

Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation

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In three cases, Amselem, Multani and Hutterian Brethren of Wilson Colony, the Supreme Court of Canada examined conflicts between state law and the religious practices of litigants. While much has been written about the holdings in these cases, less is known about the experience of the participants. Based on in-depth interviews with litigants, lawyers and experts involved in these cases, this article examines how the participants viewed their relationship to the Canadian legal system. Drawing on critical legal pluralist scholarship, the author demonstrates that in many instances, participants (i) considered their religious norms as legally binding; (ii) placed their religious obligations above Canadian law; and (iii) filtered state law through the lens of their normative, religious beliefs. The author also examines how participants, in their submissions to the court, challenged the status of Canadian law as the sole legal system governing their lives. For many participants, these cases represented a conflict between religious law and state law that could not be easily reconciled. The overlap of legal systems in the participants' lives is complex and the boundaries between state and religious principles are often blurred. With a greater awareness of these issues, courts could be more conscientious in applying the proportionality test of section 1 of the Charter of Rights and Freedoms in religious freedom cases.

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Introduction

Though there have long been controversies over religious freedom in Canada, they have blossomed again in the public imagination in the last two decades. Recently, the government of Quebec set off a vigorous debate when it proposed adopting a "Charter of Values" that would prohibit various public sector employees from wearing "conspicuous religious symbols".¹ Previously, Quebec introduced a bill aimed at niqab-wearing and burqa-wearing women, which stated as "general practice" people are to show their faces when providing or receiving government services.² During a legislative hearing on this bill, the legislature unanimously decided to exclude kirpan-wearing Sikhs from the legislature.³ In Ontario,

1. See e.g. "Quebec's values charter sends politicians scrambling" *CBC News* (11 September 2013), online: CBC News <<http://www.cbc.ca>>; Ingrid Peretz, "Critics call Quebec's proposed ban on religious headwear 'Putinesque'" *The Globe and Mail* (20 August 2013), online: The Globe and Mail <<http://www.theglobeandmail.com>>; Jocelyn Desjardins, *Le Journal de Montréal* "Charte des valeurs québécoises ou comment tracer une ligne" (23 September 2013), online: Le Journal de Montréal <<http://www.journaldemontreal.com>>; Sean Fine, "Is Quebec's secular charter constitutional? Nine legal experts weigh in" *The Globe and Mail* (14 September 2013), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

2. Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess, 39th Leg, Quebec, 2009-11, cl 6, online: National Assembly of Québec <<http://www.assnat.qc.ca>>.

3. See "Kirpan ban passed unanimously by Quebec legislature", *The Hamilton Spectator* (9 February 2011), online: TheSpec.com <<http://www.thespec.com>>.

debates over religious arbitration in family matters led the government to commission a report on the issue, and eventually made changes to the relevant provincial legislation to limit such arbitration.⁴

In the last twenty years, the Supreme Court of Canada has made a number of decisions implicating the religious practices of Canadians. Recently, the Court laid out guidelines for whether a sexual assault complainant can wear a niqab while testifying.⁵ The Court has also held that a province need not exempt members of a small religious group from a photo requirement for driver's licences,⁶ that a Sikh high school student in Quebec could not be prevented from bringing his kirpan to class⁷ and that a Quebec condominium syndicate could not prohibit owners from erecting succah on their balconies, although they had apparently signed an agreement to the contrary.⁸

4. See "Ontario Premier rejects use of Shariah law" *CBC News* (11 September 2005), online: CBC News <<http://www.cbc.ca>>. The affair generated significant debate. See Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004) at 89-92, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca>>; Jean-François Gaudreault-Desbiens, "Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society" (2005) 19 *NJCL* 155; Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50:1 *McGill LJ* 49; Lorraine E Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 239; Veit Bader, "Legal Pluralism and Differentiated Morality: Shari'a in Ontario?" in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (Surrey, BC: Ashgate Publishing Limited, 2009) 49; Sherene Razack, "Between a Rock and a Hard Place: Canadian Muslim Women's Responses to Faith-Based Arbitration" in Rubya Mehdi et al, eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008) 83; Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism" (2009) 54:1 *McGill LJ* 45; Anver Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation" (2008) 87:2 *Can Bar Rev* 391.

5. See *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

6. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Wilson Colony*].

7. See *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

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

This article applies qualitative research methods to data collected from participants in religious freedom litigation.⁹ I interviewed ten participants—litigants, lawyers and expert witnesses—in three cases decided by the Supreme Court of Canada: *Syndicat Northcrest v Amselem*,¹⁰ *Multani v Commission scolaire Marguerite-Bourgeoys*,¹¹ *Alberta v Hutterian Brethren of Wilson Colony*.¹² Transcripts of testimony, written submissions and transcripts of oral arguments were used for “triangulation” to verify or challenge the analysis of interview transcripts.

Drawing on data collected in interviews and from court documents, I focus on the interaction between religious norms and state laws. By explaining the subtle processes of interpretation in a particular social setting, a qualitative approach provides an ideal way of assessing the individualized experiences of participants in court processes surrounding religious freedom.¹³ Religious freedom claims open a window to the

9. This article is part of a larger project, carried out as part of a doctoral dissertation, in which I employ qualitative methods to examine the ways in which participants in religious freedom litigation are affected by their experience in Canada’s legal system. The ethical conditions attached to my project prohibit me from using the names of interview participants. Interviews are referenced as: Lawyer 1 Interview, Litigant 2 Interview, etc.

10. *Supra* note 8.

11. *Supra* note 7.

12. *Supra* note 6. The interviews were semi-structured, allowing participants to construct their own narratives. To be sure, this is a small sample. However, the size of the sample is less relevant in qualitative research than the depth of the data collected. The goal of the research is to generate new theoretical insights rather than to posit general conclusions. The choice of these cases is deliberate. First, as these cases reached the highest court, participants interacted with the state legal system several times. Second, participants had both successful and unsuccessful encounters with the state legal system and they were able to provide insight into a broader range of experience. Finally, the Supreme Court maintains a large and centralized documentary record of these cases.

13. For a helpful overview of the use of qualitative methods in legal scholarship, see Lisa Webley, “Qualitative Approaches to Empirical Legal Research” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 926. See e.g. Angela Campbell, “Bountiful Voices” (2009) 47:2 Osgoode Hall LJ 183; Eve Darian-Smith, ed, *Ethnography and Law* (Aldershot, UK: Ashgate, 2007); John M Conley & William M O’Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990); Shauna Van Praagh, “The Chutzpah of Chasidism” (1996) 11:2 CJLS 193; Sally Falk Moore, *Law as Process: An Anthropological Approach* (London, UK: Routledge & Kegan Paul, 1978). The *Journal of Legal Pluralism and Unofficial Law* also published ethnographic accounts of legal practices, particularly in post-colonial environments.

complex ways legal systems and sources of normativity can interact. Such claims involve individuals who see themselves as subjects of at least two legal systems that make comprehensive claims of authority over their lives. A poignant example is provided by the timing of the first court process in the *Amselem* litigation. The condominium syndicate applied for an emergency injunction on the eve of the Succoth holiday.¹⁴ The Jewish litigants had to choose between attending the injunction proceedings and observing the holiday according to their custom.¹⁵ In the end, one of the three co-owners stayed in court on behalf of the others.¹⁶

This paper draws on both legal pluralism and critical legal pluralism to unpack the narratives of the three cases described in Part I, although the methodology employed is more consistent with critical legal pluralism in its emphasis on the perspectives of individual participants. The plural legal orders at play in these cases may not be immediately apparent, as the claims were all made in state courts and thus formally acknowledged the applicability of state law. However, the litigants displayed subtle resistance to the state monopoly on law both in recounting their experiences during the interviews and in documents submitted to the courts. In these narratives, religious norms exert a kind of legal force and are spoken of as such. Further, the data demonstrate some of the ways in which individuals explain and perform the interaction between religious and state norms.¹⁷

Part I summarizes the judicial decisions in the three cases studied in this project. Part II is the analytical heart of the article. It draws on legal pluralist theory to explore three themes: (i) how participants treated their religious norms as “legal”, (ii) the complex hierarchies of normative systems in participant narratives, and (iii) the ways in which each legal system served as a lens through which participants approached the others.

14. Lawyer 1 Interview; Litigant 2 Interview.

15. The Orthodox Jewish tradition, as it has been mainly interpreted in Canada, requires that all meals during the eight-day holiday of Succoth be taken in the succah. In addition, during the first two days and final two days of the holiday, the use of electricity and cars is prohibited. At the time the injunction proceedings occurred, Orthodox families would be either attending synagogue services or celebrating the holiday in a succah.

16. Litigant 2 Interview.

17. To be clear, I do not advance the argument that state courts ought to enforce religious laws. Rather, the aim of this paper is to examine how particular individuals understand the relationships between multiple sources of legality and normativity in their lives.

I conclude by suggesting that courts should be alive to the legal force of religious obligations on religious freedom claimants to conduct more accurate proportionality analyses in religious freedom cases.

I. Case Backgrounds

A. Amselem

In *Amselem*, a condominium complex's bylaws prohibited "decorations, alterations and constructions" on the building's balconies.¹⁸ A conflict arose when co-owners of three units erected succoth (singular: succah) on their balconies. Succoth are ritual huts built by some Jews during the annual nine-day holiday of the same name. The condominium board sought an injunction requiring these co-owners to dismantle their succoth.¹⁹

The lower courts found for the condominium board, holding that the bylaws' restrictions on the rights of ownership were justified by aesthetic and safety concerns.²⁰ On appeal, in what has been perhaps the most influential holding on religious freedom in the last twenty years, a five to four majority of the Supreme Court of Canada held that the religious freedom interests of the succah-building co-owners outweighed the concerns of the other co-owners. The majority judgment emphasized the short span of the holiday and the dearth of evidence that other co-owners were materially affected by the presence of succoth.

The majority in *Amselem* adopted "a personal or subjective conception of freedom of religion".²¹ In its words, "claimants seeking to invoke

18. Quebec law does not use the term "condominium", preferring "divided co-ownership". See arts 1038–1109 CCQ. Moreover, instead of a board of directors, properties of divided co-ownership have a "syndicate of co-owners". I use the less cumbersome terminology here as Quebecers use the common law terms in common parlance.

19. For an analysis of *Amselem* through the lens of the common law of nuisance and the Quebec civil law concept of "voisinage", see Shauna Van Praagh, "View from the Succah: Religion and Neighbourly Relations" in Moon, *supra* note 4, 21.

20. *Amselem c Syndicat Northcrest*, [1998] RDI 489, [1998] RJQ 1892 (CS), *aff'd Amselem v Syndicat Northcrest*, [2002] RJQ 906, [2002] RDI 233 (CA).

21. *Amselem*, *supra* note 8 at para 42. Interestingly, despite the use of the language of autonomy and choice here, Sébastien Grammond has argued that the Supreme Court sees the act of adhering to a religion as not purely voluntary, but as deeply connected to an

freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion”.²² The majority also held that the religious freedom guarantee in the Quebec *Charter* applies to obligatory and voluntary religious practices.²³

B. Multani

The dispute in *Multani* centred on whether a student in a public secondary school could carry a kirpan, an article of faith resembling a dagger carried by some baptized Sikhs.²⁴ The student, eleven-year-old Gurbaj Singh Multani, dropped his kirpan at school.²⁵ The school board and the Multani family agreed that Gurbaj Singh could wear the kirpan secured in a particular way under his clothing. The school board’s Council of Commissioners, however, refused to ratify this agreement.²⁶ The Multani family obtained a judgment from the Quebec Superior Court, authorizing Gurbaj Singh to wear his kirpan in school under conditions which made it difficult to remove from under his clothing, but the Quebec Court of Appeal overruled the judgment.

