

Translating the Conflict over Trinity Western University's Proposed Law School

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In early 2017, Trinity Western University (TWU) received leave to appeal to the Supreme Court of Canada in its ongoing battle for its law school's accreditation by the Law Societies of British Columbia (LSBC) and Upper Canada (LSUC). These appeals will mark the conclusion of a legal dispute encompassing broad, fundamental questions concerning the appropriate balancing of rights to freedom of religion with the protection of equality rights within the context of the Law Societies' statutory mandates to act in the public interest.

The author contrasts TWU's Evangelical perspective which views individual religious beliefs as fundamentally intertwined with the public good, necessitating the public expression of these beliefs, with the courts' commonly held view that religious views may be present in public, as long as they are kept private. The author highlights the tensions and ambiguous arguments in these decisions to offer a critique of the perception of the law as objective truth, and to emphasize the significant role that social context plays in the development of rights jurisprudence.

Ultimately, the author advocates for the use of the law as a means of "translating" these differences, allowing the parties to resolve ambiguities and ultimately find common ground. In a novel analytical approach to this controversial litigation, the author frames TWU and the Law Societies as members of a shared community and suggests that it is most helpful to view the relationship between these actors as being rooted in friendship, rather than competition. Despite their seemingly irreconcilable legal positions, the author advocates for the issue of accreditation to be resolved through dialogue and mutual consideration.

* This research was supported by the Social Sciences and Humanities Research Council of Canada.

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Common ground is what emerges when you assume the normative status of your own judgment and fix the label “unreasonable” or “inhuman” or “monstrous” to the judgment of your opponents. . . . The irony—not a paradox or even a matter of blame because it is inevitable—is that while adhering to “common ground” is proclaimed as the way to sidestep politics and avoid its endless conflicts, the specifying of common ground is itself a supremely political move.

—Stanley Fish (1997)¹

At the centre of law is the activity of translation.

—James Boyd White (1990)²

Introduction

The fate of Trinity Western University's (TWU) proposed law school now lies in the hands of the Supreme Court of Canada.³ Both the Law Society of Upper Canada (LSUC) and the Law Society of British Columbia (LSBC) refused to accredit TWU's proposed law school on the basis that TWU institutionally discriminates against LGBTQ people. The crux of the matter is that TWU requires its students to sign and follow TWU's Community Covenant Agreement, which restricts permissible sexual activity to heterosexual marital relationships.⁴

The legal arguments have boiled down, in large part, to a question of balancing the rights of religious freedom with the equality rights that protect

1. Stanley Fish, “Mission Impossible: Settling the Just Bounds Between Church and State” (1997) 97:8 *Colum L Rev* 2255 at 2264.

2. James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990) at 246 [White, *Justice as Translation*].

3. See *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423, 405 DLR (4th) 16 [LSBC BCCA], leave to appeal to SCC granted, 37318 (23 February 2017); *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, 131 OR (3d) 113 [LSUC ONCA], leave to appeal to SCC granted, 37209 (23 February 2017) (the Court ordered that the two appeals be heard together).

4. Trinity Western University, “Community Covenant Agreement”, online: <www8.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> [TWU, “Covenant”].

LGBTQ people against discrimination.⁵ Behind these legal questions lurks a set of complex social questions which affect the appearance of religion in public life. It is not always easy to represent social issues in legal analysis. Often, we look at the law as an objective text, the demands of which must be understood and applied in and on its own terms, believing that if we can only understand “what the law really is” then we can reach the right decision. But this fails, I believe, to consider the ways in which social questions structure legal arguments and analysis offered by the parties and by the courts. The legal dispute over the accreditation of TWU’s proposed law school is a particularly striking example of this.

My analysis traces two sets of perspectives, interests and concerns in the legal arguments for and against the accreditation of TWU’s proposed law school. The imperfections in translating these perspectives into the language of law—the way they contort, stretch and bend the meaning of the law—are incredibly informative. Through them, we see not only the unsettled parts of the legal doctrine at issue but also the way that doctrine reflects and refracts different worldviews. Paying attention to the *process* of translating these different perspectives into the language of the law reminds us that the law is indeed a *language*. The normative demands of the law speak equally to social attitudes as to propositional coherence. From this view, the dispute over the interpretation of the law regarding TWU’s proposed law school is a conversation between two users of the language of the law. Deciding the fate of TWU’s proposed law school will affect legal *relationships*, not just legal propositions.

The purpose of this article is, following the title, to translate the situation surrounding TWU’s proposed law school from a conflict over legal principles to an ongoing process of social interaction. The trope of “translation” has two functions here. First, it reframes the way we look at the legal arguments used in the conflict over the accreditation of TWU’s proposed law school to see the residual tension of using the language of the law to express positions laden with social complexity. Secondly, translation also helps us take a step beyond the questions about where to draw the line in law between TWU and the Law Societies (i.e., between private religious association and public legal institutions) and to focus instead on what is involved in integrating TWU and the Law Societies through the process of legal interaction.

5. How this balancing occurs within the administrative context has its own unique implications, which are also subject to legal argument. Further discussion of the features of the administrative law analysis will be found in Part II, *below*.

This article has five parts. First, I will briefly look at the evangelical influence on TWU's community self-description and how this informs the practice of community discipline through the TWU Covenant. I will describe the uncomfortable translation of this perspective into the language of religious freedom. Second, I will explore the way in which the language of discrimination and equality is used against accrediting TWU's proposed law school.⁶ I pay particular attention to the way that the strains in the argument amplify the difficulties identified in the TWU argument. Third, I briefly explore the idea of "law as translation", and propose it as an approach for confronting the dissonance caused by holding the first two parts next to each other. Fourth, employing the law as translation approach, I set myself to the task of reconstructing the legal relationship between TWU and the Law Societies. Here I explore how the uses of the law outlined earlier crystalize into parameters of meaning and structures of relationship. Fifth, I then propose that the legal relationship can be recast as a "community of friendship" rather than a competition between strangers.

