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# The Cultural Limits of Legal Tolerance

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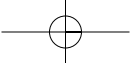
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# The Cultural Limits of Legal Tolerance

Benjamin L. Berger

*"Tolerance is intolerant and demands assimilation."*

—Hermann Broch, quoted in the Jewish Museum, Vienna, Austria<sup>1</sup>

The success of the rhetoric of legal multiculturalism has clouded our capacity to see clearly the true nature of the relationship between religious conscience and the constitutional rule of law. Legal multiculturalism has held that, in a society characterized by deep cultural pluralism, the role of the law is to operationalize a political commitment to multiculturalism by serving as custodian and wielder of the twin key tools of tolerance and accommodation. In the context of religious difference in Canada, this commitment has translated into a prevailing juridical wisdom that freedom of religion is a hallmark of the liberal constitutional order and that the mechanism by which religious culture can be harmonized with the state is through the rights-based use of these legal tools.

In the context of many questions of difference, a similar role for law has, from a juridical perspective, proven not only laudable but essential: we have seen in Canada that the judicious use of principles of tolerance and accommodation of difference inspired by constitutional rights has frequently produced positive legal outcomes in matters concerning sexual orientation, disability, political dissent and, in many instances, religious individuals seeking protection from unfair treatment at the hands of the state.<sup>2</sup> It is, no doubt, these practical legal achievements of tolerance and accommodation—aspects of the triumph of law—that have so cemented in our imagination the role of a tolerantly implemented set of constitutionalized rights and freedoms as the framework within which to address such issues.

But when this approach is applied to instances in which the law comes face to face with pronounced cultural difference it also creates a deeply flawed story about the relationship between religious difference and the constitutional rule of law. This relationship repeatedly proves to be far more conflictual, far more agonal, and far more durable than the language of legal tolerance conventionally suggests. In particular, conflicts between religious freedom/equality and other constitutional rights,

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1. Cited in Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006) at 48.
2. Whether these legal successes have translated into political gains for these groups is yet another question. I suspect that the nature and concomitant political effects of legal tolerance described in this piece apply in analogous ways to these groups as well.

rather than tolerant accommodation, seem to be the principal manifestation of religious pluralism in contemporary Canadian public life. What's more, some religious communities and commentators are expressing dissatisfaction with what they feel to be the oppressive force of secular law.<sup>3</sup> Yet the story that the law tells about its encounter with religion—and, indeed, the story told by most liberal theory that treats this issue—seems ill-equipped to account for these features of modern religious life in western constitutional democracies. The purpose of this article is to explain why this is so. Why is it that “legal multiculturalism” seems so dissonant both with our observations of the relationship between religious pluralism and the law and with the experience of religiously committed groups living within the secular rule of law?

My principal argument is that using the lens of rights and the tools of legal tolerance and accommodation to manage deep religious diversity hides the fact that the meeting of law and religion is not a juridical or technical problem but, rather, an instance of cross-cultural encounter. This being so, the use of the explanatory and managerial tools of legal multiculturalism—and, in particular, the device of legal tolerance—is an instance of and a contributor to, not a solution for, the growing tensions we see in a contemporary condition of deep religious diversity within modern secular constitutional democracies. Nor do most influential theories of law and religious pluralism offer relief from this tension. Theories of multiculturalism predicated on symbols and values indigenous to the political culture of liberalism and native to the rule of law cast law firmly apart from religion. Law is not seen as a cultural player making similar claims and, hence, facing similar stakes as the subject of its encounter, religion.<sup>4</sup>

Both juridical and academic approaches to addressing religious diversity in the modern legal setting are afflicted by a double blindness. First, they fail to see that the constitutional rule of law is, itself, a cultural system—that is, an interpretive horizon, composed of sets of symbols, categories of thought, and particular practices that lend meaning to experience. The tacit starting proposition of legal multiculturalism is that law is a means of managing or adjudicating cultural difference but enjoys a strong form of autonomy from culture, a claim of autonomy that Wendy Brown characterizes as a central “conceit” of modern liberal orders.<sup>5</sup> The cultural

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3. In her fascinating book considering the contemporary state of laws protecting freedom of religion in the United States, Sullivan writes of a “growing disjunction between the expectation of both these fissiparous communities and their members with respect to their right to self-determination as religious communities and the realities of legal regulation.” (Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005) at 153.)

4. In this vein, Sullivan complains that theorists “tend to work with a definition of law as problematic as that of religion. There is a tendency to accept modern law’s representation of itself as autonomous, universal, and transparent. Such a representation makes religion, not law, the problem” (*ibid.*).

5. In her study of the political discourse of tolerance, Brown identifies the idea that politics and law are autonomous from culture as one of the two core “conceits” of liberal orders, conceits with which the idea of tolerance, which I address later in this article, powerfully interacts. See Brown, *supra* note 1 at 166ff. Specifically, having first noted that moral autonomy is viewed as both the goal of tolerance and the antithesis of rule by culture, Brown argues that “[t]he twin conceits of the autonomy of liberal legalism from culture and the autonomy of the self-willing and sovereign subject from culture enable liberal legalism’s unique positioning as fostering tolerance and liberal

pluralism imagined by legal multiculturalism never includes the constitutional rule of law itself; rather, law sits in a managerial role above the realm of culture. Law is the curator—rather than a component—of cultural pluralism. With this as the conceptual starting point, it is exceedingly difficult to appreciate what is at stake *for the law* in its engagement with religion and to see the tenacity and force with which it protects its symbolic, structural and normative commitments.

A second, and correlative, blindness is in place once this distance between law and culture is established. Putting law “above” culture in this way means that the tools used by the law in this managerial endeavour—principally the tools of “tolerance” and “accommodation”, but also certain structural commitments and adjudicative values—are themselves seen as distinct from any particular cultural system and, hence, not exerting cultural force. And so with law strongly distinguished from the realm of culture, the cultural impact of law’s curatorship is made invisible. This enables an easy passage over the subject of law’s concern, religion, which is merely tagged as “culture;” no significant thought is given to the experience and meaning of inhabiting an “other” culture within the culture of law, nor to the way in which religion is understood and shaped by the law. Appreciating this effect is important for understanding the nature of religious pluralism within the modern rule of law because if the cultural force of the assumptions and tools of legal multiculturalism is not assessed, it is difficult to take meaningful account of the experience of living in a religious culture that faces the force of the culture of Canadian constitutionalism.<sup>6</sup> As a result, there is only a limited appreciation of what is at stake *for that religious culture* in this encounter with law and, absent a sense of the stakes, it is impossible to really understand the game.

In short, the lens of legal multiculturalism—the lens applied by juridical and most academic accounts alike—obscures the fact that the contemporary encounter between religion and the constitutional rule of law is a cross-cultural encounter. This means that the concepts and tools used by these conventional theories are not understood as components of a cultural system and as producing profound cultural impacts for those subject to them. This being so, whenever religious groups find themselves before the bar of the law the terms of the debate are, in important ways, always already settled—certain commitments and assumptions of the culture of

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polities’ unique position as capable of brokering the tolerable” (171). And if the capacity to engage in toleration is also a mark of civilization, Brown argues, liberalism thus becomes definitional of civilization and the tolerated becomes definitionally uncivilized or “barbaric.” Martha Minow similarly notes that tolerance “perpetuates assumptions that some—who put up with others—are actually superior to those others. ... [T]he very injunction to put up with others may be experienced as putting down some ways of life.” (Martha Minow, “Putting Up and Putting Down: Tolerance Reconsidered” (1990) 28 Osgoode Hall L.J. 409 at 410.)

6. Religious individuals living in Canada occupy, of course, both the religious culture in question and the culture of the constitutional rule of law, in addition to a range of possible other cultures. As such, the culture of law also makes claims upon the religionist in many settings and the individual is, in many instances, faced with intersecting theories and practices of meaning. My more Manichean framing of the issue is not meant to deny this reality. Casting the issue in the way that I have is, however, both heuristically useful and a reflection of my focus on those points at which religion becomes the subject of the adjudicative scrutiny of the law; points at which, among the various cultures potentially at play in both individual and public life, the interaction across religious and legal culture becomes especially salient.

constitutionalism are not up for grabs or open to debate because they are seen as solutions to, not aspects of, the underlying tension.<sup>7</sup> When this is the case, the rhetoric of pluralism, tolerance, and accommodation can be experienced as a language of power, coercion and enforced transformation. This is the felt cultural force of the law.

One family of approaches appears to take much better account of the cross-cultural nature of the encounter between law and religion: dialogic theories of cultural understanding. These approaches to the relationship of constitutionalism to pluralism attempt to take seriously the cultural dimensions of the issue. These theories offer far more promise in terms of understanding the realities of and offering possibilities for the interaction of law and religion. There, however, is an explanatory failure in these theories as well: the constitutional rule of law is a culture, but not like all others. It has particular features and commitments that, I will argue, severely qualify the promise of these dialogic approaches. Although they see the cultural issue more clearly, these approaches do not account for the very distinct and challenging characteristics of the culture of the constitutional rule of law. Wedded to the state and committed to its own brand of universalism, it is far from clear that the culture of law's rule is amenable to dialogic theories of cultural pluralism.

Most accounts of the interaction of law and religion fail to appreciate the culture of the constitutional rule of law. This means that the resulting discussions and theories tend to be about how law and policy should manage culture, not about the nature and dynamics of the cross-cultural encounter between law and religion. When seen more sharply this encounter appears as one that involves a culture of the rule of law that is far more interpretively ambitious and far less readily commensurable with deep religious diversity.

### 1. Looking through the Lens of Cross-Cultural Encounter

In 1763, the Treaty of Paris<sup>8</sup> brought an end to the imperial wars in Canada. Building upon similar provisions in the Articles of Capitulation, 1759,<sup>9</sup> Article IV of the Treaty of Paris included the following guarantee:

His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit.

7. Indeed, this bracketing of the core assumptions of the law even as space is left open to assess the just is an intrinsic feature of law's rule. Law mediates all conflict by bringing to it a kind of "bounded openness." The openness reflects the indeterminacy recognized in the statement that there is a "conflict" and not simply a "breach" or "violation" of the law or of some right. Yet that openness in which the exploration of the indeterminacy and ultimate resolution will take place is bounded by sets of procedures and assumptions that are precisely what make the situation one of law and not the state of nature. I am indebted to Paul Kahn for drawing this point to my attention.

8. W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution 1713-1929*, 2nd ed. (Toronto, ON: Oxford University Press, 1930) at 31.

9. *Ibid.* at 23.



From its inception, then, Canada held itself out to be a place of religious toleration with provision for the legal toleration of religion. By modern comparison, of course, this was a modest form of multiculturalism. Yet, as part of an attempt to settle the peace and establish government in a volatile incipient nation, this form of accommodation recognized that the legitimacy of a state met with the fact of internal cultural diversity depends, at least to some degree, on the extent to which it provides some room for cultural difference.

But does the story of legal multiculturalism with which we have become accustomed adequately capture the nature of this constitutional arrangement? I have suggested that the principal frailty in this account is a certain descriptive shortfall. The conventional story of legal multiculturalism fails to reflect the nature of the interaction between religious conscience and the rule of law as what it is—a cross-cultural encounter. Multiculturalism, as conventionally understood within the context of legal relationships, is a form of cultural pluralism over which law presides, but not one in which the law is itself one of the cultural players.

