinpoint a stable definition has enabled the work of religious studies departments to flourish. The possibilities for the study of "religion", considering the contested and unresolved meaning of the word, are virtually endless. The question remains whether this wide range of possible meanings is a positive development.

---

<sup>8</sup> Russell T. McCutcheon, *Manufacturing Religion: The Discourse on Sui Generis Religion and the Politics of Nostalgia* (New York: Oxford University Press, 1997), 201.

My project discusses the contention of recent critical scholarship that posits that the purpose of Religious Studies, as an academic discipline, is mystified and unclear. Many religious studies departments engage in the scientific study of religion, or *Religionswissenschaft*, a product of the Enlightenment era that posits that religion is a natural, observable and ostensibly essential phenomenon that permeates peoples' daily lives.<sup>9</sup> This premise has remained heretofore relatively unquestioned. The vagueness of the category central to the field, however, leaves researchers without a strong analytic direction, and results in a bemusing variety of conclusions. Scholars such as Talal Asad, Jonathan Z. Smith, and Timothy Fitzgerald have recently suggested that the problem does not lie with researchers, but rather with their object of research. These scholars as well as others have begun to criticize how the field of religious studies reifies a category instead of describing a universal phenomenon. The work of these scholars, and that of their students, has been labeled "critical religion".<sup>10</sup>

Scholars working under the rubric of "critical religion" have as their goal the analysis and deconstruction of the word "religion". They suggest that "religion" is a term with various historical and political connotations, and is not, contrary to popular belief, a descriptive label for an essential and unchanging facet of human existence. Arguments within critical religion arise from various academic specialities such as political science, history, gender studies, and philosophy. Brent Nongbri, for example, insists that scholars who study "ancient religion" commit the error of applying the term "religion" anachronistically to practices that occurred before a discourse about religion even existed; his concern is with the use of the term within the

---

<sup>9</sup> Russell T. McCutcheon, *Manufacturing Religion*, 13, 19.

<sup>10</sup> The field of "critical religion" is only beginning to emerge. In 2012, the Critical Religion Association was formed at the University of Stirling in Stirling, UK by four researchers (Timothy Fitzgerald, Andrew Hass, Alison Jasper, Michael Marten), and it is "committed to approaching religion in a *critical* manner". More information about the Association is available on their website: [www.criticalreligion.org](http://www.criticalreligion.org)

academy.<sup>11</sup> William T. Cavanaugh, in contrast, takes issue with the word “religion” on the basis that discourse about it promotes a “religious/secular” divide, in which the rational “secular” West is permitted to commit violence in the name of protection against a “religious” Other, whose violence is inherently irrational.<sup>12</sup> Common assumptions about religion, such as its distinction from “politics” and “secular society”, are thus being re-examined.

In Chapter One, I demonstrate that the aims and approaches of scholars of critical religion vary, but that they are united in their contention that the term “religion” is problematic. These scholars (Fitzgerald, Asad, McCutcheon, et al.) agree that “religion” is a discursive construction that has emerged in the last three centuries, and that it is a label applied to various behaviours and worldviews that often serve as a way to classify practices in order to fit those practices into a generalized Protestant discourse. “Religion” is, as a descriptor, unstable; its meaning is ever shifting. In addition, scholars of critical religion argue that the concept of religion as an objective phenomenon is a mere few centuries old, and that therefore it can hardly be said that religion is basic to human experience, or that religion is an essential part of human society. They argue that the roots of religion are Christian, that it is a product of European discourse, and that its universalization and imposition onto non-European cultures can therefore be seen as a continuation of colonialism, or a remnant of its legacy.

Certainly, the fact that religion presents a definitional problem for academics may have no bearing on how a concept is understood “on the ground”, in everyday discourse among non-academics. There has been a shift toward discernible sociological and anthropological scholarship that takes an emic approach to religion. In fact, the concern for many contemporary

---

<sup>11</sup> Brent Nongbri, *Before Religion: A History of A Modern Concept* (New Haven: Yale University Press, 2013).

<sup>12</sup> William T. Cavanaugh, “Colonialism and the Myth of Religious Violence”, in *Religion and the Secular: Historical and Colonial Formations*, ed. Timothy Fitzgerald (London: Equinox, 2007).

scholars is not to define the term “religion”, but to determine the ways that people define *themselves* as religious. In studies such as these, the academic perspective on the nature of religion may lack relevance. Nevertheless, I have argued elsewhere, semantics (the meanings attributed to a word) are especially important to consider when appraising the use of terms like “religion” in public policy and human rights law.<sup>13</sup> This is because “words matter, and words spoken by agents of the state matter, at least insofar as they communicate, quite clearly, the Vision of the Good the state endorses.”<sup>14</sup>

In Chapter Two, I argue that the existence of legal provisions for “freedom of religion” in Canada (and in other countries as well) necessarily makes the interpretation of “religion” a key issue. The definition of “religion” in the courtroom determines which groups receive protection under the *Canadian Charter of Rights and Freedoms*, and which do not. Moreover, when deliberating whether a practice or belief is religious or not, the definition of “religion” provided by the claimants is not taken at complete face value, despite the courts’ emphasis on religion as a deeply personal affair. The Supreme Court of Canada often calls upon academics to serve as expert witnesses in these cases, and their input carries significant weight. Therefore, what seems to be merely an academic dispute in fact has a distinct impact on the definition of “religion” in the courtroom and, in turn, affects policy decisions and the protection of human rights for individuals who self-identify as religious.

Citing research in critical religion, I will argue that the ways in which current definitions of “religion” are used in Canadian case law are problematic in the same ways that academic

---

<sup>13</sup> Gabrielle Desmarais, “Law, Critical Religion, and the Importance of Semantics,” *The Critical Religion Association Blog*, November 26, 2012. <http://criticalreligion.org/2012/11/26/law-critical-religion-and-the-importance-of-semantics/>

<sup>14</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton and Oxford: Princeton University Press, 2013), 124.

definitions have proven to be an issue for scholars in religious studies departments. I survey a number of important Canadian legal disputes in which the concept of religion is discussed and, using discourse analysis, I show that the language used to describe religion reflects the vague, Christianized usage that is predominant in modern religious studies. My intent is to critically examine the use of such a vague and vacillating term to inform decisions about human rights.

The most pressing concern, I argue in Chapter Three, is how the language of “freedom of religion” may be affecting new religious movements, or modern ideological groups that identify their own practices as religion.<sup>15</sup> Using a combination of speech act theory, queer theory, and discourse analysis to theorize about the results of my survey of case law, I suggest that the word “religion”, as well as the words that are used to describe it, encourage the *performance* of religion in the realm of law and policy. Using (unfortunately scarce) research and case law surrounding new groups such as The Church of the Universe and Wicca, I argue that, rather than protecting religious freedom, the language of religion in the courtroom *compels* ideological and cultural groups to fashion themselves in a way that is recognizable as religion. The discourse about religion is self-replicating, I argue, and restricts freedom of religion to those structures that successfully mimic conventional notions of what the term means.

### **Notes on Methodology**

My first goal is to examine the language used to describe religion in Canadian courts. Discourse analysis proved infinitely useful in this case. Used by scholars in religious studies

---

<sup>15</sup> In this dissertation, I use “new religious movement” as a name for emerging ideological groups that use the word “religion” to describe themselves or their practices. My terminology is not intended to affirm that these groups are, in fact, “religion”, but rather to show that these groups understand themselves as “religion”.

from all specializations, from late antiquity<sup>16</sup> to contemporary studies in religion and law,<sup>17</sup> discourse analysis involves the investigation of communicative acts (oral, textual, or other) to determine their intent, their effects, and their position in a larger hermeneutical framework. One of the most important writers in the development of discourse analysis is Michel Foucault, who writes extensively on the role of power in the creation and maintenance of grand narratives. His goals include searching “for instances of discursive production (which also administer silences, to be sure), of the production of power (which sometimes have the function of prohibiting), [and] of the propagation of knowledge (which often cause mistaken beliefs or systematic misconceptions to circulate).”<sup>18</sup> Foucault’s concern focuses on the intersection of both power and historically perpetuated communicative acts, especially as they relate to sexuality. Considering my focus on law, it is no surprise that I should interest myself in, and utilize to my advantage, methodologies which seek to outline the power inherent in language and discourse.

In keeping with the practices often associated with discourse analysis, I surveyed multiple academic sources, including edited volumes written by both religious studies and legal scholars; these treatments helped me pinpoint the landmark cases that deal with religion in a meaningful way. Of the myriad cases that touch on the subject of religion, I chose twelve to study at length: *Chaput v Romain* (1955), *Robertson and Rosetanni v R.* (1963), *R. v Big M Drug Mart Ltd.* (1985), *Zylberberg v. Sudbury Board of Education* (1988), *Allen v Renfrew* (2004), *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine* (2004), *Syndicat Northcrest v. Anselem* (2004), *Multani v Commission scolaire Marguerite-Bourgeoys* (2006), *R.*

---

<sup>16</sup> Vernon K. Robbins, *The Tapestry of Early Christian Discourse: A Guide to Socio-Rhetorical Interpretation* (London ; New York : Routledge, 1996).

<sup>17</sup> Lori Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver : UBC Press, 2008).

<sup>18</sup> Michel Foucault, *The History of Sexuality: Volume 1* (New York : Vintage Books, 1990), 12.

*v Welsh* (2007), *Alberta v Hutterian Brethren of Wilson Colony* (2009), *R. v Kharagani* (2011), and *Bennett v Canada (Attorney General)* (2011). The cases were chosen on the basis of their treatment of the definition of “religion”, or of “freedom of religion”. In addition, some cases from the United States were consulted when referenced in Canadian law, or when case law pertaining to a specific group did not exist in Canada.

My examination of the cases at hand involved detailed and careful reading of case law, in chronological order, in order to more easily identify historical shifts in the way “religion” has been defined in court proceedings. I took care to note terminology, repeated words, underlying themes and general arguments surrounding particular conceptions of religion. My main concern was not that of the validity of arguments presented for or against permitting certain practices to be named as religion (i.e. the specific issue of drug use as a religious ritual in *Bennett v Canada*), but rather the ways in which the word “religion” was discussed, framed and compared with other terms such as “secular”.

I have chosen to examine specific legal documents detailing the proceedings of certain cases, in order to provide critical insight into the discourse about religion within Canadian law. This is not, however, a legal analysis. My interest accords with that of sociologist Lori Beaman, who writes: “A legal analysis might suggest that the focus should be on a Supreme Court or Court of Appeal decision that would be a better representation of precedent. However, my concern is not with precedent but with power.”<sup>19</sup> Brent Nongbri argues that “the energy spent on trying to produce a ‘good definition’ of religion or trying to decide whether or not something ‘really is’ a religion might better be directed to individual acts of naming some phenomena as

---

<sup>19</sup> Beaman, *Defining Harm*, 3.

religion and others as not religion.”<sup>20</sup> He asks: “Who gets to make these decisions and what are their reasons?”<sup>21</sup> The latter question accurately summarizes the driving force of my project, and I will endeavour to provide an answer.

I hope to highlight the complications that arise out of the current usage of the word “religion” in Canadian law. In order to accomplish this, I analyse the data I collected from the twelve aforementioned cases according to multiple theoretical frameworks. These included critical religion and discourse analysis, as well as key concepts from queer theory. I have already outlined the reasons why arguments stemming from critical religion are crucial for a nuanced approach to law; perhaps the relevance of queer theory is less obvious. The concepts I borrow from queer theory include (but are not limited to) Judith Butler’s theories about language, performativity, and drag. These concepts, while initially used to describe the social construction of gender through language and behaviour, prove startlingly applicable to the social construction of religion as well. Butler, transforming J L Austin’s concept “performative utterances” (words that enact what they purport to describe), theorizes that the concept of gender, by its use and assignation at birth, *creates* gender as a social fact. In the following thesis, I theorize that a similar phenomenon occurs when discussing “religion” in a courtroom. In addition, just as Butler suggests that drag performers occupy an ambiguous space in the discourse on gender, I argue that new religious movements occupy a comparable space in the legal discourse on “religion”.

Despite the similarities between the goals of critical religion and queer theory, I was initially reluctant to utilize queer theory for my project, since queer theory has “no clear

---

<sup>20</sup> Nongbri, *Before Religion*, 116.

<sup>21</sup> *Ibid.*

definable methodology”.<sup>22</sup> Helen Sauntson summarizes the predicament of queer theory in her chapter of *Gender and Language Research Methodologies*: “‘Queer’ resists methodological classification and organisation in the same way that it resists definition and categorisation. Queer theories, [...] do not have rigorous methodology, therefore their potential application to systematic analyses of language and gender may initially seem questionable.”<sup>23</sup> Queer theory is also often criticized for being too abstract.<sup>24</sup> However, I believe the insights to be gained from using queer theory outweigh its deliberately sibylline qualities. I would venture to say that queer theories, for all that they do not provide statistical, “hard” data, serve as ideal jumping-off points for researchers in the social sciences.

Queer theory seeks to interrogate “the production of the normal” and is thus an indispensable and under-utilized tool within religious studies.<sup>25</sup> I will further detail some of the intricacies of contemporary queer theory, as well as their relevance to my dissertation, in Chapter Three. To conclude, I will consider several solutions offered by scholars such as Winnifred Sullivan and Micah Schwartzman to the problems the word “religion” creates within law. Finally, I will endeavour to posit a solution of my own.

---

<sup>22</sup> Helen Sauntson, “Contributions of Queer Theory to Gender and Language Research,” in *Gender and Language Research Methodologies*, ed. Kate Harrington et al. (Basingstoke and New York: Palgrave Macmillan, 2008), 278.

<sup>23</sup> Sauntson, “Contributions of Queer Theory”, 278.

<sup>24</sup> Ibid, 272.

<sup>25</sup> Claudia Schippert, “Queer Theory,” in *The Encyclopedia of Women and World Religion: Vol. 2*, ed. Serenity Young (New York: Macmillan Reference USA, 1999), 825.

## Chapter One: The Trouble with “Religion”

I would like to introduce the topic of “freedom of religion” by first examining the word “religion”. For the past century, various scholars have attempted to single out the *essence* of religion, the specific words that emphatically describe this universal, complex and overwrought concept. From a short dictionary entry (“the belief in and worship of a superhuman controlling power, especially a personal God or god”)<sup>26</sup> to Edward Burnett Tylor’s “belief in spiritual beings”;<sup>27</sup> from Emile Durkheim’s treatise (“a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into a single moral community, called a Church, all those who adhere to them”)<sup>28</sup> to William James’ description (“the feelings, acts, and experiences of individual men in their solitude so far as they apprehend themselves to stand in relation to whatever they might consider divine”),<sup>29</sup> definitions of religion abound. These definitions loosely imply a kind of fundamental harmony, that religion is a unique experience that is separate from “profane” existence, and that religion concerns “individual men in their solitude”, spanning all cultures and time periods. Nevertheless, these descriptions remain vague and inconsistent with one another.

What if the reason why academics cannot agree on a definition of this universal, ubiquitous thing called “religion” is because there is no such thing at all? This is the question that scholars like Timothy Fitzgerald and Talal Asad have recently dared to ask. For decades, the

---

<sup>26</sup> *Oxford English Dictionary Online*, s.v. “Religion”, accessed July 7, 2013.  
<http://oxforddictionaries.com/definition/english/religion>

<sup>27</sup> E. B. Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, Vol 1. (London: John Murphy, 1903), 424.

<sup>28</sup> Emile Durkheim, *The Elementary Forms of the Religious Life*, translated by Karen E. Fields (New York: Simon & Schuster, 1995), 44.

<sup>29</sup> William James, *The Varieties of Religious Experience: A Study in Human Nature* (Rockville, MD: Arc Manor, 2008), 31.

idea that religion is “simply there” has permeated public and academic discourse. Tomoko Masuzawa even argues that “when it comes to the subject of religion, it appears that the scholarly world is situated hardly above street level. In the social sciences and humanities alike, ‘religion’ as a category has been left largely unhistoricized, essentialized, and tacitly presumed or inherently resistant to critical analysis.”<sup>30</sup> However, since the publishing of Talal Asad’s *Genealogies of Religion* in 1993, or even since Wilfred Cantell Smith’s *The Meaning and End of Religion* in 1962, the field of religious studies has seen a steady and increasing criticism of its very foundation, the object of study that unifies all its scholars’ endeavours: religion.

Critical religion presents an oppositional discourse to the idea that religion is a *sui generis* (unique) category that describes an objective, essential aspect of human existence. Proponents of critical religion are steadily increasing, and they have begun to establish research groups centered on a critical engagement with the category of religion. For example, the Critical Religion Association was recently formed at Stirling University in Stirling, United Kingdom to encourage work in this subfield. The association promotes scholarship that “question[s] the fundamental category of ‘religion’”, which “is sometimes assumed to be a ‘thing’ that simply exists, and this is where, in part, the idea that we can study ‘religions’ as entities in any society or context comes from.”<sup>31</sup> This emerging field raises the question: how can scholars in Religious Studies study religion if they cannot pinpoint what constitute religion?

Critical religionists argue that the reason the discussion of what constitutes religion is never-ending is because the concept of religion is itself a construction, a Christian concept created in the seventeenth century and eventually generalized in discourse, to the point that it no

---

<sup>30</sup> Masuzawa, *The Invention of World Religions*, 2.

<sup>31</sup> “What is Critical Religion?”, *The Critical Religion Association Blog*, accessed July 9 2013. <http://criticalreligion.org/what-is-critical-religion/>

longer describes anything in particular, especially not a universal and trans-cultural human phenomenon. Religion, some critical religionists argue, represents a theological Christian idea which was, over time, spread thin and veiled with universalistic objectivity. In the following chapter, I will outline a number of arguments made by critical religionists that point out the problematic aspects of a universal concept of religion. In Chapter Two, I will show how these problems are paralleled in Canadian legislation.

### **Critical Religion: An Overview**

The first precarious characteristic of a universal concept of religion that critical religionists have identified is that religion (singular) takes an idea from a particular cultural and historical setting and veils it with an aura of factuality that makes it look timeless and natural. In his introductory essay in *Genealogies of Religion* (1993), entitled “The Construction of Religion as an Anthropological Category”, Talal Asad critiques the idea of religion as a cross-cultural category, suggesting that the term, as it is currently used, implies a universal and omnipresent category, and removes it from its historical context (and thus, from its locus of meaning).<sup>32</sup>

Thus, what appears to anthropologists today to be self-evident, namely that religion is essentially a matter of symbolic meanings linked to ideas of general order (expressed through either or both rite and doctrine), that it has generic functions/features, and that it must not be confused with any of its particular historical or cultural forms, is in fact a view that has a specific Christian history. From being a concrete set of practical rules attached to specific processes of power and knowledge, religion has come to be

---

<sup>32</sup> Talal Asad, “The Construction of Religion as an Anthropological Category”, in *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore and London: John Hopkins, 1993), 42-43.

abstracted and universalized.<sup>33</sup>

Religion, Asad says, needs to be relocated in its historicity, and recognized as a cultural-contingent idea, one that emerged in seventeenth century Protestant Britain and has been since reproduced and generalized beyond recognition. To do otherwise is to perpetuate a myth, one that actively applies European colonial practices of homogenization to the rest of the world, pinpointing practices and amalgamating them in an attempt to mirror Western concepts.<sup>34</sup> The terminology used to describe religion is often irrelevant to many cultures; words such as “belief”, “faith” and “worship” are imposed on non-European practices in order to describe them in a way that fits a Christian model.<sup>35</sup> This is exactly the kind of discourse that a universal idea of religion encourages and perpetuates.

To demonstrate his point regarding the loss of particular meaning that occurs when a universal definition is used, Asad engages in a critique of Clifford Geertz's now famous definition of “religion”, quoted below:

(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.<sup>36</sup>

---

<sup>33</sup> Ibid, 42.

<sup>34</sup> Asad, “The Construction of Religion”, 54.

<sup>35</sup> Ibid, 47.

<sup>36</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 90.

Asad argues that this definition could also be applied to secular ideologies; in fact, to almost anything at all, and represents an appropriation and expansion of Christian ideological concepts to an almost meaningless degree. An ahistorical definition, he argues, cannot be used accurately, “not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes.”<sup>37</sup> The symbols that Geertz suggests are so important, Asad argues, are significant precisely because they are intimately linked to specific cultures.<sup>38</sup> The authorization and attribution of meaning of symbols, he says, go hand in hand with processes of power.<sup>39</sup> A universal definition of religion fails to take account of such contexts and dynamics.

Tomoko Masuzawa, for her part, uncovers the roots of religion in seventeenth century Britain, much like Asad.<sup>40</sup> In her book *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism*, she documents the emergence of the ahistorical notion of religion. She notes that religion “had not been, until the eighteenth century, a particularly serviceable idea, at least for the purposes we employ it today – [yet] came to acquire the kind of overwhelming sense of objective reality, concrete facticity, and utter self-evidence that now holds us in its sway.”<sup>41</sup> She argues that the process of identifying and classifying what were called “Oriental religions” in the nineteenth century formed part of a European logic whereby other nations were “presumed to have one (or sometimes more than

---

<sup>37</sup> Asad, “The Construction of Religion”, 29.

<sup>38</sup> Ibid, 35.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Masuzawa, *The Invention of World Religions*, 2.

one) of these world religions in lieu of Christianity.”<sup>42</sup> Our conception of religion and its plurality, then, is not based in natural fact, but in a kind of ethnocentrism through which European scholars organized the world. Masuzawa’s work not only serves to destabilize the notion that there are such universal things as “world religions”, but also to remind us that religious pluralism, and government practices perpetuating the idea of religious pluralism, while intending to promote diversity and equality, project a universalistic image of what religion and its diversity should look like based on European conceptions of the universe. The generalization of religion obscures its specific origins and thus assumes that its application is generally appropriate.

Russell McCutcheon has also argued that a universal concept of religion is fallacious, writing about what he calls “*sui generis* religion” in his book *Manufacturing Religion*. He argues that treating religion as universal disturbs the concept’s usefulness as a referent to a specific, historically-contingent phenomenon of Western culture. He writes:

the taxonomic category of religion is useful inasmuch as it is but one conceptual apparatus employed to investigate an aspect of historical human behaviour and beliefs from the vantage point of one theoretical position. To presume, however, that the category “religion” signifies something fundamentally different from all other aspects of human life and experience, that such experiences and behaviors necessarily possess a reality that somehow transcends, predates, or founds the historical person making the claim or doing the religious action, generates a surplus value for the taxonomic term

---

<sup>42</sup> Ibid, 29.