I. Translating TWU's Covenant into the Language of the Law

The TWU Covenant is based upon a view of the TWU community that is oriented equally toward academic achievement and spiritual formation, understanding these two things to be mutually corroborative. The opening paragraph of the TWU 2017–2018 Academic Calendar says: "Trinity Western University is much more than an institution with classrooms, books, and exams; it is a passionate, intentional, disciple-making academic community."⁷ TWU describes itself as "an arm of the Church, [which] is first and foremost an academic community of people passionately committed to Jesus Christ and to God's purposes".⁸ One of the six core values of TWU is "[d]iscipling through community", which encourages all members of the community "to deepen their understanding of what it means to be disciples

6. See e.g. *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250, 126 OR (3d) 1 [LSUC ONSC]; *LSUC ONCA*, *supra* note 3. I rely here primarily on these decisions, instead of the arguments of the Law Societies represented in their litigation pleadings. The Ontario decisions capture and articulate quite precisely the heart of the legal argument that opposes accrediting TWU's proposed law school, and so serves the purpose of this article by providing a foil that draws out the dissonance in the competing uses of law.

7. Trinity Western University, "Academic Calendar 2017-2018" at 5, online: <www.twu.ca/students/current-students/academic-calendar> [TWU, "Academic Calendar"].

8. *Ibid* at 6.

of Jesus Christ, to practice such discipleship, and to help others be disciples”.⁹ Students are invited to be “co-owners” and “shareholders” of the community, accountable to each other in the common pursuits of the community.¹⁰

TWU is a thoroughly evangelical organization. In addition to its formal affiliation with the Evangelical Free Church of Canada, TWU’s self-description displays several of the main features of evangelicalism.¹¹ This includes a focus on individual responsibility for the pursuit of “purity”, which calls for the total surrender of the individual will to God’s will.¹² The evangelical focus on individual regeneration/transformation is part and parcel with a disestablished view of the Christian Church. In this perspective, the “true Church” is understood in spiritual terms and is grounded in the pursuit of and obedience to God’s will—those who are being transformed by God compose the Church, so that the individual life of purity through obedience to God is the essence of the Church.¹³ For many of the Reformed Christian movements, including evangelicalism, inner discipline is inseparable from Church discipline.¹⁴ The process of transformation experienced by individuals together is understood to have a role in God’s plan to transform the world.¹⁵ The Church is the power of light and obedience in a dark and evil world. It is through individual participation in the communal pursuit of God’s will and obedience to his instruction, in being made pure, that God’s work is done in the world. This understanding connects to a strong sense of

9. *Ibid.* See also Trinity Western University, “Core Values”, online: <www.twu.ca/about/core-values> [TWU, “Core Values”].

10. TWU, “Academic Calendar”, *supra* note 7 at 5.

11. See *ibid* at 4–6. TWU has six core values: 1) obeying the authority of scripture; 2) striving for excellence in university education; 3) pursuing faith-based and faith-affirming learning; 4) having a transformational impact on culture; 5) servant leadership as a way of life; and 6) discipling through community. *Ibid.* See also TWU, “Core Values”, *supra* note 9 (the evangelical aspect of the core values is especially apparent in the fuller descriptions of each value, except for “[d]iscipling in [c]ommunity”, provided on TWU’s website); TWU, “Academic Calendar”, *supra* note 7 at 10 (the evangelical aspects are also apparent in the “Statement of Faith” section of the Academic Calendar).

12. See Mark Y Hanley, “Evangelical Thought” in *Encyclopedia of American Cultural and Intellectual History*, vol 1 by Mary Kupiec Cayton & Peter W Williams (New York: Charles Scribner’s Sons, 2001); Ian A McFarland et al, eds, *The Cambridge Dictionary of Christian Theology* (Cambridge: Cambridge University Press, 2011) *sub verbo* “evangelical theology”.

13. For a description of the changing views on the understanding of the Christian Church, see McFarland et al, *supra* note 12, *sub verbo* “ecclesiology”; Susan E Schreiner, “Church” in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

14. See Lee Palmer Wandel, “Church Discipline” in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

15. See DG Hart, “Evangelical Protestants” in *Encyclopedia of American Cultural and Intellectual History*, vol 2 by Mary Kupiec Cayton & Peter W Williams (New York: Charles Scribner’s Sons, 2001).

mission in evangelicalism, in seeking to convert individuals to faith in God and to learn to be obedient to his will.¹⁶

Voluntariness in religious choice is a central aspect of evangelicalism (and the Christian Reformation movement generally).¹⁷ But it is important to note the unique emphasis given to voluntariness in evangelicalism, which sees the free choice of faith not as a good in itself but as a necessary precondition for surrender and obedience to God. Hence, the TWU Covenant reads: “True freedom is not the freedom to do as one pleases, but rather the empowerment to do what is best.”¹⁸ God provides guidance for humanity through the Bible, supplementing the limitations of human understanding. It is through surrender to God’s guidance, supplanting human understanding with God’s instruction and aligning oneself with God’s will and truth, as revealed in scripture, that human corruption is transformed and redeemed.¹⁹ Through this process alone, true freedom is experienced. Asking students to commit themselves to follow biblically grounded standards of moral behaviour—even asking them to give up aspects of their lives as personal as sexuality—is not the specific prerogative of TWU, but is a precondition for the students to experience the true freedom that is from God. This is an essential element for achieving TWU’s evangelical mission, which is to develop the whole student: intellectually, socially, emotionally, physically and spiritually.²⁰

The concern of the TWU community in holding its members accountable to “right living” reflects an ancient theme of maintaining the purity of Christian community.²¹ In the contemporary setting, the concern for the purity of Christian community is seen most strongly in the (sometimes rather extreme) exercises of church discipline in Anabaptist communities. The Anabaptists understand the Church to be the presence of God in a dark and evil world—

16. See TWU, “Core Values”, *supra* note 9 (specifically addressed in the subsection “Transforming Culture”).

17. See Hanley, *supra* note 12.

18. *Supra* note 4 at 3.