Yet even with this appreciation of the cross-cultural nature of the interaction between law and religion in hand, the language of multiculturalism suffers from another descriptive shortfall. “Multiculturalism” or, more specifically germane to the present topic, “religious pluralism” is, in the first instance, a description of a state of affairs, referring to the *fact* of a number of cultures existing in relationship to one another. In Canada, the language of multiculturalism is also something more; it is the name of a policy adopted by the federal government in 1971, a policy that took a normative position on this descriptive state of affairs—that multiculturalism was a good to be cultivated.<sup>10</sup> In neither instance, though, is this the language and idiom of “encounter.” It says nothing in itself about the quality or nature of the interaction between and among the multiple cultures embraced by its meaning. It says

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10. For the history of the development of the policy of official multiculturalism in Canada, see Joseph Eliot Magnet, “Multiculturalism and Collective Rights” (2005) 27 S.C.L.R. (2d) 431 and Jack Jedwab, “To Preserve and Enhance: Canadian Multiculturalism Before and After the *Charter*” (2003) 19 S.C.L.R. (2d) 309. Both articles demonstrate the evolution of the concept since the official adoption of the policy in October of 1971 to its current form, influenced by the *Charter*. Both also assess the impact and potential role of s. 27 of the *Charter*, which declares that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Jedwab provides evidence of the strong public support for multiculturalism and Magnet emphasizes the pervasive political influence of this policy in Canada, stating that “[m]ulticulturalism is a principle which has suffused the energies radiated by all segments of Canada’s governmental structure” (437). Magnet also provides a brief summary of some of the critiques of multiculturalism from both the left and the right, ultimately defending the policy against both sets of charges. See also Will Kymlicka, “Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique” (2003) 13:1 Const. Forum Const. 1, in which Kymlicka reviews the history of Canadian multiculturalism, arguing that, from a comparative perspective, the distinctiveness of multiculturalism in Canada does not lie in the idea, approach, or particular achievements of multiculturalism. Indeed, he argues that multiculturalism is a broader trend in modern Western nations and that, in fact, other countries may well have dealt better than Canada with issues of immigration, Indigenous peoples, or sub-state nationalisms. Rather, Canada’s distinctiveness lies, first, in the breadth of multicultural issues that Canada has had to face—in particular that it has had to face all three of these categories of issue at the same time—and, secondly, in the extent to which multiculturalism has become central to the way that Canadians think about the country. On this latter point, he writes that “[w]hile the actual practices of accommodation in Canada may not be that distinctive, we are unusual in the extent to which we have built these practices into our symbols and narratives of nationhood” (4).



nothing, furthermore, about the experience of this interaction for those living within it, nor about the possibilities and room for commensurability within this encounter.

To even begin to discuss what a satisfying and just form of the encounter within this broadened sense of the multiculturalism of law and religion would look like, one must first set in place lenses appropriate to cross-cultural interaction. Only once so equipped can we begin to assess with detail and sensitivity the character of the engagement that is of concern.

Approaching the topic from a broad, historical perspective, in his book *Beyond Orientalism*,<sup>11</sup> Fred Dallmayr offers an idiom for the analysis of cross-cultural encounter. Dallmayr's focus is upon the particular cross-cultural encounter that began in 1492 and his project is ultimately prescriptive, arguing for the dialogical model of engagement as the one most appropriate to a respectful commitment to the integrity of cultural difference. Along the way, however, he provides a non-exhaustive taxonomy of modes of cross-cultural encounter. As an account of *modes* of encounter, Dallmayr's "accent is not so much on historical scholarship as on theoretical-philosophical understanding."<sup>12</sup> These modes are descriptive of various postures of engagement between cultures and the attitudes with which each approaches difference and understands the relation between the self and other. His taxonomy offers a helpful starting point for talking about law and religion as the meeting of two cultural systems and, ultimately, assessing the nature of this meeting and the adequacy of contemporary accounts.

Dallmayr's first two modes of cross-cultural encounter are closely related and even frequently, though "not always or necessarily", linked.<sup>13</sup> The first, *conquest*, is linked to territorial aspirations. Conquest can take the form of complete assimilation or extermination, or some form of subjugation, of the encountered culture. Read in this light, colonialism is a quintessential form of conquest. Yet it is not simply the expression of political power and its related violence that is of interest and concern in acts of conquest. Conquest is also characterized by a particular ideological posture. As has been all-too apparent in the context of European "engagement" with various indigenous populations, encounter through conquest is predicated on a particular way of conceiving of other cultures. Specifically, conquest demands a confidence in one's own cultural assumptions and a conviction that the dissemination of this way of being is not only permitted, but justified. Typically, "conquest entails the physical subjugation of alien populations and sometimes also their forced cultural assimilation."<sup>14</sup>

11. Fred Dallmayr, *Beyond Orientalism: Essays on Cross-Cultural Encounter* (Albany: SUNY Press, 1996).

12. *Ibid.* at 3. The historical result of such interactions is always messier than such heuristic idioms can capture. For example, with his concept of "hybridity", Homi Bhabha emphasizes the manner in which even in the colonial relationship, the colonizer is deeply influenced by the colonized, which in turn affects the nature of authority structures. See, e.g., Homi Bhabha, *The Location of Culture* (London: Routledge, 1994), especially at 112-16. James Tully similarly emphasizes "the overlap, interaction and negotiation of cultures" in his account of cultural difference in James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 13.

13. Dallmayr, *supra* note 11 at 9.

14. *Ibid.* at 9. Dallmayr notes that, from the perspective of the colonized, conquest can be understood as yet another mode of encounter—the mode of "conflict" (30).

Where, however, the dominant feature of this meeting is the forced cultural assimilation of the alien population, the mode is best described as *conversion*, Dallmayr's second mode of encounter. Dallmayr explains the relationship between conquest and conversion as follows:

Although distinguishable, the two modes of outreach share one prominent feature: the denial of meaningful human difference. In the case of conquest, difference is actually affirmed but in a radical-hierarchical way which sacrifices mutuality in favour of the rigid schism of mind and matter, culture and nature, civilized people and savages. In the case of conversion, difference is denied through the insistence on a common or identical human nature—an identity which predestines native populations to be willing targets of proselytizing missions.<sup>15</sup>

Conversion is a form of cultural encounter that, like conquest, is predicated on a sense of universalism. Although normally used in the context of the relationship between religious cultures, this use is only exemplary, not exhaustive of the utility of the term. Christian practices of conversion are premised on the sense that there is a commonality of human need and a universalism in the means of satisfying this need. In this sense, it is manifestly not the case that conversion is an un-ethical practice, in the sense of being a practice that proceeds uninformed by moral claims; rather, it is an ethical practice based on a commitment to a normative universalism that denies difference. Any instance of cultural encounter in which one culture, operating on the basis of an assumed identity of human nature, seeks to transform the other to its own way of being can, thus, be described as a practice of conversion.<sup>16</sup>

Dallmayr offers *assimilation/acclulturation* as a third mode of cross-cultural encounter. Assimilation and acculturation are found in “the spreading of diffuse cultural patterns or ways of life (of religious and/or secular vintage),”<sup>17</sup> usually targeted at marginalized ethnic, linguistic, and national groups. This mode of cross-cultural encounter is very closely related to conversion. In Dallmayr's terms, assimilation is best understood as another form of the conversionary imposition of cultural hegemony, simply one that takes place in the domestic setting. Domestic conversion of minority cultures to the dominant way of life is called “assimilation.”

These first three modes of cross-cultural encounter are cut from the same cloth. They are unified by a dedication to the preservation of one cultural form at the expense of the other. Whether by violence and force of arms (conquest) or by ideological means either abroad (conversion) or at home (assimilation), each shares a core characteristic: a commitment to asserting the dominance of one's own culture, including its basic ways of knowing, its symbolic and normative commitments, and its ways of life.

15. *Ibid.* at 9-10.

16. Dallmayr is vague on the role of force in this and his other modes of encounter. Presumably, conversion can take the form of violent imposition, rhetorical persuasion, or something between the two. Again, however, I am only interested in Dallmayr's taxonomy so far as it is useful as a device in gaining insight into the nature of the cross-cultural interaction of law and religion. Beyond this, I am not committed to the particulars of his scheme.

17. Dallmayr, *supra* note 11 at 14.

In stark contrast to these first three modes of cross-cultural engagement stand Dallmayr's two preferred postures. Of these two modes, he describes the weaker form as "partial assimilation: cultural borrowing." If the rigid hierarchy assumed in the first three forms is softened and the cultures in question begin to borrow from one another, Dallmayr argues that anything from cultural incorporation to genuine cultural self-transformation can take place. *Cultural borrowing* is a form of engagement that "involves a prolonged, sometimes arduous process of engagement in alien life-forms, a process yielding at least a partial transformation of native habits due to a sustained learning experience."<sup>18</sup> Importantly, for this mode of engagement to take place, "the respective cultures must face each other on a more nearly equal or roughly comparable basis."<sup>19</sup>

This is all the more true for the mode of encounter that Dallmayr views as the "normatively most commendable"<sup>20</sup>—*dialogical engagement*. This form of encounter demands a kind of "caring respect" and "agonistic mutuality" in which both cultures are willing "to undergo a mutual learning process while simultaneously preserving the distinctiveness of difference of their traditions."<sup>21</sup> This is a dialogue in which no one has the final word; it involves both a kind of borrowing and learning, but also the maintenance of one's own culture without suppression or subordination of the other. In stark contrast to conquest, conversion, and assimilation, a dialogic mode of cross-cultural encounter actively encourages pluralism and diversity, and does so expecting to have one's own way of being changed through the influence of the other.<sup>22</sup>

Despite their profound differences in posture, both the conquest/conversion/assimilation and borrowing/dialogic groups of modes are forms of cross-cultural encounter that, for worse and for better, involve *engagement*. Although he is not an advocate of it, Dallmayr identifies a third way: *liberalism and minimal engagement*. This is a mode of encounter characterized by relative indifference to the other cultural form: "Faithful to its motto of *laissez-faire* (let it be, do not meddle)", he explains, "modern liberalism has promoted a tolerant juxtaposition of cultures and

18. *Ibid.* at 24. Dallmayr notes, however, that the results of cultural borrowing can be various, ranging from "complete absorption of foreign ingredients in the prevailing cultural matrix" to "reciprocal give-and-take" or even "genuine self-transformation" (18). In any case, such borrowing requires "a willingness to recognize the distinctiveness of the other culture, coupled with a desire to maintain at least some indigenous preferences" (18).

19. *Ibid.* As Bhabha and Tully, *supra* note 12, make clear, a degree of mutual influence short of this posture of cultural borrowing takes place even in modes of conquest or conversion. The historical case of the Spanish conquest of Latin America is a powerful case in point. Dallmayr himself recognizes that "concrete historical examples tend to resist neat labeling and to range frequently across a whole spectrum of possibilities" (18).

20. Dallmayr, *supra* note 11 at 31.

21. *Ibid.* at 36. See also Tzvetan Todorov, *The Conquest of America: The Question of the Other*, trans. by Richard Howard (New York: Harper & Row, 1984). An interesting question is whether true openness to dialogue and its effects is commensurable with an *a priori* commitment to preservation of one's own cultural distinctiveness.

22. As I will discuss in detail below, Dallmayr is not alone in holding this commitment to dialogic modes of cross-cultural engagement. See, e.g., Tully, *Strange Multiplicity*, *supra* note 12; William Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox*, expanded ed. (Minneapolis: University of Minnesota Press, 2002), advancing an approach that he calls a "discursive ethic of cultivation" or an "ethic of agonistic care."

life-forms predicated on relative mutual disinterest and aloofness.<sup>23</sup> With interactions between cultures buffered by formal techniques and procedures, substantive cultural differences are to be left alone. By these means liberal minimal-engagement seeks to stave off a mode of encounter characterized by conflict.<sup>24</sup> A more-or-less sharp division is drawn between those things that we share and are, thus, the constituents of public life, and those that are culturally specific and, hence, the private subjects of hands-off tolerance. This form of encounter imagines that engagement—which offers a promise of dialogue but the dangers of conquest/conflict—can be forestalled or controlled by careful formal and procedural delineation of spheres of autonomy.

These models all proceed from the proposition that a culture sits on both sides of every encounter. Each mode is descriptive of a different posture regarding the nature and possibilities of self-other relations in the context of cross-cultural encounters. Viewed through this diagnostic lens, how can we best understand modern approaches to the relationship between the culture of the constitutional rule of law and religious cultures?