The Supreme Court unanimously held that Gurbaj Singh’s right to religious freedom under section 2(a) of the *Charter* included the right

individual’s identity. This logic, he claims, explains the majority’s decision in *Amselem* and makes it possible for the Court to redistribute the economic burdens that flow from religious obligations. Sébastien Grammond, “Conceptions canadienne et québécoise des droits fondamentaux et de la religion: convergence ou conflit?” (2009) 43 RJT 83 at para 23. For an account of religious freedom in the American context that deals with religious traditions that challenge the notion of individual choice by ascribing spiritual consequences to actions beyond the control of adherents, see David C Williams & Susan H Williams, “Volitionalism and Religious Liberty” (1991) 76:4 Cornell L Rev 769.

22. *Amselem*, *supra* note 8 at para 43.

23. While this case did not involve the Canadian constitution *per se*, the protection of religious freedom in Quebec applies to private transactions through Quebec’s *Charter of Human Rights and Freedoms*. RSQ, c C-12, s 3. Moreover, the Supreme Court of Canada made clear in its decision that the general comments it made about religious freedom in *Amselem* were relevant for the constitutional right of religious freedom as well. *Supra* note 8 at para 37.

24. *Supra* note 7.

25. *Ibid* at para 3; Litigant 1 Interview.

26. *Multani*, *supra* note 7 at paras 4-5.

to wear a kirpan in school.²⁷ In considering whether the board was demonstrably justified in its actions under section 1 of the *Charter*, Charron J, for the majority, found that the objective of securing school safety was “sufficiently important to warrant overriding a constitutionally protected right or freedom”.²⁸ However, she went on to hold that the standard normally applied in schools was one of reasonable safety, not absolute safety, and observed that the school did not, for example, install metal detectors, nor did it prohibit all potentially dangerous objects “such as scissors, compasses, baseball bats and table knives in the cafeteria”.²⁹ She rejected the school board Council of Commissioners’ characterization of the kirpan as a weapon, and determined that the risk posed by the kirpan in the circumstances was “quite low”.³⁰ More importantly, Charron J underlined that “over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools has been reported”.³¹ Justice Charron ultimately held that the Commissioners had failed to provide unequivocal evidence for its safety concerns and could not justify the absolute prohibition on kirpans.

C. Wilson Colony

In *Wilson Colony*, a dispute arose between a small group of Hutterian Brethren and the Alberta government about the photographs that appear on driver’s licences. The Hutterite faith stems from the Anabaptist tradition. Some Hutterites believe that the Bible’s Second Commandment, which forbids graven images, prohibits them from displaying any images, including photos.³² The Alberta government had exempted Hutterites from the driver’s licence photo requirement since 1974. In 2003, the

27. *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

28. *Multani*, *supra* note 7 at para 45 (Justice Abella wrote a separate concurring opinion in which Deschamps J concurred).

29. *Ibid* at para 46.

30. *Ibid* at para 58.

31. *Ibid* at para 59.

32. The text of the biblical commandment that the Wilson Colony members submitted to the Court provides: “You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth (Exodus 20:4).” *Wilson Colony*, *supra* note 6 at para 29. For a more thorough account of the Hutterite faith

province eliminated this exemption, claiming that photographs were necessary to create a secure digital databank that would be used to combat identity fraud.

The Alberta trial court and the Court of Appeal ruled in favour of the Wilson Colony.³³ However, in a four to three judgment, the Supreme Court reversed the decision. The case turned on the application of section 1 of the *Charter*, as Alberta had conceded that there was an infringement of religious freedom. In a crucial part of the majority's analysis, McLachlin CJC defined the purpose of the universal photo requirement as "[m]aintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft" and accepted this as pressing and substantial.³⁴ She accepted Alberta's claim that exemptions would make the licencing system more vulnerable to identity fraud and accordingly found that the requirement was rationally connected to the government's legitimate goals.³⁵

In assessing whether the universal photo requirement minimally impaired the rights of the Colony members, McLachlin CJC held that all other options, including the Colony's proposal of photo-less licences marked "[n]ot to be used for identification purposes", would "significantly increase the risk of identity theft using driver's licences".³⁶ She therefore held that the universal photo requirement was a reasonable option that impaired the Colony's rights as little as possible while still achieving the government's objective in a real and substantial manner.³⁷

Finally, in considering whether the universal photo requirement was proportionate in its effect, McLachlin CJC found it yielded three benefits established by the evidence: "(1) enhancing the security of the driver's licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta's licensing scheme with those in other

in relation to litigation, see Alvin J Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004).

33. *Hutterian Brethren of Wilson Colony v Alberta*, 2006 ABQB 338, 398 AR 5, aff'd 2007 ABCA 160, 417 AR 68.

34. *Wilson Colony*, *supra* note 6 at para 42.

35. *Ibid* at paras 50, 52.

36. *Ibid* at para 59.

37. See Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 Sup Ct L Rev (2d) 25 [Berger, "Constitutional Reasoning"].

jurisdictions”.³⁸ While the Chief Justice accepted that the universal photo requirement imposed a cost on the Wilson Colony members by limiting their ability to drive, she found that the cost did not “rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice”.³⁹ She rejected the claim that the photo requirement would end the Colony’s rural way of life. Rather, she said, the Colony would likely hire outside drivers. In sum, McLachlin CJC held that the benefits of the law outweighed its costs and that the government had justified the breach of religious freedom.

II. Legal Pluralism in Religious Freedom Litigation

Legal pluralist scholarship helps to clarify the interaction between religious and state norms. Its central claim is that state law is not the only form of law that orders and gives meaning to social life.⁴⁰ According to John Griffiths’s influential definition, legal pluralism describes “that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs”.⁴¹ The modern theory of legal pluralism emerged in the 1960s and 1970s,⁴² “through studies of law in colonial and post-

38. *Wilson Colony*, *supra* note 6 at para 79.

39. *Ibid* at para 96.

40. See e.g. Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Soc’y Rev* 869; Franz von Benda-Beckman, “Who’s Afraid of Legal Pluralism?” (2002) 47 *J Legal Pluralism* 37; Margaret Davies, “Legal Pluralism” in Cane & Kritzer, *supra* note 13; John Griffiths, “What is Legal Pluralism?” (1986) 24 *J Legal Pluralism* 1.

41. *Ibid* at 2.

42. See Martha-Marie Kleinhans & Roderick A Macdonald, “What is a *Critical Legal Pluralism*?” (1997) 12:2 *CJLS* 25 at 28 (locating the origins of modern legal pluralism in the 1960s); Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30:3 *Sydney L Rev* 375 [Tamanaha, “Understanding”] (writing of the 1970s as the time when “[l]egal pluralism first began to garner attention within academia in legal anthropology . . . through studies of law in colonial and post-colonial situations” at 390); John Gillisen, *Le pluralisme juridique* (Brussels: Editions de l’Université de Bruxelles, 1972) (providing an example from this time period); Griffiths, *supra* note 40 at 26; Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13:1 *Social & Legal Studies* 57 at 59. Both Griffiths and Melissaris locate some of the theoretical origins of legal pluralism in the sociological thought of Eugen Ehrlich, who discussed the notion of “living law” in the 1930s. Griffiths, *supra* note 40; Melissaris, *supra* note 42.

colonial situations”.⁴³ Those studies presented clear examples of cases where both indigenous and colonial legal orders claimed authority over people’s lives in a single social setting.⁴⁴

Boaventura de Sousa Santos developed the idea that legal pluralism was not merely a feature of a social field, but also an attribute of each individual.⁴⁵ The individual members of different communities see themselves as subject to the multiple claims of legal authority. The notion of law in each person’s mind is a hybrid of the various legal orders to which she is subject.⁴⁶

Martha-Marie Kleinhans and Roderick Macdonald further pursued legal pluralism at the individual level, arguing for a critical form of legal pluralism.⁴⁷ Their theory emphasizes the capacity of legal subjects to create law for themselves: “Legal subjects are ‘law inventing’ and not merely ‘law abiding’.”⁴⁸ This is not to say, however, that each individual creates her own law. Rather, Kleinhans and Macdonald insist on the relational nature of the legal subject’s self while leaving room for individual agency in the creation of norms: “Subjects construct and are constructed by the State, society and community through their relations with each other.”⁴⁹ Finally, Kleinhans and Macdonald add the important insight that the legal

43. Tamanaha, “Understanding”, *supra* note 42 at 390.

44. See Moore, *supra* note 13 (this study of the Chagga of Mount Kilimanjaro is a classic in this field).

45. Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law” (1987) 14:3 *JL & Soc’y* 279 at 296–97.

46. There are parallels between this view and the “aspectual” view of identity posited by James Tully. In Tully’s view, because of the heterogeneous nature of culture, “the experience of cultural difference is *internal* to a culture” and individuals experience “otherness” in a manner internal to their own identities. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 13 [emphasis in original].

47. *Supra* note 42 at 38.

48. *Ibid* at 39.

49. *Ibid* at 43. For similar emphases on the role of the legal subject within legal pluralist analysis, see Masaji Chiba, “Other Phases of Legal Pluralism in the Contemporary World” (1998) 11:3 *Ratio Juris* 228 at 239; Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London, UK: Glasshouse Press, 2005) at 8–9.

subject can critically evaluate the various sets of norms in her life through the lens of other sets of norms.⁵⁰

A. Religion as Law

One form of resistance to the state's exclusive claims on legal authority occurs through the use of language in the court proceedings. The use of legal language is strongly emphasized by some legal pluralist scholars. I suggest that the use of legal terminology is significant and meant to augment the status of a particular rule or practice, even if one is not inclined to accept that anything people habitually call "law" is legal in nature.⁵¹ Participants in religious freedom cases have often used legal terminology, both in and out of court, to describe their religious obligations. This suggests that participants perceive religious norms as having a legal quality,⁵² and that this legality exerts a special force in the context of personal narratives.⁵³

Affidavits submitted by the Orthodox Jewish litigants in *Amselem* provide a first example of the use of legal language in relation to religious practices. These affidavits asserted:

50. This notion is central in Part II, which demonstrates how participants internalized state laws through their particular religious lenses, and how they presented their own religious norms as consistent with state values.

51. See Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 *JL & Soc'y* 296 [Tamanaha, "Non-Essentialist"] ("*Law is whatever people identify and treat through their social practices as 'law' (or recht, or droit, and so on)*" at 313 [emphasis in original]). See also Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13:5 *Cardozo L Rev* 1443.

52. That the use of legal language to describe religious obligations piques our curiosity is perhaps emblematic of "the success of the state-building project and the ideological views which supported it, a project which got underway in the late medieval period". Tamanaha, "Understanding", *supra* note 42 at 379. As Tamanaha notes, religious and other forms of customary law only came to be referred to as "norms" rather than "laws" in the seventeenth and eighteenth centuries. Even though these norms "often were more efficacious than state law in governing every day social affairs . . . the loss of legal status had significant implications that would bear fruit over time". *Ibid* at 381.

53. Interestingly, counsel for the succah-building appellants in *Amselem* also argued that the notion of religious freedom should be broad enough to protect those religions that do not employ the concept of commandments, citing the example of Buddhism. *Amselem*, *supra* note 8 (Transcript of Oral Argument at 83 (Julius Grey for *Amselem et al*)).

THAT according to the commandment in Leviticus and the rabbinical interpretation that has evolved, I celebrate the holiday of Succat by dwelling in a succah for 8 days;
THAT as per Jewish law, during these 8 days I eat all of my meals in the succah.
THAT as per Jewish law, every morning I take the 4 species (palm branch, citron, myrtle leaf and myrrh) to the succah and therein perform the ritual blessing.⁵⁴

The affidavits invoke a “commandment” and then immediately reference the textual source of the commandment and its interpretive tradition. This serves as authority for the references to “Jewish law” that follow. Moise Amselem made parallel comments in cross-examination. When opposing counsel asked a general question about the “tradition” of Succoth, Amselem responded: “C’est pas une tradition, c’est commandement de Dieu, faites attention.”⁵⁵

The legal terminology employed by the litigants provides context and legitimacy for rituals which, to many, would appear to be unconnected to a legal system. One might argue that the deployment of this terminology was simply a strategy designed to bolster litigants’ claims.⁵⁶ However, the use of legal terminology in respect to the Succoth holiday was not an invention unique to the *Amselem* litigants. The rabbis called as expert witnesses by both parties explained some of the intricacies of Jewish law (*Halakbah*). Rabbi Ohana, the expert witness called by the religious freedom claimants, noted in his expert report that “[l]a loi et coutume juives ne s’arrêtent . . . pas au symbole et définissent dans le détail des

54. *Ibid* (Affidavit of Gabriel Fonfeder, 9 December 1997 at paras 7–9; Affidavit of Thomas Klein, 22 December 1997 at paras 7–9; Affidavit of Moise Amselem, 18 December 1997 at paras 8–10 (the Amselem affidavit is in French, but is a direct translation of the information in the other affidavits)). In cross-examination, a litigant used more colourful legal terminology to describe the same obligation: “according to Jewish law, the very first night it’s obligatory [to eat in the succah] even if it pours cats and dogs”. *Ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record, vol 1 at 210).