“religion” that is not defensible in historical terms.<sup>43</sup>

He goes further to state that such generalized use of the category “religion” functions ideologically, obscuring its own history and context in order to maintain a naturalized social privilege.<sup>44</sup> This discourse, which posits religion as a natural and timeless phenomenon, prevents academics from having to justify their categorization of phenomena as religion, even if these phenomena occur in non-Western cultures.<sup>45</sup> Such a presumption, McCutcheon suggests, “accomplishes a very effective seclusion” of religion from scrutiny, and simultaneously minimizes “the importance of historical relations between humans” due to the reverence attached to the presumed atemporal nature of religion.<sup>46</sup>

A second way that the term “religion” is problematic is that it is used anachronistically to describe ancient practices that existed before the word “religion” was born. As Tomoko Masuzawa writes, “the discourse of world religions takes for granted the idea of ‘religion itself’ as a ‘unique sphere of life,’ and ... it presumes that this sphere is prevalent throughout the world and throughout history.”<sup>47</sup> Nongbri highlights this problem by stressing that “‘religion’ is a modern concept, and ‘the religions’ are the products of modern interactions”; therefore, to talk about ancient practices using these terms is inappropriate.<sup>48</sup> He writes that “[r]eligion has a history. It was born out of a mix of Christian disputes about truth, European colonial exploits,

---

<sup>43</sup> McCutcheon, *Manufacturing Religion*, 19.

<sup>44</sup> *Ibid*, 29, 31.

<sup>45</sup> *Ibid*, 4.

<sup>46</sup> *Ibid*, 19.

<sup>47</sup> Masuzawa, *The Invention of World Religions*, 313.

<sup>48</sup> Nongbri, *Before Religion*, 113.

and the formation of nation-states. Yet the study of religion as an academic discipline has proceeded largely on the assumption that religion is simply a fact of human life and always has been.”<sup>49</sup> To describe ancient Greek or Roman practices as religion, he says, or to translate terms such as the latin *religio*, the greek *threskeia* or the arabic *din* as “religion”, is to cast a modern Western viewpoint over the data. He argues that this misrepresentation occludes accurate information about Greek and Roman practices. The consequence of his arguments pertains primarily to academics, but it is important to note that the discourse on religion which enables such descriptions, and which compels “[t]extbooks, departmental websites of universities, and the media [to] present the model of World Religions as a self-evident fact: these religions are ‘simply there’, and classifying them in this way is a natural and neutral activity,” also informs non-academic discourse.<sup>50</sup> Claiming that the word “religion” can be traced back through time reinforces the concept’s indisputability.

In a paper presented at the 2012 graduate conference “On Religion: Definition, Delimitation, and Application” at Indiana University, Gloria Lopez engages in a discussion of the merits and downfalls of the category “religion” in academic discourse. Citing Daniel Dubuisson’s *The Western Construction of Religion*, Lopez outlines the history of the emergence of the contemporary category of religion, especially the universalization of the term in the nineteenth century, which, she argues, resulted from Christianity’s shifting cultural ties.<sup>51</sup> Dubuisson insists on a historically conscious dialogue about religion. The problem with the current usage of “religion”, she suggests, is that without paying attention to the historical context

---

<sup>49</sup> Ibid, 154.

<sup>50</sup> Ibid, 129.

<sup>51</sup> Gloria Lopez, “Removing ‘Religion’ From The Universe: A Proposal for Reform and Translation” (paper presented at the graduate conference “On Religion: Definition, Delimitation, and Application, Bloomington, Indiana, February 24-25, 2012).

of the emergence of "religion" (or its older cognates, like the latin *religio*), we unquestioningly apply a term used in ancient Roman culture to unrelated phenomena such as Vedic literature or new religious movements, a discursive practice that leads to misunderstanding cultural expressions and the unhelpful conflation of several different phenomena.<sup>52</sup> The key, Lopez says, is not necessarily to try to redefine "religion", an inherently Eurocentric term, but rather to consider using another, more collaborative term: "Instead of insisting that our language refers to universals, language must be reconstituted as the starting point from which we can orient ourselves to the rest of the world."<sup>53</sup> Research like Nongbri's and Lopez' further demonstrates the pervasiveness of a socially constructed discourse about religion. Such research shows that the concept has been naturalized by its projection back in time, and that this anachronism affects not only the future treatment of religion, but also our interpretation of the past.

A third problem with the concept of religion is that the word has become very vague. Timothy Fitzgerald highlights this point in *The Ideology of Religious Studies*. He contends that "[r]eligion' and 'religions' are used in a vast variety of contexts to include so many different things that they have no clear meaning."<sup>54</sup> I will argue later that this amorphousness is at odds with human rights codes that insist that religion is inherently meaningful. I am not implying that people who describe themselves as religious do not ascribe meaning to the term, but rather that "objective" descriptions of the word "religion" (used by scholars and policy makers) are unclear. Fitzgerald writes:

---

<sup>52</sup> Lopez, "Removing 'Religion' From The Universe".

<sup>53</sup> Ibid.

<sup>54</sup> Timothy Fitzgerald, *The Ideology of Religious Studies* (New York, Oxford: Oxford University Press, 2000), 6.

This world of natural rationality is an ideological construction, and quite frequently scholars who are sensitive to this refer to the secular institutions such as the nation, the principles of the Constitution, and the values of the civil society and the family as being part of civil religion. But this common scholarly usage destroys the very distinction between religion and the secular assumed in the first place, because virtually everything is 'religion', in which case the term has lost any clear referent or meaning.<sup>55</sup>

If virtually everything is religion, including many things which we would normally describe as being secular, then what interests do the separation of religion from the secular serve? A fourth, connected point of contention expressed by scholars of critical religion is that the category "religion" serves, in an administrative sense, to depoliticize certain groups and to shore up the certainty of a secular and objective nation state. In his most recent book, *Religion and Politics in International Relations: The Modern Myth*, Fitzgerald argues that the existence of the category "religion" in opposition to "secularism" legitimates the latter by making the world of secular rationality seem natural, benign and "really real".<sup>56</sup> He writes that "the distinction between the religious and the non-religious secular is a powerful modern myth which, like other dominant myths, has come to be taken for de facto truths about the world, embedding largely unconscious assumptions about reality which appear intuitively self-evident and unchallengeable."<sup>57</sup> This distinction obscures the ideological nature of systems such as

---

<sup>55</sup> Fitzgerald, *Ideology*, 8.

<sup>56</sup> Timothy Fitzgerald, *Religion and Politics in International Relations: The Modern Myth* (New York and London: Continuum, 2011), 15.

<sup>57</sup> Fitzgerald, *Religion and Politics*, 85.

neoliberalism and capitalism, and severely limits the opportunity for alternatives.<sup>58</sup> Fitzgerald sees this mystification as particularly dangerous. The issue is not that people identify as “religious” or “non-religious”, but that these two terms reinforces the constructed dualism of religion versus secularism. The existence of this dualism naturalizes secularism as objective fact and disguises its ideological and political aspects.

Fitzgerald muses about the consequences of such a mistake for discourses about law:

If, for example the state were not assumed to be essentially different from religion and therefore itself non-religious, it would be unable to enforce laws that demarcate religion from the state or from politics. If courts were not deemed to be essentially secular, non-religious institutions, they would be unable to make believable judgments about which groups can legally be classified as religious and which cannot. That such judgments are made on the basis of criteria that to a great extent are arbitrary or at least unclear does not contradict the assumption of essential differences embedded in the procedures.<sup>59</sup>

This “essential difference” between religion and the secular structures current Western political and legal systems, and constitutes a useful fiction. However, to maintain such a trenchant division results in the depoliticization of groups and individuals whose commitments and values are deemed religious by the state. While secular values (often indistinguishable from “religious” ones) are permitted to affect public policy, values informed by religion are not. The difference between religion and the secular also raises religion to a status beyond scrutiny, and

---

<sup>58</sup> Ibid, 10.

<sup>59</sup> Ibid, 85.

makes it “unchallengeable”.<sup>60</sup> Religion is also privileged by the state in particular ways through its supposed separation from politics, exemplified by such practices as receiving tax-exempt status. Fitzgerald argues that the separating away of religion helped, historically, in the creation and proliferation of capitalist markets, especially in colonized countries.

McCutcheon also takes issue with the idea of religion as an apolitical, benign phenomenon, an association that arises due to the pervasive “religion/secular” divide. The problem, he says, is that a universalized idea of religion prevents critical dialogue and removes political power from particular groups whose motivations are deemed religious by the state.<sup>61</sup> Religion, he says, is deeply involved in processes of power.<sup>62</sup> Not only does the discourse of religion, according to McCutcheon, lump phenomena together that do not necessarily have anything essentially in common with one another, but the adherence to the idea of an apolitical, ahistorical and sacrosanct category “religion” limits the potential for critical and progressive dialogue on the subject.<sup>63</sup> Religion, as an ostensibly objective category, also obscures the processes of power that surround the designation of certain groups as religious, effectively removing them from the political realm.

Furthermore, McCutcheon argues that there is a large group of people who want to preserve the appearance of the category as *sui generis* (or, at least, who do not challenge it), because religion legitimates an entire economy of academics whose jobs depend on the existence of the field of religious studies.<sup>64</sup> He therefore strongly advocates for the dissolution of religious

---

<sup>60</sup> Ibid.

<sup>61</sup> McCutcheon, *Manufacturing Religion*, 133.

<sup>62</sup> Ibid, 18.

<sup>63</sup> Ibid, 11, 26.

<sup>64</sup> Ibid, 22, 31.

studies departments because their mere existence does nothing except proliferate and solidify a *sui generis* concept of religion.<sup>65</sup>

A fifth problematic aspect of religion, one that is nearly unanimously agreed upon by scholars of critical religion and which serves as a key focus for this dissertation, is the fact that the category of “religion” is inherently Christian. By “inherently” Christian, I mean to point out that the category was constructed in a Christian context, to serve Christian purposes, and continues to be framed according to Christian concepts. Fitzgerald argues that “religion” does not adequately or clearly define any universal cross-cultural concept that is not reducible to culture, ideology, or society, *without delving into Christian theological language and arguments*.<sup>66</sup> Religion is an intrinsically Christian theological concept, and attempts to “secularize” it for analytical purposes have still maintained the word’s links to theological arguments. Fitzgerald writes:

[R]eligion was traditionally used to mean something like faith in God or faith in Jesus Christ and in the church and priesthood who serve him. However, through a historical process [...] writers such as the deists since at least the eighteenth century have self-consciously attempted to transform the meaning of religion, reduce its specifically Christian elements, and extend it as a crosscultural category. This has stretched the meaning of God and related biblical Judaeo-Christian notions such as the Lord’s providence to include a vast range of notions about unseen powers. This has given rise to

---

<sup>65</sup> McCutcheon, *Manufacturing Religion*, 201.

<sup>66</sup> Fitzgerald, *Ideology*, 8.

intractable problems of marginality.<sup>67</sup>

These connections to Christianity, he says, while persistently disavowed, are inevitable because they are tied to the history of the term “religion”.<sup>68</sup> These connections also prevent the term from being fully secular or objective, since the link of religion to Christianity helps to reinforce the all-too-important perceived ontological difference between “religion” and “the secular”.<sup>69</sup> Religion, he says, can never be an “objective” category, though academics and policymakers use it as if it were.<sup>70</sup>

This connection to Christianity does not end with the word “religion”, but extends also to other cognates. Fitzgerald writes that “ecumenical theology in the form of phenomenology has significant de facto institutional control over the meaning of the category religion, and to a lesser extent over terms such as ‘sacred’, ‘soteriology’, and ‘transcendence’. [...] The word [religion] is so thoroughly imbued with Judaeo-Christian monotheistic associations and world religion ecumenicism that it tends to also color the meaning of the other three.”<sup>71</sup> I argue that this observation extends to other related words used to describe religion: “faith”, “worship”, “belief”, and so on. These words have their roots in Christian contexts, and despite being used to describe groups and practices outside of Christianity, the linkages remain. These connections are important to keep in mind as I continue to examine the language surrounding religion in Canadian courtrooms in Chapter Two.

---

<sup>67</sup> Fitzgerald, *Ideology*, 5.

<sup>68</sup> *Ibid.*, 3.

<sup>69</sup> *Ibid.*, 106.

<sup>70</sup> *Ibid.*, 4.

<sup>71</sup> *Ibid.*, 19.

Brent Nongbri agrees with the argument that the modern Western conception of religion is basically Christianized. He expresses bafflement when discussing religious studies scholars who continue to use the word as if it were unproblematic, arguing that there is “a widespread conviction that the history of religious studies has brought about a progressive purging of those Christian assumptions such that religion has become a more and more universally valid descriptive category.”<sup>72</sup> Nongbri argues that religion became useful for cross-cultural analysis specifically through an attempt to reduce the overtly Christian language with which it began, and to substitute them for more general terms such as “Ultimate Concerns”.<sup>73</sup> This substitution does not negate the fact that the concept is specifically Christian. Therefore Nongbri judges the efforts of finding a universal definition of “religion” to be misguided, and advocates instead for a more specific focus for academic study.<sup>74</sup>

Masuzawa, like Fitzgerald, demonstrates that the concept of religion is closely tied to Christianity. Her perspective is a historical one and she notes that the superiority of Christianity used to be regarded as common sense. She writes: “so many nineteenth-century authors of varying attitudes toward non-Christian religions claimed – or, for the most part, assumed – that their enterprise of comparing religions without bias was not only compatible with but in fact perfectly complementary to their own proudly unshakable conviction in the supremacy of Christianity.”<sup>75</sup> Non-Christians who recognized a “supreme being” were interpreted as having religion, though it was “not quite right”.<sup>76</sup> Jews and “Mohammedans”, in contrast, were viewed

---

<sup>72</sup> Nongbri, *Before Religion*, 155.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Masuzawa, *The Invention of World Religions*, 103.

<sup>76</sup> Ibid, 49.

as simply denying the essential truth of Christian salvation.<sup>77</sup>

Closely tied to the Christian imperial history of the term is a sixth problem pertaining to religion, which is that it has been used historically as a tool for colonizing non-European peoples. David Chidester points this out repeatedly in his writings. He is concerned not simply with the implications of the “secular/religious” divide in the West that permeates and even structures almost all discourse about religion, but also the ways in which such a distinction has historically served colonial enterprises. He argues, in “Real and Imagined: Imperial Inventions of Religion in Colonial Southern Africa”, that the West, by fostering an ideology that separates “irrational” religion from “neutral” and “rational” secularism, raised itself above other “primitive” cultures (who had no such distinction).<sup>78</sup> This separation permitted, and even encouraged, the advancement of Western forms of social organization.<sup>79</sup> In addition, since religion has historically been understood as Christianity (in myriad forms), colonial forces could legitimize their treatment of colonized peoples. Since the non-Europeans did not have religion (as the colonizers understood it), and all humans were posited to have religion, the colonized peoples were therefore regarded as not fully human.<sup>80</sup>

Masuzawa writes about the historic attitude of Christian colonizers toward non-European cultures and their conjectured “lack” of religion, arguing that

the most significant chasm among nations was between those who had knowledge of one supreme deity and those who did not. The latter, whether they were those who had

---

<sup>77</sup> Ibid.

<sup>78</sup> Chidester, “Real and Imagined”, 104.

<sup>79</sup> Ibid, 103.

<sup>80</sup> Ibid, 156.

lamentably fled to the hill and to the “heath,” clinging to their old bucolic ways at the advent of Christianity, or those who simply had the misfortune of having lived before the time of Christ, or those now inhabiting the hinterlands still remote from the saving grace of the church, were all spiritual rustics, as yet untouched by the civilizing knowledge of Christianity. They did not have religion in the proper sense of the term, but in its place they had something that resembled it...<sup>81</sup>

Processes of colonization worked hand-in-hand with processes of conversion. The mechanism through which “primitive” cultures were “civilized” and educated included, among other things, the abandonment of dated or ancient religion and the adoption of Christianity.<sup>82</sup> As John Caird wrote in 1882 regarding religion in India, “he who seeks to convert a heathen must himself become a heathen – must, by a kind of intellectual self-abnegation, endeavour to throw himself into the point of view of the minds he would elevate.”<sup>83</sup> This is problematic in several ways, most importantly because it devalues non-European cultural practices by conceptualizing them as “faulty Christianity”. The division between “true religion” and “false religion” has its roots in Christian theology regarding interpretation of God’s word,<sup>84</sup> and the idea of such a distinction continues, to this day, in the court’s concept of fictitious, capricious and artificial religion.<sup>85</sup>

The seventh and (for this paper) final problem with religion is that it can (and often does)

---

<sup>81</sup> Masuzawa, *The Invention of World Religions*, 48.

<sup>82</sup> Ibid.

<sup>83</sup> John Caird, “Religions of India” (1882), cited in Masuzawa, *The Invention of World Religions*, 80.

<sup>84</sup> Timothy Fitzgerald, *The Ideology of Religious Studies*, 103.

<sup>85</sup> *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 SCR 551, Overview.

easily serve as a scapegoat to justify state violence. William T. Cavanaugh calls attention to the contemporary political consequences of the division between religion and the secular in *The Myth of Religious Violence*. Citing critical scholarship about the category of religion as his basis, Cavanaugh pushes Fitzgerald's observations about "religion" and "the secular" further, arguing that the separation of two realms and the association of secularism with rationality (and, in contrast, religion with irrationality) legitimates state violence against groups labeled religious. He writes:

In foreign affairs, the myth of religious violence contributes to the presentation of non-Western and nonsecular others as inherently irrational and prone to violence. In doing so, it helps to create a blind spot in Western thinking about Westerners' own complicity with violence; the history of our interactions with the non-Western world need not be investigated too closely, for the true roots of "rage" against the West are the violent impulses in religion that nonsecularist actors have failed to tame. The myth of religious violence is also useful, therefore, for justifying secular violence against religious actors; *their irrational violence must be met with rational violence*. We must share the blessings of secularism with them. If they are not sufficiently rational to be open to persuasion, we must regrettably bomb them into higher rationality.<sup>86</sup>

Cavanaugh argues that this kind of thinking can be found imbedded in many of the foreign policy strategies of Western democracies. The dichotomy between the rational West and the irrational East is enabled, in large part, by the existence of a "religion/secular" divide and the

---

<sup>86</sup> William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York and Oxford: Oxford University Press, 2009), 226.

presumed superiority of a rational secular mindset. Yet, he does not necessarily want to suggest that there is a conspiracy against religion and non-Western cultures by Western secularists – he merely wants to point out the concepts which are entrenched in an ideology that seems natural and unquestionably superior.<sup>87</sup> The fact that such an indisputable status is granted to a single ideology (since, as Asad and Fitzgerald argue, secularism is as much an ideology as any religion) is unsettling. The interrogation of the category of “religion” promoted by critical religionists does not seek to only reveal the unstable nature of religion, but also its contingent category, “the secular”.

### **Concluding Thoughts**

From its distinct (yet often disavowed) Christian past to the ways in which the vague term is used to shore up the certainty of a secular society, the category of “religion” is not without its ambiguity and contradictions. Nevertheless, people continue to use religion as an identity category in their day-to-day lives, and the category has therefore been included in human rights codes in Canada, notably the *Canadian Charter of Rights and Freedoms*. The existence of religion as a legal category despite the term’s inconsistency creates the potential for serious infringements of human rights, and is worth thorough examination. Do the same issues that arise in the academic discourse about the study of religion affect the law’s use of “religion” for the purposes of protection of individual freedoms? If so, how do these problems pertaining to definition affect the concept of religious freedom?

---

<sup>87</sup> Cavanaugh, *The Myth of Religious Violence*. 183.

## Chapter Two: Canadian Law and “Freedom of Religion”

Since the mid-twentieth century, religion has been a central concern of politicians, policy makers, international affairs delegates, and human rights activists. In Canada, the enactment of the *Canadian Charter of Rights and Freedoms* solidified the importance of religion in relation to rights, and pronounced "freedom of religion" to be an inalienable right alongside freedom of expression, peaceful assembly, and free association. The *Charter* was enacted through the effort of Pierre Elliott Trudeau in 1982 and is considered one of the shining achievements of his term as Prime Minister of Canada. Section 2(a) of the *Charter* explicitly protects “freedom of conscience and religion”. It is considered by many to be a positive development in Canadian law (although there are dissenting voices)<sup>88</sup> and a demonstration of Canada’s renowned commitment to diversity and multiculturalism.

An interesting aspect of the use of the term “religion” in Canadian law is that its meaning is never clarified in foundational documents like the *Charter*. Religion has historically been considered to be self-evident, until the recent emergence of cases that involve practices or beliefs that do not coincide with a traditional concept of religion, or practices which are imported into Canada from other countries, such as the wearing of the kirpan by Sikhs.<sup>89</sup> It is in regard to these instances that the courts find it necessary to define “religion” with the help of expert opinions (which include academic evaluations). Religion, by virtue of remaining undefined in the *Charter*, continues to be contested in the courtroom. What is absent from most case law, and from scholarship surrounding the history of “freedom of religion” in Canada, is an acknowledgment of the political implications of the mere existence of religion in law. Who decides what qualifies as

---

<sup>88</sup> Lorraine E. Weinrib, “Ontario's Sharia Law Debate: Law and Politics under the Charter” in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 240

<sup>89</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6

religion and what does not? What measures does the law take to investigate the legitimacy of a claim to religion? Should the state even be attempting to be selective in this way? In the following chapter, I examine the way the term “religion” is defined and discussed in ten Canadian cases in the span of over fifty years. Taking particular notice of the language used to describe “religion”, I show that the use of the term reflects many of the problems highlighted by critical religionists in recent years.

When I speak of the meaning of religion, I am speaking of the understanding of the word “religion” in a strictly legal sense (what is considered religion and what is not by a court of law), and not about the popular or individual significance the word accrues in common usage. The latter task can perhaps be left to sociologists and anthropologists. These particular, individual and deeply personal understandings of religion are not the focus on my project. I am specifically interested in the history of religion as a category in Canadian law: its semantics, its interpretations and, as I will theorize in Chapter Three, the possible effects that some aspects of the term “religion” might be having on the ways in which new religious groups are formed.