The answer will depend on the details, details that are sometimes buried beneath the surface. I began this section with a description of the legal status given to Roman Catholicism in early Canadian constitutional documents. The British Crown confirmed that Catholics in Canada would be entitled to “profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit.” The stance appears to be one of liberal minimal engagement and tolerance. But the very day that the Royal Proclamation of 1763 was issued, and in the same year as the signing of the Treaty of Paris, Governor Murray was issued a set of secret instructions in which he was directed to actively limit the influence of the See of Rome and to establish the Church of England in Quebec so that the inhabitants, “may by degrees be induced to embrace the Protestant religion, and their Children be brought up in the principles of it.”<sup>25</sup> Beneath the veneer of emerging liberal tolerance was a deep grain of conversionary impulse.

## 2. Law’s Approach

One can discern the particular mode of encounter that law assumes in its interaction with religion by looking to the *Charter* jurisprudence governing the management of strong claims of religious freedom.<sup>26</sup> The starting point for understanding law’s

23. Dallmayr, *supra* note 11 at 24.

24. *Ibid.* at 28. Dallmayr explains that “proceduralists take for granted existing contrasts between ways of life, while seeking to mitigate them through a thin consensual layer composed of shared general rules. Once this layer is removed, contrasting life-forms or beliefs face each other in unmediated fashion, which may result either in indifference or (more commonly) in mutual repulsion and conflict.”

25. Kennedy, *supra* note 8 at 47-48.

26. One might object that by focusing on the jurisprudence, I am over-privileging the judicial voice in constructing the mode of cultural engagement between law and religion. To the extent that there is some narrowing of focus in this approach, it is justified for at least two reasons, one a conceptual claim and one a matter of local fact. First, when attempting to understand the claims made by the rule of law there is something heuristically useful in a focus on the courts. When

posture when it encounters religion is the fountainhead case on religious liberties in Canada, *R. v. Big M. Drug Mart*.<sup>27</sup> In it, Justice Dickson (as he then was) linked the notion of religious freedom to the very nature of a free society, stating that such a society “is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.”<sup>28</sup> The concept of freedom of religion, then, is centrally concerned with permitting the free and unconstrained expression of religious belief and conduct. Freedom of religion is, in the jurisprudence, an ideal that revolves around the notion of tolerance.<sup>29</sup> The Court has explained its view that “respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy”;<sup>30</sup> going so far as to declare that “mutual tolerance is one of the cornerstones of all democratic societies.”<sup>31</sup> It has characterized Canada as “a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.”<sup>32</sup> The story that law tells about its encounter with religion is generally shot through with the language of tolerance. Law should be a mechanism of repelling the state from interference with religion and should itself be parsimonious in its interventions with religious beliefs and practice.

The Court explains that this commitment to tolerance is directly linked to the fact of living in a “multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human

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an issue of religious freedom comes before the courts, given the institutional role and constraints of the judiciary, the result and reasoning necessarily involve a set of claims about the relationship between the rule of law and religion. As George Grant wrote, “[t]heories of justice are inescapably defined in the necessities of a legal decision.” (George Grant, *English-Speaking Justice* (Toronto, ON: House of Anansi Press, 1985 [orig. pub. 1974]) at 69.) By contrast, when an issue appears before Parliament or a legislature the possibilities for and modes of response are more open. They can, for example, choose not to act or might not set the issue in a constitutional or rights-based register. In either case there is no clear statement being made about the relationship between religious culture and the rule of law. The second reason for this focus on the courts is one grounded in the nature of debate about the rule of law and the current shape of politics in Canada. Particularly since the introduction of the *Charter*, the courts have been both viewed and treated as the authoritative speakers about the shape and claims of the rule of law. Even when the legislatures and Parliament have chosen to cast an issue in a constitutional and rights-based register, their terms of reference have been overwhelmingly those taken from the law as spoken by the courts. To many this is a lamentable state. As scholarship about legislative and popular constitutionalism suggests, this juricentric vision of the constitutional rule of law is not the only way of thinking about constitutionalism and rights interpretation. See, e.g., Lawrence G. Sager, “Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law” (1993) 88:1 Nw. U. L. Rev. 410; Robert C. Post & Reva B. Siegel, “Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act” (2003) 112 Yale L.J. 1943. It is, however, the way things currently are in Canada. In this sense, in a work aimed at generating a more satisfying account of the relationship between religion and the constitutional rule of law in Canada, a focus on the jurisprudence is justified.

27. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 [*Big M.*].

28. *Ibid.* note 27 at 336.

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

30. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 1 [*Amselem*].

31. *Ibid.* at para. 87.

32. *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at para. 21 [*Chamberlain*].

rights and of promoting tolerance of religious and ethnic minorities.”<sup>33</sup> Our policy of multiculturalism produces the commitment to religious tolerance and the constitutional manifestation of this commitment is the protection of religious freedom in s. 2 of the *Charter*. This, then, is the first plank in law’s approach to religion: given the multicultural character of the state, tolerance is the guiding feature of law’s engagement with religion, giving a margin of freedom for a broad diversity of pursuits, tastes, beliefs, and practices. Section 2(a) of the *Charter*, thus, asserts an aspiration of religious tolerance within a multicultural society and surely holds out substantial comfort to communities of religious belief.

On closer inspection, however, the picture becomes rather more complex and intricate. In *Big M.*, Justice Dickson explains that the corollary of freedom of religion is freedom *from* religion. If the basis for religious freedom is, in the first place, respect for the autonomy and freedom of each person, then it is equally antithetical to our commitments to allow the religious beliefs of one individual or group to be imposed upon the unwilling or the non-believing. This holding gestures towards the potential—not infrequently actualized in contemporary issues of religious freedom—of the conflicts of rights: “respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals.”<sup>34</sup> The issue is not solely one of the parallel individual rights of others; rather, the tolerance of religious difference takes place within a society with its own concerns, needs, and imperatives. Otherwise put, “[r]espect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society.”<sup>35</sup>

In recognition of this embeddedness within a context of other rights and other pressing societal interests and needs, the Canadian legal story adds to its aspiration of tolerance a second feature: limits on freedom of religion may be justified in order to protect broad social interests or preserve the rights of others. Since *Big M.*, there has been some ambiguity and debate within the jurisprudence as to whether the right to religious freedom found in s. 2(a) may be internally—or “definitionally”—limited by certain powerful public interests, such as public safety and order, or by the rights and freedoms and others.<sup>36</sup> Recently, however, the Court has expressed a strong preference for managing such conflicts not by declaring that the religious

33. *Amselem*, *supra* note 30 at para. 87. In *Regulating Aversion*, Wendy Brown emphasizes and critiques the centrality of the concept of tolerance in modern multicultural democracies, asking how and why it is that tolerance has become “a beacon of multicultural justice and civic peace at the turn of the twenty-first century” when “[a] mere generation ago, tolerance was widely recognized in the United States as a code word for mannered racialism” (*supra* note 1 at 1).

34. *Amselem*, *supra* note 30 at para. 1.

35. *Ibid.*

36. On the one hand, in *Big M.*, the Court stated that religious freedom was “subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (*supra* note 27 at 337). On the other hand, in *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 383-84 [*B.R.*], Justice La Forest, writing for the majority of the Court, stated that the Court had “consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*.”



practice falls outside the protection of s. 2(a), but by recognizing a breach of religious freedoms and then moving on to assess whether a limit on that right is reasonable. In *Multani*,<sup>37</sup> as well as the *Same Sex Marriage Reference*,<sup>38</sup> the Court explained that the most appropriate means of dealing with such conflict is to balance religious freedom against these other rights and interests under the rubric of s. 1 of the *Charter*, which asks whether a limit on a right can be “demonstrably justified in a free and democratic society.” Section 1 is, in essence, a means-ends proportionality review. The rhetorical rendering of a successful limitation of religious liberties is a declaration that, “although we have limited your religious liberties and, in this sense, failed to be as tolerant as we would otherwise aspire to be, that we have done so is justified in light of the core commitments of, this, our free and democratic society.” The aspirational story about multiculturalism’s demand for religious tolerance is circumscribed by a limiting apparatus that looks to the central values and assumptions of society to decide the justifiable boundaries of toleration.

This doctrinal framework serves as the rules of engagement for law’s cross-cultural encounter with religion. Whether a given case is processed within the neat constraints of an analysis grounded in the text of the *Charter* or simply influenced by the brooding omnipresence of constitutional rights discourse, these principles suggest the posture that the Canadian constitutional rule of law assumes in its encounter with religion. In light of the modes of cross-cultural encounter described in the last section, how is law’s approach, conditioned as it is by these rules, best understood? On the surface, law begins firmly in the milieu of tolerance and laissez-faire liberalism. The law claims that our society is firmly dedicated to multiculturalism and this commitment demands tolerance of the ways that people choose to live their lives, including the free expression and manifestation of beliefs and cultural practices. However, there is no assumption that religious cultures might offer something valuable from which the legal culture might borrow. Law and religion are certainly not engaging in a conversation as relative equals, one that may result in the transformation of either. Law’s formal encounter with religion is neither an instance of cultural borrowing nor of dialogic engagement. Neither, though, is there an attempt—at this point—to subordinate difference by means of the kind of ideological force that characterizes conversion or assimilation. Instead, the law affirms diversity, but at arm’s length. Religious cultures are entitled to the benefit of a liberal philosophy of *modus vivendi* tolerance.<sup>39</sup>

The difficulty with tolerance, as Bernard Williams has argued, “is that it seems to be at once necessary and impossible.”<sup>40</sup> Tolerance takes its place as a robust virtue

37. *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*]. The Court confirmed, at para. 26, that it had “clearly recognized that freedom of religion can be limited when a person’s freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others” but emphasized that it had “on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis.”

38. *Reference re: Same-Sex Marriage*, [2004] 3 S.C.R. 698 [*Same Sex Marriage Reference*].

39. See John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000).

40. Bernard Williams, “Tolerating the Intolerable” in Susan Mendes, ed., *The Politics of Toleration in Modern Life* (Durham, NC: Duke University Press, 1999) 65 at 65. See also Joshua Halberstam, “The Paradox of Tolerance” (1982-83) 14:2 *The Phil. Forum* 190. Halberstam also sees a paradox



at those points at which the tolerating group “thinks that the other is blasphemously, disastrously, obscenely wrong.”<sup>41</sup> A virtuous toleration that will “accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct”<sup>42</sup> must be one that finds it difficult to accept these practices and beliefs within its own system of meaning and commitments. As Williams explains, “[w]e need to tolerate other people and their ways of life only in situations that make it really difficult to do so. Toleration, we may say, is required only for the intolerable. That is its basic problem.”<sup>43</sup> The doctrinal structure of Canadian constitutional law as I have described it reflects this “basic problem” and, in so doing, points to important characteristics of law’s mode of cross-cultural engagement with religion.

The easy language of “toleration” exhausts itself juridically at the—now capacious and, hence, largely analytically vacant—s. 2(a) stage of the analysis. That which has come before the law is nominally “religion” and religious difference should be tolerated. Yet if the religious conduct or beliefs in question are arguably “intolerable”, the law moves to a means-end proportionality analysis that asks whether the limit on legal tolerance is justified. With this move, the law quickly collapses into a conversionary mode of cross-cultural encounter. A particular instance of religious pluralism has been deemed problematic and the law now asks whether the limit imposed on the tolerance of this religious culture is justified. When asking if a limit on religious freedom is justified, the question is assessed within the values, assumptions, and symbolic commitments of the rule of law itself.<sup>44</sup> In particular, law’s conception of religion comes strongly into play.<sup>45</sup> The

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in the idea of tolerance, but constructs it somewhat differently: “genuine tolerance is in fact impossible for anyone. An examination of just why the true believer cannot be tolerant uncovers the less obvious conclusion that any conviction potentially precludes tolerance toward dissidence from that conviction. Yet at the same time it is only those with convictions who can be tolerant, for it is only when one has a strong belief that a different point of view can be considered an opposing view toward which tolerance is possible. Thus when tolerance is contextually possible, it is untenable; tolerance, I want to suggest, is paradoxical” (190).