55. *Ibid* (Cross-examination of Moise Amselem, 3 February 1998, Respondent’s Record, vol 1 at 283). Similarly, Mr. Amselem said: “Alors tout ça, vous savez, ce n’est pas des choses qui sont symboliques, ce sont des commandements, et on se sent très mal à l’aise de faire—de transgresser un commandement. . . . Ce n’est pas une histoire de symboles.” *Ibid* at 303.

56. Given the state of the law of religious freedom in Canada at the time *Amselem* commenced, it was not clear that non-mandatory religious practices would receive *Charter* protection. Thanks to Benjamin Berger for raising this point.

modalités d'application du commandement biblique.”⁵⁷ Similarly, the condominium syndicate’s expert, Rabbi Levy, noted in his report: “The number, size, and shape of the walls are regulated The roof of the sukkah is the most important part, and many rules govern it.”⁵⁸

The two rabbis disagreed on several points, but made their arguments using legal language. The difference of opinion between these rabbis was brought out most starkly during their testimony at the Superior Court. In Rabbi Ohana’s view, where taking one’s meals in the sukkah becomes a source of serious discomfort, one is released from the obligation of dwelling in the sukkah.⁵⁹ Further, those who remain in an uncomfortable sukkah (for example, where it is raining), “manquent de sophistication en matière religieuse et ne font pas nécessairement plaisir à Dieu, puisque *la loi* vous a dit que, quand la *succah* devient source raisonnable d’inconfort . . . vous devez la quitter”.⁶⁰ Rabbi Levy, while clearly disagreeing on the nature of the sukkah obligation, nonetheless used legal terminology throughout his testimony. He stated, for example:

The *Jewish legal system*, called *Halakhab* . . . has been in operation for more than three thousand (3,000) years and I don’t believe it’s possible to find in that entire literature . . . any claim that one must build a sukkah. *The law* requires that one use one, live in it, eat in it, sleep in it . . . there is no obligation to build a sukkah.⁶¹

57. *Ibid* (Expert Report of Rabbi Dr. Moïse Ohana, 16 February 1998, Appellants’ Record, vol 2 at 316). The report went on to deal with some of the practical requirements of celebrating the holiday—transporting fine linens, dishes, decorations and food—which lead to the practice of arranging for easy access to the sukkah.

58. *Ibid* (Expert Report of Rabbi B Barry Levy, PhD, 19 February 1998, Appellants’ Record, vol 2 at 323).

59. In support of this position, Rabbi Ohana cited the *Shulhan Aroukh*, a well-known religious text, and Talmudic interpretations of Biblical verses. *Ibid* (Examination of Moïse Ohana, 17 March 1998, Appellants’ Record, vol 1 at 267–69). Rabbi Ohana went on to note that the obligation is vacated only when the discomfort is unforeseeable. *Ibid* at 273. Moreover, in describing those who do not fulfill the obligation of dwelling in the sukkah, Rabbi Ohana employed the language of “transgression”, further indicating the legal contours of the religious norm. *Ibid* at 288.

60. *Ibid* (Examination of Moïse Ohana, 17 March 1998, Appellants’ Record, vol 1 at 269 [emphasis added]).

61. *Ibid* (Examination of Barry Levy, 17 March 1998, Appellants’ Record, vol 1 at 297 [emphasis added]). Rabbi Levy used nearly identical language in his expert report, where he made general comments on the nature of the Jewish legal system:

The complexity and sophistication of Jewish law, and its attendant interpretive disagreement, are all familiar characteristics of the Canadian state legal system. Of course, this does not mean it is necessarily a legal discourse. Still, the style of argumentation in this case resonates with constitutional jurisprudence in Canada. Here, one rabbi based his opinion on the absence of a specific obligation to build one's own succah while another tried to overcome this difficulty by relying on a more purposive interpretation of the obligations associated with the holiday. Indeed, there is an analogue in the decision in *Amselem* itself. The lower courts and dissenting opinions of the Supreme Court looked to the specific terms of the building's bylaws, while the majority of the Supreme Court took a more purposive approach to religious freedom. These disagreements could alternatively be characterized as stemming from fundamental differences in principle. In any event, the resonance remains.

As in *Amselem*, the religious freedom claimants in *Wilson Colony* used the language of "commandment" and other terms familiar to legal discourse to describe their religious practices. In one affidavit, a Colony member explained that he and the other members "adhere to the *principles, commandments and doctrines* of the Bible".⁶² Indeed, the Hutterites object to being photographed because they understand this to be prohibited by of the Second Commandment in the Old Testament. They interpret the prohibition on graven images to forbid all kinds of images, treating them as idolatrous. A Colony member also used the language of "prohibition" to describe the religious obligations flowing

Halakhah is the generic name of the Jewish legal system that began in the Bible, that has continued to be developed ever since, and that contains the operative collection of regulations and principles according to which observant Jews conduct their lives. There is only one halakhic system, which derives largely from the Torah . . . the Mishnah and the Babylonian Talmud . . . and several vast medieval codifications of Jewish law. Thousands of other texts are part of the halakhic literature including commentaries on the above mentioned works, and other legal digests, essays, collections of laws and customs related to specialized sub-areas of religious life, and responses to specific questions of legal theory and practice.

Expert Report of Rabbi B Barry Levy, PhD, 19 February 1998, Appellants' Record, vol 2 at 322).

62. *Wilson Colony*, *supra* note 6 (Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant's Record, vol 2 at 191 [emphasis in original]).

from the Second Commandment.⁶³ In an interview, one participant explained that the prohibition extended to all images, including paintings and other art.⁶⁴

For the Hutterite participants, the matter was straightforward: God's commandments demand obedience. There was little room, in this case, for an alternative interpretation of the Second Commandment in another way, as shown in this exchange:

Interviewer—I understand from the documents that it's the Second Commandment that prohibits the taking of the photo.

Respondent—Yes.

I—Can you give me a little bit more background on that?

R—You don't need more background . . . When God made the Ten Commandments, and gave 'em to Moses for him to give to the children of Israel, he wrote 'em in stone and if you put something in stone well that should last forever and ever. . . . And it's not only the Ten Commandments we try to obey, it's all what our Jesus taught us.⁶⁵

Like the religious freedom claimants in *Amselem*, the *Wilson Colony* participant situated the Second Commandment in a larger body of obligations and teachings, contextualizing the particular obligation in a religious legal tradition.

In another exchange, the Hutterite participant added an additional layer of legal significance to the practice: the breach of a covenant. When asked about the two accommodations proposed by the Alberta government, both of which involved a photograph, he described a transgression of the Commandment as breaking a vow: “the damage is done if you sit down and . . . they take your photo, what's the use of hiding that photo . . . you've broken your vow to God”.⁶⁶ Thus, breaching the Commandment also constitutes a breach of covenant. The participant was unwilling to break his covenant in order to satisfy state-made legal obligations. He was resistant to the notion of the state being the sole creator of binding law.

63. *Ibid* at 192.

64. Litigant 3 Interview.

65. Litigant 4 Interview.

66. *Ibid*.

The use of legal language in the *Multani* litigation was less prominent. However, when asked why certain accommodations for the kirpan were unacceptable, one litigant explained:

[The school board representatives said,] “Oh, you should wear the wooden kirpan, or you should be wearing plastic kirpan, you should wear it in your neck or something like that, very small”, these things obviously, if we accept that, then . . . I’m giving up [the] whole thing.

...

Kirpan is made of metal . . . *I have [been] given it with laws.*⁶⁷

Here, the participant invokes the legal nature of the religious obligation to explain why some compromises were rejected. In this participant’s view, his religious law must at some point be unyielding and the obligation to wear a kirpan is not satisfied by an object that does not meet certain requirements. There is perhaps a resonance here with the view from inside state law, which has its own red lines, as seen in *Wilson Colony* and other religious freedom cases.⁶⁸ In these cases, Canadian courts have pursued an approach of reconciling competing rights claims where possible, but demonstrated the boundaries of the state’s accommodation. This unwillingness to compromise religious obligations in favour of state laws reflects the participant’s resistance to the state’s monopoly on law-making.

67. Litigant 1 Interview [emphasis added]. The same litigant also drew on the religious laws associated with the kirpan as a source of confidence when confronted by authority figures: “And I explained to her, since I was well aware of what it is, why I carried it, I knew the laws and everything.” *Ibid.* In a textual source on Sikhism cited by the *Multani*’s expert witness, the “five Ks” required of Sikhs (which include the kirpan) are described as belonging to a prescribed discipline and code. See Dharam Singh, *Dynamics of the Social Thought of Guru Gobind Singh* (Patiala, India: Publication Bureau Punjabi University, 1998) at 121, cited in *Multani*, *supra* note 7 (Affidavit of Manjit Singh, Appellant’s Application for Leave to Appeal to the Supreme Court of Canada, vol 1 at 61).

68. See e.g. *R v NS*, *supra* note 5 (the Supreme Court held that while in some circumstances a witness in a sexual assault case would be allowed to testify while wearing a niqab, this would not be allowed in all cases: “where a niqab is worn because of a sincerely held religious belief, a judge should order it removed if the witness wearing the niqab poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so” at para 46).

There is a significant caveat to my claim that by using legal terminology, religious freedom claimants engage in an act of subtle resistance against the state's claimed monopoly on law. One participant suggested that the *Amselem* litigants performed a more controversial form of resistance to state laws by presenting an inaccurate picture of Jewish law to the state courts.⁶⁹ This participant suggested that some of those connected with the litigation were conforming to a different norm in the Jewish legal tradition, a norm under which rabbis "in the defence of whatever it is they consider to be under attack, can do all kinds of things, and I think in this case they may have done that".⁷⁰ This narrative casts the litigants' behaviour as "strategic essentialism",⁷¹ i.e., as presenting a caricatured version of their tradition to suit their purposes in litigation. Indeed, one of the litigants in *Amselem* suggested that part of his motivation for pursuing the claim was to combat what he saw as anti-Semitism.⁷² That said, there was never any real suggestion to the courts that the *Amselem* litigants were insincere; instead, the argument was that they were incorrect in their interpretation of the *sucrah* obligation.⁷³ This strategy emphasizes how participants on both sides of the dispute approached the norms of Judaism as legal norms. The syndicate's essential argument was that the religious freedom claimants had made an error of law.

69. See Ihsan Yilmaz, "The challenge of post-modern legality and Muslim legal pluralism in England" (2002) 28:2 *Journal of Ethnic and Migration Studies* 343; Suzanne Last Stone, "The Intervention of American Law in Jewish Divorce: A Pluralist Analysis" (2000) 34:1 *Isr L Rev* 170. Both Yilmaz and Stone present situations in which religious adherents successfully co-opted or manipulated the laws of the state to serve their own ends. But see Campbell for a more complex example of the unorthodox deployment of the state laws regarding same-sex marriage in the context of a polygamous relationship. *Supra* note 13.

70. Expert Witness 1 Interview. The participant was somewhat ambivalent on this point, having previously suggested that he was "not accusing the rabbis" of misrepresenting rabbinic law.

71. See Tariq Modood, "Anti-Essentialism, Multiculturalism and the 'Recognition' Of Religious Groups" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 175 at 178.