I am not attempting to write a legal analysis.<sup>90</sup> It is my intent to conduct an analysis from outside a legal framework, in order to “put law in context”; specifically, the context of critical inquiries about the category of “religion”.<sup>91</sup> I will focus not on the ways in which society as a whole understands the word “religion”, but on the ways certain understandings of that word become institutionalized, standardized and reified through the citation of “religion” in Canadian law.

---

<sup>90</sup> Beaman, *Defining Harm*, 3.

<sup>91</sup> *Ibid.*

### **Scholarly Perspectives About “Freedom of Religion”**

Before delving into Canadian case law, I would like to briefly survey some scholars’ perspectives on the concept of “freedom of religion” in Canada, related to both its contemporary usage and its history. These perspectives are important because they provide context within which my data can be more fully understood. Richard Moon, in his edited collection of essays, *Law and Religious Pluralism in Canada*, argues that the increase in religious diversity in Canada has inevitably led to a rise in legal conflicts about which religious practices are acceptable or tolerable in Canadian society.<sup>92</sup> Although Canada does not, like the United States, have laws that prohibit state establishment of a particular religion, there is an understanding that the state should treat all religions equally, which “entail[s] the exclusion of religion from public life, the separation of law from religion”.<sup>93</sup>

Canada has, since the 1980s, employed a number of tactics to promote religious accommodation, which distinguishes its interaction with religion from some other countries, like France, that insist on a complete separation of religion from public life.<sup>94</sup> The notion of religious equality is enshrined in the *Canadian Charter of Rights and Freedoms*, which dictates the ways in which the Canadian government can and should help to provide equal footing for religious citizens. The important clauses in the *Charter* pertaining to religious freedom and equality are Section 2, which prevents “coercive interference” from the state in the lives of religious adherents, and Section 15, an equality provision which protects citizens from discrimination

---

<sup>92</sup> Richard Moon, “Introduction: Law and Religious Pluralism in Canada”, in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008), 2.

<sup>93</sup> Ibid.

<sup>94</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship”, in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 89.

based on their religious ties.<sup>95</sup>

Bruce Ryder argues that, over all, Canada's approach is superior to that of other Western democracies, because its treatment of religion is not confined to such strict separation and non-participation with religion as in other countries.<sup>96</sup> In Canada, the state is free to promote religious freedom, as long as it treats all religions equally while doing so. Ryder, however, argues that although equal religious citizenship may seem simple on paper, new groups must first struggle to be understood, recognized and accepted under the rubric "religion" before they can be accommodated under Charter provisions.<sup>97</sup>

There are three major concerns in relation to how religion is handled in Canadian law: the definition of the word, the measuring of beliefs' sincerity, and the question of reasonable limits. Definitions of "religion" are necessary to establish a religious freedom case in any instance in which the status of a claimants' practices as religion are unclear. This definition can either be substantive or functional, with each presenting its own problems.<sup>98</sup> Substantive definitions, Beaman writes, risk essentialization, while functional definitions may be too encompassing.<sup>99</sup> A fine line must be drawn between definitions that are too narrow, and those that are too accepting. Often when establishing whether a belief or practice should be protected, the court inquires into the sincerity of said belief. The idea of measuring the sincerity of religious beliefs (meant to ensure that the rights accorded to religion are not also accorded to fraudulent claims) is

---

<sup>95</sup> Ryder, "Equal Religious Citizenship", 93.

<sup>96</sup> Ibid, 95.

<sup>97</sup> Ibid, 89.

<sup>98</sup> Lori Beaman, "Defining Religion: The Promise and Peril of Legal Interpretation", in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 193.

<sup>99</sup> Ibid.

problematic, since the court posits religious belief as private and personal.<sup>100</sup> How can the state accurately judge the sincerity of something that it understands primarily as an inward experience? Finally, the court's strategy of utilizing the notion of "risk of harm" to determine the acceptable limits of religious liberties may seem an even-handed tactic for a multicultural society; but as Beaman points out, the notion of harm is far from objective, and implies that minority religious groups are prone to harm and must be controlled.<sup>101</sup> This division is hardly the equal footing for religious groups that is presented in the *Charter*.

According to Moon, one of the reasons there is a debate about the level and style of support for religion in law is that there is a constant shift within legal discourse from the notion of religion as a personal choice to one of religion as an inalienable part of one's identity, and back again.<sup>102</sup> This ambivalence, he argues, leads to a tension in the ways disputes involving religion are dealt with in the courtroom.<sup>103</sup> Technically, the Canadian government is required to take a neutral stance when it comes to religion: it must not work against religion, but it may not favour religion over non-religion, nor support any particular denomination. However, neutrality is only simple to achieve if it remains an abstract concept; when applied to real communities, the balance is difficult to achieve. One of the major concerns of using religion is that the

---

<sup>100</sup> Ibid, 200.

<sup>101</sup> Ibid, 210. Beaman is particularly interested in the notion of "harm" in Canadian legal discourse. Using the case of Bethany Hughes, a Jehovah's Witness whose right to refuse blood transfusions based on her religious beliefs was denied, Beaman investigates the ways in which notions of risk, harm and excess became justifications for this refusal. In the B.H. case, Bethany's agency is called into question repeatedly: expert opinions were sought to counteract Bethany's own testimony of her beliefs, the notions of harm and "common sense" were used to discredit her wishes, and her agency was reduced by claims that her environment (her mother and her community) had somehow "brainwashed" her. Beaman is concerned with sedimentations of power and how they play out in the courtroom, and investigates this at length in *Defining Harm*.

<sup>102</sup> Richard Moon, "Government Support for Religious Practice", in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 217.

<sup>103</sup> Moon, "Government Support", 218.

government has the power, by supporting religious practices, to compel or coerce non-believers (or people of another religion) into participating in religious practices that are not their own.<sup>104</sup> The state also has the power to make non-believers or religious minorities feel excluded from a full political participation.<sup>105</sup> Finally, the government can explicitly *impose* particular beliefs and morals on non-believers by creating laws enforcing certain religious practices, as opposed to simply compelling these practices by showing popular support for the religion that prescribes them.<sup>106</sup> While not related specifically to the definition of “religion” and the ambiguities that such a definition might entail, Moon highlights the predicaments that arise from the implementation of “religious freedom”, definitional issues notwithstanding. All of these complications in the governmental treatment of the word “religion” testify to the difficulties created by including “religion” in fundamental governing documents, even without taking into account the insights of work in critical religion.

### **Pre-Charter Case Law**

If we examine case law prior to 1982 (the year of the establishment of the *Canadian Charter of Rights and Freedoms*), we can see that the idea of “freedom of religion”, though perhaps not framed in such terms, had already begun to take root in Canadian legal discourse. As a colony of both England and France, Canada was heavily influenced by both the conception of a divide between religion and the secular (made popular by British philosopher John Locke) as well as the French notion of *laïcité*; both ideas influenced Canada’s eventual formation as an

---

<sup>104</sup> Ibid, 220.

<sup>105</sup> Ibid, 227.

<sup>106</sup> Ibid, 220.

officially secular state. Unlike the United States, Canada does not have any laws which explicitly forbid the establishment of a state religion, nor does it enforce a notion of the “separation of church and state”; however, given the close historical formation of both countries, their political ties, and their geographical proximity, it comes as no surprise that Canada has often interpreted “freedom of religion” in a way that mirrors the anti-establishment aspects of America legislature.

Freedom of religion as it is understood today (“freedom of religion as protecting freedom to follow one’s religious beliefs and practices, freedom from state imposition of religious precept and action, and the equal standing of all religious faiths”) was only made formal in 1982; prior to this date, Canada was understood to be a Christian country.<sup>107</sup> In fact,

[j]ust a century ago, the Minister of Justice of Canada reflected public opinion when he stipulated that Christianity was an embedded component of Canadian law. On this basis, Parliament enacted legislation that supported Christian Sabbath observance. There was no challenge to the idea that the Christian majority was entitled to deploy its political power to arrange daily life to suit its religious precepts.<sup>108</sup>

In addition, David Schneiderman notes that “[a]lthough there was not a religion ‘established’ at Confederation, religious minorities and dominant denominations – Roman Catholic and Protestant – were guaranteed education rights constitutionally at Canada’s founding in 1867.”<sup>109</sup> This binary regarding traditions in the religious history of Canadian law, one that

---

<sup>107</sup> Ibid, 244.

<sup>108</sup> Ibid, 244.

<sup>109</sup> David Schneiderman, “Associational Rights, Religion and the *Charter*” in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 66-67.

focuses on two forms of Christianity, is evident in the way that religion is discussed in case law, since the terminology used in the courtroom reflects primarily Christian rhetoric.

### ***Chaput v Romain (1955)***

A concrete example of the understanding of religion as Christian is the 1955 Supreme Court case of *Chaput v Romain*. In this case, the court is informed that two provincial police officers were instructed to find and disperse a religious service conducted by Jehovah's Witnesses in a private home.<sup>110</sup> The appellant (the owner of the home where the service was being held) argues that the police actions violated the law, which forbade the obstructing of religious services.<sup>111</sup> The *Criminal Code of Canada* (first enacted in July 1892) stated in sections 199 and 120 (in very similar wording) that such obstruction was illegal. Section 199 read as follows:

199. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place.<sup>112</sup>

---

<sup>110</sup> *Chaput v Romain*, [1955] SCR 834, 839.

<sup>111</sup> *Chaput v Romain*, 836.

<sup>112</sup> *Chaput v Romain*, 858.

The terms used here (“clergyman”, “minister”, “church”, “chapel”, and “divine”) are far from universal. Rather, they are just short of being exclusive to Christianity, though the words “or other” allow for other religions to be covered by this law.<sup>113</sup> Such associations with Christianity were uncontroversial for the time, and suggest that initial laws aimed to protect religion were primarily concerned with competing Christian groups. A definition of “religion” is lacking, and contemporary judicial interpreters might find that, despite certain clear assumptions, it is unclear what counts as “religion” and what does not.

What is most revealing in *Chaput v Romain*, as a stepping stone toward concrete religious freedom jurisprudence, is the appellant’s arguments that the law explicitly recognizes (or should recognize) a separation of religious and secular duties. The French text is provided below :

Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre.<sup>114</sup>

Loosely translated, the text states that “there is no state religion in our country, and no person is required to believe anything. All religions are equal; Catholics and Protestants, Jews or adherents to other religious denominations are free to think as they please. Conscience is a personal matter, and the business of no one else”. While “all religions are equal”, it is clear that

---

<sup>113</sup> These provisions still exist in the *Criminal Code of Canada* today under section 176, subsections 1 and 2, and the wording remains the same.

<sup>114</sup> *Chaput v Romain*, 840.

the chief concern of the speaker of this paragraph is equality between Christian and Jewish groups and denominations. Religion and conscience are linked in the text, and religion (as well as conscience) is posited as a private matter. *Chaput v Romain* also cites c.175 of the *Statutes of Canada* by Locke J., “by which it is declared: “That the free exercise and enjoyment of *Religious Profession and Worship*, without discrimination of preference [...] is by the constitution and laws of this Province allowed to all Her Majesty’s subjects within the same.”<sup>115</sup> To profess (declare openly) seems to be a neutral term, but the idea of worship (derived from the Old English word *worthscipe*, which signifies “to demonstrate worthiness”) is derived from Christian theology.<sup>116</sup>

There are a few notable points to draw from *Chaput v Romain*. First, the demand for the service to be broken up was filed by another priest, “le curé Harrington de Chapeau”, the leader of a local church (likely a Catholic church, given the location of the conflict in Quebec).<sup>117</sup> This detail lends credibility to the idea that an early type of religious freedom concerned the freedom to practice whatever denomination of Christianity (or Judaism) a person wished. It seems that the competition for freedom of religion, at this time, concerned a freedom of interpretative traditions centered around the Bible.

In addition, the argument is made by the respondent in *Chaput v Romain* that the “Jehovah’s Witnesses were carrying on activities of a seditious nature”.<sup>118</sup> Sedition signifies

---

<sup>115</sup> *Chaput v Romain*, 865, emphasis added

<sup>116</sup> William K. Kay, *Religion in Education* (Herefordshire; Gracewing, 1997), 77.

<sup>117</sup> *Chaput v Romain*, 839.

<sup>118</sup> *Chaput v Romain*, 852.

“conduct or speech inciting people to rebel against the authority of a state or monarch”.<sup>119</sup> The respondent’s argument implies that to practice as a Jehovah’s Witness is to go against the will of the state (a state heretofore understood as a primarily *Christian* state). The influence of a Christian hegemony is evident in these arguments. While there existed proclamations at this time (such as in the *Statutes of Canada*) declaring “free exercise” of “Religious Profession and Worship”, I found no prior case law that focused on freedom of religion. *Chaput v. Romain* appears, then, to be a foundational piece of jurisprudence, a significant initial instance of freedom of religion as a central legal debate.

Although the primary text governing religious freedom in contemporary case law is the *Canadian Charter of Rights and Freedoms*, *Chaput v. Romain* gives us insight into arguments made in the pre-*Charter* era, the laws that governed the practice of “religion”, and those that protected it from interference from the state and other citizens. In this case, the Jehovah’s Witnesses successfully sued the police for damages. The meaning of the word “religion” is not elaborated, but based on the language used, we can deduce it to mean, generally, a community surrounding Biblical interpretation such as Christianity and Judaism.

### ***Robertson and Rosettani v R. (1963)***

A second case that provides information about the understanding of religious freedom before the enactment the *Canadian Charter of Rights and Freedoms* is *Robertson and Rosettani v R.*, a Supreme Court of Canada case in which the operators of a bowling alley were charged with acting against the *Lord’s Day Act*, an act that prevented the operation of businesses on

---

<sup>119</sup> Oxford English Dictionary Online, s.v. “Sedition”, last accessed June 22, 2013, <http://oxforddictionaries.com/definition/english/sedition?q=sedition>.

Sunday.<sup>120</sup> The *Canadian Bill of Rights*, a precursor to the *Canadian Charter of Rights and Freedoms*, enacted with the help of Prime Minister John Diefenbaker in 1960, expressly protected religious freedom in Section 1: “It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, *religion* or sex, the following human rights and fundamental freedoms, namely [...] (c) *freedom of religion*”.<sup>121</sup> This statute is cited by the appellants as evidence that the *Lord’s Day Act* was unconstitutional, because it discriminated against religions whose day of rest did not coincide with Sunday, the Christian one. The court, however, judged that the effect of the *Lord’s Day Act* was purely secular and therefore remained valid.

“Freedom of religion” is defined in *Robertson and Rosetanni v R.* as “freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not prescribe”.<sup>122</sup> The examples given are that of Orthodox Jews and “members of the Mohammedan faith” (Islam).<sup>123</sup> Once again, “religion” is not clearly defined, but is qualified by “tenets of faith”, a distinctly Christian idea. The word “faith” originates from the Latin *fides*, meaning “trust, faith, confidence, reliance, credence, belief”, and is linked with religion dated from the late fourteenth century.<sup>124</sup>

The judgment delivered by Judge Ritchie appeals to the tradition of Canada to use

---

<sup>120</sup> *Robertson and Rosetanni v R.*, [1963] SCR 651, 652.

<sup>121</sup> *Canadian Bill of Rights* S.C. 1960, c. 44, Section 1, emphasis added.  
<http://laws-lois.justice.gc.ca/eng/acts/c-12.3/page-1.html>.

<sup>122</sup> *Robertson and Rosetanni v R.*, 657.

<sup>123</sup> *Ibid.*

<sup>124</sup> Online Etymology Dictionary, s.v. “Faith”, last accessed July 7, 2013.  
[http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=faith&searchmode=none](http://www.etymonline.com/index.php?allowed_in_frame=0&search=faith&searchmode=none)

Sunday as the day of rest, stating that “legislation for the preservation of the sanctity of Sunday has existed in this country from the earliest times”, and argues that legislation “cannot... be construed as attaching some religious significance to an effect which is purely secular”: that is, the existence of a national day of rest.<sup>125</sup> Judge Cartwright dissented, arguing that “the constitutional power of Parliament to pass the *Lord’s Day Act* is found in the fact that it is enacted in relation to religion and prescribes what are in essence religious obligations.”<sup>126</sup> He cites *An Act for the better observation of the Lord’s Day, commonly called Sunday*, which states that “[t]he spirit of the act is to advance the interests of religion, to turn a man’s thoughts from his worldly concerns, and to direct them to the duties of piety and religion.”<sup>127</sup>

Here we can note that the *Lord’s Day Act* equates Christianity, and the observance of Christian piety and worship, with “religion” (singular), as a universal phenomenon, not “a specific religion”; Christianity is not spoken of as one of many “religions” (plural), but rather its characteristics are broadened to a universal scale. When explaining how the *Lord’s Day Act* compels religious observance, J. Cartwright offers that it engenders “a purely religious course of conduct” and the “attendance at least once at divine service in a specified church”.<sup>128</sup> It is unclear from this statement to what extent the right to “religious freedom” stretches beyond church attendance, but it is evident from the way in which it is discussed that at this juncture, “religion” is associated with Christian customs and rhetoric (such as “faith”, piety”, divine service”, “church”) and that there is perceived to be a noticeable and self-evident difference between religious and non-religious practices. “Religion” appears to be understood as a straightforward

---

<sup>125</sup> *Robertson and Rosetanni v. R.*, 658.

<sup>126</sup> *Ibid*, 659.

<sup>127</sup> *Ibid*, 660.

<sup>128</sup> *Ibid*, 661.

term. Thus, what remains to be decided in these cases is not what constitutes “religion”, but rather which particular religious sect or denomination is given preference in the eyes of the law.

### **The Québec Charter of Human Rights and Freedoms (1975)**

The *Quebec Charter of Human Rights and Freedoms* was made official in 1976, following the *Canadian Bill of Rights* but preceding the nationwide *Canadian Charter of Rights and Freedoms*. The *Quebec Charter* states: “Every person is the possessor of the fundamental freedoms, including freedom of conscience, *freedom of religion*, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.”<sup>129</sup> Religion is also referenced in Section 10:

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, *religion*, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.<sup>130</sup>

Despite being mentioned twice, in no section of the *Quebec Charter* is “religion” defined. We can, and do, therefore assume that “religion” in this context operates in the same way it did previously; that is, primarily in reference to Christianity and Judaism. I found no notable Supreme Court decisions that were based *solely* on the *Quebec Charter*’s stipulation of religious

---

<sup>129</sup> *Quebec Charter of Human Rights and Freedoms*, Part 1, Section 3, emphasis added.  
[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C\\_12/C12\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_12/C12_A.html)

<sup>130</sup> *Ibid*, Section 10, emphasis added.

freedom between 1975 and 1982. I suspect that this is due to two factors: the *Quebec Charter* was not a national legislative document, and it was quickly followed by the *Canadian Charter*, a mere six years later.

### **The Canadian Charter of Rights and Freedoms (1982)**

The *Canadian Charter of Rights and Freedoms* is arguably the most important document relating to religious freedom in Canada. As Lori Beaman explains, “[a]lthough religious freedom certainly did not begin with the Charter, it has been identified as an important legal ideal in Canada through the guarantees offered by the Charter.”<sup>131</sup> Section 2(a) explicitly protects “freedom of conscience and religion”, while Section 15 includes “religion” in its provisions for equality and anti-discrimination.<sup>132</sup> Benjamin Berger notes, in his article “Law’s Religion: Rendering Culture”, that “[a]t the level of political and legal rhetoric, the protection of religious liberties symbolizes Canadian constitutionalism’s commitment to multiculturalism and the protection of plural cultural forms”.<sup>133</sup> Therefore, the *Charter*’s sections 2(a) and 15 represent important markers of national Canadian identity.

The *Canadian Charter of Rights and Freedoms* begins with a preamble, which states: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”.<sup>134</sup> This statement itself has caused much debate. Beaman writes:

---

<sup>131</sup> Beaman, *Defining Harm*, 60.

<sup>132</sup> *Constitution Act*, 1982, c. 11 (U.K.), Schedule B, Part I, *Canadian Charter of Rights and Freedoms*, Section 2(a). <http://laws-lois.justice.gc.ca/eng/const/page-15.html>

<sup>133</sup> Benjamin Berger, “Law’s Religion: Rendering Culture”, in *Osgoode Hall Law Journal* 45: 2 (2007), 2.

<sup>134</sup> *Chaput v Romain*, 858, emphasis added.

the preamble brings faith and positivism both side by side and head-to-head, as God represents faith, and the rule of law implies an objective working out of legal rules in some sort of orderly fashion. God as a legal marker plays a double role – the reification of mainstream Christianity as a dominant motif in Canadian society, as well as the possibility of introducing arguments based in faith rather than on ‘reason’.<sup>135</sup>

Both judges and scholars have dismissed the importance of “God language” in the founding texts of Western nation-states, attributing it to a reflection of religious values held by the countries’ colonizers.<sup>136</sup> Nevertheless, such language continues to be used to make legal arguments about the nature of religion.

Section 2(a) of the *Charter*, entitled “Fundamental Freedoms”, contains the specific provision for religious freedom. The text reads: “2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion”.<sup>137</sup> What this passage establishes for the purposes of litigation is that the government of Canada guarantees the protection of “freedom of conscience and religion”; however, this is curtailed by Section 1, which allows the court to restrict freedoms based on “reasonable limits” to behaviour if the freedom in question would protect actions that might endanger or otherwise oppress other citizens of Canada.<sup>138</sup> Section 2(a) prevents “coercive interference” from the state in the lives of religious adherents, a phrase that signifies that the government may not actively support or promote any particular religious

---

<sup>135</sup> Beaman, *Defining Harm*, 10.

<sup>136</sup> While the preamble is a relic of an earlier, more heavily Christianized era in Canadian history, it was dismissed as invalid jurisprudence in *R v Sharpe* (1999).

<sup>137</sup> *Canadian Charter of Rights and Freedoms*, Section 2(a).

<sup>138</sup> Beaman, *Defining Harm*, 62.

denomination that might coerce citizens who do not ascribe to a religion to shift their commitments in order to receive preferential government treatment.<sup>139</sup>

The second section of the *Canadian Charter of Rights and Freedoms* that proves important in Canadian court decisions about religion is Section 15, entitled “Equality Rights”.