19. See TWU, “Core Values”, *supra* note 9 (specifically addressed in the subsection “Obeying the Authority of Scripture”). Biblicism is another key aspect of Evangelicalism. See McFarland et al, *supra* note 12, *sub verbo* “evangelical theology”. For definitions regarding the corruption of human nature and the process of regeneration, see *ibid*, *sub verbo*: “sanctification”; Alister E McGrath, “Sanctification” in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

20. TWU, “Academic Calendar”, *supra* note 7 at 9.

21. See generally Dale B Martin, *The Corinthian Body* (New Haven: Yale University Press, 1995) (although the ancient sense of purity of Christian community, which was grounded in Greco-Roman conceptions of the connection between the individual and social bodies, does not appear in the same terms today, it is still found today in the idea that the behaviour of individual members affects the health of community).

separated from the world, sanctified and holy through the obedience of its members to God's words. The Anabaptist Christian community is jealously guarded and its purity judiciously enforced through different forms of church discipline such as excommunication.²² Although TWU's self-description does not have the same apocalyptic fervour of some Anabaptist groups, they do share key elements. This includes the sentiment that Christian community is a shelter where believers are strengthened and enabled to participate in God's redemptive work in the world, and, as such, the community must be protected in order to preserve its role in fulfilling God's mission of transforming the world.²³

The ideas of human limitations, surrender to God, membership in community and participation in God's mission undergird the TWU Covenant and the concern of TWU to maintain a structure of accountability for the members of its community. This complex theological perspective is not easily translated into the *Canadian Charter of Rights and Freedoms*' protection of religious freedom in Canada.²⁴ From its earliest interpretation, section 2(a) of the *Charter* was understood to protect individuals from being coerced by the state regarding their religious beliefs.²⁵ As this understanding developed, it came to be seen as a protection for the individual's own understanding of his or her religious obligations.²⁶ All that was needed was a nexus with religion, rather than alignment with "orthodox" religious teachings or practices.²⁷ Protection from being coerced has remained relatively central to the freedom of religion jurisprudence.²⁸ Of course, the law has recognized the ability of religious communities to exercise disciplinary authority over their members, even at great cost.²⁹ But there is also a counter-narrative, which has recently gained strength, whereby

22. See e.g. Schreiner, *supra* note 13; Wandel, *supra* note 14.

23. See TWU, "Core Values", *supra* note 9 (specifically addressed in the subsection "Pursuing Faith-Based Learning and Faith-Affirming Learning").

24. s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

25. See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336–37, 60 AR 161 [Big M].

26. See *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256; *Syndicat Norberst v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [Amselem].

27. See *Amselem*, *supra* note 26 at para 46.

28. See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para 74 (the principle of the religious neutrality of the state creates a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality). See also *Klunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 152 [Klunaxa] (Moldaver J, concurring with the majority in result, expressed concern about restricting the use of public land to conform with the religious beliefs of a particular group).

29. See e.g. *Hofer v Hofer*, [1970] SCR 958, 13 DLR (3d) 1; *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540, 117 OR (3d) 1 [Delicata]; *Caldwell v Stuart*, [1984] 2 SCR 603, 15 DLR (4th) 1; *Barickman Hutterian Mutual Corp v Nault*, [1939] SCR 223, [1939] 2 DLR 225.

religious freedom is understood to protect individuals from the power and abuse of their religious communities.³⁰ Likewise, there is a line of decisions that affirm the communal aspect of religious freedom.³¹ But communal rights of religious freedom have been understood as a vehicle for individual rights, rather than something that stands on its own.³²

The importance given to the individual in the Canadian law of religious freedom resonates with TWU, as seen in the evangelical focus on the individual journey of faith. The goal of the TWU Covenant is to help foster *individual* intellectual and spiritual formation, not to develop the profile or purposes of the community per se. The difference between TWU and Canada's law of religious freedom emerges in the particular emphasis given to the focus on the individual and the implications that this carries. The Canadian law on religious freedom maintains that religious belief and religious choice are, despite their associational component, fundamentally *private* activities.³³ TWU's evangelical perspective pushes against this view. Even though for TWU the choice to follow God is the responsibility of the individual, it is also through this choice that the individual participates in God's larger plan for the whole world. Individual choices therefore have an intrinsic and inextinguishable public dimension. The divergence from Canadian jurisprudence can be seen in TWU's view of the role of the community in relation to the individual choices of its members. Educating students in an evangelical way requires the university community to

30. See e.g. *Braker v Marovitz*, 2007 SCC 54 at para 19, [2007] 3 SCR 607; *Hall (Litigation guardian of) v Powers* (2002), 59 OR (3d) 423, 213 DLR (4th) 308 (Sup Ct J).

31. See *Ktanaxa*, *supra* note 28 at para 74. See generally *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [BCCI]; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*]. The communal aspect of religious freedom is part of the original description of the concept. See *Big M*, *supra* note 25 at 336.

32. See Faisal Bhabha, "From *Saumur* to *L(S)*: Tracing the Theory and Concept of Religious Freedom Under Canadian Law" (2012) 58:2 Sup Ct L Rev 109 at 117–21 (Bhabha argues that despite the communitarian aspect of early constitutional encounters with religion, post-*Charter* Supreme Court of Canada jurisprudence has tended more to a liberal theory in which individual autonomy is paramount). One implication of this is that religious freedom is inherently limited by the rights of others. See e.g. *P (D) v S (C)*, [1993] 4 SCR 141 at 182, 108 DLR (4th) 287; *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at paras 80, 107–09, 226, 21 OR (3d) 479.

33. For a discussion of the associational component of the freedom of religion and its application to TWU's proposed law school, see Mark Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2016) 79:2 Sask L Rev 215 [Witten, "Tracking Secularism"]; Thomas M.J. Bateman, "Trinity Western University's Law School and the Associational Dimension of Religious Freedom: Toward Comprehensive Liberalism" (2015) 66 UNBLJ 78. The decision that comes closest to recognizing an institutional aspect, separate from the individual aspect, of religious freedom is *Loyola*, where the associational aspect of religious freedom is emphasized in the majority decision, but it is only explored as an independent aspect of religious freedom in the minority concurring decision. See *Loyola*, *supra* note 31 at paras 60, 62, 67, 91–100, 135–39.

foster the students' intellectual and spiritual pursuit of God in its private dimension, too. In particular, the community provides accountability for the individual to remain faithful to the Bible, which is the ultimate guide for Christian life and mission.