41. Williams, *supra* note 40 at 65. See also Rainer Forst, “The Limits of Toleration” (2004) 11 *Constellations* 312, who, in providing his definition of the concept of toleration, articulates the “objection component”, which holds that “it is essential for the concept of toleration that the tolerated beliefs or practices are considered to be objectionable and in an important sense wrong or bad” (314).
42. *Big M.*, *supra* note 27 at 336.
43. Williams, *supra* note 40 at 65.
44. See *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136: “The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.” See also *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 353, Arbour J: “it would not be far from the truth to state that the types of limits that are justified under s. 1 are those, and *only* those, that not only respect the content of *Charter* rights but also *further* those rights in some sense—or to use the language of s. 1 itself, “guarantee” them—by further advancing the values at which they are directed” [emphasis in original].
45. Law never really meets religion; instead, it always engages its own projected image of religion’s nature and value. See Benjamin L. Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 *Osgoode Hall L.J.* 277. In this respect, law is operating as any culture might, for it is always the case that “our understandings of other cultures’ practices are refracted and distorted through our own cultural or ideological preoccupations.” (Jeremy Webber, “Multiculturalism and the Limits to Toleration” in André Lapierre, Patricia Smart & Pierre Savard, eds., *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa, ON: Carleton University Press, 1996)

law assesses whether the religious expression in question has deviated—and if so, how much—from acceptable religion. Here, the relevant questions include whether the controverted practice is closely linked to individual flourishing, whether it was merely private or encroached on the public, and whether it limited the autonomy or equality of another. These are the criteria that determine if this instance of cultural difference will be tolerated or not. Crucially, these criteria are drawn from inside the culture of Canadian constitutionalism itself. The more that a given religious culture or practice accords with law's understanding of religion, the less abrasive and challenging to law's commitments it will be and, hence, the more likely it is that it will fall within the limits of legal tolerance. When, however, a claim to religious freedom begins to grate or put pressure on the law, it appears legally intolerable. The deeming of a particular manifestation of religion as "intolerable"—and, hence, the limitation of religious freedom as "justified"—can always be read as the product of a misfit between the claimant's religion or religious practice and what law understands as "acceptable religion." Law's religion is tolerable religion.

If the limit on tolerance is justified, it is justified owing to its fidelity to the commitments, values, and overarching objectives of the rule of law. If the limit on tolerance is not justified, *the reason is the same*. It is not justified because we erred in thinking that the practice *actually* offended the basic commitments of law's rule. The limitation was unduly onerous or we did not appreciate that, in fact, the religious practice or belief in question could be viewed as or rendered consonant with these commitments—commitments such as autonomy, the protection of individuals, and the maintenance of a private sphere characterized by personal values and a public sphere cleansed of the influences of choice and taste. Within this analytic structure, law always vindicates its own cultural understandings.

With this, law's encounter with religion takes on salient features of the conversionary/assimilationist mode of cross-cultural encounter.<sup>46</sup> Most significantly, there

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269 at 271.) Of course, law's self-presentation as a-cultural masks the fact that it possesses a particular theory of religion. In the result, however, the law is culturally conditioned to being more accepting of certain forms of religion than others. See also Sullivan, *supra* note 3, who writes "[t]he right kind of religion, the approved religion, is always that which is protected, while the wrong kind, whether popular or unpopular, is always restricted or even prohibited" (154). In a somewhat similar vein, Brown, *supra* note 1, argues that "[t]he conceit of secularism undergirding the promulgation of tolerance within multicultural liberal democracies not only legitimates their intolerance of and aggression toward non-liberal states or transnational formations but also glosses the ways in which certain cultures and religions are marked in advance as ineligible for tolerance while others are so hegemonic as to not even register *as* cultures or religions" (7). Though a matter for another work, the consonance between Canadian constitutional law's sense of religion and William James' influential Protestant conception of genuine religious experience—an understanding that is emblematic of and participates in a rich tradition within Christianity—is both very interesting and more than coincidental. For a discussion of James' thought on religion and its historical provenance, context, and influence, see Charles Taylor, *Varieties of Religion Today: William James Revisited* (Cambridge, MA: Harvard University Press, 2002).

46. This experience of an encounter with law as an experience of cultural imperialism or as conversion/assimilation is, of course, something all-too familiar for the Indigenous peoples of Canada. For a reflection on the assimilationist policies concerning Aboriginal communities in Canada as part of the story of Canadian constitutional engagement with cultural diversity, see Colleen Sheppard, "Constitutional Recognition of Diversity in Canada" (2006) 30:3 *Vt. L. Rev.* 463 at 466-67.

is an underlying repudiation of the diversity and difference recognized, from a distance, in the minimal engagement posture. Law tolerates that which is different only so long as it is not *so different* that it challenges the organizing norms, commitments, practices and symbols of the Canadian constitutional rule of law.<sup>47</sup> As such, the denial is an ethical one; it inheres in both the assertion that there is a single and indissoluble package of criteria that is appropriate to judging the result of such conflicts of rights and interests and in the fact that these criteria are all drawn from within the culture of the rule of law itself. Once this move has taken place, there is only one of two possibilities: the courts will either deem the conduct intolerable and require the religious group or individual to conform to the norms and commitments of the rule of law or the courts will conclude that the state was wrong in limiting this instance of religious diversity *because this instance of cultural pluralism is itself consistent with the values and commitments of the rule of law*. In either instance, there is the kind of universalism and, characteristic of conversionary and assimilationist modes of cross-cultural encounter, an ultimate denial of difference.<sup>48</sup> In the final analysis, you are either required to conform your way of life to the symbols, values, and meanings of the rule of law, or permitted to carry on without interference *because the law recasts the meaning of your practices and beliefs as already consistent with those cultural commitments*. In either instance, the law spreads a cultural pattern or way of life that has, at its base, “the insistence on a common or identical human nature.”<sup>49</sup> In either instance, the religionist is sent

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47. With respect to the political discourse of tolerance, Wendy Brown similarly argues that “tolerance signifies the limits of what foreign, erroneous, objectionable, or dangerous element can be allowed to cohabit with the host without destroying the host—whether the entity at issue is truth, structural soundness, health, community, or an organism” (*supra* note 1 at 27). In my analysis, religion is the foreign element and the constitutional rule of law is the host. In some respects, however, my claim is more ambitious, finding a limit on tolerance not only at those places that would “destroy the host,” but at those points at which the host (law) would have to cede public epistemological or ontological territory.
48. In this way there is the simultaneous marking of the group that is the candidate for tolerance as *factually* different and an assertion of the dominance of the meanings and perspectives of the culture of Canadian constitutionalism that renders marginal the perspectives or meanings of the group in question. Iris Marion Young identifies just this “paradox of experiencing oneself as invisible at the same time that one is marked out and noticed as different” as the central experience of cultural imperialism. (Iris Marion Young, “Five Faces of Oppression” (1988) 19:4 *The Phil. Forum* 270 at 286.)
49. Dallmayr, *supra* note 11 at 9-10. This dynamic that I am arguing is at the core of Canadian constitutionalism’s engagement with difference is described by Tully, *supra* note 12, as follows: “The words and deeds of one side are redescribed and adjudicated in the monological framework of the other, thereby providing further evidence for the correctness of their comprehensive and exclusive view from the safety of the sidelines” (164). As he elsewhere writes, *supra* note 12 at 7, there is an “imperial culture embodied in most liberal constitutions.” Iris Marion Young describes cultural imperialism in a way that resonates with both Tully’s claims and with the account of legal tolerance that I am providing: “This, then, is the injustice of cultural imperialism: that the oppressed group’s experience and interpretation of social life finds no expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life” (*supra* note 48 at 286-87). Of course, law’s self-presentation as neutral and, as I have emphasized, “above culture” means that it is unable to recognize its own imperial force. As Wendy Brown writes, “The double ruse on which liberalism relies to distinguish itself from culture—on the one hand, casting liberal principles as universal; on the other, juridically privatizing culture—ideologically figures liberalism as untouched by culture and thus as incapable of cultural imperialism” (*supra* note 1 at 23).

the message that, despite the values at stake for him or her at this analytic moment, what *really* matters is the set of values and commitments held by the rule of law and, whether by proscribing certain behaviour or by re-casting the meaning of that behaviour, you will be made to conform to the culture of law's rule.

Consider two examples drawn from the jurisprudence, one in which religion "wins" and one in which religion "loses." What is the message about the nature of legal tolerance expressed in each of these cases? The case of *Multani*<sup>50</sup> is an interesting example of apparent legal tolerance, in part because it also contains a passionate plea by the Court for the importance of religious tolerance in Canadian society and the need to teach this value to Canadian youth. *Multani* involved an Orthodox Sikh boy who felt that his faith required him to wear a *kirpan*, a small ceremonial dagger, at all times. His school issued an absolute prohibition on wearing the *kirpan* at school on the basis of its policy that prohibited students from carrying any "weapons and dangerous objects." Given that it was the product of a sincerely held religious belief, the Court had no difficulty finding that the policy offended Multani's s. 2(a) right. The bulk of the analysis turned on s. 1. Although the school board argued that the prohibition was justified as a safety measure and that the *kirpan*'s presence could have an adverse impact on the school environment, the Court concluded that this absolute prohibition was not a proportional limit on Multani's religious right. Dismissing the safety concern as ill-founded, the Court noted that there was no history of *kirpan*-related violence and that Multani had already agreed to wear the *kirpan* under his clothes and in a wooden sheath, itself wrapped and sewn in a cloth envelope. Contrary to the school board's submissions that the presence of a *kirpan* would damage the school environment, the Court explained that it was, in fact, the absolute prohibition that would have this effect:

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.<sup>51</sup>

So this religious practice is entitled to legal tolerance. The Court even emphasizes that "[r]eligious tolerance is a very important value of Canadian society."<sup>52</sup> But note that before arriving at this conclusion, the Court has cast the meaning of Multani's religious expression in a form consistent with law's understanding of religion, whether that comports with his understanding or not. The logic of the s. 2(a) analysis says that Mr. Multani's religious expression is constitutionally cognizable because it is an aspect of an "individual's self-definition and fulfilment and is a function of personal autonomy and choice."<sup>53</sup> Although it takes place at school, this religious practice is an expression of individual difference, does not touch the

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50. *Multani*, *supra* note 37.

51. *Ibid.* at para. 79.

52. *Ibid.* at para. 76.

53. *Amselem*, *supra* note 30 at para. 42.

domain of public reason, and does not threaten the autonomy, choice, or equality of any others. Sheathed, sealed, and tucked away inside the folds of young Multani's clothing, religion does not threaten any of the values or structural commitments of the rule of law. *Multani* holds that this religious difference will be "tolerated", but the underlying message is that it will be tolerated because it conforms to law's understanding of religion and does not meaningfully grate upon any of the central cultural commitments of the culture of Canadian constitutionalism. In this way, even as it tolerates, law asserts its cultural superiority and performs the dominance of public norms.<sup>54</sup> The message sent is that Multani's religion should be tolerated because it ought not to be of genuine public concern.

What, on the other hand, is the message sent when the law trumps religious freedom? In *B.R.*,<sup>55</sup> the religious freedom issue was whether the government of Ontario had interfered with parents' religious liberties by overriding their decision not to permit a blood transfusion for their infant child, a decision motivated by their Jehovah's Witness faith. The majority of the Court accepted that this decision was an expression of the parents' religious freedom as protected by s. 2(a). When, however, the judges turned to the s. 1 analysis, they reasoned that the state's actions were justified limitations on this religious freedom. The Court explained that the child had "never expressed any agreement with the Jehovah's Witness faith" and that respect for the child's autonomy demanded that she be allowed to "live long enough to make [her] own reasoned choice about the religion [she] wishes to follow",<sup>56</sup> if any. The parents had found the limit of legal tolerance at the border of individual autonomy and choice. There was simply no way that the Canadian constitutional rule of law would cede the necessary territory to make room for the parents' sincerely-held ethical and epistemological commitments. The message sent in *B.R.* is that, in the presence of a religious difference that actually challenges the fundamental commitments of the Canadian constitutional rule of law, tolerance is at an end.