The text reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, *religion*, sex, age or mental or physical disability.<sup>140</sup>

What Section 15 effectively does is solidify the notion of religion as an inherent human trait, akin to biological sex, physical disability, or race. Religion becomes as inalienable in the eyes of the law as other traits which are perceived to be outside a person’s control. The government thus guarantees protection from discrimination against it (within the reasonable limits described Section 1).

As I have said, “religion” is not defined in the *Charter* text itself. The *Charter* implies certain things about religion; namely that it is an inalienable quality, and that it is akin to conscience yet is categorically different since it is named separately. One might also infer something of the nature of “religion” based on the preamble to the *Charter*, which prioritizes “the supremacy of God”; a singular, all-powerful god, whose name is capitalized (“God”). Given

---

<sup>139</sup> Ryder, “Equal Religious Citizenship”, 91.

<sup>140</sup> *Canadian Charter of Rights and Freedoms*, Section 15, emphasis added.

that the term “religion” is not defined in the *Charter*, and that the preamble is not considered valid jurisprudence according to *R. v Sharpe* (1999), it comes as no surprise that courts have struggled with finding just limits to its scope. Jurisprudence relies on the *Charter*, and inevitably on pre-Charter cases like *Chaput v Romain* and *Robertson and Rosetanni v R*, to inform the decisions about “religion” that proceed after the enactment of the *Charter*.

### **Post-Charter Case Law**

After the establishment of the *Canadian Charter of Rights and Freedoms*, much case law struggles with the notions of “religion” and “religious freedom”. While both terms are mentioned in the Charter, neither is defined. The protection of freedoms would be much simpler if “religion” meant, solely and explicitly, “Christianity”; it would also be extremely clear which groups and persons would be accorded that freedom. However, given a wider common understanding of religion, this would render freedom of religion unconstitutional, because it would conflict with freedom of conscience and the right to freedom of non-Christians who understood themselves as having religion. The extent of the freedom guaranteed by the Charter is, however, unclear, since “religion” remains undefined. The courts therefore takes it upon themselves to elaborate “freedom of religion” when the understanding of the word “religion” causes great debate. In the following section, I will examine case law that emerges post-Charter. I will argue that the language used in these cases serves to implicitly promote a particular understanding of what is signified by “religion” for the purposes of Canadian human rights law.

### ***R. v Big M Drug Mart Ltd. (1985)***

In *R v Big M Drug Mart Ltd.*, the constitutionality of the *Lord’s Day Act* was again

called into question; this is an issue that, if we recall, was dismissed in *Robertson and Rosetanni v R.* in 1963. In *Big M*, the grocery store Big M Drug Mart was charged with “unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord’s Day Act*”.<sup>141</sup> The store countered with the argument that the *Lord’s Day Act* was in fact unconstitutional because it impinged on the *Canadian Charter of Rights and Freedoms*’ Section 2(a) guarantee of “freedom of conscience and religion”.<sup>142</sup> The *Act*, the store said, discriminates against non-Christians whose religious duties fall on another day of the week, as well as “non-believers”.<sup>143</sup> The appeal was allowed and the *Lord’s Day Act* was deemed unconstitutional and was subsequently abolished.

In the proceedings of *Big M*, “religion” is not defined per se. “Freedom of religion”, on the other hand, is described succinctly as follows:

The essence of a concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear or hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.<sup>144</sup>

The essence of “freedom of religion” is described as involving belief, worship, practice, teaching and dissemination. What can be grasped of “religion” here is that, first, it is comprised of individual beliefs that a person may wish to declare to others. Second, it involves worship, or

---

<sup>141</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, Overview.

<sup>142</sup> *R. v. Big M Drug Mart Ltd* at para 33.

<sup>143</sup> *Big M*, at para 97.

<sup>144</sup> *Ibid*, at para 94.

“the feeling or expression of reverence and adoration for a deity”;<sup>145</sup> the emphasis on worship indicates that “religion”, as it is understood by the court, often places humankind in a relationship with a deity that is more powerful than humans. Third, *Big M*’s understanding of “religion” implies that “religion” naturally includes teaching and dissemination; that one essential aim of religion is to gain new followers, either through the instruction of children and other curious individuals, or by proselytizing to outsiders. While the definition of “freedom of religion” in *Big M* obviously attempts to be expansive and inclusive, the language (“belief”, “worship”, “teaching and dissemination”) betrays continuing linkages to Christianity. The concept of “worship” is typical of a Christian relation to an all-powerful God who is perceived to be worthy of reverence and adoration by virtue of being more righteous than humans.<sup>146</sup> The word for worship used in the New Testament is the Greek *proskuneo*, which signifies “to express deep respect or adoration—by kissing, with words, or by bowing down.” The word took on specifically religious connotations (“reverence paid to a supernatural or divine being”) in the fourteenth century.<sup>147</sup>

The notion of “belief” is also a key qualifier of this relationship; since within mainstream Christian theology, God is generally thought of as transcendent and unknowable. In a 2009 article in the *Journal of Chinese Philosophy*, Guoping Zhao writes:

In Christianity, a fundamental tension was established between the Deity and this world,

---

<sup>145</sup> *Oxford English Dictionary Online*, s.v. “Worship”, accessed June 22, 2013.  
<http://oxforddictionaries.com/definition/english/worship?q=worship>.

<sup>146</sup> Vernon Whaley, *Called to Worship: The Biblical Foundations of Our Response to God's Call*, (Nashville: Thomas Nelson, 2009), xiv.

<sup>147</sup> Online Etymology Dictionary, s.v. “Worship”, accessed July 8, 2013.  
[http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=worship&searchmode=none](http://www.etymonline.com/index.php?allowed_in_frame=0&search=worship&searchmode=none)

and transcendence became the realm of God which, for many Christians even now, is beyond, completely outside, and even against the world. Although some Christians may contend that “God is not to be construed as separate and real apart from the world,” and although there is the idea of the Trinity and even that sinners can strive to be one with Christ, still a profound sense of conflict is established in Christianity which leads to the separation of this world from the world beyond.<sup>148</sup>

Adherents to Christianity must therefore believe in the existence of God despite a lack of concrete proof. The etymology of the word “belief” also points to its Christian origins. The term had religious significance as early as the thirteenth century, meaning “things held to be true as a matter of religious doctrine”.<sup>149</sup> By the sixteenth century, however, “belief” had become limited to “mental acceptance of something as true”.<sup>150</sup> When cited or connected to “religion”, the word “belief” finds roots in Christianity, originating with the King James translation of the Bible in 1611, from the Latin *credeo* and *pisteuo*.<sup>151</sup> According to Karen Armstrong in her book *The Case for God*, “in religious contexts the Latin *credere* and the English ‘belief’ both retained their original connotations well into the 19<sup>th</sup> century.”<sup>152</sup> Thus, while *Big M* was a landmark case allowing businesses to remain open on Sundays and freeing them from explicitly Christian constraints, the language used to describe “religion” still indicates that the word relies on

---

<sup>148</sup> Guoping Zhao, “Two Notions of Transcendence: Confucian Man and Modern Subject”, *Journal of Chinese Philosophy* 36: 3 (2009): 394.

<sup>149</sup> Online Etymology Dictionary, s.v. “Belief”, accessed June 22, 2013.  
<http://www.etymonline.com/index.php?term=belief>

<sup>150</sup> Ibid.

<sup>151</sup> Karen Armstrong, *The Case for God* (New York: Alfred A. Knopf, 2009), 86.

<sup>152</sup> Ibid.

Christian features to determine what qualifies as “religion” for the purposes of law.

***Zylberberg v Sudbury Board of Education (1988)***

In the 1988 Supreme Court of Ontario case *Zylberberg v Sudbury Board of Education*, we are reminded of the existence of the preamble of the *Charter* which declares that the state recognizes “the supremacy of God and the rule of law”. The case in *Zylberberg* deals with the constitutionality of the Sudbury Board of Education’s policy of having children recite prayers at the beginning of each school day. The appellants argued that this impinged on their right to freedom of religion, because it imposed Christian practices.<sup>153</sup> The Board of Education countered by arguing that children have the option to refrain from reciting prayers, and are not compelled or pressured to participate in this practice.<sup>154</sup> The court, however, ruled in favour of the appellant, because “[t]he peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.”<sup>155</sup>

What is most significant for my analysis is the following paragraph in defense of the *Charter* preamble, in which the supremacy of God is referenced:

*There is no ambiguity in the meaning of s. 2(a) of the Charter or doubt about its application in this case. Whatever meaning may be ascribed to the reference in the preamble to the "supremacy of God", it cannot detract from the freedom of conscience*

---

<sup>153</sup> *Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON CA), 21.

<sup>154</sup> *Zylberberg*, 22.

<sup>155</sup> *Ibid*, 24.

and religion guaranteed by s. 2(a) which is, it should be noted, a "rule of law" also recognized by the preamble.<sup>156</sup>

In 1988, it was claimed that there was “no ambiguity” in the meaning of “freedom of religion”; however, debates about the meaning of Section 2(a) have continued to this day. “Religion” is not defined in *Zylberberg*, although the word “religion” appears one hundred and forty-seven times, and various things are described as “religious” two hundred and forty-eight times. In none of these instances is “religion” elaborated, except in cases where a few qualifiers are attached (for example, “the Christian religion”).<sup>157</sup> “Religion” is presented here as unambiguous and self-evident, just as it has historically been understood, particularly when Canada was still widely and explicitly considered to be a Christian country.

### ***Allen v Renfrew (2004)***

In *Allen v Renfrew*, a 2004 Ontario Superior Court of Justice case, the appellant, Robert Allen, challenged the Corporation of the County of Renfrew, whose council had the practice of conducting a prayer at the beginning of each of its monthly meetings. The council, in its defense, argued that the prayer was a “non-secular prayer” and that the practice of reciting prayers “has been followed as long as anyone can remember and likely since the Council was established in 1861”.<sup>158</sup> Allen, in contrast, argued that as a secular humanist, the requirement of prayer constituted an infringement upon his freedom of religion. He argued, among other things, that

---

<sup>156</sup> Ibid, 28, emphasis added.

<sup>157</sup> Ibid, at paras 6, 26, 27, 43, 45.

<sup>158</sup> *Allen v. Renfrew (Corp. of the County)*, 2004 CanLII 13978 (ON SC), at para 1.

“[h]umanists are people who do not believe in the idea of a Divine Architect or Regulator who has constructed the universe and controls human affairs, and they reject religions based on dogma, revelation, or mysticism.”<sup>159</sup>

Instead of considering Allen’s challenge on the basis of non-belief and of the discrimination against non-religion or secular conscience by religion, the court in *Allen v Renfrew* argues that “it is relevant to consider whether Humanism is a religion”<sup>160</sup>. This changes Allen’s claim from his right to non-belief to a matter of whether secular humanism is a “religion”, equal to other “religions”. Allen provides, in defense of his belief being religious, a document entitled “Ten Core Beliefs of Humanists” that links secular humanism to the court’s understanding of religion, an understanding that involves belief.<sup>161</sup> The document provided by Allen can be considered a “statement of faith” or tenets of some sort. The argument is later made that

[a]ny activity which claimed to be non-sectarian in the sense of encompassing all religions (i.e. symbolically mediated world-and-value-views) in a pluralist society would have to accommodate the Humanist phenomenon. The Renfrew County Council prayer is clearly theistic; it is not non-sectarian since it intrinsically excludes the Humanist and other analogous, modern, secular movements. Its use within the official agenda of the Renfrew County Council effectively discriminates, at some levels, against those whose faith is not formed by its supernaturalistic, theistic symbols and cosmology.<sup>162</sup>

---

<sup>159</sup> *Allen v. Renfrew* at para 9.

<sup>160</sup> *Allen v. Renfrew*, at para 11.

<sup>161</sup> *Ibid*, at para 9.

<sup>162</sup> *Ibid*, at para 13.

The above argument contributes to the court's interpretation that Allen's "freedom of conscience and religion" was being impinged, not based on conscience, but rather on religion. His religion, he says, is secular humanism. "Religions" are described briefly here as "symbolically mediated world-and-value-views"; however, since secular humanism is argued to be a religion, it appears that "symbolically mediated world-and-value-views" are understood to be somehow intrinsically different from notions of conscience.<sup>163</sup> Even with the definition of "religion" provided by the court in *Allen v Renfrew*, the concept is still very vague. The court attempts to broaden "religion" to include secular humanism, but in doing so, undermines the "religion/secular" divide on which "freedom of religion", and all notions of religion, are premised. One is left to wonder why Allen's claim was not simply made under "freedom of conscience", and why beliefs and written tenets were required to justify the value of Robert Allen's claim to infringement.

Religion is made plural in the context of *Allen v Renfrew*; it shifts from the universal to the particular, from "the one" to "one among many". This emphasis is in contrast with *Robertson and Rosetanni v R.*, in which religion, conflated with Christianity, is spoken of as a universal

---

<sup>163</sup> Timothy Fitzgerald writes, in *The Ideology of Religious Studies*, that "the Protestant doctrines of salvation introduced a profoundly different concept of the private conscience. The new doctrines of the self in relation to God and the world had implications for philosophical concepts of individual autonomy, for economic activity, for ideas about rationality, civil society and human rights, and for the development of the institutions of representative government. With regard specifically to the category of religion, there developed an influential notion that the truly religious consciousness is private, that religion is defined in terms of some special kind of experience had by individuals, and that the institutional forms of ritual, liturgy, and church are merely secondary social phenomena that are either not in themselves religious or are religious in a secondary, derivative sense" (27-28). Not only does this demonstrate that the idea of conscience itself also has a Christian background, it shows that the court's understanding of "religion" which develops later in case law, particularly in *Syndicat Northcrest v Anselem*, is not, as it were, radically different from the idea of conscience. If the only difference posited between the two words is that one is inherently "religious" and the other "secular", Fitzgerald also argues that a distinction between these two realms (religion/the secular) is unclear, that "it has lost any clear semantic differentiation and needs to be abandoned" (109).

genus. This change renders the overall picture of religion within case law even more ambiguous and confusing. The case in *Allen v Renfrew* describes religion as sometimes theistic, sometimes not (the latter, in the case of Secular Humanism). While humanism is described as “modern” and “secular”, it is nevertheless considered a *faith*, though not one “formed by its supernaturalistic, theistic symbols and cosmology”.<sup>164</sup>

*Allen v Renfrew* expands the court’s definition of “religion”, broadening it to include secular movements which closely resemble easily-recognized religions. Humanism is deemed a religion in this case, with its list of “core beliefs” and its description as a “faith” (though a non-theistic one). Winnifred Sullivan points out that “[r]eligion scholars would argue that ‘faith’ is not the defining characteristic of many religious traditions outside Protestant Christianity. To translate religion as faith from this perspective is itself to discriminate against the religious practices of those other religious communities.”<sup>165</sup> The inclusion of secular humanism under the category of “religion” breaks the deistic mold evident in earlier cases, though the description of religion still relies on Christian markers, such as tenets of faith, in order to identify groups or worldviews as religious. Non-religious ideologies (that, as Fitzgerald argued, are almost indistinguishable from religious ones) appear to carry less weight, while practices and beliefs framed as religion gain privilege and protection.

### ***Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (2004)***

The year 2004 was a busy time for case law concerned with religious freedom. The Supreme Court of Canada heard the case *Congrégation des témoins de Jéhovah de St-Jérôme-*

---

<sup>164</sup> *Allen v Renfrew*, at para 13.

<sup>165</sup> Winnifred Fallers Sullivan, *Prison Religion: Faith-Based Reform and the Constitution* (Princeton: Princeton University Press, 2009), 13.

*Lafontaine v Lafontaine*, which concerned perceived discrimination on the basis of “religion” against a group of Jehovah’s Witnesses in the Quebec village of Lafontaine. The group, which sought to build a place of worship called a “Kingdom Hall”, was unable to find land within the property zone allocated for that purpose.<sup>166</sup> However, their application to construct their place of worship in another zone was denied, and no plans to expand the allotted zone were proposed.<sup>167</sup>

The arguments in favour of the congregation concentrated primarily on state involvement with religion, a topic widely debated in the United States due to the existence of the Establishment Clause in the First Amendment to the United States Constitution. The dissenting judges, Bastarache, LeBel and Deschamps JJ., note that “freedom of religion is a fundamental right that imposes on the state and public authorities, in relation to all religions and citizens, a duty of religious neutrality.”<sup>168</sup> Additionally, they maintain that “the state must refrain from implementing measures that could favour one religion over another”.<sup>169</sup> “Religion” in this case refers to Jehovah’s Witnesses, and instead of being spoken of here as universal, it is removed from a universalizing position and is made particular, a noun (“religions”, “one religion”). This particularization, again, is in contrast to mainstream Christianity, which as we saw in *Robertson and Rosetanni v R.*, is conflated with a universal idea of religion. This conflation unwittingly serves as discourse that subtly implies that Christianity is the epitome of the genus from which other groups are derived.

The establishment of a place of worship, previously unmentioned in legislative

---

<sup>166</sup> *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650, at para 37.

<sup>167</sup> *Lafontaine*, at para 1.

<sup>168</sup> *Ibid*, at para 65.

<sup>169</sup> *Ibid*, at para 76.

documents, is touted as “essential” in *Lafontaine*:

If no land were available in the regional community use zone, this would constitute an infringement of freedom of religion under s. 2(a) of the Charter, because the construction of a place of worship, which is an integral part of this freedom, would then be impossible within the boundaries of the municipality.<sup>170</sup>

This statement builds on the court’s conception of religion. A permanent place of worship is held up as an “integral part” of religion; thus the freedom to construct said structure is part of religious freedom. Another aspect of freedom of religion that is clarified in this case is the right to congregation. It is argued that “[t]he right to freely adhere to a faith and to congregate with others in doing so is of primary importance, as attested to by its protection in the Canadian Charter of Rights and Freedoms and the Quebec Charter of human rights and freedoms”.<sup>171</sup> The fact that the judges assert that both the Canadian and Quebec Charters “attest” to the “primary importance” of adherence to a faith and the right to congregate is peculiar, because no mention of congregation is made in the Charters themselves. However, since *Lafontaine* is a Supreme Court of Canada case, whatever is presented in the court proceedings in relation to religion is bound to be cited in further cases; jurisprudence functions as a chain of citation. Thus, whether or not these aspects of religion were made explicit in the Charters is perhaps irrelevant; they are being made explicit here, and offered as evidence for the scope of freedom of religion.

Judge LeBel cites, further in the document, the definition of “freedom of religion” as set

---

<sup>170</sup> Ibid, Overview.

<sup>171</sup> Ibid, at para 9.

out in *R. v Big M. Drug Mart Ltd* (“the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear or hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”) and adds:

The concept of freedom of religion, which is not strictly limited to the above definition, includes a positive aspect, that is the right to believe or not to believe what one chooses, to declare one’s beliefs openly, and to practise one’s religion in accordance with its tenets. This positive aspect also includes the right to proselytize, that is, to teach and disseminate one’s beliefs.<sup>172</sup>

This statement only serves to clarify the statement that was made in *Big M*, and emphasizes previously cited aspects: belief, practice, tenets, dissemination, and a new term: proselytization. In conjunction with the historical conception of religion that I unearthed from pre-Charter case law, we can see how this kind of language evokes a particularly Christian (and to an extent, Jewish) image of religion. This is especially the case with “proselytize”, a term originating in the fourteenth century, originating from the latin *proselytus*, meaning to “convert to Judaism”.<sup>173</sup> The re-established emphasis on “belief” also reinforces the tendency to distinguish religion as something related to Christianity and its affiliates, as opposed to groups centered on practice that identify as religion.

---

<sup>172</sup> *Lafontaine*, at para 65.

<sup>173</sup> Online Etymology Dictionary, s.v. “Proselyte”, last accessed June 22, 2013.  
<http://www.etymonline.com/index.php?term=proselyte>

***Syndicat Northcrest v Anselem (2004)***

Although the elaborations of “religion” in the cases I have presented above reflect aspects of the modern legal understanding of religion, their authority pales in comparison with the definition provided in the 2004 landmark Supreme Court case *Syndicat Northcrest v. Anselem*. The definition of “religion” provided in *Anselem* is cited consistently in cases succeeding it. The intent of those who formulated the definition was evidently to pinpoint an essence of religion, while also remaining open to non-traditional (i.e. non-Christian) forms of religious expression. However, the lauded interpretation still remains problematic.

In *Anselem*, the Jewish appellants had requested permission to erect a *succah*, a temporary hut erected for the festival of *Succot*, on the balcony of their unit in a condominium building.<sup>174</sup> The respondent, Syndicat Northcrest, replied that since the terms of co-ownership clearly indicated that no structures were permitted to be built on the balconies, and since the appellants had read this agreement and signed it, they had effectively waived their rights to practicing their religion in this manner.<sup>175</sup> The respondents had made a communal *succah* available, but this was not deemed acceptable by the appellants.<sup>176</sup> In response to the continued restriction by the respondent regarding the erection of a private *succah*, the appellants, Moise Anelem, Gladys Bouhadana, Antal Klein and Gabriel Fonfeder, sought judicial action. The case was elevated to the level of the Supreme Court.

The case begins with a statement offered by Judges McLachlin C.J. , Iacobucci, Major, Arbour and Fish JJ, that defines both the term “religion” and “freedom of religion”, as well as

---

<sup>174</sup> *Syndicat Northcrest v. Anselem*, 2004 SCC 47, [2004] 2 SCR 551, Overview.

<sup>175</sup> *Anselem*, at para 28.

<sup>176</sup> *Ibid*, at para 26.

the relationship of these terms to constitutional law. I will quote both in their entirety:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. 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 or with the subject or object of that spiritual faith.

Freedom of religion under the Quebec Charter of Human Rights and Freedoms (and the Canadian Charter of Rights and Freedoms) consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief

and the court's role is to ensure that a presently asserted belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Assessment of sincerity is a question of fact that can be based on criteria including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her current religious practices. Since 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, it is inappropriate to require expert opinions. It is also inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Because of the vacillating nature of religious belief a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.<sup>177</sup>

These two paragraphs inform most subsequent cases surrounding religion and religious freedom. It is an expansive definition, surely. It makes mention of both beliefs and practices, links their importance to self-definition and relies on sincerity of belief as opposed to the acceptance of that belief by an official religious organization. However, if examined closely, the language proves problematic. Vague ideas about the nature of religion, as well as reliance on Christian categories, could signify that the definition is not thoroughly egalitarian.