The unique public nature of the legal profession is precisely what motivates TWU to become involved in legal education—to train good, Christian lawyers, who will model the purity and integrity of Christian living in a public (and morally agnostic) profession.³⁴ TWU's mission as an evangelical institution, a self-proclaimed arm of the Church and a site for the spiritual formation of Christian disciples, forges a deep connection between religious commitment and public life. In seeking to open a law school, TWU aims to push further into the public space and advance the goals of its eschatological mission of social transformation. This helps make sense of why TWU has met so much resistance from within the legal profession—there are two countervailing ideas about the public and its relation to religion. It is precisely TWU's hope to further its evangelical mission through legal education that has been perceived as a threat to the *public* nature of legal education and the legal profession.

TWU's claim that it has a protected right to employ its Covenant does not fit neatly into the Canadian legal conception of religious freedom because religious freedom is philosophically grounded in the division between internal beliefs and external practices, which reflects the division between private and public spheres in Western liberal societies more generally.³⁵ Of course, TWU received some legal recognition by the Supreme Court of Canada in 2001 of the legitimacy of the TWU Covenant.³⁶ The professional field at issue in *Trinity Western University v British Columbia College of Teachers* (BCCT) was TWU's teacher training program, and whether the British Columbia College of Teachers could refuse to accredit TWU's program because of the TWU Covenant.³⁷ The Court upheld the TWU Covenant in this context, but even in doing so, reiterated the distinction between the privacy of religious belief and the activity of public life. This is summed up in the pithy

34. For an interesting discussion of the potential benefits of religious lawyering, see Faisal Bhabha, "Religious Lawyering and Legal Ethics" in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart, 2016) 41.

35. See generally Fish, *supra* note 1; Mark Witten, "Rationalist Influences in the Adjudication of Religious Freedoms in Canada" (2012) 32 Windsor Rev Legal Soc Issues 91; John von Heykin, "The Harmonization of Heaven and Earth?: Religion, Politics and Law in Canada" (2000) 33:3 UBC L Rev 663; Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 UT Fac L Rev 1; Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2016) at 167–80.

36. See BCCT, *supra* note 31.

37. *Ibid* at paras 5–8.

statement of the Court: “The freedom to hold beliefs is broader than the freedom to act on them.”³⁸

The central question in the *BCCT* case was whether teachers trained solely at TWU, with its institutionally ingrained religious conservative view of acceptable human sexuality, would be capable of teaching in such a way as not to harm LGBTQ students.³⁹ In finding that the TWU Covenant does not provide sufficient basis to reach such a conclusion, the Court held that TWU graduates are free to hold whatever views about human sexuality are provided by their religion, regardless of how hurtful those views might seem, as long as they do not act on those beliefs in such a way as to harm their future students. Without evidence of such harm (which the Court could not find), there is no reason in law to limit private religious beliefs from entering the public realm.⁴⁰

TWU’s victory in the *BCCT* case was fairly hollow, insofar as the decision quite specifically avoided legitimizing TWU’s evangelical mission to bridge faith and public life. Private religious beliefs were allowed into the public (i.e., the TWU Covenant in an accredited teacher-training program) so long as those beliefs did not migrate too far into the public and affect sexual minorities.⁴¹ The public persona granted by the Supreme Court of Canada to religious beliefs through the TWU Covenant was heavily circumscribed. Religious beliefs could be present in the public as long as they were neither seen nor heard.⁴² TWU’s request for law school accreditation seems to ask for a more robust recognition of the public character of private religious beliefs and practices.

38. *Ibid* at para 36.

39. *Ibid* (L’Heureux-Dubé J, in dissent, went so far as to say that the mere fact that someone had signed their name to the TWU Covenant raised a reasonable concern that they might act in a discriminatory manner toward sexual minority students in their classroom at para 72).

40. *Ibid* at para 38.

41. *Ibid*. Justice L’Heureux-Dubé, in dissent, openly recognized the nuances of the public/private divide at issue in the case. However, she also took the separation between belief and action to a much more extreme conclusion, saying that the TWU Covenant was not a proxy for religious belief, which means that restricting it is not offensive to religious freedom. *Ibid* at paras 62, 102.

42. See Victor M Muñoz-Fraticelli, “The (Im)possibility of Christian Education” (2016) 75 SCLR (2d) 209 at 220 (Muñoz-Fraticelli argues that a highly circumscribed approval system that comports with institutional values essentially makes religious institutions irrelevant). See also Bateman, *supra* note 33 at 85–86. Bateman’s general argument is that the move in Canadian jurisprudence away from plural liberalism to comprehensive liberalism, which can be discerned in the TWU law school dispute as well as in the case law more generally, undermines the Canadian legal narrative of fostering diversity. *Ibid* at 114. But see Witten, “Tracking Secularism”, *supra* note 33 at 238 (arguing that the *BCCT* decision provided a robust protection for private religious institutions wading into the public sphere). These authors argue against such an approach to religious freedom, arguing that individual religious freedom requires a robust associational element. From this perspective, opposing the accreditation of TWU’s proposed law school leads to a fairly radical redrawing of the boundaries between public and private, which is not justified in the liberal tradition of Canadian law.

This difference regarding the relation between religion and the public is reflected in the way that harm is understood. As mentioned, the *BCCT* decision used the idea of harm to draw a strict line between private belief and public action, so that the ideas about “sacred” sexuality represented in the TWU Covenant could be believed but could not be acted upon. In the dispute over the accreditation of its law school, however, TWU relies on the insistence in the *BCCT* decision that harm be evidentially based rather than speculative, which pushes the line between private faith and public action in the opposite direction. The TWU Covenant, itself a form of public action, should be allowed as long as there is no evidence of harm. Although TWU’s point is not necessarily incompatible with the *BCCT* decision, it raises questions about the purposes of religious freedom. Does religious freedom allow religious institutions to keep themselves unaltered by the discourse of public values, as some sort of “super private” institutions?