Consider further two cases that both touch upon the role of religion in the provision of public education, one in which the expression of religious conscience is deemed inconsistent with the rule of law and one in which religion "wins." In both cases, the Court chose to decide the issue in administrative law terms but extensive resort was made to the constitutional status of religious freedom and the rights contained in and values reflected by the *Charter*. In *Trinity Western University*,<sup>57</sup> the Court was called upon to review the B.C. College of Teachers' refusal to certify

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54. Wendy Brown notes that the object of tolerance is always marked "as naturally and essentially different from the tolerating subject" (*supra* note 1 at 15). She explores the way in which this core dynamic within tolerance has the effect of legitimating the state and its role in reproducing the dominance of certain groups, while having profound identity effects for the "tolerated." Although his explanation of the mechanism is different, Robert Paul Wolff similarly complains of the maintenance of social dominance as one of "the covert ideological consequences" of pluralism and tolerance as ideals of social policy. (Robert Paul Wolff, "Beyond Tolerance" in Robert Paul Wolff, Barrington Moore, Jr. & Herbert Marcuse, eds., *A Critique of Pure Tolerance* (Boston, MA: Beacon Press, 1965) 3 at 39ff.)

55. *B.R.*, *supra* note 36.

56. *Ibid.* at 437.

57. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [TWU].

the University's education program, thus preventing its graduates from serving as public school teachers. The basis for the College of Teachers' decision was the fact that Trinity Western required all students to sign a code of conduct in which they agreed to refrain from practices "that are biblically condemned", including "homosexual behaviour."<sup>58</sup> The College of Teachers held that it would be contrary to the public interest to approve the program of an institution whose students had to sign a document that reflected beliefs so inconsistent with the non-discrimination and equality principles of the *Charter* and human rights legislation. In quashing this decision, the Court explained that even if it was fair to impute this religiously-based belief to those who signed the code of conduct, until there was evidence that teachers acted upon these beliefs in the public schools, the College of Teachers' decision was an unfair limitation of the students' religious freedom. Trinity Western and its students were entitled to religious tolerance; but what were the conditions of this legal tolerance? The Court explained that, in such matters, "the proper place to draw the line ... is generally between belief and conduct."<sup>59</sup> So long as the issue was belief held within a private religious school rather than practice manifested in a public institution, the discriminatory religious views would be tolerated. *TWU* was interpreted by many as a "win" for the religious group in question. But the underlying logic of the decision is that tolerance was in order *inasmuch* as the religious beliefs comported with law's understanding of religion as dominantly a private issue and could be contained within law's structural commitment to the public/private divide.

Although it concerned interestingly similar issues to *TWU*, in *Chamberlain*, by contrast, the claims of religion "lost" when tested against a legislative demand that public education be conducted on the basis of "strictly secular and non-sectarian principles."<sup>60</sup> Relying in part on the religious sentiments of a group of parents in the school district, the School Board had banned the use in Kindergarten-Grade 1 of books that depicted families headed by same-sex couples. The Court quashed this decision, making clear that the role of the Board as a public decision-maker and the role of individual parents were fundamentally different. Although the demand for "secularism" did not entirely prohibit religious concerns within the community from informing the Board's decision-making, the Court emphasized that the Board's public role demanded that it "must not allow itself to be dominated by one religious or moral point of view, but must respect a diversity of views."<sup>61</sup> Furthermore, its decision would have to be guided by the public values reflected in the *Charter*, including the strong constitutional value of equality, a value to which the Board had inadequately attended. This case imparts the message that, although religion is a legitimate, perhaps even laudable, component of private life, it must not be the dominating consideration in public decision-making. The presence of religious influence in the formation of public education policy must be circumscribed by the powerful public law value of equality. In short, the deep logic of this

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58. As cited in *TWU*, *ibid.* at para. 4.

59. *Ibid.* at para. 36.

60. *Chamberlain*, *supra* note 32 at para. 18.

61. *Ibid.* at para. 28.



decision is that this expression of religion is impermissible because it fundamentally offends law's conception of the public/private divide; once in the public realm, religion had to comply with the value of equality that has been so deeply internalized in Canadian constitutional culture.

A common dynamic appears in these cases: To the extent that religion can be contained within the structural commitments of the rule of law, interpreted as comporting with its values, and read as consistent with its understanding of religion, tolerance is the mode of cross-cultural engagement. The grant of tolerance is based on the implicit judgment that the cultural differences found in the "tolerated" really ought not to bother the law. The point at which religion transgresses these commitments and defies these conceptions is the point at which tolerance gives way to the forceful imposition of the culture of Canadian constitutionalism.

This is certainly not law's self-understanding in matters of constitutional law's treatment of religious diversity. Judges, for example, understand their analyses and debates with one another as being about the genuine potential for the law to "make room" for religion. Such an understanding is what allowed Justice Abella, writing for the majority in *Bruker v. Marcovitz*, to characterize Canadian legal multiculturalism as reflecting an "evolutionary tolerance for diversity and pluralism."<sup>62</sup> But I have proceeded from the assumption that law's self-understanding on this issue is already afflicted by a double blindness to its own cultural nature and to the cultural way in which it renders religion. Canadian constitutional law is very much committed to a self-presentation as neutral and, concomitantly, free from particular cultural commitments. Acceptance of this self-presentation is precisely the means by which law is set "above culture," the configuration that I have argued is at the core of the failure of the account of legal multiculturalism. Accordingly, my interest is in an account that can illuminate the way in which the dynamic between law and religion can be experienced by those embedded with religious culture.<sup>63</sup>

In his essay "Tolerating the Intolerable", Bernard Williams refers to an apparent form of tolerance in history of the relationship among various churches and denominations within the Christian world. One means of managing this pluralism was to assert that, despite seeming differences, all of these brands of Christianity were, in essence, the same. Since all were ultimately concerned with the same goals, one need not care much about the details of what the other believed. Although he recognizes this as a solution with certain practical political goods, Williams cautions against an excessively sanguine evaluation of this state of affairs, stating that "as an attitude, it is less than toleration. If you do not care all that much what anyone

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62. *Bruker v. Marcovitz*, 2007 SCC 54 at para. 1 [*Bruker*].

63. Minow, *supra* note 5 at 421, similarly argues that a commitment to multiculturalism demands recognition of "the conflict between ostensible tolerance, advanced by members of a secular, liberal community, and perceptions of intolerance by members of religious, conservative subcommunities. Secular humanism, from the vantage point of certain religious subcommunities, is not a solvent of tolerance for all points of view but a conflicting belief system that threatens the integrity and viability of their own culture." Accordingly, she argues that the idea of tolerance must be re-thought in such a way as to "include the vantage point of members of traditional subgroups that do not share the dominant liberal commitments to individual choice, experimentation, and value relativism" (440).



believes, you do not need the attitude of toleration, any more than you do with regard to other people's tastes in food."<sup>64</sup> Instead, the attitude being relied upon beneath the language of toleration is, in truth, indifference.

What I have described above is a tolerance of indifference. Insofar as religious culture either produces no apparent conflicts with what centrally matters to the law or the basic ways in which law understands the world, toleration is the mode of engagement. This kind of tolerance ends at the point at which the religious culture genuinely begins to grate on the values, practices, and ways of knowing of Canadian constitutionalism. When religious practice actually starts to *matter* to the law by challenging something central to the culture of law's rule, we begin to see the depth and force of law's commitments. Legal tolerance of religion re-enacts the public/private divide that is so central to law's culture. The law is able to tolerate those religious beliefs and practices that exert little pressure on the public norms and commitments of Canadian constitutionalism.<sup>65</sup> As Wendy Brown writes, "[t]olerance of diverse beliefs in a community becomes possible to the extent that those beliefs are phrased . . . as being constitutive of a private individual whose private beliefs and commitments have minimal bearing on the structure and pursuits of political, social, or economic life"<sup>66</sup> When the law can no longer be indifferent—when the religious belief or practice begins to trouble the law—we encounter the cultural limits of legal toleration.

This designation of a religious belief or practice as something that "troubles the law" triggers an interesting symbolic economy. Sometimes these issues crystallize around practices about which the symbolic stakes are, *ex ante*, symmetrically high for both law and religion. Law's tolerance may run out precisely at the point that it matters most to the religious culture. *B.R.*, the Jehovah's witness blood transfusion case discussed above, is an example.<sup>67</sup> Yet even if the religious expression is less central to the culture in question, the symbolic stakes are not, in the result, so different. Once marked as a matter of cultural significance to the law, the religious practice *assumes* deep importance to the religious culture because the practice has

64. Williams, *supra* note 40 at 67. Halberstam puts it somewhat differently, but in a way that echoes with my analysis that follows: "Tolerance is paradigmatically exemplified when one allows a *meaningful* challenge to a deeply-felt conviction" (*supra* note 40 at 192). Given his view that tolerance is a paradoxical concept such that it is untenable precisely when it becomes conceptually possible—when one feels a challenge to strongly-held *convictions*—Halberstam's ultimate argument is "a plea for recognizing the implications of having convictions and a suggestion of a moral argument for curtailing the scope of these convictions" (*ibid.* at 190).

65. There is an irony in this point. The rhetoric of multiculturalism is usually levied against a vision of religious and cultural difference as a purely private matter. I am suggesting that, while in certain ways resisting the easy relegation of difference to the private sphere, the invocation of legal tolerance has the simultaneous effect of, in other ways, shoring up that border between the public and private.

66. Brown, *supra* note 1 at 32. See also Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003). Writing of the force of the state conception of the private and public within modern secularism, Asad observes that "[f]rom the point of view of secularism, religion has the option either of confining itself to private belief and worship or of engaging in public talk that makes no demands on life. In either case such religion is seen by secularism to take the form that it properly should have. Each is equally the condition of its legitimacy" (199).

67. See text accompanying notes 55 and 56 above.

become a site for negotiating the relationship between cultures.<sup>68</sup> For this reason, we sometimes see practices not at the self-understood core of a religious tradition suddenly embraced as uniquely definitional of a given religious culture. This better describes the dynamic in *TWU*,<sup>69</sup> in which the demand to sign a heterosexist code of conduct in order to gain entrance to a teacher training program became a rallying point for arguments about the status of Christianity in modern Canadian public life. In such a case, the practice in question has become the emblem of something larger than itself: the power and politics of engagement with the culture of the Canadian constitutional rule of law. It is at these points there is felt to be *genuine* difference; yet at these points toleration as indifference runs out and the structural *and cultural* reticence of law to give anything up of significance takes shape.

Law's tolerance of indifference is not a simple one, nor is it entirely without virtue.<sup>70</sup> Recall the constitutional logic employed when analyzing whether an aspect of religious culture that might appear to chafe on the commitments of the liberal rule of law ought to be tolerated: before limiting the right, the courts should carefully consider whether the religious expression that is producing the apparent conflict can actually be satisfyingly digested within the values and commitments of the rule of law. This reflective process demands a continual refinement and perhaps even expansion of the realm of indifference. Law asks itself to reconsider and reconfigure the geography of indifference using its own categories, like the private/public, and its own values, like autonomy and choice. Perhaps what we thought, on first glance, was objectionable is actually something that we can convince ourselves we shouldn't really mind after all. On first blush, the code of conduct at issue in *TWU* appears beyond the pale seen through the values dear to the culture of Canadian constitutionalism. On reflection, though as always within the boundaries of law's structural and normative commitments and its conception of religion, the Court concluded that the belief was sufficiently private so as not to trouble the law. On the face of the situation that arose in *Amselem*—a condo owner's religiously-motivated desire to erect a sukkah on his balcony despite condo regulations to the contrary—Mr. Amselem was simply breaching the aesthetic rules to which he had agreed when he purchased his unit. Nevertheless, irrespective of whether Mr. Amselem viewed his religion in this manner, the Court ultimately concluded that, because it was both essentially a matter of private expression of preference and “integrally linked with an individual's self-definition and fulfillment and is a function of personal autonomy and choice”,<sup>71</sup> the law ought not to object to this practice.<sup>72</sup>

68. The debate about the *hijab* in France is a sharp example of this symbolic economy.

69. *TWU*, *supra* note 57.