There are multiple and conflicting aspects to the definition of "religion" in the judgement in *Anselem*. First, we are left to wonder whether the nature of religion lies inside the individual or if it is located outside in the realm of objective, observable facts. The court in *Anselem* insists

---

<sup>177</sup> *Anselem*, Overview.

that religion is about “deeply held personal convictions”, “self-definition and spiritual fulfillment”, and that the understanding of religious freedom in both the Quebec and Canadian Charters “is consistent with a *personal or subjective* understanding of freedom of religion”, which the court seems to value.<sup>178</sup> Individuals are not required to show an “objective religious obligation, requirement or precept” in order to justify a claim to religious freedom.<sup>179</sup> However, the court in *Anselem* continues to emphasize that religion involves a “particular and comprehensive system of faith and worship”, one whose practices and beliefs are expressed through individuals whose actions have a “nexus with religion”.<sup>180</sup> Classifying religion as a comprehensive system of faith and worship is problematic. Lori Beaman writes:

Most Canadians, while identifying with a faith tradition, do not consider their religious beliefs to be a ‘comprehensive system of faith and worship’ or, if church attendance figures are any indication, are not at all regular participants in the worship activities of their faith communities. This limited engagement with religion leads to the question of how a ‘deeply’ held conviction is measured.<sup>181</sup>

This confusion between public and private conceptions of religion leaves room for the court to make judgements based on “objective” inquiries about the validity of a claimant’s religion.

The courts see their role as determining whether particular beliefs are fictitious,

---

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Beaman, “Defining Religion”, 195.

capricious, or artificial, to ensure that only “true” religion is protected under “freedom of religion”. Judges accomplish this by inquiring into whether beliefs are sincere and consistent, since religion involves a *comprehensive system* of those beliefs.<sup>182</sup> No mention is made of how the court determines sincerity; in fact, no one questions the court’s ability to judge this fact. It is not posited that a person’s deeply held beliefs could be internally inconsistent and yet still sincere, that a person is capable of living with contradictory ideologies within him or herself and is able to negotiate among them. The court acknowledges the “vacillating nature of religious belief”, yet still seeks consistency in beliefs; this consistency is based on the appellant’s current beliefs, not past ones.<sup>183</sup> It seems the court expects that religious belief should only vacillate among fully enclosed, comprehensive religions, and not among a multitude of conflicting beliefs, or beliefs derived from several sources.

In addition, although the court claims that “it is inappropriate to require expert opinions”, expert opinions are still sought out.<sup>184</sup> These are primarily academic assessments from scholars of religious studies, who are brought in to testify about the nature of religion, the history of a particular group, or the validity of a practice or belief. Beaman writes that “[t]he expert voice is heard in religion... and is perhaps most visibly hegemonic in the collusion between religion and law.”<sup>185</sup> It is these experts that “act as gatekeepers in the discursive construction of religion”, determining the boundaries between legitimate and illegitimate religion.<sup>186</sup> Given the disagreements among scholars about the concept of religion, it is problematic for the court to

---

<sup>182</sup> *Amselem*, Overview.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Beaman, *Defining Harm*, 48.

<sup>186</sup> *Ibid.*

treat these kinds of academic opinions as objective proof.

Another confusion in the definition of “religion” cited in *Anselem* is the unclear importance given to a “mandatory nature” in relation to religious beliefs. The court in *Anselem* asserts that sincerity is the foremost cause for taking a claimant’s belief seriously, not the fact that it is “required by official dogma or is in conformity with the position of religious officials”.<sup>187</sup> This emphasis on sincerity rather than official mandate places authority in the individual, as opposed to the institution or religious officials. According to *Anselem*, “it is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.”<sup>188</sup> It is soon revealed, however, that the emphasis on beliefs that are considered valid for the purposes of Section 2(a) protection is placed on whether or not *they are perceived as mandatory by those who believe them*.

In *Anselem*, the appellant is argued to have “sincerely believed that *he was obliged* to set up a succah” and this evidence of the “inherently personal nature of *fulfilling the commandment* of dwelling in a succah” is understood to qualify his belief as sincere.<sup>189</sup> The belief in the requirement of a personal succah was important because the appellants “believe[d] they must fulfill the *biblically mandated obligation*” of erecting a succah.<sup>190</sup> Thus, due to wavering ideas about the importance of a mandate, the definition of “religion” provided in *Anselem* remains highly ambiguous and contradictory. A fluctuation between the conception of religion as private and personal and the idea that religion is public and verifiable, presents an obstacle to clear and equal treatment of people who identify as religious.

---

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid, emphasis added.

<sup>190</sup> Ibid, emphasis added.

Despite all its ambiguity, the definition of “religion” provided in *Anselem* marks an important shift toward more inclusive language and the opening up of possibilities for individuals whose beliefs do not coincide with the official tenets of the religion with which they are affiliated. The focus on sincerity of belief also shifts the locus of the power to define “religion” slightly in favour of individuals. However, *Anselem*’s definition remains narrow since it describes religion using Christian concepts (“faith”, “belief”, “worship”) and still requires an objective, verifiable manifestation of any purportedly deeply held personal commitment.

***Multani v Commission scolaire Marguerite-Bourgeois (2006)***

In 2006, the Supreme Court of Canada heard the case of *Multani v Commission scolaire Marguerite-Bourgeois*, which dealt with the issue of permitting a Sikh boy to carry a kirpan (symbolic dagger) on his person while at school. The student (referred to as “G”), “believes that his religion *requires* him to wear a kirpan at all times”.<sup>191</sup> Immediately, it is recognizable that importance has been placed on the fact that the practice was perceived as mandatory by the appellant, regardless of the fact that this should be irrelevant according to the definition of religious freedom given in *Anselem*. In fact, the mandatory nature of the belief and the question of sincerity are spoken of in a way that implies that they are related: “G genuinely believes that he would not be complying with *the requirements of his religion* were he to wear a plastic or wood kirpan, and none of the parties have contested the *sincerity* of his belief.”<sup>192</sup> Lemelin J., one of the judges, found that the belief was proven to be sincere, but the case law does not

---

<sup>191</sup> *Multani*, Overview, emphasis added.

<sup>192</sup> *Ibid*, emphasis added.

elaborate on what grounds this was decided.<sup>193</sup> Paragraph 35 explains that sincerity is determined using the credibility of the person attesting to the belief and “the consistency of the belief with his or her other current religious practices”.<sup>194</sup> This requirement of consistency is problematic because it does not account for religious syncretism in any form as a valid expression or understanding of one’s own religiosity, and this goes against the idea of religion as a set of deeply personal beliefs. The same uncertainty that was evident in *Anselem* is duplicated here. In *Multani*, it was decided that the appellant would be permitted to carry his kirpan, so long as it was worn under his clothing and secured closed using a piece of cloth. No further elaboration of “religion” or “religious freedom” is provided.

### ***R. v Welsh (2007)***

In 2007, the Supreme Court of Ontario heard the case *R. v Welsh*, which dealt heavily with the issue of whether or not certain practices could be called religious (though this was not the primary issue). In this case, it is stated that an undercover police officer played the role of an Obeahman (a religious official of Obeah<sup>195</sup>) in order to infiltrate the circle of two suspects in a murder investigation.<sup>196</sup> The undercover officer convinced the suspects to give statements

---

<sup>193</sup> *Multani*, at para 11.

<sup>194</sup> *Ibid*, at para 35.

<sup>195</sup> Obeah, in this context, is a term used to describe a collection of folk practices, religion and sorcery originating in West Africa and flourishing in the Caribbean. It is a “set of ‘hybrid’ or ‘creolized’ Caribbean beliefs” which “could be traced to the concentrations of Ashanti and kindred tribes from the Gold Coast of Africa, heavily represented in the slave population of the British colonies of the Caribbean”. (Fernández Olmos, Margarite and Lizabeth Paravisini-Gebert, *Creole Religions of the Caribbean: An Introduction from Vodou and Santería to Obeah and Espiritismo* [New York: New York University Press, 2011], 22.)

<sup>196</sup> *R. v. Welsh*, 2007 CanLII 39889 (ON SC), at para 2.

regarding their crime by asserting that he had the power to protect them from an evil spirit.<sup>197</sup>

Though the court was concerned about whether the actions of the police officer in question infringed on the religious freedom of the individuals involved, a sizeable section of the proceedings was dedicated to the definition of “religion”, and whether Obeah fit into this description, thus enabling the appeal to be heard on the grounds of “freedom of religion”.

In its defense of Obeah as a “valid” religion, the court cites *Big M* and *Anselem*, whose definitions I have already examined.<sup>198</sup> The case does, however, include new information that has considerable bearing for the understanding of “religion” as it pertains to new religious movements or religions that are not considered mainstream. The court cites the Australian High Court case *Church of New Faith v Commissioner of Pay-Roll Tax*, saying:

The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail.

Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number adherents small, the leaders hypocrites, or because they seek to obtain the financial or other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is “one in, all in”.<sup>199</sup>

---

<sup>197</sup> Ibid.

<sup>198</sup> Ibid, at paras 6, 8.

<sup>199</sup> *Church of New Faith v Commissioner of Pay-Roll Tax* 1982), cited in *R. v. Welsh*, at para 9.

Thus in *R. v Welsh* the court attempts to broaden its understanding of religion to encompass new religious movements that may seem strange. What is peculiar about this statement is that it focuses on the communal or institutionalized aspect of “religion”. Despite *Anselem*’s concentration on religion as composed of deep personal convictions, it seems that in the case of new religions, the existence of an institution upon which the belief of an individual can be verified is, in fact, a consideration. It is even stated that “it is necessary only the determine whether the constellation of *beliefs and practices for which Obeah is traditionally known* are such that they merit consideration under s.2(a) of the Charter”, implying that the practices which seem “absurd, fraudulent, evil or novel” must be traditional or institutionalized in order to be kept in consideration.<sup>200</sup>

Nonetheless, there is evidence of an effort to be more inclusive and egalitarian. In *R v Welsh*, the court aligns itself with the stance in *Anselem*, and sees itself as “reject[ing] a narrow, overly-precise definition of religion in favour of a broad perspective that could conceivably capture an array of beliefs that, like Obeah, fall outside of well-recognized religious boundaries.”<sup>201</sup> The courts recognize, with the help of expert opinions, that “Obeah is a religious belief system that meets the Supreme Court definition of such in [*Anselem*] and thus warrants s.2(a) protection.”<sup>202</sup>

### ***Alberta v Hutterian Brethren of Wilson Colony (2009)***

---

<sup>200</sup> Ibid, at para 10, emphasis added.

<sup>201</sup> Ibid, at para 28.

<sup>202</sup> Ibid, at para 29.

In 2009, the Supreme Court of Canada heard the case *Alberta v Hutterian Brethren of Wilson Colony*, which dealt with the issue concerning members of a Hutterite colony who refused, on religious grounds, to have their photos taken for the purposes of issuing drivers licenses because they understood the Second Commandment as prohibiting them from having photographs taken. Hutterites are Anabaptists (from the Greek *anabaptista*, meaning "one who baptizes over again"), or Christians whose practice originates from the Radical Reformation of 16th-century Europe.<sup>203</sup> Similar to the Amish or Mennonites, Hutterites live in colonies that isolate them from the rest of the world. The *Hutterian Brethren* case is a prime example of the role of Section 1 of the *Canadian Charter of Rights and Freedoms* that guarantees its freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".<sup>204</sup>

The government of Alberta argues that compromising the integrity of the licensing system could result in identity theft and fraud, and therefore prohibited the Hutterites from circumventing the regulation about ID photographs, insisting that the requirement of photographs is a justifiable limit to the appellants' religious freedom.<sup>205</sup> The Hutterites, conversely, argue that their religious beliefs should be accommodated because their communal lifestyle would be threatened if they are prohibited from obtaining driver's licenses.<sup>206</sup> Similarly to *Anselem* and *Multani*, belief is seen as important because it is perceived to be mandatory: "Members of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits

---

<sup>203</sup> *Online Etymology Dictionary*, s.v. "Anabaptist", accessed June 22, 2013.

[http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=anabaptist&searchmode=none](http://www.etymonline.com/index.php?allowed_in_frame=0&search=anabaptist&searchmode=none)

<sup>204</sup> *Canadian Charter of Rights and Freedoms*, Section 1.

<sup>205</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, Overview.

<sup>206</sup> *Ibid.*

*them* from having their photograph taken. This belief is sincerely held.”<sup>207</sup> Their belief is rooted in Biblical text: “You shall not make for yourself an idol, or any likeness of what is in heaven above or on earth beneath or in the water under the earth”.<sup>208</sup> This text is cited in the case law.<sup>209</sup>

The court in *Hutterian Brethren* assesses the issue of whether the infringement is related to a sincerely-held belief that has “a nexus with a religion”, and interferes with the individuals actions “in a manner that is more than trivial or insubstantial”.<sup>210</sup> They also stand by *Anselem*’s insistence that “religious freedom ‘revolves around the notion of personal choice and individual autonomy’”.<sup>211</sup> The same confusion between the communal and personal aspects of religion is included in the proceedings:

There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.<sup>212</sup>

The boundaries between religion and culture, individuality and communality, mandate

---

<sup>207</sup> *Ibid.*, at para 7, emphasis added.

<sup>208</sup> Exodus 20:4, cited in *Hutterian Brethren* at para 29.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Hutterian Brethren*, at para 32.

<sup>211</sup> *Anselem*, at para 40, quoted in *Hutterian Brethren*, at para 88.

<sup>212</sup> *Hutterian Brethren*, at para 89.

and choice, seriousness or levity, are all blurred. Choice is a word that occurs frequently in the case material because the court adds that “to compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof.”<sup>213</sup> This emphasis on choice is peculiar, given the fact that religion is posited as inalienable in Section 15 of the *Canadian Charter of Rights and Freedoms*, and is akin to traits such as race or sex, which are not chosen but are rather biological. Religion in the form of communal living, in the case of *Hutterian Brethren*, is seen as a choice (though a choice that is restricted if the Hutterites are prohibited from obtaining drivers licenses). Ties between “religion” to notions of “faith” are renewed in the discourse of *Hutterian Brethren*. The court even goes so far as to maintain that “prayer” and “the basic sacraments”, very obviously Christian practices, are “sacred” and their restriction would represent “forced apostasy”.<sup>214</sup> Despite their unorthodox practices (unorthodox in relation to mainstream Christianity), the Hutterites’ sincerity of belief is not questioned, unlike the example given regarding *Bothwell v. Ontario (Minister of Transportation (2005))* of “a ‘Caucasian man’ who sought a Condition Code G licence, based upon his commitment to native spirituality. He was refused because he was not a member of a recognized organization or denomination that shared his beliefs.”<sup>215</sup>

*Hutterian Brethren* is rife with interesting statements about religion. The following two paragraphs summarize well the predicament of courts in relation to religion:

Perhaps, courts will never be able to explain in a complete and satisfactory manner the

---

<sup>213</sup> Ibid, at para 92.

<sup>214</sup> Ibid, at para 89.

<sup>215</sup> Ibid, at para 157.

meaning of religion for the purposes of the Charter. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the Charter thought it fit to incorporate into the charter an express guarantee of freedom of religion, which must be given meaning and effect.

That decision reflects the complex and highly textured nature of freedom of religion. The latter is an expression of the right to believe or not. It also includes a right to manifest one's belief or lack of belief, or to express disagreement with the beliefs of others. It also incorporates a right to establish and maintain a community of faith that shares a common understanding of the nature of the human person, of the universe, and of their relationships with a Supreme Being in many religions, especially the three major Abrahamic faiths, Judaism, Christianity and Islam.<sup>216</sup>

Thus, despite having made many declarations regarding religion in past cases, and the high regard for and frequent citation of the definition of "religion" expressed in *Anselem*, Canadian courts remain ambiguous about the matter of religion, and in some cases (such as in *Hutterian Brethren*) have stated that they do not actually understand the very thing they are seeking to protect.

### **Concluding Remarks**

It is clear, after thorough examination, that Canadian courts' use of "religion" is subject

---

<sup>216</sup> *Hutterian Brethren*, at paras 180, 181.

to many of the same problems as the use of the word “religion” in the academy. First, the citation of religion as a universal phenomenon in case law projects a typology that originated in a specific historical and cultural setting (seventeenth century Britain) onto a variety of incomparable practices, such as the use of kirpans by Sikhs or the setting up of *succahs* by Jews. Even within case law, one can see that the court’s concept of religion was originally based explicitly in Christian rhetoric that was subsequently generalized.

Second, the result of the generalization of Christian thoughts and practices is that the meaning of “religion” has become incredibly vague. The court’s contradictory stance on the characteristics of religion (public/private, individual/communal, mandatory/choice) is problematic, given that law treats the word “religion” as if it had a consistent, agreed-upon meaning. Third, despite being gradually expanded to include other traditions, “religion” remains an inherently Christian category. The idea of religion surfaced in Protestant Britain and continues to be described using language rooted in that tradition: faith, worship, prayer, belief, sacrament, and divine service. The consequences of such a contrived approach to religion have the potential to be harmful in law, since legal decisions made on supposedly consistent principles concretely affect peoples’ daily lives. The questions become: how are these contradictory ideas about religion affecting people who identify their ideological commitments and cultural practices as religion? In particular, how does the court’s understanding of religion affect those who claim to be religious, but whose practices are outside the purview of the law? I address this specific concern in the next chapter, using language and gender theory to speculate on the ways current law pertaining to “freedom of religion” affects new religious movements.

### Chapter Three: The Performance of “Religion”

In my preceding chapters, I have shown that the use of the word “religion” in Canadian courtrooms is, at best, vague and unhelpful and, at worst, detrimental to equality and the equal treatment of groups. This is because the court, no matter how benign its intentions, relies on a concept of religion that is entrenched with centuries of historical baggage; specifically Protestant Christian baggage that is evidenced by language that continues to structure any legal discussion about religion. The issue lies not only in the disavowed historicity of the term, but also in its expanded usage, which renders it ambiguous and unclear. The courts, in keeping with changing ideas about religion “on the ground”, have applied the word in a way that posits religion as an essential, ahistorical and apolitical concept present in all cultures, one that is inalienable and worthy of protection. The universalism of religion is an ideological assumption that emerged from the discursive separation of “religion” from “the secular” (a concept borrowed from Christianity) in seventeenth century Europe. This assumption permeates both academic and public discourse, and is an assumption that a growing number of scholars of religion are seriously questioning.

Many of those who are engaging critically with the category “religion” approach it as an issue with main relevance to the academy. The argument is made that “religion” is too vague for meaningful analysis, and thus we must recategorize our scholarly endeavours.<sup>217</sup> However, it is easy to see how such a deep and long-standing problem with definition also creates complication for the law, which relies on heavily on definitions and expert opinions. Scholars such as Lori Beaman, Peter Beyer and James Beckford have briefly mentioned this issue; some others, such as Winnifred Sullivan and Micah Schwartzmann, have approached the problem of vague

---

<sup>217</sup> See Asad (1993), McCutcheon (1999) and Fitzgerald (2001).

definitions of “religion” in law directly. Sullivan and Schwartzmann have sought to find a viable solution for what they understand to be a flawed system.<sup>218</sup> As yet, the quandaries put forward by academics do not seem consequential enough to policy-makers, at least not enough to warrant a serious re-examination of the idea of “religious freedom” and “religion” as legally defensible concepts; or so it appears, based on the relative lack of critical discussion by courts, lawyers, and those expert witnesses often called to testify to the authenticity of religion in court cases. While it is true that academic discourse is often ahead of the curve, it is frequently suggested that removing religion from law (such as Sullivan suggests) is simply not a pragmatic option, complications and problems notwithstanding. Whether or not this is true, or relevant, is something I will investigate further at the end of this chapter. For the time being, I would like to suggest, however, that there is a more worrisome phenomenon at play than simply a lack of historicization of religion in Canadian law, one that might justify a (sorely needed) modification of the way in which courts currently treat religion.

It is my suggestion that “religion”, as a legal category with a historical attachment to ideas of “Christian Truth” and the legitimization of particular Western social structures, *compels* new ideological groups to present themselves in a way that can be understood and compared alongside “conventional religions” (the most conventional of which is Protestant Christianity). In order to become viable recipients of protection and privilege accorded by the state, individuals and groups must make themselves *intelligible* within a legal discourse favouring religion that resembles Christianity. The worrisome aspect of this state of affairs is not simply the encouraged similarity of ideological groups to Christianity, but rather the fact that the connection between the authenticity of religion (viable, protected ideologies) and Christian discourse is disavowed by

---

<sup>218</sup> See Winnifred Sullivan's *The Impossibility of Religious Freedom* and Micah Schwartzman's “What if Religion Isn't Special?”

religion's proposed universality. Only those groups that resemble Protestantism are constitutionally protected, and groups are encouraged to seek this protection in order to fully assert their religious freedom. Unwittingly, ideological groups that frame themselves as religion in order to gain freedom are achieving the opposite; they are restricting their ideology and organizational structure to a Christian-like form.

After having examined several Canadian cases in which the definition of "religion" is debated, I would like to suggest that the courtroom creates a discourse in which the idea of religion functions *performatively*. This means that the discourse of religion within law, which is posited as a universal and legally defensible concept, *hails* (or calls into existence) the groups it purports to describe. Religions are not merely described and protected by the *Charter* and subsequent case law, but are simultaneously *created* through the existence of these provisions. The ahistorical discourse that reinforces the idea of a universal, yet particular phenomenon called "religion", also projects itself backwards into history, leading subjects to believe that religion (despite being a historically contingent idea) is an objective reality, a universal category, and one that is indisputable in its substance and reality. The ambiguity of the term and its incontestability within law give the state the power to determine, according to "common sense", which groups are religious and which are not.

I derive my hypothesis about the term "religion" as performative from the work of some theorists in philosophy and queer theory. Beginning with J.L. Austin's idea of performative utterances (a linguistic approach), I adopt the idea that language has performative power, a concept that has been negotiated and transformed into a political argument by scholars such as Louis Althusser and Jacques Derrida.<sup>219</sup> My analysis, however, is primarily an application of

---

<sup>219</sup> Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (New York and Abingdon: Routledge, 2007), 18.

Judith Butler's concept of gender performativity that extends her theories more generally into the realm of legal language. In order to explain why and through what means "religion" can truly be understood as a performative, I will first unpack Butler's account of performativity. I will then show how performativity, as a concept applicable to gender, can be extended to other discursive constructions, such as religion – and what this might mean for the future of religious freedom in Canadian law.