72. Litigant 2 Interview.

73. Indeed, one expert witness explained how the lawyer who had hired him suggested that he point out an error of religious law made by the expert testifying for the opposing side. Expert Witness 1 Interview.

B. Re-examining “Law”

While the use of legal terminology by religious freedom claimants underscores their perception that religious normative systems are legal in their own right, it also illustrates the complexities of defining what the term “law” means, a matter of persistent debate in legal pluralist scholarship.⁷⁴ Indeed, some of the religious obligations at issue in these cases are an awkward fit with posited functional definitions of law, which rely on notions of social control, institutionalized dispute resolution or institutionalized norm enforcement.⁷⁵ Arguably, the obligation at issue in *Wilson Colony* is consonant with the notion of law as social control or as institutionalized norm enforcement. The prohibition on idolatry is, perhaps, given broad scope in order to protect a particular version of monotheism. Moreover, in cases when this obligation was breached, transgressors were sometimes punished. Indeed, the *Wilson Colony* litigation provided a glimpse of the role of religion as a force of social order in the Colony’s life.⁷⁶

However, the insistence by the *Amselem* and *Multani* claimants on the legal nature of their religious obligations poses more of a challenge to these functional definitions. It is difficult to see how the obligation to construct a succah on one’s own property or the obligation to wear a kirpan fits into the posited functions of law mentioned above. Certainly, the erection of a succah is a norm among a subset of Jews, as is the wearing

74. Oren Perez treats this as a significant weakness of legal pluralism. Oren Perez, “Legal Pluralism” in Donald Critchlow & Philip R VanderMeer, eds, *The Oxford Encyclopedia of American Political and Legal History* (Oxford: Oxford University Press, 2012). See also Ralf Michaels, “Global Legal Pluralism” (2009) 5 *Annual Review of Law and Social Science* 243 at 250–51. To this, Margaret Davies, responds that conventional definitions of law can be just as arbitrary:

By demanding justifications for classifying non-state norms as “law,” we deflect attention from providing an adequate justification for the status of state law as “law”. Arguably, any answer to the “why not?” question [posed by Boaventura de Sousa Santos] rests only on convention, hegemony, and power—that law is conventionally and discursively tied to a state—rather than on any philosophical necessity. It is a “politics of definition”.

Supra note 40 at 821.

75. See Tamanaha, “Non-Essentialist”, *supra* note 51 at 312–13.

76. In the next sub-part, I highlight elements of the data that demonstrate this in detail.

of a kirpan among some Sikhs, but there is no institution that enforces those obligations. The religious practices clearly fulfill a social function in the life of the individual, family or community, but the claim that the obligation to build a succah or wear a kirpan is a form of social control is true in only a tangential sense. Both of those obligations are imagined as symbolic instantiations of higher principles, but they do not themselves control social interactions.

One possible response is that the religious obligations are not legal at all, and that the claimants are mistaken to the extent that they take such a position. But such a response does violence to the common understanding that there is something called religious law embodied in written and oral traditions that is subject to multiple interpretations. Moreover, insisting that religious norms are not legal, discursively diminishes the significance of the religious practices. The particular obligations at issue in these cases thus challenge state-centred and functional definitions of law, prompting a re-examination of the term “law”.

One way of re-examining “law” is through the Wittgensteinian approach adopted by James Tully, which groups terms together on the basis of their “family resemblances” to one another.⁷⁷ In the three cases under review, the religious obligations contain aspects that mark them as belonging to law’s family. First, all the religious freedom claimants symbolized their practices as rules, viewing them as obligatory in meaningful ways. In all of the cases, the participants were willing to take on the significant financial and time-related burdens of pursuing litigation to the highest level in order to be able to carry out their religious practices. Though the way in which they felt compelled by their religious obligations likely differs from the compulsion that emanates from the state, they nonetheless showed a deep commitment to the practices in question, making it difficult to dismiss those practices as mere choices of the practitioners.⁷⁸

77. *Supra* note 46 at 104–14. In this view, “[u]nderstanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases”. *Ibid* at 108.

78. For the difficulties of treating religious obligations as mere choices of adherents, see Williams & Williams, *supra* note 21; Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:1 *Osgoode Hall LJ* 277 [Berger, “Law’s Religion”].

A second way in which participants marked their religious practices as legal was by describing them as flowing from higher principles within a larger tradition. The *Amselem* claimants and their expert witness connected the succah to human dependence on God. The *Multani* claimants, their counsel and the World Sikh Organization described the kirpan as a symbol of resisting oppression and injustice. The *Wilson Colony* claimants framed the Second Commandment as flowing from a monotheistic tradition that forbids idolatry. In state law too, practical obligations flow from principled commitments. Indeed, the judges rationalized the obligations embodied in the court rulings in all three cases as being in service of the higher values of religious freedom and its reasonable limits in a free and democratic society.

Third, like more familiar legal obligations, the religious practices at issue are regulated in detail and have practical effects on the lives of the practitioners. *Amselem* offered a glimpse into the level of specificity of the succah obligation in the rabbinic literature. The *Multani* claimants emphasized that the material with which the kirpan is constructed was significant, as was the material of the sheath. Interviews with *Wilson Colony* participants showed that the prohibition on idolatry manifests at the most mundane levels, regulating how Hutterites decorate their homes. Thus, like the terms of a condominium's bylaws, a school's code of conduct, or the regulations on driver's licences, each of these practices required particular forms of behaviour with respect to the minutiae of everyday activities.

Fourth, in all of the cases, there was reasoned disagreement within the relevant religious community on the import and nature of the obligations. This was clearest in *Amselem*, where expert witnesses articulated that disagreement in court. In *Multani*, there was some discussion of Sikhs who wear a pendant in the form of a miniaturized kirpan in order to fulfill their kirpan obligation, with Gurbaj Singh and his family explaining why this was not acceptable to them. Similarly, in *Wilson Colony*, there was evidence of a difference of opinion among Hutterites on whether the Second Commandment prohibited adherents from having their photos taken for their driver's licences. There is a resonance here with the narrowly divided Supreme Court decisions in *Amselem* (5 to 4) and *Wilson Colony* (4 to 3). These rulings show that even at the highest levels of Canada's state legal system, there is often disagreement as to the meaning

and application of legal principles. This form of reasoned disagreement is a common feature of the religious norms studied here and the state legal system in Canada.

In my view, these aspects of the religious practices at issue in *Amselem*, *Multani* and *Wilson Colony*, taken collectively, justify the drawing of a compelling analogy to widely recognized contemporary legal norms. This may not be the case for all religious norms, but under Tully's Wittgensteinian approach, it is neither necessary nor appropriate to enter into that debate at this stage. Like the common law, this approach prefers to deal with new cases as they arise.

C. Religion as a Source of Social Order in Wilson Colony

As alluded to above, *Wilson Colony* involved a community that, more clearly than in *Amselem* and *Multani*, drew on its religion to make basic social ordering decisions. This merits special consideration, as it illustrates how a religious normative system can operate in ways that are easier to understand as legal. This is seen most clearly in the Colony's communal holding of property. Participants explained this practice in both historical and religious terms. For example:

Well, this colony got started way back in the Hutterian Brethren Church, a community of Christians in 1528, by the man named Jacob Hutter. And he . . . started the Hutterite way of life which says in the Bible, Acts the second chapter, all those who are together, believe in that everything in common, they sold their possessions and goods, and laid them to the apostle's feet.⁷⁹

Another participant explained how religion structures daily life on the Colony:

Whatever we do, Jesus says, you eat or you drink or whatever you do, to the praise of the Lord. . . . In the mornings when we get up, the first thing we do is we pray to God . . . the next thing we sing a morning song, praise the Lord with a hymn, and we go have breakfast, and when we go, everybody's got their assigned job, like the hog man, the cattle man, they all go to do their jobs, and . . . around quarter to six, we go to church, just about every evening we have . . . church services, and after church services when there is time, everybody goes home and sings and reads the Bible and teach the kids about the way, what the Lord wants from us, and . . . the German school teacher, he has to take care of the

79. Litigant 3 Interview.

children, he takes 'em into German school . . . or there is no school, he keeps 'em busy in the garden helping out with the vegetables . . . all our activities in the colony are based on religion based on religion.⁸⁰

Thus, in this account, the Second Commandment's influence on the mundane details of everyday life, discussed above, is just one example of how religious norms provide the basic structure for all that happens in the Colony.

Hutterite participants also explained that religious norms structure how their communities deal with those who transgress religious rules. The norms serve a disciplinary function parallel to state penal law. For example, one participant recounted the use of disciplinary sanctions against young men who wanted to join the Hutterite Church but had previously had their photos taken for their driver's licences:

Well these boys, they were not baptized, they were not members of the colony, and they went ahead and they put their photo on by themselves . . . then when we find out that they had their photos on there, well we had a policy, rules and regulations that when a person is not a member, he can be punished by just standing up in church for half of the church, or kneeling for half the church, or . . . the school teacher can punish him in Sunday school by having him stand all Sunday school.⁸¹

Another participant explained the use of temporary excommunication as a sanction when members breach religious laws:

R—[I]f they're a member and we discipline them, then we excommunicate them from the colony so they're [not] members for [a] while. . . . Till they come back and beg to be members again . . . that's our punishment in the colony.

I—So what happens to a member who is excommunicated?

R—Well he, he's [not a] member . . . he's not able to come to church or eat with the members, he has to eat separate for a while till he begs to be a member again.

. . .

I—And is there a set amount of time before he's allowed to beg—

R—Well, all depends how hard he wants to be a member again. Two, three, four weeks.⁸²

80. Litigant 4 Interview.

81. *Ibid.* See also *Wilson Colony*, *supra* note 6 (Affidavit of Samuel Wurz, affirmed, 18 January 2006, Appellant's Record, vol 3 at 303–05).

82. Litigant 3 Interview.

The data from the Hutterite case offered a vivid example of the legal aspects of religious norms. Commitments to communal living function like constitutional principles, forming the basic structure of life on the Colony. From the same principles, the Colony derives a disciplinary function, as sanctions relate to the transgressor's relationship with the rest of the community. The Colony exercised this function in order to maintain a form of social order, which comprised both the commitment to communalism as well as other religious norms such as the prohibition on images.

D. Hierarchies of Legal Systems

If both state norms and religious norms exert their own legal force in the lives of religious freedom claimants, which norms prevail in the end? In all three cases under review, a religious law conflicted with a norm recognized by state law. State law has its own story to tell about the relative priority of state and religious norms. For example, the Supreme Court held in *Amselem* that the state must remain agnostic as between varying interpretations of the same religion.⁸³ In the face of conflicting expert reports on the religious significance and laws associated with the succah, the majority of the Supreme Court confined its analysis to whether the claimants sincerely believed in their interpretation of Judaism. There are good reasons for this deferential posture to individual religious interpretation. Arguably, it flows from the principle that state courts do not have the right kind of authority to be making decisions on religious doctrine.⁸⁴

However, implicit in this approach is a kind of double standard: the courts are comfortable with indeterminacy when they look at religious

83. *Supra* note 8 at para 50.

84. Some might also argue that courts do not possess the requisite expertise to make these types of determinations. This position, however, disregards that state judges are often called upon to make decisions on matters for which they have little or no expertise, such as the relevant standards for engineering safety in cases of extra-contractual liability or highly technical scientific matters in patent litigation. The justification for courts not making decisions of religious dogma, then, is not to be found in the limitations of judges' particular expertise, but rather the nature of the subject matter: religious dogma is quite a different thing than biological science or engineering standards. Thanks to Professor Jean-François Gaudreault-Desbiens and an anonymous reviewer for these insights.

legal systems, and they justify this stance by referencing the values of tolerance and multiculturalism.⁸⁵ At the same time, this open-endedness is not tolerated when it comes to state law.⁸⁶ Even in a case like *Amselem*, where the Supreme Court sharply divided on the proper outcome,⁸⁷ the state legal system insists on finality in the particular dispute before the court, and, to a more limited extent, in the articulation of the applicable legal rules. *Amselem*'s subjective test for religious belief, a view not shared by all the judges,⁸⁸ has come to be cited in nearly every subsequent religious freedom case.⁸⁹

I am not arguing that state courts should be more partisan in adjudicating disputes involving religious norms, or that state judicial decisions should be less than final. Instead, I mean to demonstrate how state law sees itself as sitting atop a hierarchy, subsuming other normative systems within its dominion.⁹⁰ The difference in state law's treatment of itself and its treatment of religious law is an aspect of the law's view of itself not only as being more powerful, but as being justifiably so; it is

85. For an argument that Canadian law is less tolerant than it imagines itself to be, see Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Can J.L. & Jur 245.