The tension between TWU’s argument and the *BCCT* decision draws out a very interesting ambiguity in the notion of harm. In light of the earlier discussion of TWU’s evangelical perspective, for TWU the obedience to God that leads to participation in God’s redemptive work in the world is painful stuff. The evangelical claim involves the total surrender of personal preferences and the total embrace of a perspective informed by the Bible. But this pain would not be considered harmful because it is ultimately liberating and life-giving. Since the Bible is true, subjecting oneself to its teachings will never be detrimental but always beneficial. TWU understands the TWU Covenant as a point of resistance to the moral and social elevation of self-fulfillment.⁴³ It is a concrete way to ground oneself in a particular Christian worldview.⁴⁴ TWU decries the moral relativism of self-fulfillment as philosophically dishonest and

43. See *BCCT*, *supra* note 31 at para 10 (citing an older version of the TWU Covenant). In *BCCT* the Court cited the following explanation that used to be given to students at TWU to explain the Covenant:

When you decided to attend TWU you signed on to live by different standards than the rest of the world does. The “rules”, or Community Standards, are not meant to be the bane of your existence, but to create an atmosphere that is consistent with our profession of faith.

You might not absolutely agree with the Standards. They might not be consistent with what you believe. However, when you decided to come to TWU, you agreed to accept these responsibilities. If you cannot support and abide by them, then perhaps you should look into UIG [University of Instant Gratification] or AGU [Anything Goes University].

Ibid.

44. See TWU, “Academic Calendar”, *supra* note 7 (this is reflected, for example, in the following statement on Academic Freedom: “Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consis-

intellectually vacant. Self-fulfillment produces people who are insensitive to the needs and circumstances of others, which stands contrary to the social attitudes of charity and mercy that are valued by TWU. The TWU Covenant creates a communal environment that embodies the attitude of putting the needs and concerns of others above one's own.⁴⁵

This affects the ways in which harm might be used to evaluate the TWU Covenant. A sexual minority giving up his sexual preferences to attend TWU will undoubtedly feel pain, but that pain can be understood as beneficial, providing the means by which to develop spiritual discipline. Harm seems to be relevant if it can be shown that an LGBTQ person does not have a meaningful choice to *not* attend TWU, because then they will effectively be forced, via the TWU Covenant, to abandon or hide their sexual orientation. This, of course, is one of the key elements standing against accrediting TWU's proposed law school. The desirability and competitiveness of getting into law school means that some students will probably feel that they have no choice but to attend TWU. The tricky thing is to acknowledge the significance of this harm without disregarding the reality and importance of human spiritual experience. One helpful point to keep in mind is the centrality of free individual will and choice in evangelical theology. While some might feel pressured to attend TWU, TWU is highly motivated (religiously) to proactively avoid situations where LGBTQ people might be forced to follow the TWU Covenant against their will.⁴⁶ The concept of harm cannot account on its own for the enormous complexity of experiences, risks and motivations at play.

The conflict regarding the accreditation of TWU's proposed law school is not the first time that the ambiguities of harm have played a significant role in adjudicating a claim involving religious freedom. In her book *Defining Harm*,

tent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research" at 48).

45. *Supra* note 4 ("a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others" at 1–2).

46. *Ibid* at 1. The contractual language of the TWU Covenant invites students to carefully consider their choice to enter into a covenantal relationship with the TWU community. A similar sentiment is reflected in TWU's ideas about education, which decries the indoctrination of Biblical values as offensive to a Christian biblical understanding of truth, human dignity and educational goals. See TWU, "Core Values", *supra* note 9 (this is reflected in the subsection titled "Pursuing Faith-based Learning and Faith-affirming Learning"). One possible conundrum is if a student were to realize her sexual orientation is LGBTQ while attending TWU. The student would have presumably entered TWU freely agreeing to follow the Covenant, but after having made that initial free choice began to experience the Covenant as oppressive and in contradiction with her free will.

Lori Beaman explored the way that harm was used in *BH v Alberta (Director of Child Welfare)*⁴⁷ to adjudicate whether a mature minor could be compelled to receive medical treatment despite her religious objections.⁴⁸ Although the facts of the *BH* case do not align with the facts of the TWU dispute,⁴⁹ Beaman's argument nevertheless "act[s] as a reminder or map for possible nexes of discourse that work to bind the definition of religious freedom".⁵⁰ Her book shows that particular difficulties arise when harm is used to adjudicate cases that involve religious matters and reasons. Harm is tied to the different philosophical backgrounds that inform different groups of people (for Beaman, the fields of medicine, social work and religion). The idea of harm used in legal analysis reflects some form of philosophical and ideological commitment to identity, truth, reality and reason. Often times, this background stands in tension with religious worldviews.

Beaman found this to be the case in *BH*. According to Beaman, the way that the Courts used harm seemed to be motivated by fear of the way that the claimant's religion conceptualized "health" and "life". The notion of harm used by the Courts reflected a particular picture of a "normal" desire to live and certain predilections regarding truth, reality and the self. The claimant's religious motives were portrayed as irrational, unduly influential and ultimately harmful. This does not mean that religious perspectives should be given preference over other perspectives. Rather, Beaman's critical reflection on harm draws attention to the way that the claimant was isolated and alienated from her religious community and religious tradition. Exposing this helps shift the narrative of the legal analysis and broaden its philosophical engagements.

A similar process can be used to reflect on the legal dispute regarding the accreditation of TWU's proposed law school. The next section of the article looks at the discursive effects of the arguments used against accrediting TWU's proposed law school, attending specifically to the way that the use of harm,

47. 2002 ABQB 371, [2002] 7 WWR 616 [*BH*], aff'g 2002 ABPC 39, [2002] 11 WWR 752, aff'd 2002 ABCA 109, [2002] 7 WWR 644.

48. Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008).

49. For a discussion of the factual background of the case, see *BH*, *supra* note 47. *BH* is distinct from the TWU law school dispute because the former deals with harm to an individual claiming religious freedom protection whereas TWU deals with harm to LGBTQ people resulting from the TWU Covenant. In *BH* the Court had to balance between two harms that the claimant faced: harm to her spiritual/religious condition if she received a blood transfusion (as per her religious beliefs) and harm to her physical body if she did not receive a blood transfusion (likely leading to her death). The Court also had to include the public interest concerns regarding the sanctity of human life and child welfare. *Ibid*. There might be lessons that could be drawn from the *BH* litigation for the TWU dispute, but those would have to be the subject of their own analysis at a different time.