### **Legal Ambivalence and New Religious Movements**

I have already shown that the ways in which courts use the word "religion" seem straightforward at first glance, but in fact remain ambivalent. This uncertainty about what constitutes religion and how it should be treated has several drawbacks, including the persistent and thoroughly Western association of religion with Christianity. Though it can be argued that the consistent reference to Christianity does not affect the law's treatment of religious groups, there are many arguments that suggest otherwise. For example, Richard Moon writes that "religious beliefs often inform or shape state laws. Even if Canadian law does not directly compel citizens to engage in religious practices, to attend church or pray, for example, it sometimes favours or advances the religious practices or values of some members of the community over those of others."<sup>220</sup> If Christian assumptions shape the mere idea of religion as a sphere separate from the secular, and these assumptions result in the privileging (through tax exemption, accommodation and social status) of groups within the category of "religion", then it is clear that "freedom of religion" does not have the effect of creating equality of religious freedom.

---

<sup>220</sup> Moon, "Introduction", 1.

There is a special set of obstacles to overcome, it seems, for people within new religious movements who wish to claim infringements on their freedom of religion. Unlike “imported” religions from non-Western cultures, new religious movements with origins in the West do not have an ancient history from which they are able to draw legitimacy. This is not to say that non-Western cultures do not have to be compromised or adapted on North American soil in order to fit the “religion model” to gain protection in Western democracies.<sup>221</sup> However, the status of non-Western groups as religion is often gained by virtue of the longstanding discursive construction of non-Western countries as mystical and religious.

David Chidester writes that “conventional distinctions between the secular and the religious have often smuggled into cultural studies the ideological division between a modern Western ‘Us’ and a primitive, savage, barbarian and exotic ‘Them’ . While the West is supposed to be secular, the alien is rendered as essentially religious.”<sup>222</sup> Religion was in fact used by colonial administrations to dismiss newly-encountered individuals as lesser beings and therefore colonisable (since they had no religion), or to convert them (since they had religion, but it was the wrong one). While the assumptions about religion as an indicator of human value are no longer prevalent, the power to recognize or dismiss groups based on the legitimacy of their status as “true religion” remains. The advantage, in relation to Western groups, that “Eastern” practices

---

<sup>221</sup> In fact, Janet McClellan has written an extensive account of the ways in which this assimilation occurs in response to persecution and cultural ignorance. In *Many Petals of the Lotus: Five Asian Buddhist Communities in Toronto* (Toronto: University of Toronto Press, 1999), she details how many Japanese immigrants who were interned on the west coast of Canada during World War II came to view conversion to Christianity as essential for cultural integration. Some, however, such as the Jodo Shinshu Buddhists, survived by adapting their practices to fit more easily into a Christian society. While Buddhism has long been recognized as a “world religion” and thus does not face the same issues of recognition under the law as new religious movements, McClellan’s work demonstrates that Eastern groups facing persecution might experience a similar impulse to adapt themselves to a mainstream Christian norm.

<sup>222</sup> Chidester, “Real and Imagined”, 153

gain is that their cultures are already perceived as deeply religious. Certain non-Western groups are even beginning to transform the concept of “religion”, originally a colonial imposition, into a powerful political tool.<sup>223</sup>

I am also not arguing that the religion that emerged in non-European cultures as a result of colonial contact is somehow less legitimate than Western religion because it was a product of colonialism. While it is true that many “Eastern religions” were originally colonial constructions, I believe both types of religion (Western and non-Western) to be constructed. This is true not only of groups and individuals’ conceptions of religion, but also those that are created and used by “collective agents, such as the institution of law, the State, the mass media, school education, health authorities and so on.”<sup>224</sup> It seems, however, that non-Western groups are often still recognized as religion and, as the emphasis on multiculturalism grows in the West, these groups are gaining a voice on the legislative playing field. They are able to make correlations between their traditions and those of the Christian mainstream; their similarities allow them to be somewhat recognizable as “different but essentially the same”.

Much more disadvantaged, I suggest, are those groups which understand themselves as religion or “religion-like”, yet are not recognized by the Canadian legal system for the purposes of protection and privilege. They are often smaller, and lack (or deliberately avoid) the infrastructure that might otherwise help them appear more legitimate. These groups cannot contest the meaning or history of the term “religion” using their own experience as leverage, because they emerge with little historical background and are formed within what is perceived to

---

<sup>223</sup> A good example of this is the Hindutva movement. While “Hinduism” as an institution was only created in the wake of colonial forces’ attempts to categorize Indian religious belief, contemporary Indians are utilizing the concept of Hinduism to promote a unified sense of nationalism centered around Hindu teachings.

<sup>224</sup> James A. Beckford, *Social Theory and Religion* (Cambridge, UK and New York: Cambridge University Press, 2003), 18.

be an essentially secular society. This lack of background makes their practices, especially if they are emphatically inconsistent with a Protestant vision of religion, seem particularly spurious. They are deemed to be non-religion; lifestyle groups, parodies, cults. They are seen, at worst, as mockeries and fraudulent attempts to take advantage of a system which recognizes the importance of religion in public life and guarantees freedom of religion to individuals in a secular system.

Although new religious movements are often too small or unorganized to contest their status as non-religion in court, I will offer below some examples, from both Canada and the United States, of movements that have been involved in court proceedings in which their legitimacy as religion has been contested. The two movements I will focus on are The Church of the Universe and Wicca.

### **The Church of the Universe**

The Church of the Universe is a new religious movement that was formed on August 9, 1969 by Walter Tucker in Puslinch, Ontario.<sup>225</sup> According to their website, the church's adherents understand the consumption of marijuana to be a sacrament.<sup>226</sup> They also advocate for nudity (which they see as holy) and the belief that "God is God".<sup>227</sup> In the 2011 Federal Court case *Bennett v Canada*, an appeal was made regarding the denied exemption of Christopher Bennett, a member of the Church of the Universe, from laws prohibiting the production and use of marijuana without criminal charges. Bennett claimed that, as part of his religious beliefs, he

---

<sup>225</sup> "The Canadian Inquisition: History and Beliefs of the Church of the Universe", The Church of the Universe, accessed July 23, 2013. <http://www.iamm.com/history.htm>

<sup>226</sup> "The Beliefs of the Church of the Universe", The Church of the Universe, accessed July 23, 2013. <http://www.iamm.com/belief.htm>

<sup>227</sup> Ibid.

understood cannabis to be the “tree of life”, and that Sections 4 and 7 of the *Controlled Drugs and Substances Act* (CDSA) unfairly restricted him from engaging in an uninhibited religious life. He argued that since he considered the growth and consumption of marijuana to be an essential part of his religion, he should be entitled to an exemption from laws restricting marijuana production outside specific medical and institutional contexts. He requested to be permitted to grow and consume 7 grams of the drug per day.<sup>228</sup> The Minister of Health denied the exemption.<sup>229</sup> Bennett then sued the Attorney General for Canada and the Minister of Health on three separate grounds. First, he claimed that such a denial constituted an infringement of his constitutional rights to religious freedom; second, he argued that the denial breached his Section 7 rights to individual liberty; third, he asserted that his rights to equality under Section 15 of the *Canadian Charter of Rights and Freedoms* were impeached.

The Federal Court speaks of religion in varying ways throughout the proceedings of *Bennett v Canada*. The opening sentence prefaces the case with the statement that “[i]t is not for a Court to deny or affirm a revelatory experience” since it “exists in a realm of its own” and can therefore not be objectively verified.<sup>230</sup> The court then cites the Supreme Court of Canada case *Syndicat Northcrest v Anselem*, affirming that the court in *Bennett* has consistently employed the “expansive definition” of religion in *Anselem*, indicating that religion “revolves around the notion of personal choice and individual autonomy”.<sup>231</sup> As such, anyone who invokes Section 2(a) of the Charter “need not prove that their beliefs or practices are recognized as valid by other

---

<sup>228</sup> *Bennett v Canada* 2011 FC 1310 [2011] at para 15.

<sup>229</sup> *Bennett* at para 32.

<sup>230</sup> *Ibid*, at para 1

<sup>231</sup> *Ibid*, at para 6.

members of their religion”.<sup>232</sup>

Yet, as it is highlighted in *Bennett*, Justice Iacobucci in *Anselem* argued that the court “need not accept that a practice is religious... just because a claimant says so”, and that the court has the authority to make an “objective inquiry” into the matter to determine whether the practice falls under Charter protection.<sup>233</sup> This, Iacobucci says, is due to the fact that “only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected”.<sup>234</sup> These discussions of the definition of “religion” preface the consideration of Christopher Bennett's claim to the protection of his religious practices with an understanding of religion as personal, individual, and subjective, and yet capable of being objectively identified as something in opposition to “the secular”.

Despite their acknowledgement of the individuality and sincerity of Bennett's belief in the religious significance of marijuana use,<sup>235</sup> the Court rules in *Bennett* that “[t]he Applicant's evidence discloses no connection between his ongoing marihuana use and any *comprehensive system of religion that would meet the definition of religion set out by the Supreme Court of Canada*”.<sup>236</sup> Here we see the beginnings of a definitional discussion about “religion”, whereas this term had previously been used without clarification. As a starting point, the Federal Court cites the definition provided in *Anselem*, which highlights the fact that religion is comprised of a *comprehensive system of faith and worship*.

The Court in *Bennett* then validates this definition by comparing it to measures taken in

---

<sup>232</sup> Ibid.

<sup>233</sup> Ibid, at para. 8.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid, at para 77,78.

<sup>236</sup> Ibid, at para 46, emphasis added.

the United States, such as in the 10th Circuit Court of Appeals case *United States v Meyers*. In *Meyers*, whereby the court suggests determining whether a group or practice is “religion” based on whether it exhibits a number of attributes, including “metaphysical beliefs which transcend the physical and apparent world”, and

the accoutrements of religion in that it will: (a) have a founder or prophet, (b) refer to important writings, (c) define gathering places, (d) have keepers of the religion’s knowledge such as clergy; (e) prescribe rituals and ceremonies; (f) possess a structure or organization; (g) have sacred holidays; (h) prescribe diet or fasting; (i) prescribe appearance and or clothing; and (j) promote the propagation of its beliefs.<sup>237</sup>

Although the historical environment of religion in the American legal system is quite different from that of Canada, and is typically more narrow in their understanding of religion, the court in *Bennett* nevertheless does not hesitate to draw parallels between both systems to strengthen their argument. Thus, despite their assurance that Canada has historically employed an “expansive definition” of religion, it seems here that the court is seeking to reign in the vagueness that lies in Canadian legislation by tying it to a stricter American definition. The definitions offered by the court in *Bennett* (with the exception of *Meyers*) emphasize religion as individualistic, personal, and primarily related to a connection with the divine. However, the portion of the *Anselem* definition most reiterated when trying to refute Bennett's claim that marijuana use is religious is the idea that religion involves a *particular and comprehensive system* of faith and worship.

---

<sup>237</sup> *United States v Meyers*, cited in *Bennett v Canada*.

Returning to the idea of religion as a comprehensive system,

[t]he Applicant states that his practice of smoking seven grams of marihuana per day is connected to his belief that cannabis is the tree of life mentioned in the Book of Revelation in the following passage: “[o]n either side of the River of Life stood the Tree of Life, which bear twelve manner of fruits, and yielded her fruit every month, and the leaves of the tree were for the healing of the nations” (Applicant’s Statutory Declaration at para 16).

While this belief references a book from the Bible, the Applicant made it clear on cross-examination that – as far as he is concerned – this belief has no connection to Christianity, the belief in God or even the Bible itself (Qs 656-663). The Applicant testified that he does not believe in the crucifixion (Qs 272-276), the virgin birth, heaven and hell or the existence of the god “Jehovah”, as he, himself, states as described in the Old Testament.<sup>238</sup>

The Federal Court moves forward to review a similar case to that of *Bennett*, namely *R v Kharaghani*, to support the argument against the validity of The Church of the Universe as religion. *R v Kharaghani* was a 2011 Ontario Superior Court of Justice case involving Shahrooz Kharagani, a “reverend” of the Church of the Universe who was charged with illegal possession and trafficking of marijuana. He identified as “a member of the G13 Mission”, which is the

---

<sup>238</sup> *Bennett* at para 79, 80.

Toronto branch of the Church.<sup>239</sup> *R. v Kharaghani* serves as a direct comparator to *Bennett v Canada*. According to the court in *Bennett*, the claimants in *Kharaghani* had an understanding of “religion” that was flawed:

The claimants in *Kharaghani* argued that paragraph 2(a) is triggered whenever an individual has a practice or belief that subjectively offers them a connection with the divine (*Kharaghani* at para 136). The Crown argued that any such connection must also have an objective nexus with religion in order to be constitutionally protected (*Kharaghani* at para 138-139).<sup>240</sup>

Strangely enough, these citations are incorrect. The case law of *Kharaghani* only extends over 78 paragraphs.<sup>241</sup> The citation given for the case cited at paragraphs 136, 138, 139 is 2011 ONSC 836 (CanLII), which corresponds to the case *Bertrand v. 640195 Ontario Inc. Desrosiers & Fils* and only extends over 86 paragraphs. It is true, however, that in *R v Kharaghani*, Herman J. stated: “I accepted ... that [Brother Shahrooz’s] consumption of cannabis was related, at least in part, to his religious beliefs and practices. I did not, however, find that his provision of cannabis to others was a religious practice stemming from a sincerely held religious belief.”<sup>242</sup>

### **Wicca and Wiccan Churches**

I will now turn to the example of Wiccan churches and their relationships with laws

---

<sup>239</sup> *R v Kharaghani* at paras 9, 10.

<sup>240</sup> *Bennett v Canada*, at para 63.

<sup>241</sup> *R v Kharaghani* at para 78.

<sup>242</sup> *Ibid*, at para 20.

about charitable status in the United States and Canada. Wiccan churches are but one arm of a larger religious movement called Wicca, popularized in the 1950s in part by the books of retired British civil servant Gerald Gardner.<sup>243</sup> Despite the variety of practices it encompasses, Wicca could be said to be a nature-based philosophy, one which sees the divine as immanent in nature, while also understanding the divine (and the physical world) in terms of a masculine/feminine duality. Traditional Wiccan worship groups, called covens, vary in size but remain relatively small, with a traditional number of thirteen people. However, with the advent of the internet and rapid global exchanges of information, knowledge about Wicca has spread and many people have started to practice on a solitary basis, creating eclectic traditions through a syncretism of traditional Wicca with New Age, aboriginal spirituality and folk practices.<sup>244</sup>

Given the variety of philosophies and practices now embraced under the label Wicca, and the fact that it is decentralized and composed of autonomous covens, it is no surprise that conventional Wiccan groups have experienced great difficulty being recognized as a religion in the eyes of the law.<sup>245</sup> Margot Adler, in writing a concise history of neo-paganism, concedes that “no single definition applies to all Wiccans.”<sup>246</sup> This lack of definition is not the only obstacle faced by Wiccans, since the small structure of traditional covens (twelve to thirteen people) prevents them from forming groups that have enough members to be considered eligible for tax exemption. In addition, the fact that Wiccan clerical duties (the nomination of a High

---

<sup>243</sup> Shelley Tsivia Rabinovitch, *The Encyclopedia of Modern Witchcraft and Neo-Paganism*, 2<sup>nd</sup> ed. (Dubuque, IA: Kendall Hunt, 2011), 116. Some Wiccan practitioners, however, claim longer roots to pre-Christian practices, which they understand to have been passed on through centuries of family history.

<sup>244</sup> Rabinovitch, *Encyclopedia*, 89, 263.

<sup>245</sup> Margot Adler, *Drawing Down the Moon: Witches, Druids, Goddess-Worshippers and Other Pagans in America*, 4<sup>th</sup> edition (New York: Penguin, 2006), 95.

<sup>246</sup> Ibid.

Priest/Priestess) are not stable, and may rotate on a yearly or ritual-by-ritual basis, does not help Wiccan claims to be recognized as a religion under the law. Particular physical locations for worship are not important, although outdoor sites are often preferred. Nevertheless, it is quite common to hold rituals indoors and in members' homes. There are no tenets of faith or rules that apply to all Wiccans; to claim or enforce such tenets would refute the independence fostered by the religion.<sup>247</sup> However, many witches ascribe to the Wiccan Rede, which states: "An ye harm none, do what ye will" in the last verse.<sup>248</sup> Despite the success of other new religious movements, the de-centralized and varied nature of Wicca signifies that, under working definitions of "religion" in the legal sphere, Wicca does not typically qualify for tax exempt status.

In Canada, it is the *Income Tax Act* that dictates the exemption of charitable organizations from taxation. However, in this legislation there is no mention of specific exemptions of religious organizations, or even what is meant by "charitable". Therefore, the definition of "charitable" is left to the courts.<sup>249</sup> According to the Canada Revenue Agency, a charity's activities must "fall within one or more of the following categories: the relief of poverty; the advancement of education; *the advancement of religion*; or other purposes beneficial to the community in a way the law regards as charitable."<sup>250</sup>

What is meant here by "the advancement of religion"? For a clarification of this, we can turn to the Federal Court of Appeal case *Fuaran Foundation v. Canada Customs and Revenue*

---

<sup>247</sup> Ibid.

<sup>248</sup> Ibid., and Rabinovitch, *Encyclopedia*, 300.

<sup>249</sup> "What is Charitable?," Canada Revenue Agency, accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/cpc/wtc-eng.html>

<sup>250</sup> "Summary Policy (CSP-C01)," Canada Revenue Agency, last modified December 11, 2008. Accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-c01-eng.html>. Emphasis added.

*Agency* (2004), in which the “advancement of religion” is defined as “to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary”.<sup>251</sup> Another definition put forward is that the advancement of religion signified “the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of the doctrines and observances upon which it rests...”<sup>252</sup> Canada Revenue Agency itself defines “the advancement of religion” on their website (where groups go to register for tax exempt status): “To advance religion in the charitable senses means to preach and advance the spiritual teachings of a religious faith and to maintain the doctrines and spiritual observances on which those teachings are based.”<sup>253</sup> The religious organization must also prove itself to be of public benefit.<sup>254</sup>

While application for “registered charity” status in Canada is not mandatory for religious organizations, it provides many benefits, such as the ability to issue tax-deductible receipts, automatic tax exemption under the *Income Tax Act of Canada*, some special provisions under the GST (Goods and Services Tax) and HST (Harmonized Sales Tax), and possible exemption from other taxation, such as corporate income or retail sales taxes.<sup>255</sup> Tax exemption also adds credibility and aids in the social acceptance of those groups who are registered, thereafter transforming them from marginal ideological movements or dangerous “cults” to previously

---

<sup>251</sup> *Fuaran Foundation v. Canada Customs and Revenue Agency* (2004 FCA 181), par. 13.

<sup>252</sup> *Ibid.*

<sup>253</sup> “Summary Policy (CSP-R06),” Canada Revenue Agency, last modified October 14, 2004. Accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r06-eng.html>. Emphasis added.

<sup>254</sup> *Cocks v. Manners* L.R. 12 Eq. 574, at 585 (H.L.) (1871).

<sup>255</sup> Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations* (Markham, ON: Butterworths, 2002), 315.

misunderstood religion. On this issue, the law sets itself up as the protector of the people, one that distinguishes “good religion” from “bad religion” (referred to as cults).<sup>256</sup>

The Wiccan Church of Canada has applied for tax exempt status under the *Income Tax Act of Canada*. As Shelley Rabinovitch explains, “[a]fter waiting more than three years for a decision, their application was denied in September 1986. Revenue Canada asserted that the syncretic and amorphous nature of neo-Pagan beliefs and practices led to a vagueness around doctrine that effectively amounted to no doctrine at all, thereby disqualifying it as a religion.”<sup>257</sup> According to Rabinovitch, the Wiccan Church of Canada has not yet attempted to bring a constitutional case to Canadian courts on this issue.<sup>258</sup> Although there is no case law dealing with Wicca’s status as “religion” in Canada, the issue has been taken up repeatedly in the United States. Wicca has also met success in being recognized in the United Kingdom.<sup>259</sup>

In the Supreme Court of Florida case *The Wiccan Religious Cooperative of Florida, Inc. v. Zingale* (2005), a constitutional case was brought up by the Wiccan plaintiffs, who claimed that they were denied state-regulated tax exempt status, a denial that unjustly favoured other religions.<sup>260</sup> The co-operative was denied sanction in the Florida Supreme Court case due to its lack of “taxpayer standing”.<sup>261</sup> What constitutes taxpayer standing is not elaborated by the official case opinion, but an article published by *ABC News* reported that the Wiccan

---

<sup>256</sup> Beaman, *Defining Harm*, 61.

<sup>257</sup> Rabinovitch, 299.

<sup>258</sup> Shelly Rabinovitch, email message to author, December 21, 2011.

<sup>259</sup> Tairu, Teemu. “The Category of ‘Religion’ in Public Classification: Charity Registration of the Druid Network in England and Wales”. In “Modern Government, Sovereignty and the Category of Religion”, edited by Timothy Fitzgerald, Naomi Goldenberg, and Trevor Stack. Manuscript in preparation.

<sup>260</sup> *Wiccan Religious Cooperative of Fla., Inc. v. Zingale*, 898 So. 2d 134, 135 (Fla. 1st DCA 2005).

<sup>261</sup> *Ibid.*

Cooperative did not meet all the requirements of the state of Florida for “religion”, one of which required “having a permanent address and a building where worshippers gather regularly.”<sup>262</sup> Similarly, the *Sarasota Herald-Tribune* reported that the group “once qualified for the exemption on items sold by the cooperative. They sued on Halloween 2000 after losing their exemption because they did not own a place of worship as required by state regulations.”<sup>263</sup> A unified and authoritative source of knowledge regarding normative Wiccan practices and a fixed location of worship were required on these occasions by the government, something counter-intuitive within Wiccan tradition.<sup>264</sup>

Such restrictions, it seems, led certain groups of Wiccans to establish official “Wiccan churches” in many places, particularly within the United States. Wiccan churches, whose form is markedly differently from the typical structure of covens, began to emerge in North America in the 1970s, after traditional Wicca had seen considerable growth and strengthening for just over two decades. These churches resemble Christian establishments in many ways. They maintain a public place of religious worship, although the purpose of such buildings has been contested in courts as not “used exclusively for religious worship.”<sup>265</sup> Many, such as the Ravenwood Church of Wicca, have established Wiccan seminaries, in which practitioners can be trained to be

---

<sup>262</sup> “Wiccans Sue for Tax-Exempt Status in Fla.” *ABC News*. Accessed December 9, 2011. <http://abcnews.go.com/US/story?id=95146&page=1#.TuVtLHJZrOM>

<sup>263</sup> “Supreme Court rejects Wiccans’ tax exemption challenge.” *Sarasota Herald-Tribune*, Oct. 26, 2006. Accessed December 9, 2011. <http://www.religionnewsblog.com/16394/supreme-court-rejects-wiccans-tax-exemption-challenge>

<sup>264</sup> “An it harm none, do what ye will”.