86. Notably, in the opinion of one of the expert witnesses called in *Amselem*, "normally it is relatively simple to determine when a [Jewish] law is accepted by all, when a position has been influenced by local teachings that may deviate from the norm, when enhancements and strictures are of a voluntary nature, and when personal preferences have played a role in setting practices". *Amselem*, *supra* note 8 (Expert Report of Rabbi B. Barry Levy, PhD, 19 February 1998, Appellants' Record, vol 2 at 322).

87. Indeed, in the course of the case's litigation, more judges came down on the side of the condominium syndicate (1 trial judge, 3 judges of the Quebec Court of Appeal and 4 judges of the Supreme Court of Canada) than did on the side of the religious freedom claimants (5 judges of the Supreme Court of Canada).

88. See *Amselem*, *supra* note 8 at para 135, Bastarache J, dissenting.

89. Lawyer participants explained that the holding in *Amselem* structures litigation strategy for lawyers handling religious freedom claims. Lawyer 2 Interview; Lawyer 3 Interview; Lawyer 4 Interview.

90. See The Right Honourable Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004) 12. Suzanne Last Stone has described the ways that some practitioners of Orthodox Judaism took advantage of this same hierarchy, using state law to resolve a problem that Jewish law could not. *Supra* note 69. This demonstrates, perhaps, a willingness by some religious adherents to accept, for practical purposes, the dominance of state law over religious law.

supreme because it is part of a democratic system, it is fully rational and it yields stable results. Of course, state laws must be interpreted in order to be applied, and that leaves room for the interpreter to create norms, belying the notion of stability in law.⁹¹ Nevertheless, the accepted reasons for state law's dominance serve to justify its jurisdiction over religious freedom claims.

The Alberta government's arguments in *Wilson Colony* expressed this general view. Counsel for Alberta made the following submission on the notion of "reasonable accommodation":

[W]hat it means to provide reasonable accommodation for a religious belief that happens to conflict with an otherwise unobjectionable law is that, where it is possible to achieve the purpose without impairing the religious belief, we must do that. But if the religious belief causes or demands a genuine impediment to achievement of a pressing and substantial purpose, then reasonable accommodation has been achieved.⁹²

Counsel argued that this view was particular to the religious freedom context because of the "subjective character" of the *Charter* right to religious freedom. He thus provided a rationale from inside state law for prioritizing state law over religious law. The argument runs as follows: (1) the Supreme Court held in *Amselem* that religion must be treated subjectively; (2) this subjectivity has the potential to give individuals the power to avoid the application of state law; (3) to control the resulting unpredictability, if there is no way for the state to fully achieve its purpose without infringing religious beliefs, the courts must give priority to state purposes over religious practices. The unpredictability referred to in step two is created by the subjective treatment of religious beliefs in step one. Though the Court jettisoned the language of "reasonable accommodation", the essence of its ultimate finding was the same: if the state cannot fully achieve a valid purpose, religious law must yield.⁹³

While the notion of law as the final adjudicator may be the narrative of state law, this idea does not reflect the experience of those subject to overlapping legal systems. Even after courts make their orders, questions

91. For an excellent discussion on these lines, see Roderick A Macdonald & Jason MacLean, "No Toilets in Park" (2005) 50:4 McGill LJ 721 at 723-26.

92. *Wilson Colony*, *supra* note 6 (Transcript of Oral Argument at 16 (Rod Wiltshire for the Attorney General of Alberta)).

93. See Berger, "Constitutional Reasoning", *supra* note 37.

of how to behave can linger as participants struggle to reconcile their religious and state legal obligations. As Martha Minow has noted,

Decisions reached within formal governmental authorities do not end the matter for members of subgroups who are themselves tolerating the secular political arrangement only as long as it remains compatible with their own sense of alternative authorities. . . . The official authorities may themselves seem peripheral to those minority groups that seem peripheral to the majority.⁹⁴

Indeed, this study's interviews highlighted the tensions experienced by participants when state and religious norms demand conflicting behaviour and each normative system claims comprehensive authority.

One might suppose that religious adherents approach their religious laws similarly to how state judges explain state law, i.e., that a religious believer would view his or her divine legal system as all-encompassing and supreme over state law, especially in a religion with a tradition of martyrdom at the hands of state officials or other authorities.⁹⁵ In some respects, the data from this study support that supposition. In cross-examination, one of the *Amselem* litigants said concerning the installation of his succah: "C'est peut-être contre la loi du Sanctuaire [the name of the condominium complex] mais ce n'est pas contre la loi ni de Dieu ni d'une loi normale."⁹⁶ Similarly, Hutterite interview participants were firm in their view that "God's law" was paramount, and related stories of their ancestors who were "burned at the stake", "beheaded" and "drowned" for their faith but remained steadfast in their beliefs.⁹⁷ A

94. Martha Minow, "Pluralisms" (1989) 21:4 Conn L Rev 965 at 971. In a similar vein, Shauna Van Praagh has suggested that courts participate alongside communities in the construction of identity as "partner[s] in an ongoing dance". Shauna Van Praagh, "Identity's Importance: Reflections of—and on—Diversity" (2001) 80:1 & 2 Can Bar Rev 605 at 617–18 [Van Praagh, "Identity"].

95. See Robert Cover, "Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1993) 95 ("self-referential supremacy of each [normative] system" at 127).

96. *Supra* note 8 (Cross-Examination of Moise Amselem, 3 February 1998, Respondent's Record, vol 1 at 326).

97. Litigant 4 Interview. Notably, Cover's work focused on litigation involving Amish communities, whose religion stems from the same Anabaptist tradition as does Hutterianism, and shares a similar "jurisprudence of exile and martyrdom". Cover, *supra* note 95 at 152.

Hutterite litigant seemed to be prepared to face imprisonment to maintain his beliefs,⁹⁸ and some Hutterites have opted to pay fines rather than be photographed.⁹⁹ While migration was discounted as an effective option, at least some Hutterites performed a kind of attenuated martyrdom by accepting state punishments in order to maintain their practices.

Not all participants approached the conflict of religious and state authority in such a straightforward manner. The Hutterites were divided in their response to the Supreme Court ruling. Some of the Hutterite litigants decided to have their photos taken for their driver's licences,¹⁰⁰ while others decided to go on driving without valid licences and have the Colony absorb their fines.¹⁰¹ This divergence was possible because the Wilson Colony had split into two colonies. This is standard practice among Hutterites when colonies reach around 140 members and it was already underway when the litigation began.¹⁰² A member of the Colony that has opted for its members to drive with expired, non-photo licences explained the decision by reference to a biblical narrative:

[T]here was an incident there in the Bible where . . . twelve apostles were preaching in the temple, and the scribes and the Pharisees they said, no you can't do that, and they chased them out of the temple and even whipped 'em for doing that. And Peter was put in jail, and in the night time . . . an angel come to Peter and woke him up and said let's go, the chains fell off of him . . . the gates opened by themselves and he went to the other disciples. . . . The next day he went into the temple and preached again. The [s]cribes and the Pharisees seen that, and they called him and said you're not supposed to do that. He said, yes I am supposed to do that, God says I should go and preach and I have to obey God more than man.¹⁰³

Similarly, in materials submitted to the courts, several members of Hutterite colonies wrote:

Some laws are just, but some are unjust . . . each person must determine for himself in accordance with his conscience in which category each law falls. Those that fall in the unjust basket may be freely violated & even though thereafter this law is held valid, the

98. *Wilson Colony*, *supra* note 6 (Transcript of the Cross-Examination of Samuel Wurz by Rod Wiltshire (on affidavit), 2 February 2006, Appellant's Record, vol 5 at 674–75).

99. Litigant 4 Interview.

100. *Ibid.*

101. *Ibid.*

102. Litigant 3 Interview; Litigant 4 Interview.

103. *Ibid.*

disobedient may continue his recalcitrance, if his conscience will not permit him to agree.

...

Yes, the Holy Scripture urges all men obey the civil authorities Romans Chapter 13 which we are in agreement, up to the point when Authorities order conduct contrary to God's expressed command.¹⁰⁴

In contrast, the issue was framed in this way by a member of the Colony that has decided that some members would have their photos taken:

R—[S]till there's quite a few members of ours that had to obey the law and put, and take a photo and put it on their licence.

...

I—How has that affected the life on the colony?

R—Well, what else . . . could we do? Look at all the business we have to do, how else could we keep on going and doing our way of life and make a living?

...

[W]e were forced to do it. . . . Against the Ten Commandments.¹⁰⁵

Indeed, according to this participant, after the decision of the Supreme Court, police officers “were waiting on corners already for us”.¹⁰⁶ The economic threat that this presented was too great, “if . . . you get a ticket every other day, pretty soon you'll be in the poor house”.¹⁰⁷ For at least some litigants, the state has at its disposal the means to alter the behaviour of religious adherents, leading them to violate their religious norms and adopt a narrative of state coercion.¹⁰⁸

104. This text comes from a letter composed (but apparently never sent) to Alberta government officials. See *Wilson Colony*, *supra* note 6 (Exhibit F to Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellants' Record, vol 2 at 209 [emphasis in original]). See also *ibid* (Transcript of the Cross-Examination of Samuel Wurz by Rod Wiltshire (on Affidavit), 2 February 2006, Appellant's Record, vol 5) (“when it comes to disobeying God's word, then we want to believe—obey God more than man” at 689).

105. Litigant 3 Interview.

106. *Ibid*.

107. *Ibid*.

108. See W Michael Reisman, “Autonomy, Interdependence, and Responsibility” (1993) 103:2 Yale LJ 401; Van Praagh, “Identity”, *supra* note 94 at 609.

Issues of hierarchy were less immediate in *Amselem* and *Multani*.¹⁰⁹ In both cases, when the litigants lost in the lower state courts, they found ways to comply with court orders while fulfilling their religious obligations. An *Amselem* participant explained that until the Supreme Court of Canada eventually found in his favour, he moved to one of his children's homes for the duration of Succoth so he could have comfortable access to a succah.¹¹⁰ Similarly, the Multani family found alternate schooling rather than violate a court order by having Gurbaj Singh bring his kirpan to the public school. Perhaps because both the *Amselem* and *Multani* claimants were eventually successful, they did not express any concerns analogous to the Hutterite participants who ultimately had to choose between state and religious law. In all of the cases, the fact that at least some claimants found ways to maintain their religious practices suggests that the state's claim to be at the top of a hierarchy may reflect reality at the level of enforcement, but not at the level of normative legitimacy in the eyes of its subjects.

E. Religion as a Lens for State Law

Above, I detailed some of the complex ways in which both religious and state norms claim a place at the top of a normative hierarchy. However, it would be simplistic to paint the relationship between religious and state legal norms as a mere competition. Members of religious communities often view state legal concepts through their own normative lenses. Robert Cover argued that although all citizens may be bound by the same laws, the meaning those laws take on for particular citizens is conditioned by the normative worlds they inhabit.¹¹¹ A group's particular history and religion can influence members' interpretation of state law.

The interviews illuminated some of the ways in which this occurs. Historical narrative was certainly significant to Hutterite participants. One litigant said, "[I]n 1918, and we got the documents to show for

109. In the initial phases of these disputes, though the claimants resisted the application of a legal norm recognized by the state (a contract or an administrative decision), they did so on the basis of the state's own legal norms. For that reason, I focus here on their responses to court rulings.