50. *Supra* note 48 at 2.

equality and discrimination cover over some very important social and philosophical questions that strongly affect the legal analysis. Like Beaman, I am not arguing for the application of TWU's religious perspective in law. Rather, I hope to disentangle the subterranean forces at work in the dispute so that we can more clearly address the way that law intersects with the social and relational dynamics of the dispute.

II. Using the Language of Equality and Discrimination in Opposition to TWU

Harm is an important theme for those who oppose TWU's proposed law school. But there is some ambiguity about the nature of the harm at stake and how it is conceptualized and used in the legal analysis. Although the conflict is often viewed as the collision between LGBTQ equality rights and TWU's religious rights,⁵¹ this is not technically the proper way to frame the legal dispute. The lawsuits mentioned in the introduction, now waiting to be decided before the Supreme Court of Canada, involve the judicial review of the administrative decisions of the Law Societies of Ontario and British Columbia to refuse to accredit TWU's proposed law school. This means that the balance being evaluated in the cases is actually between the exercises of administrative discretion and TWU's asserted religious rights. The general framework for the judicial review of this type of case is found in *Doré v Barreau du Québec*,⁵² in which the Supreme Court of Canada held that in such cases, courts are to determine whether the administrative body properly balanced the *Charter* values at stake with its own statutory objectives.⁵³ *Doré* goes on to say that administrative bodies must also consider the *Charter* values underlying their empowering legislation when exercising their administrative powers.⁵⁴

One of the challenges with analyzing the dispute over the accreditation of TWU's proposed law school is that there are essentially three sets of *Charter* values at stake. The equality rights of LGBTQ people and the religious

51. See e.g. *LSUC ONCA*, *supra* note 3 at para 113.

52. 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. Balancing *Charter* rights with the public interest is usually performed through the application of section 1 of the *Charter* pursuant to the test in *R v Oakes*. [1986] 1 SCR 103, 26 DLR (4th) 200. However, the Supreme Court of Canada in *Doré* decided that the *Oakes* analysis should not be applied in the context of the judicial review of administrative action. Instead, the Court established a "flexible administrative approach to balancing *Charter* values" that, in essence, "works the same justificatory muscles" as a traditional *Oakes* test without its formal confines. *Doré*, *supra* note 52 at paras 5, 37.

53. *Supra* note 52 at paras 55–56.

54. *Ibid* at paras 24, 35.

freedom rights of TWU are obvious, but there is also an underlying *Charter* value of equality in the empowering statutes of the law societies.⁵⁵ It is clear in *Doré* that the equality interest of the law societies is to be balanced with TWU's religious rights. It is not clear, however, precisely how the equality rights of LGBTQ people fit in. Should they be treated as the subject or the object of the administrative decision under review?⁵⁶ The Ontario Court of Appeal took the latter approach and framed its analysis in terms of whether the LSUC reasonably balanced its public interest mandate to “promot[e] a legal profession based on merit and excluding discriminatory classifications with the limit that denying accreditation would place on [TWU's] religious freedom”.⁵⁷ Framed this way, balancing the public interest of the Law Societies against the religious freedom of TWU also involves the collision of TWU's religious freedom and respect for LGBTQ equality rights.⁵⁸

The question that follows from this is how are these two forms of equality—LGBTQ equality rights and the equality dimension of the public interest mandate of the Law Societies—to be merged? This merger is highly significant for the way that the administrative discretion of the Law Societies is balanced against the religious freedom of TWU. I do not think that this can be answered simply by clarifying the framework for judicial review provided by *Doré*.⁵⁹ Instead, we must attend to the effects on the legal discourse flowing from the way that the equality interests of LGBTQ people and the equality aspect of

55. See *Law Society Act*, RSO 1990, c L.8, s 4.2; *Legal Profession Act*, SBC 1998, c 9, s 3 (I refer to this throughout as the “public interest mandate” of the law societies).

56. If treated as the subject of the administrative action, then the judicial review analysis would be framed in terms of the reasonableness of the balance that the Law Societies struck between the LGBTQ equality rights and the TWU religious rights in making their decisions to refuse accreditation. On the other hand, if LGBTQ equality rights are treated as the object of the administrative action, then the judicial review analysis would be framed as the reasonableness of the balance between the mandate of the Law Societies (including both the equality interest of the Law Society as well as the protection of LGBTQ equality rights) and the *Charter* right to religious freedom struck in the decision to refuse accreditation. The former does not map well onto the analysis of *Doré*, which did not involve the review of an administrative decision that balances *Charter* rights against each other. It is not clear how to factor in the equality aspect of the public interest mandate of the Law Societies. The latter, which aligns the LGBTQ equality rights at stake with the mandates of the law societies, appears to fit better within the analysis set out in *Doré*. See *Doré*, *supra* note 52 at paras 55–56.

57. *LSUC ONCA*, *supra* note 3 at para 112.

58. See e.g. *ibid* at para 113.

59. I would like to emphasize that my argument is not regarding the administrative questions of standard of review or the jurisdiction of the law societies over law schools. Likewise, I am not arguing about the Ontario Court of Appeal's decision to frame LGBTQ equality interest through the rubric of the public interest mandate of the Law Societies. These are questions that I happily earmark as worthy of further analysis.

the public interest mandate of the Law Societies are merged. This can be traced through the ways in which the ideas of harm and discrimination are used.

The main basis of the argument that the TWU Covenant is discriminatory toward LGBTQ people is that sexual orientation is a foundational and immutable aspect of a person's identity, and that it cannot be restricted or regulated without affecting the full depths of the person.⁶⁰ This argument focuses on individuals who might want to attend law school at TWU but do not share TWU's evangelical perspective. For these people, the restriction or regulation of sexual conduct on the basis of sexual orientation is understood to affect their innermost self and cause deeply felt harm. In the words of the Ontario Superior Court of Justice,

[N]otwithstanding TWU's stated benevolent approach to the conduct of students and others at its institution, in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practice them. The only other apparent option for prospective students, who do not share TWU's religious beliefs, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered.

...

[I]n order to attend TWU, [LGBTQ persons] must sign a document in which they agree to essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship.⁶¹

The Ontario Court of Appeal agreed and, taking the argument one step further, said: "[T]he part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts".⁶² For the Ontario Courts, these hurt feelings are transformed, in the context of legal education, into a constitutionally recognized harm, against which the Law Society must protect in the name of public interest.