<sup>265</sup> *Roberts et al. v. Ravenwood Church of Wicca; and vice versa.*, 249 Ga. 348, 292 S.E.2.d. 657 (1982). sec. 2.

Wiccan priests or priestesses.<sup>266</sup> Implied by the establishment of seminaries is the fact that, instead of a rotation of High Priest/Priestess duties among members, a real “religion” must have a dedicated clergy, since religious legitimacy is viewed as preserved in privilege and teachings, not personal experience. Another instance in which Wiccan churches resemble Christian ones is their emerging concern about the need for national organizations and frameworks, for religious social support systems, and community involvement, as part of a “maturing” process.<sup>267</sup> Finally, Wiccan churches typically provide a set list of tenets or doctrine to which they adhere.

These tactics seem to have succeeded in the United States – when searching the IRS list of charities for the word “Wicca”, over 50% of registered Wiccan establishments have the word “church” in their names.<sup>268</sup> Based on information provided by organizations on their websites (if applicable), almost all allude to a church structure in their own descriptions. Yet Wiccan churches, even when adopting a recognizably Christian form, are still at a disadvantage in terms of constitutional and policy language. As evidence of this, we can look at the case of *Roberts et al vs Ravenwood Church of Wicca* (1982), which pertains to tax exempt status denied to a Wiccan church based on the fact that the property wherein services were held was not being used exclusively for religious purposes. Chief Justice Jordan, dissenting, argues that “the activities conducted by the appellee Ravenwood do not constitute ‘religious worship’”.<sup>269</sup> To support his

---

<sup>266</sup> “RavenStone Seminary.” Accessed December 15, 2011.

[http://www.ravenwoodchurch.org/index.php?option=com\\_content&view=article&id=11:ravenstone-seminary&catid=7&Itemid=29](http://www.ravenwoodchurch.org/index.php?option=com_content&view=article&id=11:ravenstone-seminary&catid=7&Itemid=29)

<sup>267</sup> Adler, *Drawing Down the Moon*, 445-447.

<sup>268</sup> The exceptions here are the Assembly of Wicca (no information available) and the Tucson Area Wiccan Pagan Network; although one could argue that the hierarchical structure of the latter is more reminiscent of Christian church structure than anything prevalent in traditional Wicca.

<sup>269</sup> *Roberts et al. v. Ravenwood Church of Wicca*, sec. 5. In contrast, the United Kingdom’s approval of the Druid Network as “religion” recognized “nature” as a supreme being. (Taira, “The Category of ‘Religion’ in Public Classification: Charity Registration of the Druid Network in England and Wales”.)

argument, Jordan argues that religion constituted a “belief in a relation to God” and that Wicca, wherein “[t]here is no belief in a deity in the sense of an anthropomorphic God, only a belief in some strange supernatural force which permeates the world”, did not therefore qualify as a religion.<sup>270</sup> He then appeals to the *Constitution of the State of Georgia*, *Webster's Seventh New Collegiate Dictionary* and the *United States Pledge of Allegiance* for authoritative definitions of religion, all of which refer to a Christian God. He concludes with the following:

While the majority opinion states that the Wiccan church does not believe in the devil, I do not believe it conforms to the traditional concept of a religion as embraced in the preamble of our State Constitution and as expressed in the Pledge of Allegiance to the flag of the United States. This nation was founded “under God,” not the “karmic circle.”<sup>271</sup>

Despite several errors in his descriptions of Wiccan practices (such as the reference to “warlocks”, a term not used by Wiccans), Chief Justice Jordan successfully prevented the case from being ruled in favour of Ravenwood.<sup>272</sup> One argument loaded with religious ideology held just as much weight as legal arguments, leading to a call for the rehearing of the case.

Ravenwood, however, later succeeded in attaining tax exempt status.

Is there any space for groups such as the Church of the Universe and to challenge the problematic notion of “religion” in the court? Why and how do new religious groups make

---

<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

<sup>272</sup> *Roberts et al. v. Ravenwood Church of Wicca*, “Summary”.

themselves heard in a discourse that privileges a certain kinds of ideology and particular social manifestations of those ideologies? Are groups that successfully lobby to be recognized as religious merely helping to perpetuate a colonial category? Or is there more at play? All of these questions merit consideration. Furthermore, I believe that new advances in gender theory are relevant in thinking about current trends in the determination of what counts as religion in the Canadian courtroom.

### **Contributions of Queer Theory**

The term “queer theory” was introduced in 1990 by Teresa de Lauretis at an academic conference. De Lauretis later wrote about the term in a 1991 article, published in *differences: A Journal of Feminist Cultural Studies*, entitled “Queer Theory: Lesbian and Gay Sexualities”. She describes queer theory as “the necessary work of deconstructing our own discourses and their constructed silences.”<sup>273</sup> Her vision for queer theory was to transcend gendered notions of sexuality, and to thoroughly destabilize and unsettle previously accepted identity categories, essentializations and conceptions of what constitutes sex, gender, race, and personhood.<sup>274</sup> All of these goals were presented as a response to feminism and gender theory, the progress of which seemed to have stalled.

Queer theory is important for my analysis for several reasons. As I argued in Chapter One, certain scholars who study religion are criticizing the foundational category of the field, re-historicizing it and recognizing the ways in which the idea has become, in the minds of many, an ahistorical, transcendent and universalized concept. The writings of these scholars is renewing

---

<sup>273</sup> Teresa de Lauretis, “Queer Theory: Lesbian and Gay Sexualities – An Introduction”, *differences: A Journal of Feminist Cultural Studies* 3:2 (1991): iv.

<sup>274</sup> de Lauretis, “Queer Theory”, v.

the field, providing excellent commentary and investigation into issues heretofore overlooked. However, the theoretical framework provided by scholars in “critical religion” has thus far been used only sparingly in relation to legal issues. These scholars have not as yet focused on particular constraints that the term “religion” places on new religious movements in the West. As an academic endeavour, “critical religion” is remarkable and highly necessary. My project seeks to extend its insights by drawing on techniques from others fields.

Like critical religion, queer theory seeks to destabilize previously sacrosanct ideas about its own subject of analysis: gender. The goals of both critical religion and queer theory, however, are quite similar as has been pointed out by Naomi Goldenberg in her essay “Queer Theory and Critical Religion: Are We Starting to Think Yet?” She calls for an investigation of the term “religion” specifically by queer theorists, saying: “If queer theorists continue to use religious language without queering it, that is if they cite religion as if it were an essential and non-political constituent of culture, they might well accomplish nothing more than a reinforcement of religious authority.”<sup>275</sup> The combination of the focus of critical religion and the tools developed in queer theory is bound to provide a fruitful basis for sound analysis. The goal of the following chapter is to combine these two strong, highly theoretical yet widely praised theoretical frameworks; in doing so, I will demonstrate how developments in queer theory can help to further academic and legal critiques of the category of religion.

The works of Judith Butler, a prominent queer theorist, provide particularly excellent implements for deconstructing legal discourse about religion. Butler's notions of performativity,

---

<sup>275</sup> Naomi Goldenberg, “Queer Theory Meets Critical Religion: Are We Starting to Think Yet?” in *Theory/Religion/Critique: Classic and Contemporary Approaches*, ed. Richard King (New York: Columbia University Press, 2014), 14.

citation, interpellation, intelligibility and subversion, in relation to gender, can be applied to the treatment and behaviour of new religious movements.

### **Performativity and Gender: An Overview**

The key concept that Butler elaborates and is pertinent to my analysis is that of *performativity*. Performativity (or, as it was first expressed, performative utterances) emerged from the work of J.L. Austin, who posited performativity as a linguistic concept whereby speech acts perform the actions they simultaneously describe. The effect of a speech act, according to Austin, was measured as either happy or infelicitous (either creating the effect desired by the interlocutor, or not).<sup>276</sup> He places importance on the productive effects of language, and not on whether statements are true or false, or whether those statements accurately describe a particular object or phenomenon.<sup>277</sup> Several philosophers develop this concept further, including Jacques Derrida, who argues that Austin's idea of an infelicitous speech act implies a failure on the part of an interlocutor to produce the any performative effect. Derrida, on the other hand, believes that any speech act, even if it is infelicitous according to Austin's description, still succeeds in acting performatively, as it inevitably effects something as a result of that speech act, whether the effect is desired or not.<sup>278</sup>

Judith Butler, combining Derrida's notion of performativity with Michel Foucault's ideas of discourse and deconstruction, introduced her own formulation of performativity (as it related to gender) in her book *Gender Trouble: Feminism and the Subversion of Identity*. Instead of

---

<sup>276</sup> Loizidou, *Judith Butler: Ethics, Law, Politics*, 27.

<sup>277</sup> Ibid.

<sup>278</sup> Loizidou, *Judith Butler: Ethics, Law, Politics*, 30.

adhering to former ideas about performativity to the letter, Butler appropriated the general concept, while liberating performativity from its systematic linguistic restraints (which she saw in both Austin and Derrida's theories). Butler's conception of performativity is more far-reaching than that of her forerunners.

Her theory of gender performativity, she admits, was spurred by a desire to move forward in feminist theory, which she saw as being weighed down by the debate of whether gender and sex were biologically inherent or a matter of choice.<sup>279</sup> Butler suggests instead that gender is neither of these; that gender is a discursive construction, a categorization that is ascribed from birth, and is thus naturalized by being repeated as a social norm.<sup>280</sup> She describes gender as a performative, as “constituting the identity it is purported to be”.<sup>281</sup> Thus, in behaving in certain ways and adhering to particular notions of gender, gender as we understand it (male and female, man and woman) is constituted by the subjects it describes, through language and action, performatively. Gender, according to Butler, is not an essential characteristic, but neither is it a “costume” to be donned and switched at will. It is a set of behaviours, appearances, social roles and expectations that are, through a pervasive and repeated discourse of speech and action, reified as objective facts that order the social interactions of humans.<sup>282</sup>

How do subjects know “how to do gender”? To explain this, Butler borrows from Derrida the notion of iterability. Derrida argues that “a performative [could not] succeed if its formulation did not repeat a coded or iterable utterance... if it were not identifiable in some way

---

<sup>279</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York : Routledge, 2006), 11.

<sup>280</sup> Butler, *Gender Trouble*, 33.

<sup>281</sup> Ibid.

<sup>282</sup> Judith Butler, *Bodies that Matter: on the Discursive Limits of Sex* (Abingdon and New York: Routledge, 2011), 1.

as a citation”.<sup>283</sup> Citation, according to Butler, is the process by which subjects interpret social norms about gender and repeat them (and therefore propagate them) in their own behaviour.<sup>284</sup> These norms are communicated to subjects via others who are performing gender in their presence, or through representations of gendered ideals.<sup>285</sup>

However, it would be a mistake to assume that subjects are “doing gender” consciously. According to Butler, the adoption of gendered behaviour is unconscious, and is prescribed by discourse even before subjects are born.<sup>286</sup> She describes this process with the help of Louis Althusser's concept of *interpellation*. Althusser describes interpellation in his essay “Ideology and Ideological State Apparatuses”, as the process by which subjects are “hailed” or compelled to be a certain way through the process of naming.<sup>287</sup> The example Butler provides is the declaration of “he's a boy” or “it's a girl” upon a child's birth. The naming of gender *creates* gender, and thus gendered behavioural expectations, through a pre-existing discourse that attributes certain things to either maleness or femaleness, and that consequently creates the subject as a gendered being by imposing a category (girl, boy) upon them.<sup>288</sup>

If, as Butler explains, gender is not inherent but is rather a process of linguistically prescribed and physically repeated behaviours, why can a subject who wishes to live beyond the norm not simply cease to perform gender? Butler engages with this question in her book *Undoing Gender*. She tells the story of David Reimer, a person who was born biologically male

---

<sup>283</sup> Butler, *Bodies that Matter*, 226.

<sup>284</sup> *Ibid*, 95.

<sup>285</sup> *Ibid*.

<sup>286</sup> Judith Butler, *Undoing Gender* (New York: Routledge, 2004), 1.

<sup>287</sup> Butler, *Bodies that Matter*, 122.

<sup>288</sup> *Ibid*, 239.

but was reassigned as a girl after a botched surgical operation left his penis deformed.<sup>289</sup> After intensive gender re-assignment therapy, Reimer spent his childhood years as a girl named Brenda.<sup>290</sup> Eventually finding herself unsatisfied with the norms associated with her female identity, Brenda chose to undergo surgery once more and to identify as male.<sup>291</sup>

Butler draws attention to the fact that doctors felt the need to “assign” a new gender to David after his surgical mishap, and that Brenda chose to switch genders later in life. This need to assign gender, she says, is due to the fact that without a fully functional penis, David became unintelligible as a social being, because the prevalent discourse on “humanness” dictates that all humans are either (recognizably) biologically male or female.<sup>292</sup> Without this level of intelligibility (recognizability), David would not have been deemed fully human, and could therefore have been treated as less than human and would have been silenced by virtue of not belonging.<sup>293</sup> The issue of gender is such that all human interaction is structured by it; so that while it is a construction, it is a useful fiction that allows subjects to be recognized as valid contributors to social discourse.

### **“Religion” as Performative**

How can theories about gender be applied to the concept of religion? Although gender theory may seem far removed from court proceedings about religion, queer theory can provide valuable insight about the ways in which the term “religion” may operate in this context,

---

<sup>289</sup> Butler, *Undoing Gender*, 59.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid, 60.

<sup>292</sup> Ibid, 64.

<sup>293</sup> Ibid, 74.

especially in relation to new religious movements. Just as Butler argues that gender is performative, I would argue that religion, as it stands in legislation as something that merits protection and privilege, is *also* performative. The words used to describe and prescribe “religion” in the courtroom play an important in *producing* religion; religion that is recognizable according to certain (Christian) markers. Although law seeks merely to describe the extent of religion, it effectively prescribes and creates religion by virtue of naming it. This is particularly evident, I suggest, when observing new religious movements. These groups are not easily accepted as legitimate by the law, and must therefore make themselves intelligible as religion by citing dominant norms and using certain language that resonates with the court’s pre-existing notion of what constitutes religion.

In the two cases presented in this chapter, it is evident that the new religious groups in question (the Church of the Universe and Wicca) are presenting themselves to the court in a manner that reflects an implicit understanding of “religion” that evokes Christianity. Members of the Church of the Universe refer to themselves as members of a church, link their practices to the Christian Bible,<sup>294</sup> refer to God,<sup>295</sup> and describe marijuana use as a “sacrament”.<sup>296</sup> They call themselves “reverends”,<sup>297</sup> a word which has been used to refer to clergy since the fifteenth century.<sup>298</sup> The court in *Bennett* insists on “moral precepts”,<sup>299</sup> as well as “prescribed rites,

---

<sup>294</sup> *Bennett v Canada*, at para 79.

<sup>295</sup> *Ibid*, at para 83.

<sup>296</sup> *Ibid*, at para 84.

<sup>297</sup> *Ibid*, at para 16.

<sup>298</sup> *Online Etymology Dictionary*, s.v. “Reverend”, accessed July 23, 2013.

[http://www.etymonline.com/index.php?allowed\\_in\\_frame=0&search=reverend&searchmode=none](http://www.etymonline.com/index.php?allowed_in_frame=0&search=reverend&searchmode=none)

<sup>299</sup> *Bennett*, at para 84.

rituals, ceremonies or holidays”.<sup>300</sup> Although the Wiccan Church of Canada has not yet brought the government to court on the issue of legal recognition, the fact that the institution is structured as a “church” as opposed to a coven suggests an underlying move toward recognizable, Christian-like form. In the United States, where much case law surrounding Wiccan churches exists, the language used by Wiccan groups to describe themselves also reflects a Christian understanding of religion. These Wiccan churches have established seminaries, fixed places of worship, dedicated clergy, and a list of official tenets.<sup>301</sup>

I argued in Chapter Two that the language used in court cases to describe religion is heavily Christianized. The power of legal discourse and court officials to determine “what counts as religion”, I suggest, interpellates (compels) new groups to take certain forms in order to be intelligible as religion. Without the viability granted by the state, new groups are not able to have their ideological commitments protected by Charter stipulations or privileged by tax exemptions, even if they understand their commitments as equal to those of more conventional religions. They therefore organize themselves in ways that are similar to the dominant group (Protestant Christians), with churches, tenets and clergy, in order to be considered worthy of protection. Those who fall outside the requirements are not recognizable and therefore have no voice to contest the meaning of “religion” in the courtroom.

If religion is, as I have suggested, performative, how does the term present a dilemma for individuals living in Western nation states that promote “freedom of religion” as a fundamental right? What does a citational, performative notion of religion mean for the idea of religious freedom? If religious freedom is not actually free, but is constrained by repeated language and a

---

<sup>300</sup> Ibid, at para 89.

<sup>301</sup> “Ravenwood Church and Seminary of the Old Religion”, House of Ravenwood, accessed July 23, 2013. <http://www.houseofravenwood.org/rw.html>

history of legal interpretation that ties its understanding of religion to Christianity, then perhaps Charter rights to “freedom of religion” do not, in fact, protect religious freedom. If “freedom of religion” means the freedom to practice what one considers one's religion unless that understanding of religion does not take a form that is recognized by the institution of law, then one is not completely free to practice one's religion. If a person's right to practice her or his religion is infringed upon, but the practice that he or she identifies as religious is unrecognized or unintelligible as religion, the infringement of her or his rights cannot be considered, because he or she is not viewed as a viable participant in the discourse about “freedom of religion”.

A person's right to practice what she or he understands as her or his religion can therefore only really be protected if that practice resembles what religion is expected to look like, according to the law. Although the definition of “religion” continues to be expanded and generalized (a problem for clarity in itself), it still retains linguistic ties to a seventeenth century vision of Protestant Christianity. The limit to protection, along with the latent Christianity of the court's perspective on religion, result in the reiteration of a Christian model among new religious movements. However, it is important to remember that although social norms are repeated, they are not necessarily done mindlessly or uncritically. There lies, in the inevitable discrepancy between the ideal of the norm of religion and its social enactment, room for resistance and pushing of boundaries. This capacity for resistance is where new religious movements, I suggest, provide a significant opportunity for advancement and change.

### **Subversion and *Religion Drag***

Judith Butler's early theories about gender performativity have been criticized for

revoking agency.<sup>302</sup> If a subject is constantly called to perform certain gendered behaviours, behaviours which are determined by a pervading discourse on what it means to be human, where is there room for choice?<sup>303</sup> Butler addresses this criticism by calling attention to the subversive powers of drag performances. Drag, she says, is a site of ambivalence.<sup>304</sup> In drag, gendered behaviours and norms are imitated by the performers, whose assigned gender is not the same as that which they perform. This discordance reinforces the desirability of the norm, but also disrupts it, showing how easily prevailing norms about natural gender are displaced onto alternative bodies.<sup>305</sup> Drag performers do not blindly copy gender, but rather help to expose the constructed and flexible quality of gender, thereby de-essentializing it.<sup>306</sup> The performance of drag exposes the unnaturalness of heterosexuality and essentialized gender. Still, drag performers can only destabilize gender by performing the gendered act *so correctly, so convincingly* that the performer is, at first glance, accepted into the discourse of what constitutes humanness (to be “correctly” and fully gendered); it is only the revelation of the displacement that then disturbs the norm.<sup>307</sup>

Drag is a site of ambivalence because its enactment both reifies and rejects gender norms, both pushes boundaries of acceptable gender and restricts them even tighter. As Butler writes:

---

<sup>302</sup> Nancy Fraser, "False Antitheses: A Response to Seyla Benhabib and Judith Butler", in *Justice Interruptus: Critical Reflections on the Postsocialist Condition*, (New York: Routledge, 1997), 66-67.

<sup>303</sup> Karen Zivi, "Rights and the Politics of Performativity", in *Judith Butler's Precarious Politics: Critical Encounters*, ed. Terrell Carver and Samuel A. Chambers (Abingdon and New York: Routledge, 2008), 161.

<sup>304</sup> Butler, *Bodies that Matter*, 125.

<sup>305</sup> *Ibid*, 133.

<sup>306</sup> *Ibid*, 132.

<sup>307</sup> *Ibid*, 129.

... drag may well be used in the service of both the denaturalization and reidealization of hyperbolic heterosexual gender norms. At best, it seems, drag is a site of a certain ambivalence, one which reflects the more general situation of being implicated in the regimes of power by which one is constituted and, hence, of being implicated in the very regimes of power that one opposes.<sup>308</sup>

While there is no necessary correlation between drag and subversion, the unresolved status of gender drag as both *created* and *constrained* by discourse about gender gives it a unique opportunity to serve as a tool for progress. The practice of drag manipulates those gender norms that the discourse of heterosexuality enforces, and reveals how flawed and unnatural the norms are. If a man can be even more womanly than a naturally-born woman, what does this mean for the idea of biologically determined gender?

### ***Religion Drag***

In the same way that drag performers have the power to subvert gender norms, I suggest that new religious movements are in a unique position to subvert the dominant paradigms about “religion” expressed in case law. I demonstrated in Chapters One and Two that the category “religion” is flawed and used ambivalently in court proceedings. When new religious movements attempt to claim infringements on their “freedom of religion”, they must first prove to the court that they are, indeed, “real religion” and not parodic or fraudulent. I have suggested that to do so, some groups adopt certain practices that have their roots in Protestant Christianity (such as designating clergy, dedicated places of worship, writing official creeds, etc.) to prove their

---

<sup>308</sup> Ibid, 125.

legitimacy. Often, but not always, a combination of these tactics succeeds in bringing groups into the category of “religion” as it is recognized by the government. Yet donning the raiment of religion may serve another purpose – it can destabilize dominant ideas about religion and can show how the trappings of religion are easily displaced from their original contexts to groups and practices that look vastly different from the norm.