110. Litigant 2 Interview.

111. *Supra* note 95 at 110–11, 123.

it, they promised us freedom of religion . . . that we could practice our religion in Canada till the end of time”.¹¹² Thus, in part because of the Hutterites’ history in Canada, that participant described the protection of religious freedom in covenantal terms. In this narrative, religious freedom is important not because the government bound itself to a constitution, but because it made a promise to the Hutterites.

The Hutterite historical narrative includes instances of migration when religious freedom was threatened. The most recent occurred in 1918, when some Hutterites migrated to Canada in order to avoid conscription and associated difficulties in the United States.¹¹³ However, the Hutterite participants expressed hopelessness at finding a place where photos would not be required on driver’s licences.¹¹⁴ While Martha Minow has cautioned that for some groups “exit remains a viable option”,¹¹⁵ in the circumstances of the *Wilson Colony* litigation, the Hutterite colonies did not seem willing to leave Alberta.¹¹⁶ At the same time, as noted above, a Hutterite litigant suggested that he would be willing to face imprisonment

112. Litigant 4 Interview. There is historical evidence to support this claim, but it is not unambiguous. See AJF Zieglschmid, *Das Klein-Geschichtsbuch der Hutterischen Brüder* (Ithaca, NY: The Cayuga Press, 1947); Victor John Peters, *A History of the Hutterian Brethren, 1528–1958*, (PhD Thesis, Georg-August-Universität Göttingen, 1960) at 157–60 [unpublished]; Edwin L Pitt, *The Hutterian Brethren in Alberta* (MA Thesis, University of Alberta, 1949) at 101–05 [unpublished]; John W Bennett, *Hutterian Brethren: The Agricultural Economy and Social Organization of a Communal People* (Stanford, Cal: Stanford University Press, 1967) at 32.

113. A study of Hutterite history submitted to the Court by the Wilson Colony recounted the Hutterites’ expulsion from Moravia in 1622 and their exodus from the United States in response to “new sufferings at the hands of super-patriots”. *Wilson Colony*, *supra* note 6 (Robert Friedmann, “The Christian Communism of the Hutterite Brethren”, Exhibit A to the Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant’s Record, vol 2 at 196–97).

114. Litigant 3 Interview; Litigant 4 Interview.

115. *Supra* note 94.

116. Though interviews were conducted with individual members of the colonies, each related that the decision to stay in Alberta was made by the Colony. Indeed, there is no sign that the members of Hutterite colonies in Alberta have made steps towards migration within or outside Canada.

to maintain his beliefs,¹¹⁷ and some Hutterites have opted to pay fines rather than be photographed.¹¹⁸

In addition to the importance of historical narrative, the data also demonstrate how a particular religious outlook can influence understandings of state laws. For example, one litigant in *Amselem* expressed his admiration for the decisions of Canadian judges by likening them to Talmudic writings: “quand on lisait le jugement, c’était un cours de Talmud . . . moi je trouve c’est magnifique la justice ici dans ce pays. Les gens sont bien informés, et bravo! . . . Il faut être fier de ça.”¹¹⁹ Thus, this litigant filtered the state court’s ruling through a religious lens, at least in terms of its style, and respected it on this basis.

The data also showed that, at times, the substance of state law was similarly filtered. For example, in explaining his understanding of the right to religious freedom in an affidavit, one Hutterite emphasized that the *Charter’s* preamble recognizes the “supremacy of God”.¹²⁰ The affidavit’s drafting bears the imprint of a person with training in Canadian law,¹²¹ but the reference should not be dismissed entirely as emanating from counsel. The reference to the “supremacy of God” clause is significant because it is consistent with the Hutterite narratives regarding obedience to God rather than man.¹²² In this narrative, the supremacy of God is the reason for religious freedom. Similarly, a *Multani* litigant explained his

117. *Wilson Colony*, *supra* note 6 (Transcript of the Cross-Examination of Samuel Wurz by Rod Wiltshire (on affidavit), 2 February 2006, Appellant’s Record, vol 5 at 674–75).

118. Litigant 4 Interview.

119. Litigant 2 Interview.

120. *Wilson Colony*, *supra* note 6 (Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant’s Record, vol 2 at 193). Notably, the Supreme Court of Canada has not drawn on this interpretive provision in fleshing out the notion of religious freedom. But see *Allen v Renfrew (County)* (2004), 69 OR (3d) 742 at para 19, 117 CCR (2d) 280 (Sup Ct J) (in which the Court held that a town council that opened its meetings with a prayer referring to a single God did not violate the *Charter*, relying in part on the “supremacy of God” clause).

121. *Wilson Colony*, *supra* note 6 (Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant’s Record, vol 2 at 193).

122. For an argument that the “supremacy of God” clause should be taken as a general interpretive principle rather than a statement privileging particular religious views, see Lorne Sossin, “The ‘Supremacy of God’, Human Dignity and the *Charter of Rights and Freedoms*” (2003) 52 UNBLJ 227. For an argument that the clause refers to individuals’ natural and inalienable rights that pre-exist the state, see Jonathon W Penney & Robert J Danay, “The Embarrassing Preamble? Understanding the ‘Supremacy Of God’ and the *Charter*” (2006) 39:2 UBC L Rev 287.

understanding of the concept of religious freedom in distinctly religious terms: “So, there’s different paths but the destination is only one . . . we are trying to reach God, so there should be a freedom of religion.”¹²³ In this narrative, the purpose of religious freedom is not based on liberal ideas of autonomy or practical reasons like maintaining social peace; it is to allow individuals to connect with the divine in various ways.

In addition to the interview data, some of the sources cited by the Wilson Colony in their court documents filter the debate on state laws through a religious lens. The Wilson Colony included in its materials a pamphlet first published in the 1950s by the Hutterian Brethren of Manitoba. The pamphlet argued against proposed legislation that would have required Hutterites to maintain minimum distances between their colonies. In support of this position, the pamphlet referred to historic promises of religious freedom made by the Canadian government. The pamphlet also cited the Book of Matthew, appealing to religious principles to persuade its audience that a state law should not be adopted.¹²⁴ Members of several Hutterite colonies drafted, but apparently never sent, a letter intended for the Alberta government that argued for the photo exemption by reference to the Ten Commandments, described as “eternal bases for moral values”.¹²⁵ The letter also cited numerous other biblical verses, expressing the view that one who breaches the commandments is a “transgressor of God’s laws”.¹²⁶ Hutterite advocacy repeatedly filtered state laws through their religious beliefs.

In sum, as legal pluralists have suggested, the overlap of legal systems occurs on at least two levels. First, as explained above, overlap occurs within legal systems, as laws of one system are invoked in the context of a different legal system’s proceedings. Second, consistent with critical legal pluralist thought, overlap is evident within individuals’ understandings, as the laws of one legal system are interpreted through the lens of another. For Robert Cover, when a community decides to act in accord with its own

123. Litigant 1 Interview.

124. See Peter Hofer, *The Hutterian Brethren and Their Beliefs* (Starbuck, Man: Hutterian Brethren of Manitoba, 1973), cited in *Wilson Colony*, *supra* note 6 (Exhibit B to Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant’s Record, vol 2 at 205); *Walter v Alberta (AG)*, [1969] SCR 383, 3 DLR (3d) 1.

125. *Wilson Colony*, *supra* note 6 (Exhibit F to Affidavit of Samuel Wurz, affirmed, 10 August 2005, Appellant’s Record, vol 2 at 207).

126. *Ibid.*

view of law in contravention of a state pronouncement, it does not do so as a form of justifiable disobedience, but as a “radical reinterpretation”.¹²⁷ The Hutterite participants radically reinterpreted religious freedom as an instantiation of God’s supremacy or as an absolute promise made to the community. Such a manoeuvre was not necessary in *Amselem* or *Multani*, where the claimants’ views of religious freedom were affirmed by their success in court.

F. State Law as a Lens for Religion

The relationship between state and religious legal norms is not unidirectional. Some of the earliest legal pluralist scholarship examined the ways in which the norms of one legal system can become “relevant” for another. In work originally published in the 1910s, Italian legal theorist Santi Romano dealt with the relationship between state law and ecclesiastical law and the relationship between the laws of various states through private international law. In his view, church laws became relevant to state laws by entailing civil effects, such as when the religious celebration of a marriage creates consequences in state law.¹²⁸ Similarly, when state courts apply doctrines of private international law, the laws of a foreign jurisdiction can have domestic legal consequences.¹²⁹

The Canadian law of religious freedom attributes a particular kind of relevance to religious norms. *Amselem* held, and this was affirmed in *Multani* and *Wilson Colony*, that the content of sincerely held religious beliefs is significant in defining the content of the constitutional right to religious freedom. The state does not purport to set out a list of religious practices that will benefit from the constitutional protection. In Romano’s terminology, this effectively makes an individual’s religious practices relevant for state purposes while making the “correctness” of a particular

127. *Supra* note 95 at 147.

128. Santi Romano, *L'ordre juridique*, translated by Lucien François & Pierre Gothot (Paris: Dalloz, 1975) at 132–33 (this French translation from the 1970s is the only non-Italian version of which I am aware; Romano’s ideas presaged in many ways the legal pluralist thought developed later in the 20th century). For a contemporary discussion of Romano’s work, see Guy Rocher, “Pour une sociologie des ordres juridiques” (1988) 29:1 C de D 91. For a brief mention of Romano’s institutional theory of legal pluralism, see also Michaels, *supra* note 74 at 245–46.

129. See Romano, *supra* note 128 at 136.

interpretation of religious law irrelevant for these purposes. In principle, whether a particular community generally accepts a religious practice is relevant for Canadian courts only in the evaluation of a claimant's credibility.¹³⁰ If a claimant demonstrates that certain practices required by the claimant's sincere belief are hindered by state action, the courts then use the framework of section 1 of the *Charter* to limit the ambit of such claims. This gives the state the final say as to which religious norms will be deferred to by the state's legal system.

The interview data showed that litigants and their counsel sought to make religious norms relevant to state courts in another way: by emphasizing the similarities between the particular religious norms and state laws. By presenting their religious practices as rooted in values espoused by the state, participants sought to make those practices intelligible to state judges and therefore more likely to be afforded the state's protection. This is arguably attributable, in part, to the institutional pressures created by litigation before state courts. The knowledge that the dispute will be decided on the basis of state norms will encourage litigants and their counsel to present a narrative of their religious obligations that is accessible to judges and others immersed in the state's legal system.¹³¹

At a formal level, this occurred in *Multani* when the World Sikh Organization (WSO), an intervener in *Multani*, cited the decisions of state institutions to explain the religious significance of the kirpan.¹³² One could trivialize the point by claiming that the WSO was simply arguing that other state organs had found sufficient proof of the kirpan's

130. For an argument that the state ought to require, in some circumstances, testimony that a religious freedom claimant belongs to a community that observes a particular religious practice, see Robert E Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief" (2010) 51 Sup Ct L Rev (2d) 47.

131. Berger argues that Canadian law encourages religious freedom claimants to harden their own religious commitments. Benjamin L Berger, "Inducing Fundamentalisms: Law as a Cultural Force in the Domain of Religion" (2012) 9:3 Canadian Diversity 25.