60. This connection between sexual orientation and personal identity is a theme that has developed recently in Canadian jurisprudence. See e.g. *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *M v H*, [1999] 2 SCR 3, 43 OR (3d) 254; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*]. It is not without irony that TWU also recognizes the deeply personal aspect of sexuality. The TWU Covenant describes sexual choices as "physically, spiritually and emotionally inseparable" and that they profoundly affect one's relationship with God, others and oneself. *Supra* note 4 at 4. The similarity between these two points of view was highlighted by Muñiz-Fraticelli. See *supra* note 42 at 216.

61. *LSUC ONSC*, *supra* note 6 at paras 112–13. See also *LSUC ONCA*, *supra* note 3 at para 117 (which quotes the passage).

62. *LSUC ONCA*, *supra* note 3 at para 119.

In support of its conclusion that the TWU Covenant is discriminatory, the Court of Appeal referred to Iacobucci and Bastarache JJ, who, writing for the majority (8–1) in the *BCCT* decision, observed that “a homosexual student would not be tempted to apply for admission [to TWU], and could only sign the so-called student contract at a considerable personal cost”.⁶³ Read in context, however, Iacobucci and Bastarache JJ were *defending* TWU’s ability to maintain its Covenant:

TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. . . . To state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.⁶⁴

The fact that the Ontario Court of Appeal felt that Iacobucci and Bastarache JJ could be called on to *oppose* accrediting TWU’s proposed law school reveals the significant investment the Court places in the hurtful effect of the TWU Covenant. The hurt experienced by LGBTQ people because of the TWU Covenant is related directly to the “considerable personal cost”⁶⁵ of having to bury one’s sexual identity. The role ascribed to hurtfulness was contested by the British Columbia Court of Appeal, which, referring to the same section of the *BCCT* decision, concluded that “hurt feelings” are not a harm that the Constitution protects against. Refusing to accredit TWU on the basis of hurt feelings undermines religious freedom in a democratic and liberal society.⁶⁶

The view of harm put forward by the Ontario Court of Appeal represents a shift in how the principles of discrimination and equality embedded in section 15 of the *Charter* are understood. This is reflected in the focus taken by the Ontario Superior Court of Justice in rejecting TWU’s argument that it lawfully discriminates against LGBTQ people, despite the fact that TWU is partially exempted from the BC *Human Rights Code*⁶⁷ and, as a non-state actor, is

63. *Supra* note 31 at para 25. See also *LSUC ONCA*, *supra* note 3 at para 116. Similar language has been used to define analogous grounds to those enumerated in section 15 of the *Charter*. See e.g. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [cited to SCR] (“personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity” at para 13).

64. *BCCT*, *supra* note 31 at para 25.

65. *Ibid.*

66. *LSBC BCCA*, *supra* note 3 at paras 176–88. For similar arguments regarding the limitations of hurtfulness in relation to religious freedom, see *Trinity Western University v Nova Scotia Barristers’ Society*, 2015 NSSC 25 at paras 204, 213, 381 DLR (4th) 296 [NSBS].

67. RSC 1996, c 210.

not bound by the *Charter*.⁶⁸ In support of its decision, the Ontario Superior Court of Justice relied on the distinction drawn in *Miron v Trudel*⁶⁹ that even something good (like religious freedom) might nevertheless be used for the evil of discrimination.⁷⁰ As such, the Court labelled the TWU Covenant as “by its very nature, discriminatory”.⁷¹ It does not matter for the Court whether TWU is a private Christian university, or whether the TWU Covenant is based on religious principles.

The reference to *Miron v Trudel* is somewhat surprising considering that it was decided before *BCCT* and that there are a plethora of other, more recent section 15 cases that have undertaken rather drastic reformulations of the section 15 analysis.⁷² Furthermore, the reference to *Miron v Trudel* did not really answer the question that the Court claimed to address. The question was whether or not the differential treatment of LGBTQ people in the TWU Covenant should be considered discriminatory. It is undoubtedly true, as per *Miron v Trudel*, to say that things considered good might be used for discriminatory purposes and in that case it was the good of supporting marriage that was being used to discriminate against de facto spouses in claiming certain insurance benefits.⁷³ TWU’s claim does not engage the question of whether religion can be used to discriminate wrongly. Rather, TWU’s claim raises the question of whether the differential treatment of LGBTQ people resulting from the TWU Covenant is discriminatory in such a way as to transgress the values embedded in section 15 of the *Charter*. Referring to *Miron v Trudel* merely begs the question of whether TWU’s hurtful treatment of LGBTQ people is discriminatory.

Using *Miron v Trudel*, the Ontario Superior Court of Justice refocused the application of section 15 on the issue of individual merit. The purpose of section 15, according to *Miron v Trudel*, in combatting the evil of discrimination is “to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics *rather than on the basis of individual merit, ca-*

68. *LSUC* ONSC, *supra* note 6 at para 107. For TWU’s argument, see *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722 (Written Argument of the Petitioners at paras 337–67).

69. [1995] 2 SCR 418, 124 DLR (4th) 693 [cited to SCR].

70. *LSUC* ONSC, *supra* note 6 at paras 108–09.

71. *Ibid* at para 108.

72. See e.g. Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the *Charter*” (2013) 64 UNBLJ 19; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].

73. *Supra* note 69 at para 158.

capacity or circumstance”.⁷⁴ From this formulation, TWU appears to stand in direct violation of the value embedded in section 15 because it does not evaluate its incoming (or current) students solely on the basis of their merit, but also takes into account, through its Covenant, their sexual orientation. Openly LGBTQ students are therefore evaluated, in coming to and remaining within the TWU community, on the basis of their sexual practices, not solely on their merits and capacities as individuals. Following the logic of *Miron v Trudel*, this is precisely the evil that section 15 is charged to protect against.