This destabilization is made all the more evident in the example of Wiccan churches, many of which have been accepted as religious institutions in the United States. There is an added formality to their existence beyond the typical loose organizations of Wiccan groups: they have dedicated clergy, instead of rotating the responsibilities accorded priests and priestess; there are formal statements of belief that are presented as authoritative, instead of a *laissez-faire* attitude to individual religious commitment; and they have opted for the word “church” instead of the more typical “coven” that designates Wiccan religious groups.

New religious movements that, like Wiccan churches, have adapted their practices to look more like mainstream religion are effectively acting in a way that is parallel to drag performances. Instead of *gender drag*, which displaces gender norms by embodying gendered practices through an unexpected subject, it is a form of *religion drag*, in which conventions associated with traditional “religion” are displaced onto non-traditional groups. New religious movements can adapt their practices to the requirements placed on them by language and tradition, but in doing so they make themselves uncanny – recognizable, acceptable, but still *not quite right*.

This, I suggest, is the unique potential of new religious movements. The legal narrative of “religion” compels new groups to frame themselves in Christianized ways, but in doing so they bring a queerness, a strangeness to previously entrenched ideas about religion. Instead of being

posited as the opposite of “religion”, witchcraft is subsumed into “religion”. Witches organize themselves into churches, present their practice as religion, and it is by adopting the markers of Christianity that witchcraft (Wicca) comes to be acceptable, intelligible, as “religion”. It is a parody, an appropriation of power, a power that subjects individuals and groups to certain restrictions, but one that simultaneously grants these individuals and groups the power to subvert the limiting discourse of what constitutes real “religion”. It is only through *becoming* religion that the process of *dismantling* religion becomes possible.

This is not to say that the modelling of “religion” in the case of new religious movements is mere performance. Just as many drag performers feel that they are expressing their “true” or most sincere identities in this way, it is highly probable that those who identify as members of new religious movements feel that they truly possess and practice a thing called “religion”, and that this practice warrants legal protection. I am not attempting to contest the identity politics that are enmeshed with individual attachments to the concept of religion. I am also not dismissing the formation of new religious movements as merely parodic or “false religion”. I am, however, seeking to point out that there are powerful forces, linguistic (such as popular discourse) and regulatory (such as law), which compel new groups to perform in certain ways in order to become intelligible as religion. The pressure to conform to these requirements is present for all those who wish to be recognized as having religion, but it is particularly relevant for new groups, whose public acceptance may rely on their legal recognition. The perceived requirements of religion (place of worship, tenets, etc.) are based heavily in a Western Christian context; yet this connection is disavowed through discourses of pluralism, secularism and state neutrality. Of all groups compelled to conform to these requirements, new religious movements are in an ambivalent position; they are the most vulnerable, the most likely to conform, yet also the most

likely to destabilize a flawed notion of religion through their successful attempts at acceptance into the category. Their uncanny nature may strike discord in the seemingly stable and uncontested idea of religion that prevails in Western democracies. Through instances of *religion drag*, new religious movements both reify the flawed category of “religion” by seeking to conform to the norm, and also subvert long-standing and ethnocentric ideas of what “religion” should, and must, be.

### **What Do We Do With “Freedom of Religion”?**

Over the course of the previous three chapters, I have argued that the existence of language proclaiming “freedom of religion” in the *Canadian Charter of Rights and Freedoms*, as well as the language used in case law to define “religion”, is problematic. Not only does the term “religion” and its associates (“faith”, “church”, “belief”, “clergy”) reify a concept that is vague and unstable (to the point of religion being touted as an essential experience and inalienable right), the words may also hold interpellating power. Including the category of religion in the realm of law compels groups that might not otherwise have identified as religion to organize themselves in ways that mirror traditional concepts of religion for the purpose of gaining recognition from the government.

If there is to be actual freedom of religion, or freedom to practice and commit to an ideology that one identifies as religion, then the mere fact of including the word “religion” in law (and therefore necessarily tying specific terminology to it) may be creating the exact opposite effect. The term “religion” may unwittingly result in the self-replication of traditional forms of social organization and a restriction of individual experience and self-identification. If the ultimate goal of human rights law in Canada pertaining to “religion” is to ensure “true” freedom

of religion, then how can the dilemma of intention (freedom) and effect (restriction) be resolved?

Several scholars have noticed a dilemma with the use of the word “religion” in law, and have attempted to conceive of solutions to the problems that inevitably arise. Winnifred Sullivan draws attention to the failings of the US court system when dealing specifically with religious freedom claims. Using the minor case of *Warren vs. Boca Raton* as the basis for her argument, Sullivan demonstrates the ways in which laws pertaining to religious freedom fail to protect religious minorities and extraneous religious or spiritual expressions.<sup>309</sup> Members of the community whose loved ones lay in the Boca Raton cemetery had their religious practices (the setting up of graveside shrines) dismissed because they were not considered “official” or tied to majoritarian practices.<sup>310</sup> This, Sullivan argues, operates on a notion of religion as solely institutional phenomenon, which doesn’t account for growing variety and individualism in expressions of religious sentiment.<sup>311</sup> The crux of Sullivan’s argument is that provisions for religious freedom are inadequate. She suggests removing the category from law entirely.

Micah Schwartzman, on the other hand, suggests a more pragmatic approach to the ambivalence he detects within American law in his essay “Is Religion Special?”. Although his focus is on the United States context, the observations he makes regarding the paradoxes involved in negotiating the “specialness” of religion also ring true for Canada. He first surveys a variety of interpretations of what he calls the “Religion Clauses” (those sections in constitutional law that both prevent religion from influencing political decisions and grant it exemptions) and comes to the conclusion that, due to a lack of consistency and clarity, “religion” is not actually

---

<sup>309</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005), 155.

<sup>310</sup> Sullivan, *The Impossibility of Religious Freedom*, 2.

<sup>311</sup> *Ibid*, 148.

special, especially compared to equally fundamental secular ideologies.<sup>312</sup> However, it must be *treated* as special because of existing constitutional provisions, which are deeply entrenched and highly regarded.<sup>313</sup>

After showing how the enactment of each interpretation of the Religion Clauses is flawed in some way, Schwartzman sees two solutions: either rejecting the use of religion in constitutional law entirely, or creating a systematized process of negotiation that can ensure consistency in the way religion is managed.<sup>314</sup> He argues that rejecting “religion” is likely impossible, or very difficult, given how valued it is as a legal category. He therefore suggests expanding the definition of religion to include secular and moral ideologies, putting them on equal footing with religion for legislative purposes.<sup>315</sup> To temper the possibility of according privilege to any particular ideology unfairly, Schwartzman suggests utilizing the Secular Purposes doctrine (which insists that legal arguments for changes or accommodations based in religion must demonstrate a leading secular purpose).<sup>316</sup> Schwartzman recognizes the ideological weight carried by the word “secularism”. Thus, he proposes changing “secular purpose” to a more neutral “public purpose”.<sup>317</sup> Schwartzman’s observations apply well to the Canadian system, whose legal history is distinct but still similar to the United States in its Western constitutional conception of religion.

---

<sup>312</sup> Micah Schwartzman, “What if Religion Isn’t Special?”, *Social Science Research Network Electronic Paper Collection* (2012), 45. Accessed August 22, 2012. <http://ssrn.com/abstract=1992090>

<sup>313</sup> Ibid.

<sup>314</sup> Ibid, 46.

<sup>315</sup> Ibid, 55.

<sup>316</sup> Ibid, 59.

<sup>317</sup> Ibid, 61.

Free Williams doesn't conclusively suggest a tactic to deal with religion in the courtroom, but points out the problems in one scholar's solution to problem in his article "Determining What Counts as Religion in American Courts". He summarizes Timothy Macklem's argument, which upholds that the use of "religion" in the courtroom is only fruitful if the definition of religion is clearly laid out, fixed and uniformly applied to groups claiming religious status.<sup>318</sup> Williams, on the other hand, suggests that "religious freedom must mean the freedom to define and redefine what constitutes religion."<sup>319</sup> William is in favour of keeping the term "religion" in legislative documents, but suggests that the definition be more open. How this is possible, given the court's reliance on precedence, is hard to discern.

## Conclusion

In light of the problems highlighted, I concur with the strategy suggested by Sullivan: that is, the removal of the category of "religion" from law altogether. If the discourse about "religion" is performative, then the term will inevitably always be shaped by its origins in seventeenth century Christian Britain. This is because law, like language, relies on a chain of citation (in legal terms, "precedence") to anchor the meanings of its definitions. Whatever has been said about religion in Canadian courtrooms thus far will continue to affect future interpretations. It is evident that this chain of citation is already in effect, as the language used to describe religion in contemporary Canadian case law continues to reflect Protestant Christian traits. However, any attempt to expand the definition to be more inclusive will decrease clarity -

---

<sup>318</sup> Free Williams, "Determining What Counts as Religion in American Courts" (paper presented at the graduate conference "On Religion: Definition, Delimitation, and Application, Bloomington, Indiana, February 24-25, 2012).

<sup>319</sup> Williams, "Determining What Counts".

which is particularly problematic for courts, which rely on clear, common understanding. These obstacles are not unfamiliar to scholars of religious studies, and it is evident that the same dilemmas present themselves in the realm of law.

The problem of the definition of “religion” may seem insurmountable considering the significance of the category in public policy. Documents such as the *Charter of Rights and Freedoms* perpetuate not only the idea of religion as a naturalized category, but also the idea of inalienable rights – a series of conceptions of the world that many people would be hard-pressed to relinquish. Removing the word “religion” as suggested may thus appear to be impossible. Nevertheless, I propose that it is a worthwhile strategy to consider; additional research, especially from legal scholars with broad knowledge of Canadian law, would provide a valuable perspective into the logistics of this removal. The strategy needs to be adequately reviewed by scholars who are intimately familiar with the Canadian legal system.

Finally, I strongly recommend more research that utilizes queer theory to interrogate such fixed categories as “religion” and “religious freedom”. Queer theory provides an excellent framework through which scholars are able to interrogate the production of the normal. Endeavours to locate processes of regulation and sedimentations of power demonstrate the true value of humanities-based research in relation to public policy. Such research would allow scholars to seek out disparity, and in response, to formulate modes of administration that ensure that freedom and equality are nearer to being attained.

## Works Cited

- Adler, Margot. *Drawing Down the Moon: Witches, Druids, Goddess-Worshippers and Other Pagans in America Today*. Boston: Beacon Press, 1986.
- Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.
- Allen v. Renfrew (Corp. of the County)*, 2004 CanLII 13978 (ON SC).
- Armstrong, Karen. *The Case for God*. New York: Alfred A. Knopf, 2009.
- Asad, Talal. "The Construction of Religion as an Anthropological Category." In *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*. Baltimore: John Hopkins University Press, 1993.
- Beaman, Lori. *Defining Harm: Religious Freedom and the Limits of the Law*. Vancouver: University of British Columbia Press, 2008.
- Beaman, Lori. "Defining Religion: The Promise and Peril of Legal Interpretation." In *Law and Religious Pluralism in Canada*, edited by Richard Moon, 192-216. Vancouver: University of British Columbia Press, 2008.
- Beckford, James A. *Social Theory and Religion*. Cambridge and New York: Cambridge University Press, 2003.
- "The Beliefs of the Church of the Universe", The Church of the Universe, last accessed July 23, 2013. <http://www.iamm.com/belief.htm>
- Bennett v Canada* 2011 FC 1310 [2011].
- Berger, Benjamin. "Law's Religion: Rendering Culture", in *Osgoode Hall Law Journal* 45: 2 (2007): 277-314.
- Bourgeois, Donald J. *The Law of Charitable and Not-for-Profit Organizations*. Markham, ON: Butterworths, 2002.

Butler, Judith. *Bodies that Matter: on the Discursive Limits of Sex*. Abingdon and New York: Routledge, 2011.

Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York : Routledge, 2006.

Butler, Judith. *Undoing Gender*. New York: Routledge, 2004.

*Canadian Bill of Rights* S.C. 1960, c. 44. <http://laws-lois.justice.gc.ca/eng/acts/c-12.3/page-1.html>.

“The Canadian Inquisition: History and Beliefs of the Church of the Universe”, The Church of the Universe, last accessed July 23, 2013. <http://www.iamm.com/history.htm>

Cavanaugh, William T. “Colonialism and the Myth of Religious Violence”. In *Religion and the Secular: Historical and Colonial Formations*, edited by Timothy Fitzgerald, 241-275.

London and Oakville, CT: Equinox Publishing, 2007.

Cavanaugh, William T. *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict*. Oxford and New York: Oxford University Press, 2009.

*Chaput v. Romain*, [1955] SCR 834, 839.

*Charter of Human Rights and Freedoms*.

[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C\\_12/C12\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_12/C12_A.html)

Chidester, David. “Real and Imagined: Imperial Inventions of Religion in Colonial Southern Africa.” In *Religion and the Secular: Historical and Colonial Formations*, edited by Timothy Fitzgerald, 153-176. London and Oakville, CT: Equinox Publishing, 2007.

*Cocks v. Manners* L.R. 12 Eq. 574, at 585 (H.L.) (1871).

*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004  
SCC 48, [2004] 2 SCR 650.

*Constitution Act, 1982, c. 11 (U.K.), Schedule B, Part I, Canadian Charter of Rights and  
Freedoms*. <http://laws-lois.justice.gc.ca/eng/const/page-15.html>

de Lauretis, Teresa. "Queer Theory: Lesbian and Gay Sexualities – An Introduction." In  
*differences: A Journal of Feminist Cultural Studies* 3:2 (1991): iii-xi.

Desmarais, Gabrielle. "Law, Critical Religion and the Importance of Semantics." *Critical  
Religion Association Blog*. November 26, 2012. Accessed July 23, 2013.

[http://criticalreligion.org/2012/11/26/law-critical-religion-and-the-importance-of-  
semantics/](http://criticalreligion.org/2012/11/26/law-critical-religion-and-the-importance-of-semantics/)

Durkheim, Emile. *The Elementary Forms of the Religious Life*, translated by Karen E. Fields.  
New York: Simon & Schuster, 1995.

Fernández Olmos, Margarite and Lizabeth Paravisini-Gebert. *Creole Religions of the Caribbean:  
An Introduction from Vodou and Santería to Obeah and Espiritismo*. New York: New  
York University Press, 2011.

Fitzgerald, Timothy. "Encompassing Religion, Privatized Religions and the Invention of Modern  
Politics." In *Religion and the Secular: Historical and Colonial Formations*, edited by  
Timothy Fitzgerald, 211-240. London and Oakville, CT: Equinox Publishing, 2007.

Fitzgerald, Timothy. *The Ideology of Religious Studies*. New York: Oxford University Press,  
2000.

Fitzgerald, Timothy. *Religion and Politics in International Relations: The Modern Myth*. London  
and New York: Continuum, 2011.

Foucault, Michel. *The History of Sexuality, Volume 1*. New York: Vintage Books, 1990.

- Fraser, Nancy. "False Antitheses: A Response to Seyla Benhabib and Judith Butler". In *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition*, 59-74. New York: Routledge, 1997.
- Fuaran Foundation v. Canada Customs and Revenue Agency* (2004 FCA 181).
- Goldenberg, Naomi. "Queer Theory Meets Critical Religion: Are We Starting to Think Yet?" In *Theory/Religion/Critique: Classic and Contemporary Approaches*, edited by Richard King. New York: Columbia University Press, 2014.
- Goldenberg, Naomi. "Theorizing Religions as Vestigial States in Relation to Gender and Law: Three Cases." In *Journal of Feminist Studies in Religion* 29:1 (2013): 39-51.
- Geertz, Clifford. *The Interpretation of Cultures: Selected Essays*. New York: Basic Books, 1973.
- James, William. *The Varieties of Religious Experience: A Study in Human Nature*. Rockville, MD: Arc Manor, 2008.
- Kay, William K. *Religion in Education*. Herefordshire: Gracewing, 1997.
- Leiter, Brian. *Why Tolerate Religion?* Princeton: Princeton University Press, 2013.
- Loizidou, Elena. *Judith Butler: Ethics, Law, Politics*. New York and Abingdon: Routledge, 2007.
- Lopez, Gloria. "Removing 'Religion' From The Universe: A Proposal for Reform and Translation." Paper presented at the graduate conference "On Religion: Definition, Delimitation, and Application", Bloomington, Indiana, February 24-25, 2012.
- Masuzawa, Tomoko. *The Invention of Worlds Religion: Or, How European Universalism Was Preserved in the Language of Pluralism*. Chicago: University of Chicago Press, 2005.
- McClellan, Janet. *Many Petals of the Lotus: Five Asian Buddhist Communities in Toronto*. Toronto: University of Toronto Press, 1999.

McCutcheon, Russell T. *Manufacturing Religion: The Discourse on Sui Generis Religion and the Politics of Nostalgia*. New York: Oxford University Press, 1997.

Moon, Richard. "Introduction." *In Law and Religious Pluralism in Canada*, edited by Richard Moon, 1-20. Vancouver: University of British Columbia Press, 2008.

Moon, Richard. "Government Support for Religious Practice." *In Law and Religious Pluralism in Canada*, edited by Richard Moon, 217-238. Vancouver: University of British Columbia Press, 2008.

*Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.

Nongbri, Brent. *Before Religion: A History of a Modern Concept*. New Haven: Yale University Press, 2013.

*Oxford English Dictionary*. 2nd ed. 20 vols. Oxford: Oxford University Press, 1989.

<http://www.oed.com/>.

*Online Etymology Dictionary*. Accessed July 23, 2013. <http://www.etymonline.com/>

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

*R. v. Kharaghani*, 2011 ONSC 3404 (CanLII).

*R. v. Welsh*, 2007 CanLII 39889 (ON SC).

Rabinovitch, Shelley Tsivia, ed. *The Encyclopedia of Modern Witchcraft and Neo-Paganism*, 2<sup>nd</sup> edition. Dubuque, IA: Kendall Hunt Publishing, 2011.

"RavenStone Seminary." Accessed December 15, 2011.

[http://www.ravenwoodchurch.org/index.php?option=com\\_content&view=article&id=11:ravenstone-seminary&catid=7&Itemid=29](http://www.ravenwoodchurch.org/index.php?option=com_content&view=article&id=11:ravenstone-seminary&catid=7&Itemid=29)

"Ravenwood Church and Seminary of the Old Religion", House of Ravenwood. Accessed July 23, 2013. <http://www.houseofravenwood.org/rw.html>

- Robbins, Vernon K. *The Tapestry of Early Christian Discourse: Rhetoric, Society, and Ideology*. London and New York: Routledge, 1996.
- Roberts et al. v. Ravenwood Church of Wicca; and vice versa.*, 249 Ga. 348, 292 S.E.2.d. 657 (1982).
- Robertson and Rosetanni v. R.*, [1963] SCR 651, 652.
- Ryder, Bruce. "The Canadian Conception of Equal Religious Citizenship." In *Law and Religious Pluralism in Canada*, edited by Richard Moon, 87-109. Vancouver: University of British Columbia Press, 2008.
- Sauntson, Helen. "Contributions of Queer Theory to Gender and Language Research." In *Gender and Language Research Methodologies*, edited by Kate Harrington, 271-282. Basingstoke and New York: Palgrave Macmillan, 2008.
- Schippert, Claudia. "Queer Theory." In *Encyclopedia of Women and World Religions*, edited by Serinity Young, 825-826. New York: Macmillan Press, 1998.
- Schneiderman, David. "Associational Rights, Religion and the Charter." In *Law and Religious Pluralism in Canada*, edited by Richard Moon, 87-109. Vancouver: University of British Columbia Press, 2008.
- Schwartzman, Micah. "What if Religion Isn't Special?", *Social Science Research Network Electronic Paper Collection* (2012), 45. Accessed August 22, 2012.  
<http://ssrn.com/abstract=1992090>
- Sullivan, Winnifred Fallers. *Prison Religion: Faith-Based Reform and the Constitution*. Princeton: Princeton University Press, 2009.
- Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press, 2005.

“Summary Policy (CSP-C01)”. Canada Revenue Agency, last modified December 11, 2008.

Accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-c01-eng.html>.

“Summary Policy (CSP-R06)”. Canada Revenue Agency, last modified October 14, 2004.

Accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r06-eng.html>.

“Supreme Court rejects Wiccans’ tax exemption challenge.” *Sarasota Herald-Tribune*. Oct. 26, 2006. Accessed December 9, 2011. <http://www.religionnewsblog.com/16394/supreme-court-rejects-wiccans-tax-exemption-challenge>

*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

Tylor, Edward Burnett. *Primitive Culture: Researches into the Development of Mythology,*

*Philosophy, Religion, Language, Art and Custom, Vol 1*. London: John Murphy, 1903.

*United States v Meyers*, 131 S. Ct. 166 178 L. Ed. 2d 98 2010 U.S.

Weinrib, Lorraine. Ontario's Sharia Law Debate: Law and Politics under the Charter.” *In Law and Religious Pluralism in Canada*, edited by Richard Moon, 239-263. Vancouver: University of British Columbia Press, 2008.

Whaley, Vernon. *Called to Worship: The Biblical Foundations of Our Response to God's Call*.

Nashville: Thomas Nelson, 2009).

“What is Charitable?” Canada Revenue Agency. Accessed December 10, 2011. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/cpc/wtc-eng.html>

*Wiccan Religious Cooperative of Fla., Inc. v. Zingale*, 898 So. 2d 134, 135 (Fla. 1st DCA 2005).

“Wiccans Sue for Tax-Exempt Status in Fla.” *ABC News*. Accessed December 9, 2011.

<http://abcnews.go.com/US/story?id=95146&page=1#.TuVtLHJZrOM>

Williams, Free. "Determining What Counts as Religion in American Courts." Paper presented at the graduate conference "On Religion: Definition, Delimitation, and Application", Bloomington, Indiana, February 24-25, 2012.

Zhao, Guoping. "Two Notions of Transcendence: Confucian Man and Modern Subject", *Journal of Chinese Philosophy* 36:3 (2009): 391–407.

Zivi, Karen. "Rights and the Politics of Performativity." In *Judith Butler's Precarious Politics: Critical Encounters*, edited by Terrell Carver and Samuel A. Chambers, 157-169. Abingdon and New York: Routledge, 2008.

*Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON CA).