70. Being either myopically critical or overly aspirational can lead us to take for granted more modest but nevertheless very real political goods. In this vein, Bernard Williams, “Realism and Moralism in Political Theory” in Geoffrey Hawthorn, ed., *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton, NJ: Princeton University Press, 2005) 1, fn. 2 at 2, Williams chastises Rawls for his repeated use of the phrase “mere *modus vivendi*”: “The very phrase ‘a mere *modus vivendi*’ suggests a certain distance from the political; experience (including at the present time) suggests that those who enjoy such a thing are already lucky.”

71. *Amselem*, *supra* note 30 at para. 42.

72. A similar claim about the virtues of refined indifference can be made by reference to *Multani*, *supra* note 37.

Seen in this way, modern legal tolerance takes place within the margins set by culturally-conditioned points of incommensurability between law and religion at which law will move to a posture of enforcement or “conversion.” Although very much consistent with the roots of liberal thinking about the nature of political tolerance of religion,<sup>73</sup> this is a more modest practice than that presented in the modern story of legal multiculturalism. But by imposing the reflective demand to learn about the nature and contours of the religious practice or commitment appearing before it and asking whether it should *really* matter that much to the law, there is the abiding prospect that the law will stay its violent hand in more cases than it might absent this demand for the refinement of indifference. In this sense, the tacit or express declaration that a particular religious expression is “not intolerable” is a kind of political intervention with virtues and significance that it would be a mistake to ignore.<sup>74</sup> There is real liberty within this margin created by an expanded and continually refined indifference. An assiduously cultivated liberal “tolerance as indifference” is a meaningful virtue.

Nevertheless, when toleration of a given religious commitment would require the law to actually cede normative or symbolic territory, law trumps it in the name of procedural fairness, choice, autonomy, or the integrity of the public sphere; with this, tolerance gives way to conversion. Dallmayr describes conversion as a form of universalism of ideals and perhaps this description provides some insight into why religion and law have been, for so long, locked in this form of cross-cultural encounter. Like religion, the rule of law is concerned with shaping meaning and it is not modest in its claims. Living within the Canadian constitutional rule of law is living within a culture that makes claims about the relevance of space and time, about the source and nature of authority, and about what is of value about the human

73. Locke's *A Letter Concerning Toleration* is still often invoked as the basis for modern political practices of religious toleration. It is interesting to recall that Locke himself was counseling only a relatively modest form of toleration that fundamentally inhered in leaving alone that which ought not to concern civil society. The kind of accommodation imagined in the prevailing story of legal multiculturalism is entirely foreign to his concept of toleration. Of the three limits to tolerance that he outlined, the first was the border of public law and the general interests of society. He stated that no magistrate should tolerate conduct that contravenes laws of general application enacted for a valid public purpose, stating that “no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate.” (John Locke, *A Letter Concerning Toleration* (Buffalo, NY: Prometheus Books, 1990) at 61.) What were the other two limits? First, a magistrate need not tolerate religion that counsels loyalty to a foreign political power and, second and most emphatically, “those are not at all to be tolerated who deny the being of God” (*ibid.* at 64).

74. Alexander Bickel assessed the import of a court's declaration that legislation is “not unconstitutional” in a way that resonates interestingly with the point that I am making here. Building his argument for the more robust judicial exercise of the “passive virtues”, Bickel observed that although finding a statute “not unconstitutional” is not a compliment, “neither is it an inconsequential appreciation. To declare that a statute is not intolerable in the sense that it is not inconsistent with the principles whose integrity the Court is charged with maintaining—that is something, and it amounts to a significant intervention in the political process.” (Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven, CT: Yale University Press, 1986) at 129.) The point that I am making here is that, though more modest than the robust ethic of tolerance that is invoked in the story of legal multiculturalism, a tolerance of indifference, in Bickel's terms, *is something*.

subject.<sup>75</sup> So, too, does religion. Law and religion are, in this sense, homologous; both constitute meaningful worlds.<sup>76</sup> Within a liberal democratic rule of law, however, the tacit but powerful assumption is that law's meaning must "win" at points of conflict; perhaps this is to be expected—every culture assumes that its way of seeing is basically correct and, as I will argue, law is a uniquely positioned and equipped culture, equally committed to this sense of its own centrality. Thus, when religion makes a claim upon the law that is not digestible within legal frameworks, this homology means that the claim is in competition with law's vision of the world.<sup>77</sup> At this point law asserts its dominance and law's asserted dominance is experienced as a conversionary effort for those committed to the religious culture's way of being in the world. These are the unacknowledged cultural stakes of law's encounter with religion.

"Once we see that the rule of law is a way of being in the world that must compete with other forms of social and political perception, a range of questions about the actual forms and character of this competition open up. We need to study the places at which conflict emerges and the ways in which law has succeeded or failed in these conflicts."<sup>78</sup> Studying the points of conflict between the culture of law's rule and religious forms of being in the world has revealed an unacknowledged complexity. Law's self-understanding speaks of multiculturalism, toleration and accommodation as the key principles. Yet, as I have shown, this brand of toleration depends upon a kind of indifference (no matter how cultivated) and at precisely the points at which the law can no longer be indifferent—tellingly, often at the points at which the stakes for the religious culture concerned have themselves become the highest—its conversionary aspirations appear. The simplified story about the demands and ethics of tolerance and accommodation in a multicultural society is far more comforting but far less satisfying. In Mannheim's sense of the word—a way of thinking that "obscures the real condition of society both to itself and to others and thereby stabilizes it"<sup>79</sup>—legal tolerance is ideology.

75. I explain these claims more fully in Benjamin L. Berger, "Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere" (2006) 15:1 Const. Forum 15 at 16-19.

76. See Denise G. Réaume, "Legal Multiculturalism From the Bottom Up" in Ronald Beiner & Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Oxford: Oxford University Press, 2001) 194 at 196. ("A culture, whether all-encompassing or localized, is a normative order and as such has features that parallel those of the legal system.") See also Sullivan, *supra* note 3, in which she notes that law "is replete with ideas and structures that find their origin in, and are parallel to, ideas and structures in religious traditions" (153).

77. As I have argued above (*supra* note 45 and accompanying text), depending upon the shape of their symbolic, normative, and practical commitments, religious cultures will be more or less comprehensively challenging to the law. As Réaume, *supra* note 76, puts it, "[o]ne minority community may adhere to a way of life that is comprehensively incompatible with the lifestyle of others; another may differ in relatively contained spheres" (195).

78. Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, IL: University of Chicago Press, 1999) at 84-85.

79. Karl Mannheim, *Ideology and Utopia* (New York: Harcourt, Brace, and Co., 1936) at 40. Wolff, *supra* note 54, elaborates, explaining that ideology, in this sense, involves "the refusal to recognize unpleasant facts which might require a less flattering evaluation of a policy or institution" (43). For both Mannheim and Wolff, the effect of such ideology is always to privilege the already dominant in society.

### 3. The Limits of Theory

Modern theories of multiculturalism have tended to offer approaches that suffer from the same blindness as the legal account.<sup>80</sup> These theories also suffer from the explanatory failure that I have described, neither giving strong account for the realities and difficulties of the conflict of legal and religious cultures nor a meaningful sense of the stakes of this encounter for these cultures. Although there is no dearth of theoretical ink spilled on the question of the just means of approaching the interaction of law and religious culture, this explanatory shortfall and its conceptual root can be seen by turning to consider two accounts that have been influential in the Canadian scholarly debate in recent years.

In *Multicultural Citizenship*, Will Kymlicka takes up the project of developing a liberally defensible theory of minority rights.<sup>81</sup> Kymlicka's theory is based largely on the distinction between internal and external restrictions: minority cultures should be afforded external protections that enhance the equality of these groups within broader society; they should not, however, be afforded support for internal restrictions that limit the autonomy and freedom of members.<sup>82</sup> Based in liberalism, Kymlicka's idea of tolerance is bounded by the goods of equality, autonomy, and freedom; it is also guided by the categories of the inside/outside or private/public. He offers a theory of legal multiculturalism that is different in its details to the conventional legal approach, but one that similarly affords tolerance only to the extent that the given culture comports with the values, symbols, and practices of the law, which is itself set apart from the multicultural fray. As with the legal approach, the boundaries of toleration are always already set, and set in a fashion that structurally insulates the norms and assumptions of legal culture from meaningful engagement and contestation. Thus, "[l]iberals can only endorse minority rights insofar as they are consistent with respect for the freedom or autonomy of individuals."<sup>83</sup> Beyond this point of tolerance as indifference, when faced with illiberal

80. Réaume, *supra* note 76, stands out as a strong counter-example. In her compelling plea for a "bottom-up" approach to legal multiculturalism, Réaume states that "[t]he challenge of multiculturalism is that of negotiating the relationship between two or more normative systems within a political unit" and emphasizes that "[t]he legal system is also a normative system—a complex set of rules guiding behaviour and facilitating human activity" (194). In speaking only of "normative systems" and "rules", however, I would argue that the full contours of this challenge are not duly emphasized. The systems in issue are cultural systems, a more capacious and active category.

81. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

82. In a 1990 article, Martha Minow suggests an approach very similar to Kymlicka's inside/outside model. She offers the concept of "oppression" as the figurative canary in the mineshaft, arguing that, although measures taken to protect the subgroup from the dominant culture are acceptable forms of tolerance, "[w]hen a religious subgroup implements practices that systematically subordinate some of its members, such as women and children, deference to the self-government and autonomy of the groups, from the vantage point of a liberal society, is not well-placed" (*supra* note 5 at 433). She argues that a theory and approach centred on oppression could serve as a "winning solution" (436) to the seemingly intractable difference between the perspectives of the dominant social groups and sub-groups because the demands for tolerance made by the subgroup and the demand for conformity to certain liberal norms made by dominant society are joined in their concern with anti-oppression.

83. *Supra* note 81 at 75.

cultures, the general rule is that the ultimate goal of liberals should be “to seek to liberalize them.”<sup>84</sup> Kymlicka offers a full working out of a liberal theory of multiculturalism, demonstrating how far liberalism can go while working within its own categories. In so doing, he exposes in the realm of liberal theory the same limits of toleration that I have identified in liberal legal discourse. Furthermore, he demonstrates the degree to which the discourse of tolerance “is an exercise of hegemony that requires extensive political transformation of the cultures and subjects it would govern.”<sup>85</sup>

As with legal multiculturalism, this brand of tolerance as indifference flows from an initial conception of culture. Kymlicka states that, for his purposes, “culture” is understood as follows:

I am using ‘a culture’ as synonymous with ‘a nation’ or ‘a people’—that is, as an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history. And a state is multicultural if its members either belong to different nations (a multination state), or have emigrated from different nations (a polyethnic state), and if this fact is an important aspect of personal identity and political life.<sup>86</sup>

Two features of this conception of culture are of particular salience. First, it is “thin” in the sense that there is no ideological, symbolic, or belief-based component. In this respect, religious minorities might well find themselves fitting awkwardly within this understanding of culture,<sup>87</sup> just as I have argued they might struggle to fit themselves within law’s understanding of religion. Second, law does not figure in as a culture. The law oversees and moderates, but does not itself engage as a cultural

84. *Supra* note 81 at 94. In an extension of aspects of Kymlicka’s model to the issue of immigration control, Joseph Heath argues that liberal contractarian theory can justify a demand for integration into social institutions and that, despite the fact that “[t]he long-run effect of this will be a narrowing of the differences in the value systems between members of a liberal society”, this is “simply because every values system is subject to the common set of constraints imposed by the basic institutional structure.” (Joseph Heath, “Immigration, Multiculturalism, and the Social Contract” (1997) 10 *Can. J.L. & Jur.* 343 at 359.) In the context of an argument distinguishing justified demands for *integration* from illegitimate demands for *assimilation*, however, Heath further argues that “it would be highly misleading to regard this as a form of assimilation. The correct term would be *liberalization*, which we can use to denote an endogenous transformation that renders cultural value systems institutionally compatible with a plurality of other cultural forms” (*ibid.*). Like Kymlicka, Heath’s argument is compelling from within the horizon of liberal thought, which is—it must be emphasized—the horizon that both overtly seek to occupy. But whether ultimately liberally defensible or not, as experienced by a religious culture, “liberalization” as the “endogenous transformation that renders value systems institutionally compatible with a plurality of other cultural forms” may have a decidedly euphemistic ring to it.