132. *Supra* note 7 (Factum of the Intervener, World Sikh Organization at paras 5–7, 43–46). The factum also cites a decision of the Court of Appeal of Ohio. For similar purposes, see *State of Ohio v Singh* (1996), 117 Ohio App 3d 381. Specifically, the WSO factum cites decisions of the Ontario Board of Inquiry and the Alberta Board of Inquiry regarding human rights complaints: *Peel Board of Education v Pandori* (1990), 12 CHRR D/364 (Ont Bd Inq); *Pritam Singh v WCB Hospital and Rehabilitation Centre* (1981), 2 CHRR D/459 (Ont Bd Inq); *Tuli v St Albert Protestant Board of Education* (1987), 8 CHRR D/3736 (Atla Bd Inq).

religious significance. However, the WSO anticipated that courts would be more comfortable relying on the decisions of other state institutions than relying exclusively on a religious authority, even when it came to evaluating the meaning of a religious object. In response to the school commissioners' argument that Sikhs saw the kirpan as a dagger, albeit a ceremonial one, the WSO argued: "Canadian Courts have accepted that the kirpan serves only a spiritual and symbolic value for Sikhs."¹³³

State-approved norms appear not only to have influenced the parties on the formal matter of deciding which sources to cite as authoritative, but also at times to have impacted their substantive description of their practices. In her analysis of *Multani*, Valerie Stoker argued that the claimants framed their religious practices in terms that would be familiar and sympathetic to Canadian courts: "By offering up a discourse on the practice of *kirpān*-wearing that invokes shared values such as equality, tolerance, and inclusivism, Sikhs in this case simultaneously aligned their traditions with dominant values and preserved their distinctive identity."¹³⁴ In other words, the principles that the claimants used to frame the religious practice were ones that the state had previously embraced. My research echoes this conclusion. For instance, in the WSO's written submissions to the Supreme Court, it argued that the kirpan's design was meant to reflect the value of equality:

While it is accurate that the kirpan must be made of steel, and cannot be miniaturized, there is no valid authority which supports the proposition that the kirpan must be kept this way so that it can be used as a weapon . . . the requirement for the kirpan to be made of iron (now cast as steel) emphasized the concept of equality of all peoples, "since iron was widely available to the poor, it assumed the aspect of commonality, simplicity and equality."¹³⁵

133. *Multani*, *supra* note 7 (Factum of the Intervener, World Sikh Organization at para 27). In this regard, the WSO also argued that *R v Hothi*, in which a man accused of assault was barred from wearing his kirpan in the courtroom, was an outlier in the broader Canadian jurisprudence on the kirpan. 33 Man R (2d) 180, [1985] 3 WWR 256 (QB).

134. Valerie Stoker, "Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec" (2007) 75:4 *Journal of the American Academy of Religion* 814 at 818.

135. *Multani*, *supra* note 7 (Factum of the Intervener, World Sikh Organization at para 25) [citations omitted]. This passage also highlights the previously identified pattern of relying on decisions of Canadian state bodies to explain the kirpan practice.

This approach was reflected in the interview data as well. For example, a lawyer who acted on behalf of a religious organization highlighted shared religious and state values:

The kirpan is what we call the sword of spiritual power, it's never to be used . . . the whole purpose of it . . . is internalizing the external, constant reminders for us of how to live our lives . . . if you hear about all those ideals, they're very consistent with Charter values, they're very consistent with Canadian values . . . defending the defenceless, that's what the Charter is all about, really, right? To protect the minority against the tyranny of the majority.¹³⁶

In a similar vein, another litigant linked the kirpan with justice, the Canadian court system's most basic value: "kirpan is for justice . . . it's not necessary to use the kirpan, but it reminds [you, you] know, go stand for it".¹³⁷ I do not mean to claim that the values connected by participants to the kirpan practice are or were foreign to Sikhism or to the religious lives of the participants in the case. Rather, my argument is that in the context of litigation, in order to make the religious practice intelligible to Canadian courts, participants may emphasize those aspects of the practice that resonate most strongly with state values.

This can also be seen in the oral arguments before the courts. At trial, the lawyer representing the Multani family emphasized the origins of Sikhism as being opposed to the caste system, in favour of sexual equality and consistent with the "modern" notion of individual autonomy:

[L]a religion sikh était une révolte contre deux choses, contre le système de caste hindou et contre le traitement des femmes chez les musulmans. . . . [L]e début, l'idée était une idée tout à fait moderne pour souligner l'autonomie individuelle, la liberté d'expression, une idée qui était belle.¹³⁸

136. Lawyer 3 Interview. The phrase "the tyranny of the majority" is associated, in Canadian jurisprudence, with the Supreme Court of Canada's decision in *R v Big M Drug Mart*. [1985] 1 SCR 295 at 337, 60 AR 161.

137. Litigant 1 Interview.

138. *Multani*, *supra* note 7 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 10, Appellant's Record before the Supreme Court of Canada, vol 2 at 257) ("the Sikh religion was a revolt against two things, against the Hindu caste system and against the treatment of women among Muslims . . . in the beginning, the idea was an entirely modern idea to underline individual autonomy, freedom of expression, an idea that was beautiful" [author's translation]).

He went on to argue that Sikhism is integrationist in nature and that it does not oppose mixed marriage.¹³⁹ It is difficult to see the connection between these arguments and whether a student should be allowed to wear a kirpan to school. But here, they seek to create a general affinity between the values of Sikhism and the Canadian state.

Dealing more specifically with the kirpan itself, the same lawyer argued that it is linked with resistance to oppression, and “since schools are dedicated to the freedom of thought, freedom of expressions, it is at least arguable that the resistance to oppression is a commendable virtue”.¹⁴⁰ In setting up this argument, the lawyer did not refer only to abstract values, but also referenced the violent image of a sword employed in the French version of “O Canada” (“Car ton bras sait porter l’épée”) in order to demonstrate shared symbolism between the official Canadian anthem and the kirpan.¹⁴¹ Complicating this analysis, the lawyer also referred to the lyrics of *La Marseillaise* (“Aux armes, Citoyens”) and the “millions of paintings [at the Montreal Museum of Fine Arts] in which Christ rises from the grave holding a sword”.¹⁴² While these latter examples are not officially linked to the Canadian state, they are Western cultural artefacts, which include symbolism from Canada’s dominant religious group, and would have resonance with the judiciary. Thus, not only were state norms used to frame the practice of kirpan-wearing, other dominant cultural symbols were as well.

After framing the practice of kirpan-wearing in a manner consistent with state values, counsel called upon the value of inclusiveness, framed as a shared value between Sikhism and the state, to argue for the accommodation of the Sikh student. The Multani’s lawyer argued that public institutions, in general, should be welcoming: “we should encourage people to use the public school system, the public health system, the public justice system and the purpose for accommodation is to make them feel at home in the public system”.¹⁴³ According to this argument, allowing the kirpan in school demonstrates the inclusiveness of Canadian society. “If anything”, argued counsel, allowing the kirpan

139. *Ibid* at 262.

140. *Multani*, *supra* note 7 (Julius Grey, Transcript of Oral Argument to the Supreme Court on behalf of Multani at 23).

141. *Ibid* at 22–23.

142. *Ibid*.

143. *Ibid* at 26.

“would have a positive effect in demonstrating . . . the acceptability, the Canadianess of somebody who happens to be wearing a turban and a kirpan”.¹⁴⁴

In other analogous contexts, scholars have noted the tendency of state courts to accept the religious freedom claims of litigants when judges see the particular religious beliefs as congruent with the state’s values. For example, Martha Minow has followed this line of argument in her explanation of the landmark decision in *Wisconsin v Yoder*, which allowed Amish families to withdraw their children from public schooling at age fourteen:

[Justice Burger’s majority opinion] suggests that the rest of the community faces no sacrifice in respecting the subgroup’s differences because this subgroup so resembles the majority in its ability to teach its children just what the majority hopes its public schools will teach: the self-sufficiency and productivity of the yeoman farm family. In essence, the opinion maintains that here the state must respect religious and cultural differences because the Amish really are fundamentally the same as the larger society.¹⁴⁵

Linda McClain explains the dissenting view of Blackmun J in *Oregon v Smith* in a similar way.¹⁴⁶ In that case, the majority of the US Supreme Court held that the use of peyote in a religious ceremony could be valid grounds for terminating an individual’s employment. McClain sees Blackmun J’s dissent as stressing the congruence of the Native American Church with both state laws and the Amish traditions that were held in *Yoder* to be prototypical of the American yeoman farmer.¹⁴⁷ The affinity between state values and the values said to undergird a religious practice or a religion more generally had a noticeable impact on the Burger and Blackmun opinions. It would follow that counsel for religious freedom claimants are well advised to underline these affinities where they can be discerned.

In addition to encouraging the *Multani* claimants to frame their practices as being consistent with state values and symbols, the litigation

144. *Ibid* at 27.

145. *Supra* note 94.

146. *Employment Division, Department of Human Resources of Oregon v Smith* (1990), 494 US 872, cited in Linda C McClain, “Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society” (2011) 32:5 *Cardozo L Rev* 1959.

147. *Ibid* at 1975.

process also led to the description of practices as being rule-bound. In this regard, Sikhism's rules were presented as clear and predictable, as state law is often idealized to be.¹⁴⁸ As Valerie Stoker explains:

By making Sikh behavior appear more rule-bound and consistent, Sikhs might also make it seem more 'rational' and therefore trustworthy to a non-Sikh audience, particularly an audience that is suspicious of religion in general and that considers the *kirpān*'s symbolism too subjective a standard by which to evaluate its threat to school safety.¹⁴⁹

In this vein, counsel for the Multani family argued at trial that removing the kirpan from its sheath was strongly prohibited by the Sikh religion, insisting that Sikhs were afraid of such an occurrence and were very punctilious to avoid it.¹⁵⁰

However, in the course of interviews, one participant suggested exceptions to the rules of the kirpan as presented to the courts. He noted the exceptional circumstances under which, in his view, it was permissible to remove the kirpan from its sheath. He limited these circumstances to where the kirpan was the only means of defence against an attack on another person.¹⁵¹ This suggests that there is some variation among practitioners of the religion on the permissibility of using the kirpan as a weapon. It also suggests that there were a range of narratives which litigants and counsel could have attached to the kirpan, and they chose to present the one with the strictest limitations on its use.

That choice seems to have been wise. Comments from the bench indicated that the trial judge, Grenier J, recognized that interpretations of a religion can be highly varied, but also believed it was possible to objectively identify the rules that the religion prescribes. In an exchange between counsel for the Multani family and Grenier J on the possibility of

148. Of course, there is significant debate as to whether state law is determinate, see e.g. Lawrence B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462.

149. *Supra* note 134 at 822. This is also consistent with the way in which both sides of the *Amsalem* dispute presented the succah. The Jewish co-owners claimed they had a religious obligation to erect a succah on their own balcony and the syndicate of co-owners argued that while there was a set of laws applicable to the succah, they did not include the obligation to erect one's own succah. See *Amsalem*, *supra* note 8 at paras 5, 22.

150. *Multani*, *supra* note 7 (Julius Grey, Oral Argument on behalf of Multani before the Superior Court at 124, Appellant's Record before SCC vol 2 at 371).

151. Litigant 1 Interview.

sheathing the kirpan in a leather case, she grew frustrated with counsel's reluctance to commit to such a compromise: "Je viens de vous le dire, là, ça se peut fort bien que si vous parlez à dix personnes, vous recueillerez dix opinions différentes. C'est pas une question non plus de qui est votre client, là. *C'est une question de qu'est-ce que c'est cette religion.*"¹⁵² In this particular exchange, counsel was not able to make the Sikh rules intelligible to the court. Interestingly, while the rules of the kirpan were presented as being strict and having their own internal order, counsel ultimately fell back on the view that religious beliefs are not susceptible to rational explanation.¹⁵³

From the above, we might conclude that in *Multani*, litigants and counsel found it advantageous to present their religious practices as being consistent with the values of state law, and also as being rule-bound and predictable, like state law often imagines itself to be.¹⁵⁴ In *Amselem*, these strategies were less evident, but the litigants (or perhaps their counsel) did think it important to cast their overall religious approach as being consistent with state values. Thus, each succah-building litigant affirmed that he practiced his religion "with pride, dignity and resolve".¹⁵⁵ The notion of "dignity" had for many years been seen by the Supreme Court of Canada as a reason for the protection of religious freedom (and other fundamental freedoms), and it was, at the time, a defining value in the

152. *Multani*, *supra* note 7 (Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 128, Appellant's Record before the Supreme Court of Canada, vol 2) [emphasis added].

153. In answer to a question regarding the material used to make a sheath for the kirpan, counsel responded: "Votre Seigneurie . . . je pense que la religion—les croyances religieuses sont des choses qui ne sont pas rationnelles." *Ibid* at 375. See also Avihay Dorfman, "Freedom of Religion" (2008) 21:2 Can JL & Jur 279 (the protection of religious freedom is justified in part by the irreducible core of religious practice that is beyond the reach of rational explanation).