85. Brown, *supra* note 1 at 202. Brown critiques Kymlicka’s approach for “deploying Kantian liberalism in a distinctly non-Kantian way: that is, treating tolerance as a means for transforming others rather than as an end in itself, and treating individual autonomy as a bargaining chip rather than as an intrinsic value. The demand for cultural transformation, of course, also compromises the gesture of tolerance at the moment it is extended” (*ibid.*).

86. *Supra* note 81 at 18.

87. Denise Réaume criticizes Kymlicka’s approach on very much this basis. From a cultural perspective, “Kymlicka’s approach—presumptively validating rules directed at outsiders for the protection of the group while exhibiting suspicion about rules imposing restrictions on insiders—is puzzling. At its core, a culture is a set of rules and practices, some mandatory, directed at insiders—it does, after all, constitute their way of life” (*supra* note 76 at 197).



actor in, the multicultural terrain that he imagines. By locating culture only on one side of the issue, Kymlicka obscures the dominance and power at play in the cross-cultural encounter between law and religion, even as his theory performs it.

Ayelet Shachar takes a critical stance towards Kymlicka's liberal theory of multiculturalism, arguing that his "distinction between external and internal aspects of accommodation fails to provide a workable solution in practice for certain real-life situations involving accommodated groups."<sup>88</sup> She rightly notes that his approach "may even tend to reinforce injurious in-group practices in cases where the external protections that promote justice between groups uphold the very cultural traditions that sanction the routine in-group maltreatment of certain categories of historically vulnerable members, such as women."<sup>89</sup> Yet in attending to these concerns, Shachar's theory of "transformative accommodation" ultimately replicates the mode of cross-cultural engagement between law and religious pluralism found in Kymlicka's work.

Shachar's laudable goal is to find an approach to multiculturalism that is guided by a concern for cultural integrity but that is also sensitive to the distributional social costs borne primarily by women when such cultures are afforded too much autonomy from the influence of public norms. She wants to add the individual to the normally dyadic debate about multiculturalism that focuses on the interaction of the state and the group. She is critical of the "unavoidable costs" approach to multiculturalism, which holds that if you want to take multiculturalism seriously you must simply bear the costs of possible in-group rights violations. Yet she is equally critical of the "reuniversalized citizen option," which says that the only way to resolve this tension is to pick the primacy of individual rights over group cultural integrity. Shachar's preferred approach leans heavily on the concept of "jurisdiction" to achieve a form of balance that she calls "transformative accommodation". In this vision of multiculturalism, there are overlapping, non-exclusive jurisdictions shared between the state and the group, leading both to compete for the loyalties of citizens and, thus, creating incentives for both to speak to the needs of individuals within minority groups. Yet as she unfolds her theory of transformative accommodation through "joint governance," we see that the transformation envisioned is really one whereby religion is forced to change to take better account of the normative commitments of Canadian constitutional culture. On the one hand she claims that "the objective of harnessing this individual-group-state dynamic is not to strip communities of their distinctive *nomos*."<sup>90</sup> This claim is important to her because

88. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 18. Shachar also notes the curious fact that Kymlicka "pays relatively little attention to religiously defined minority communities" (26), a point of limitation in Kymlicka's theory and on which Shachar is much stronger. For her detailed critique of Kymlicka, see 29-32. Equally critical of Kymlicka on this point, Modood's "institutional integration approach" to multiculturalism that centres on "a moderate and evolutionary secularism based on institutional adjustments" is quite close to Shachar's theory in certain other key ways. In particular, Modood similarly adopts an essentially functional/institutional conception of law and assumes the values of public law as the framing limits of his approach. See Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge: Polity Press, 2007) at 79.

89. Shachar, *supra* note 88 at 18.

90. *Ibid.* at 126.



she wants to respect group and individual commitment to traditional cultures. Yet on the other hand she argues that the very goal of this model of transformative accommodation—a goal reflected in her chosen label itself—is to make in-group practices that are inconsistent with the equality and autonomy norms of the constitutional rule of law very costly and, thus, to “create incentives for the group to transform the more oppressive elements of its tradition.”<sup>91</sup> The goal is to “lead to the internal transformation of the group’s *nomos*.”<sup>92</sup>

Shachar’s is an imaginative and legally crafty alternative model of multiculturalism that admirably seeks to ameliorate the in-group social costs too often borne by women. But it is also a good example of a theory that concerns itself with a *nomos* that is “over there,” while failing to account for the extent to which the manipulation of concepts of jurisdiction and authority is a project firmly embedded in a *nomos*, this time a legal *nomos*. Throughout, Shachar presents law in an overwhelmingly functional light—as a tool for managing culture—and in so doing elides the presence and influence of law’s culture in her analysis. Indeed, Shachar’s controlling concept—jurisdiction—is itself a history- and meaning-laden way of understanding the intersection of authority and space that is specifically tied to the culture of law’s rule.<sup>93</sup> To use this concept is to employ law’s symbolic categories in service of enforcing values that are, themselves, internal to the culture of Canadian constitutionalism. Shachar’s theory is fairly described, in Dallmayr’s terms of cross-cultural encounter, as a model of gradual or “soft” conversion. She tacitly assumes certain boundaries regarding that which will be “tolerated” in her proposed multicultural jurisdictional setup.<sup>94</sup> Her means of protecting these boundaries is simply more nuanced and gradual than a direct imposition or outright demand for change. Yet whether the product of “toleration,” “internal v. external restrictions” or the hyper-cultural legal concept/symbol of jurisdiction, the process of being forced to change to comply with a given cultural system can be experienced as a dynamic of power characteristic of conquest, conversion, or assimilation. This experience demands attention as a meaningful aspect of the politics of legal multiculturalism. As was the case for Kymlicka’s avowedly liberal theory, Shachar’s predicate understanding of law hides the inter-cultural dimensions of the encounter between law and religion.

91. *Ibid.*

92. *Ibid.* at 124. In this respect, Shachar’s approach is a kind of anti-pole to Tully’s, who seeks to reorient legal practices towards recognition and understanding of the other group’s *nomos*. Tully’s approach is discussed more fully below.

93. See Berger, *supra* note 75. One is reminded of Robert Cover’s observation that “[w]e construct meaning in our normative world by using the irony of jurisdiction, the comedy of manners that is *malum prohibitum*, the surreal epistemology of due process.” (Robert M. Cover, “The Supreme Court 1982 Term—Foreword: Nomos and Narrative” (1983) 97 Harv. L. Rev. 4 at 8.) See also Richard T. Ford, “Law’s Territory (A History of Jurisdiction)” in Nicholas Blomley, David Delaney & Richard T. Ford, eds., *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell, 2001) 200 at 201 (“jurisdiction is . . . a way of speaking and understanding the social world”); Kai Raustiala, “The Geography of Justice” (2005) 73 Fordham L. Rev. 2501.

94. Ayelet Shachar states, for example, that “[a] truly comprehensive solution to the multiculturalism paradox must therefore identify and defend only those state accommodations which can be coherently combined with the improvement of the position of traditionally subordinated classes of individuals within minority group cultures” (*supra* note 88 at 118).

Despite their differences, these two models are both exemplary of conventional theorizing about legal tolerance as it relates to religious difference. Both amount to theoretical reconfigurations of the geography of legal multiculturalism and tolerance, with all of the features and cultural dynamics that I have described. The efforts of those like Kymlicka and Shachar to soften law's force and to expand and refine the margins of indifference are important. Nevertheless, these accounts essentially replicate the pattern of engagement found beneath law's story about religious pluralism. Each views law as something quite apart from the cultures that it is overseeing. Accordingly, each assumes limits to tolerance and means of managing difference that do not force law to critically examine its own symbolic and normative assumptions or seek cross-cultural understanding; as a result, toleration tends to expire at precisely the point where these assumptions are threatened. This produces a strong tendency to collapse into assimilationist modes of engagement with religious and cultural groups. Herein lies the source of the durable and protracted tensions between religious communities and the constitutional rule of law, tensions that we have seen build in recent years. If, under the banner of multicultural tolerance, religious diversity is being subject to conversionary force at precisely those points of meaningful cultural difference, the experience of those minority cultures is not one of respect for pluralism and accommodation of diversity but, rather, of coercion at the hands of the law.

What other forms of legal tolerance of religious difference can be imagined? One currently popular and, in the dimensions explored in this article, apparently promising move is to ground an approach to cross-cultural encounter in dialogic theory. Dallmayr is exemplary here. Drawing strongly from the theory of Todorov and Gadamer, Dallmayr advocates a form of cross-cultural engagement based in an ethic of "understanding" rather than in minimal engagement and *modus vivendi*. Dallmayr imagines a form of cross-cultural tolerance that is "understood not as an outgrowth of neutral indifference but as the appreciation of otherness from the vantage of one's own life world (and its prejudgments)."<sup>95</sup> A constitutional order dedicated to the ethics of dialogic cross-cultural engagement would be more than an attempt at normative agreement. Rather, it would manifest "a willingness to enter the border zone or interstices between self and other, thus placing oneself before the open 'court' of dialogue and mutual questioning."<sup>96</sup> In this form of dialogic encounter, "'one must seek to understand the other' even at the risk of self-critique and self-decentering, which entails that 'one has to believe that one could be wrong.'"<sup>97</sup> For Dallmayr, Todorov, Gadamer, Connolly and others, it is this kind of cross-cultural encounter that could navigate the "precarious course between (or beyond) assimilation and atomism."<sup>98</sup> In short, "[w]edged between surrender and triumph, dialogical exchange has an 'agonal' or tensional quality which cannot be fully stabilized; as a corollary of self-exposure, it requires a willingness to 'risk oneself.'"<sup>99</sup>

95. *Supra* note 11 at 55-56.

96. *Ibid.* at 47.

97. *Ibid.* at 48-49.

98. *Ibid.* at 33.

99. *Ibid.* at xviii. See, e.g., William E. Connolly, *Pluralism* (Durham, NC: Duke University Press,

Taken from the heights of political and hermeneutic theory, this approach to the encounter between cultures seems both to offer a more satisfying recognition of the stakes for law and religion and to chart a possible new path. So can the answer to the cultural limits of legal toleration be found in these contemporary dialogic theories of cross-cultural interaction? I argue that it cannot. The distinctive character of the culture of contemporary constitutionalism limits the possible modes of cross-cultural encounter and precludes the kind of dialogical engagement imagined in these theories.