154. Like the tendency toward congruence, this pattern is also consistent with the dissenting view of Blackmun J in *Oregon v Smith*; as McClain notes, Blackmun J was careful to point out the "carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs". *Supra* note 146 at 913, cited in McClain, *supra* note 146 at 1975.

155. *Amselem*, *supra* note 8 (Affidavit of Thomas Klein, 22 December 1997, Appellants' Record, vol 2 at 200; Affidavit of Moïse Amselem, 18 December 1997, Appellants' Record, vol 2 at 183; Affidavit of Gabriel Fonfeder, 9 December 1997, Appellants' Record, vol 2 at 173).

Court's jurisprudence on equality.¹⁵⁶ Admittedly, "dignity" may have had a somewhat different meaning in the two contexts: the Court had said that human dignity "is concerned with the realization of personal autonomy and self-determination" and means "that an individual or group feels self-respect and self-worth",¹⁵⁷ whereas the *Amselem* affiants may have used the term to indicate the seriousness or solemnity of their religious ritual. However, they also may have intended to suggest that their self-respect was implicated in their performance of the ritual. In any event, the invocation of dignity was not in my view accidental, but was meant to convey an affinity between the values of affiants and those of the Court.¹⁵⁸

In *Wilson Colony*, the Hutterites did not argue that refusing to be photographed was harmonious with state values. However, participants emphasized the strictness with which the Second Commandment was observed, highlighting the internal consistency of religious observance and creating a parallel between the religious norm and state law in its idealized form.

G. Blurred Boundaries

At times it was possible to identify when participants approached one set of norms through the lens of another. At other times the boundaries between state and religious normative systems were harder to trace, and these moments may signify the deepest interpenetration of overlapping legal systems. For example, in an interview, an expert witness who

156. See *R v Big M Drug Mart*, *supra* note 136 at 336; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR] (which used dignity as touchstone for the adjudication of discrimination claims). More recently, the Supreme Court has retreated from this amorphous concept without overruling it explicitly. See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483; *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396.

157. *Law*, *supra* note 156 at para 53.

158. It is worth noting that each claimant in *Amselem* asserted that he wore a kippah "at all times," and that his "entire family was also observant". This assertion served not only to support their credibility, but also to paint their religious lives as strictly rule-bound. *Amselem*, *supra* note 8 (Affidavit of Thomas Klein, 22 December 1997, Appellants' Record, vol 2 at 200; Affidavit of Moïse Amselem, 18 December 1997, Appellants' Record, vol 2 at 183; Affidavit of Gabriel Fonfeder, 9 December 1997, Appellants' Record, vol 2 at 173).

participated in *Amselem* simultaneously invoked norms of various provenances in assessing the claimants' position:

I—[Y]ou mentioned that given that the condo owners had signed away their right to use their balconies for a succah, that was a factor in your decision, and I wonder if, is that a factor in your decision under rabbinic law or in your general perception of the case?

R—No, my general perception of the case. According to rabbinic law, they might not have been able to do that, I have to think about it, but the fact is that when they bought the condos, they agreed not to put anything on the balcony, so the decision then to go ahead and put a succah there was clearly a post facto decision. Now, they claimed they had never read this, and they didn't realize what they had signed. I don't know what the legal significance of that is . . . but at the time that was not even my issue. All I was supposed to deal with was whether or not by Jewish requirements they had to build a succah on the balcony and I don't believe they did.¹⁵⁹

Although the participant sought here to draw a distinction between Canadian law and rabbinic law, it is not entirely clear which principles guided his view of which party was right.¹⁶⁰ From a review of the trial transcripts and expert reports submitted in the litigation, it is clear that the expert witnesses for both sides restricted their testimony to the court to issues of Jewish law. However, for this participant, the decision to provide his expertise was based in part on his assessment that the condominium board's position was correct as a matter of general principle rather than as a matter of Jewish or Canadian law. The source of that general principle is not easily identifiable.¹⁶¹

159. Expert Witness 1 Interview.

160. Part of this ambiguity may be attributable to how the question was phrased. By posing the question in an either/or fashion, I made it less likely that the participant would draw on his own terminology. Nonetheless, the response shows at least that the respondent was drawing on something in addition to rabbinic legal norms.

161. Drawing on these multiple sources, the expert witness said:

Had [the condominium board] said, for example, that there's no way we'll allow a succah to be available, then I would not have agreed, but that's not what they were saying, all they were saying was they want to put it on the ground, near the building, and while I'll admit it's not the most convenient thing, given that [the condo owners] had signed away the rights to use the balconies for this when they bought the condos . . . seemed to me that the weight of the argument clearly went against the residents.

Expert Witness 1 Interview.

One of the Hutterite participants also blurred boundaries between religious and state law. Above I noted that a participant believed that the Supreme Court should have regard for God's law and I drew on his statement of that belief to demonstrate that participants use their own religious lenses to guide their understandings of state laws and institutions. But the narrative was also noteworthy for how it blended multiple sources of normativity:

[The Court] should really have regard for God's law 'cause Canada's a democratic country, and why should we have laws that does away with the democratic way of life? We're kind of going back to communism, if you don't do as I tell you, that's what the government kinda says, why, you haven't got anything, you're a nobody.¹⁶²

He went on to describe the Supreme Court's decision as "very unconstitutional", "very undemocratic", and in the same breath, he explained that view by reference to the biblical book of Daniel.¹⁶³

This participant drew on both explicitly religious norms and his own understanding of democracy and the constitution to describe what a state Court should decide. He took up civic values (democracy and the constitution), filtered through his own understanding of religious freedom (which, as discussed above, has a particular meaning in the Hutterite narrative), to articulate why a state court ought to take guidance from religious law. The ebb and flow between state and religious norms is particularly pronounced, to the point where it becomes difficult to say where one begins and the other ends.

A different form of boundary blurring was also present in the affidavits presented in *Amselem*. The claimants all affirmed that, "according to Jewish law, my succah represents the principal residence for the eight-day period and my condominium becomes the secondary residence".¹⁶⁴ In an exchange with one of the litigants, counsel for the syndicate showed some scepticism about this, and the response was ambiguous:

162. Litigant 4 Interview.

163. *Ibid.*

164. *Amselem*, *supra* note 8 (Affidavit of Gabriel Fonfeder, 9 December 1997, Appellants' Record, vol 2 at 173, Affidavit of Thomas Klein, 22 December 1997, Appellants' Record, vol 2 at 200; Affidavit of Moïse Amselem, 18 December 1997, Appellants' Record, vol 2 at 184).

Q—[Y]ou mention that the succah represents the principal residence, could you explain what you mean by that?

A—It’s just an expression, since you eat there, you know, and entertain guests and study, it’s called the principal.

Q—But it’s not really a residence, it’s not a place where you sleep?

A—If I want.

Q—If you want.

A—But I can change my mind.¹⁶⁵

It is unlikely that any of the litigants would have made the assertion that the succah is a principal residence for other purposes—for example, they would not have expected any tax consequences to flow from it. This illustrates the simultaneous application of multiple normative orders in the lives of these affiants. And because they were subject to multiple orders, things could be true and not true at the same time. The succah both is and is not the principal residence.

This blurring of boundaries adds an important gloss on critical legal pluralist theory. One of Kleinhans and Macdonald’s main concerns in positing their critical legal pluralism was to “call for more intense scrutiny of the legal subject conceived as carrying a multiplicity of identities”.¹⁶⁶ They insisted that “legal subjects hold each of their multiple narrating selves up to the scrutiny of each of their other narrating selves, and up to the scrutiny of all the other narrated selves projected upon them by others”.¹⁶⁷ This can be read to indicate that the individual legal subject is an agent of constant, conscious re-evaluation in the construction of legal norms, which are organized in the minds of subjects on the basis of where each norm comes from. The data from this study suggest, however, that

165. *Ibid* (Cross-examination of Gabriel Fonfeder, 22 January 1998, Respondent’s Record, vol 1 at 212–13).

166. *Supra* note 42 at 40.

167. *Ibid* at 46.

the process of norm generation and deployment is at times messier and more unconscious than Kleinhans and Macdonald suggested.¹⁶⁸

Conclusion

This study of religious freedom litigation in Canada has revealed multiple layers of legality in participant narratives. At a basic level, participants attached a distinctly legal significance to their religious practices. Court documents and participant interviews provided some insight into the intricacy, sophistication and depth of commitment to religious laws. I have argued that there are good reasons for external observers to treat as legal the religious norms in the three cases on which the study is based, particularly since they share similar functions and properties.

In addition, participant narratives presented individuals and communities as subjects of overlapping and contradictory claims of authority over their behaviour, and presented the interrelationships between those various normative claims as complex. At times, participants saw state legal concepts through the lenses of particular religious and historical narratives. Some participants treated the concept of religious freedom as covenantal, or as seeking to allow legal subjects to connect with the divine. The converse phenomenon was also present, with some participants describing their religious norms and obligations as being congruent with state values in that they were rule-bound, rational, and conducive to equality, inclusiveness and dignity. As the data from this study demonstrate, subjects of multiple legal systems frequently have messier normative lives than Romano's term "juridical order" suggests. Boundaries between the state and religious legal orders blur at some points in participant narratives, demonstrating instances of legal hybridity.

Can Canadian courts draw lessons from all of this? I must caution again that the interview data gathered here comes from a very small sample of participants and does not allow for generalized conclusions

168. At other points in their writing, Kleinhans & Macdonald seem more conscious of this potential for blurring, writing that the key to multiple normative orders "is to understand how each hypothesized legal regime is at the same time a social field within which other regimes are interwoven, and a part of a larger field in which it is interwoven with other regimes". *Ibid* at 41.

about religious freedom participants. However, the experiences of interview participants may aid in critical reflection about the prevailing jurisprudence and inspire some adjustments.

Proportionality analyses can be more accurate if courts consider the force of religious obligations in the lives of the litigants. This emerges from the narratives of Hutterite participants. The Wilson Colony members responded in two different ways to the Supreme Court's decision in their case, and neither response was consistent with the majority's prediction that Colony members would hire outside drivers.¹⁶⁹ Members drove with expired licences or had their photographs taken in violation of their beliefs. Chief Justice McLachlin's judgment treated the cost of its ruling as financial, neglecting that state law does not always sit atop the normative hierarchy for Canada's legal subjects. Had the majority been conscious of the impossibility of resolving the tension between religious and state law on this issue for the Hutterites, the proportionality analysis may have more accurately assessed the consequences of the photo requirement for the Wilson Colony members.

In contrast, the majority of the *Amselem* Court showed a deeper appreciation for the Jewish law that regulated the claimants' behaviour, directly using the term "Jewish law" on several occasions¹⁷⁰ and acknowledging that the claimants were acting out of a sense of obligation.¹⁷¹ Likewise, in *Multani*, the majority recognized that Gurbaj Singh treated the kirpan as a requirement, recognizing the obligatory nature of some religious practices.¹⁷² More importantly, the Court was careful to articulate the claimants' perspective on the nature and meaning of the kirpan, treating it as a religious symbol rather than a weapon.¹⁷³ In sum, both *Amselem* and *Multani* provided a more accurate analysis in part due to the courts' more nuanced understanding of the force of the claimants' religious obligations. This is not to say, however, that the decisions in those two cases are disconnected from the majority holding in *Wilson Colony*. As Berger has noted, the approach to religious freedom in *Amselem* and *Multani* is highly individualistic.¹⁷⁴ This did not pose a

169. *Wilson Colony*, *supra* note 6 at para 97.

170. *Supra* note 8 at paras 66, 73, 101.

171. *Ibid* at paras 74–76.

172. *Supra* note 7 at paras 32, 36, 74.

173. *Ibid* at para 37.

174. "Law's Religion", *supra* note 78.

particular problem for the claimants in those cases. However, it may be partly because of this individualistic approach that the majority in *Wilson Colony* failed to properly take into account the collective dimensions of Hutterite religious law.