Dallmayr describes dialogic encounter as requiring that both cultures open themselves to mutual questioning and manifest a “willingness to risk oneself.” As noted above, a precondition to this form of cross-cultural understanding is the “risk of self-critique and self-decentering, which entails that ‘one has to believe that one could be wrong.’”<sup>100</sup> One of the distinctive features of law’s rule is that it is, in a very particular and practical respect, never wrong. This is not, of course, to say that law never admits error and makes changes accordingly; it surely does this. The point, rather, is that the ultimate authority and correctness of the law is never in question for itself. Even when it accepts that the application of its principles were misguided in a given case or that certain rules should adjust to account for changes in society, there is a permanent conservation of law’s authority and, contrary to the dialogic demand to be open to the risk of self-decentering, a structurally permanent affirmation of its place at the centre of the management of all public dispute. Paul Kahn puts the issue as follows:

Any failure at all will appear to threaten the whole of the rule of law. Law does not win localized victories over action; it cannot tolerate defeats as long as they are balanced by victories. ... Law never explicitly concedes defeat; it never admits powerlessness. A partial rule of law is not the rule of law at all. The rule of law must always claim that no one is above the law.<sup>101</sup>

Thus, although it might, in a given case, concede that the line between the private and public was incorrectly drawn in the past, we cannot imagine Canadian constitutional rule of law disavowing the organizing significance of this conceptual trope. Similarly, although the legal configurations necessary to protect individual autonomy and choice might be hotly debated in the law, the normative primacy of these values is never itself at stake. The rule of law is a way of understanding the world; when law asserts its ultimate authority, it asserts the dominance of its basic understandings. If this is true, it leaves little room for dialogic engagement.

When religious cultures claim the protection of rights that are a part of modern legal multiculturalism, there is no openness to the possibility that the law might not be the ultimate arbiter of the terms and conditions that will settle this dispute.<sup>102</sup>

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2005) at 125 (“In a relation of agonistic respect, something in the faith, identity, or philosophy of the engaged parties is placed at risk”).

100. *Supra* note 11 at 48-49.

101. Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (New Haven, CT: Yale University Press, 1997) at 167.

102. This is where Forst’s argument for a “respect conception” of toleration founders when applied to the interaction of religious culture and the culture of Canadian constitutionalism (Forst, *supra*

Another way of seeing this very particular feature of the culture of contemporary Canadian constitutionalism is in linguistic terms. In his plea for a form of dialogic constitutionalism that can better serve the needs of deep diversity, Tully argues as follows:

if there is to be a post-imperial dialogue on the just constitution of culturally diverse societies, the dialogue must be one in which the participants are recognized and speak in their own language and customary ways. They do not wish either to be silenced or to be recognized and constrained to speak within the institutions and traditions of interpretation of the imperial constitutions that have been imposed over them.<sup>103</sup>

Yet once cast as a claim about legal tolerance or accommodation within contemporary Canadian constitutional culture, the possibility of the use of a language other than law's own is foreclosed. The language becomes the language of rights constitutionalism, privileging the terms 'autonomy,' 'equality,' and 'choice.' The salient concepts are those of the public and the private, jurisdiction, and standing. The ways become the way of legal process and the matter is firmly set within the institutions and traditions of interpretation of the culture of law's rule. Tully sees this point, noting that a central defect of modern liberal constitutionalism's engagement with difference is that "[w]hen the defenders of modern constitutionalism take up claims for recognition, they assume that to comprehend (understand) what the claimants are saying consists in comprehending it within an inclusive language or conceptual framework in which it can then be adjudicated."<sup>104</sup> Indeed, this recognition of the

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note 41). Forst's reflections are provocative and helpful for many contexts in which toleration is salient (he calls for attention to the *context of toleration* himself at 314) but, in his analysis, law is always a background consideration or mechanism, never a tolerating agent itself. As a result, some of his predicate demands for toleration based on respect seem structurally inconsistent with the constitutional rule of law as I have described it. Most tellingly, toleration as recognition demands "that one does not project one's own reasons (values, interests, needs) onto others in arguing for one's claims" and that one must defend a norm based on reasons "that are not grounded in 'higher' truths or in conceptions of the good which can reasonably be rejected by others with a different ethical or cultural identity" (317). Both are, of course, the very stuff of adjudication within the culture of law's rule. Forst seems to best describe law's mode of tolerance when he explains the "permission conception" of toleration, whereby "[t]oleration means that the authority (or majority) gives qualified permission to the members of the minority to live according to their beliefs on the condition that the minority accepts the dominant position of the authority (or majority). As long as their expression of their differences remains within limits, that is, is a 'private' matter, and *as long as they do not claim equal public and political status*, they can be tolerated on both pragmatic and principled grounds" (315) [emphasis added]. Consistent with my argument, Forst concludes, however, that the permission conception fails as a non-coercive model of toleration.

**103.** *Supra* note 12 at 24. See also Charles Taylor, "Understanding and Ethnocentricity" in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 116. Tully is not alone in seeking a new form of constitutionalism that centres on dialogic forms for engagement. See Sheppard, *supra* note 46, who writes "For a growing number of scholars ... dialogue across group-based differences is the essence of constitutionalism" (487).

**104.** In this way, James Tully argues that "a just dialogue is precluded by the conventions of modern constitutionalism" (*supra* note 12 at 56.) Whereas I have discussed the impact of this modern constitutional dynamic as one of "assimilation", Tully describes it as the imposition of uniformity. Tully expresses this point with characteristic clarity and force when he concludes that "the language of modern constitutionalism which has come to be authoritative was designed to exclude or assimilate cultural diversity and justify uniformity" (58). My argument in this piece could be thought of as a close exploration of the way in which the modern culture of Canadian constitutionalism effects this assimilation and imposes this uniformity in its encounter with religious difference.

dialogic limitations of the liberal constitutional rule of law impels his search for a means of entirely reconceiving and reconstructing modern constitutionalism.

The meaningful form that law gives to experience is not the only form imaginable; indeed, law's meanings are always and essentially in competition with other ways of imagining the world—other cultures.<sup>105</sup> This is what makes the dialogic form of cross-cultural encounter so attractive. But, in a liberal constitutional democracy, the law is privileged among such possible interpretations and it is this feature of legal culture that seems to put this more promising form of cross-cultural encounter out of reach.<sup>106</sup> Once cultural conflict is embedded within the language of rights and legal accommodation, by its very nature the rule of law exerts a kind of structural dominance immiscible with dialogic forms of cross-cultural encounter. So, in the end, whereas blindness to *the fact* of the culture of contemporary Canadian constitutionalism consigns legal multiculturalism to a form of cultural assimilation, seeing the precise nature of this contemporary legal culture forecloses the possibility of the promising dialogic form of cross-cultural engagement.

#### 4. Conclusion: The Challenges of Seeing Culture

The challenging cultural dynamics of legal tolerance that I have explored in this piece can be found wherever the orthodox understanding of legal multiculturalism is invoked as a tool for the management of religious pluralism. In *Bruker*<sup>107</sup>—fundamentally a Quebec *Civil Code* case concerning the law of obligations, but one that raised the question of the relationship between religious traditions and contemporary Canadian law—Justice Abella set the tone and context for the majority decision with the following introductory paragraph:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found

105. As Van Praagh writes, “[d]espite a tendency for students and practitioners of law to presume its paramount importance, the law is but one set of influences that direct our behaviour and relationships.” (Shauna Van Praagh, “Identity’s Importance: Reflections of—and on—Diversity” (2001) 80 Can. Bar Rev. 605 at 608.) In her penetrating discussion of the role of the Court in issues of diversity and pluralism, she goes on to recognize its special role, noting that although it is “never solely determinative of our relations and interactions ... its presence is significant in our collective existence and our shared experience of living our pluralist lives. When it offers a judgment, it not only adjudicates the particular dispute before it, but traces the contours of our liberal, diverse society” (617).

106. Indeed, there is a strand of scholarships that sees law’s meaning-shaping capacity as so powerful as to destroy or threaten to destroy other forms of the social. See, e.g., Stanley Diamond, “The Rule of Law Versus the Order of Custom” (1971) 38 Soc. Res. 42 at 44 who writes “No contemporary institution functions with the kind of autonomy that permits us to postulate a significant dialectic between law and custom. We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts”. See also Jürgen Habermas, *The Theory of Communicative Action*, trans. by Thomas McCarthy, vol. 2 (Boston, MA: Beacon Press, 1984) at 356-73, in which he describes “juridification” as a “colonization of the lifeworld” brought about by a modern trend towards both the increasing density of law and the expansion of law to regulate “new, hitherto informally regulated social matters” (357).

107. *Supra* note 62.

in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.<sup>108</sup>

In the claim of a progressive evolution in Canada's handling of issues of religious diversity, one sees the extent to which contemporary legal debate about the interaction of law and religion remains very much in thrall to the conventional account of legal multiculturalism. Justice Abella paints a picture that reflects the familiar and comforting story about the management of religious pluralism by means of legal tolerance. Yet her words also betray the way in which this story fails to adequately reflect the deeper and more complex reality of the interaction between law and religion. With the suggestion that the constitutional protections for religious, cultural and ethnic differences exist to facilitate integration into a Canadian mainstream "based on and *notwithstanding*" these elements of pluralism, Justice Abella gestures—perhaps unwittingly—towards the true character of legal tolerance. The dominance and indifference that I have argued characterizes the cross-cultural encounter of law and religion shows itself in the midst of the official rhetoric of legal tolerance.

The conceptual core of this article is the suggestion that the conventional story about the relationship between the rule of law and religious cultures depends upon the conceit of law's autonomy from culture, a conceit that hides the fact that law is not merely an overseer or instrumental force in the politics of multiculturalism. When analyzed as a cultural force in its own right, the boundaries of legal doctrines of tolerance and the nature of the cross-cultural encounter between religion and law become more transparent. Yet what is thereby revealed is that legal tolerance involves a more modest posture towards religious pluralism than the rhetoric of multiculturalism would suggest. In the end, law's tolerance is a form of cultivated and continually refined indifference towards religious cultures and when the boundaries of this indifference are found—when religious belief and practice begin to push on the law in a way that would force contemporary constitutionalism to cede, reconsider, or revise its core cultural commitments—this posture of tolerance collapses into one that is assimilationist or conversionary. Understood in terms of cross-cultural encounter, the stakes of this interaction are high and it becomes clear that the culture of law's rule is structurally positioned and very much prepared to assert its dominance.

Understanding the meeting of law and religion as a cross-cultural encounter breaks down our complacencies about what it means for law to accommodate strong forms of religious pluralism and exposes the cultural limits of legal toleration. It is a more honest account of what is occurring between law and religion under the rubric of legal multiculturalism. Yet with the limits exposed by this more satisfying account of the cross-cultural nature of law's interaction with religion in clear view, the horizon is somewhat bleak when we turn to look for other, more satisfying,

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108. *Ibid.* at para. 1, per Abella J.



modes of engagement. Many influential proposed alternatives to legal tolerance are simply reconfigurations of the geography of indifference. Forms of encounter that appear more promising seem, on examination, foreclosed by law's structural hubris and institutional privilege. These features of the modern Canadian constitutional rule of law prevent it from engaging with other cultures in the open, vulnerable sense required by these more ambitious forms of cross-cultural tolerance.

It may be that Tully is correct that the only way of properly attending to deep cultural diversity is by reconstructing another form of constitutionalism. Such a form would have to differ fundamentally in its basic assumptions and self-understanding from that which we currently possess.<sup>109</sup> Or perhaps we can do no better than to work to expand the borders of our indifference. If so, we are also faced with the continuing challenge of explaining why, at points of genuine friction, the culture of law's rule is entitled to dominance over other forms of culture. Irrespective, if viewing—with detail and precision—the interaction of law and religion as a cross-cultural encounter causes us to see this interaction as decidedly fraught and durable, then it is an account that has served us well because it has helped us to see better.

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109. See Tully, *supra* note 12. Tully's reconstructed/reimagined form of constitutionalism is one built upon the three conventions of mutual recognition, consent, and continuity. Tully argues that, in order to adequately recognize cultural diversity, rather than the prevailing approach to constitutionalism, a "constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity" (30).