The turn to merit makes sense in light of the way that the law societies understand their role in guarding admission to the legal profession as flowing from their mandate to protect the public interest. According to the Court there are two gatekeepers to the legal profession, the law schools and the law society.⁷⁵ The purpose of the second gatekeeper, the law society, is to take steps to ensure that equal access to the legal profession is maintained.⁷⁶ The Law Societies are portrayed, in direct contrast to TWU (via *Miron v Trudel*), as being concerned primarily with upholding equality, which is grounded in merit:

[I]n carrying out its mandate under its enabling statute, the respondent, throughout its long history, has acted to remove obstacles based on considerations, other than ones based on merit . . . In keeping with that tradition, throughout those many years, the respondent has acted to remove all barriers to entry to the legal profession save one—merit. It is the respondent’s position that it is in the public interest to ensure that the legal profession is open to everyone. It views that approach as being fundamental to its functions. In adopting that position, the respondent says that it achieves two companion objectives. One is to ensure diversity in the legal profession. The other is that, if the legal profession is open to everyone then, perforce, it is open to “the best and the brightest”.⁷⁷

For the Court, accrediting TWU would corrupt the gatekeeper, both by allowing TWU to discriminate and by shackling the Law Society’s ability to remove discrimination from the legal profession. According to the Ontario Superior Court of Justice, TWU’s position effectively seeks to impose a Christian worldview onto the Law Society.⁷⁸ Accreditation of TWU’s proposed law school is equated with condoning the discriminatory practices of the TWU Covenant. The Law Society must be free to consider the effect on

74. *Ibid* at para 131 [emphasis added].

75. See *LSUC ONCA*, *supra* note 3 at para 130.

76. See *ibid* at para 132.

77. *LSUC ONSC*, *supra* note 6 at paras 96–97.

78. *Ibid* at para 115.

LGBTQ people if it accredits TWU's proposed law school and, thereby, condones TWU's worldview.⁷⁹

The approach taken by the Ontario Courts appears to shift the focus away from LGBTQ people and toward the integrity and autonomy of the Law Society. The harm of discrimination protected against in section 15 is now related to the communal integrity of the legal profession. The problem here is not that the equality interest of LGBTQ people was tied to the equality mandate of the Law Society (which might indeed be what *Doré* prescribes), but rather that the Courts conflated the allegation of individual harm to the LGBTQ community with the allegation that the institutional purpose and integrity of the Law Society will be compromised. Merging the discriminatory concerns related to LGBTQ people with concerns regarding the integrity of the Law Society's mission transformed the idea of equality embedded in section 15 of the *Charter*. The decisive move from concrete and demonstrable harm to abstract institutional harm feeds back to support the inclusion of hurtfulness as part of what section 15 protects against. Framing the merger between these two distinct harms in this way means that discrimination is no longer about particular harms suffered by certain individuals in specific contexts in relation to particular entitlements. It is expanded to include the perception of hurtfulness toward LGBTQ people that is communicated symbolically through the presence of the TWU Covenant within the institutions of law.

The transformation flowing from the conflation of the individual and institutional interests endows the notion of harm with a symbolic dynamic that is understood to justify the political and symbolic response of the Law Societies to TWU's proposed law school. The Ontario Superior Court of Justice held that: "It was open to the [Law Society] to take a decision that it viewed as not only promoting its statutory mandate but, as importantly, *being seen* as promoting that mandate."⁸⁰ The justification for the symbolic response to TWU's proposed law school is also couched in ideological terms: "It was also open to the respondent to view accrediting TWU's law school, while professing equal opportunity and equal treatment for its members, its prospective members, and for the legal profession as a whole, as fundamentally inconsistent, if not hypocritical."⁸¹

79. *Ibid* at para 116.

80. *Ibid* at para 118 [emphasis added].

81. *Ibid*.

The Supreme Court of Nova Scotia took exception with a similar symbolic aspect of the Nova Scotia Barristers' Society's refusal to accredit TWU.⁸² Justice Campbell found that the symbolic nature of the response to a symbolic harm demonstrated that there was actually no harm caused by TWU's proposed law school rising above the level of what should be tolerated in a liberal society.⁸³ Discrimination law is similar to hate speech law in that there is a certain amount of hurtfulness that people are expected to endure as part of existing in a diverse democratic environment.⁸⁴ This is especially so when religious beliefs are protected in order to "carve out a space" for religion in the public sphere.⁸⁵ Justice Campbell reminds us that the way in which protected religious beliefs are made part of the public space, and how they are put into practice, must be considered as part of the process of delineating and balancing between religious freedom and equality rights.⁸⁶

The idea of harmful discrimination put forward by the Ontario Courts (and the Law Societies) in opposition to TWU's proposed law school has the effect of redrawing the line between the public and the private. Placed in the context of legal education, the religious grounding of the TWU Covenant is portrayed as a contagion that spreads beyond its institutional boundary. In one way, this dissolves the division between the public and the private. Since it is through the entrance of the TWU Covenant into the public space of legal education that its symbolic harm is released, the fact that TWU is a private religious institution is considered irrelevant. Simultaneously, the division between the public and the private is *strengthened*. Religion is bound to the private sphere alone, and this is accomplished by refusing TWU, a private religious institution, entrance into the public space of legal education. The Ontario Superior Court of Justice said that the decision to not accredit TWU does not prevent TWU from opening and operating a religious law school.⁸⁷ In other words, TWU still has the protected religious freedom to

82. *NSBS*, *supra* note 66 at paras 251–64.

83. *Ibid.* See also *LSBC BCCA*, *supra* note 3 at paras 188–89.

84. See *NSBS*, *supra* note 66 at paras 204–08. See generally *Whitcott*, *supra* note 60 (throughout the decision the Supreme Court of Canada relied on the connection between hate speech and discrimination law). See also Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (2014) 37:2 Dal LJ 621 at 655–57 (Craig also drew on these connections to make her argument against accrediting TWU).

85. *NSBS*, *supra* note 66 at paras 209–13.

86. *Ibid.* at para 206 (this helps balance against falling into a one-sided focus on equality law and the harmful effect that TWU's Covenant has on LGBTQ people).

87. *LSUC ONSC*, *supra* note 6 ("[i]f TWU wanted to operate its law school for purely religious purposes, it would be content to proceed with its view of the proper law school but with the full knowledge that its students would only be automatically eligible for membership in the Bar of some Provinces, while not others" at para 121).

open its own law school, but it cannot bring its religious beliefs into the public realm of legal education.⁸⁸

The emerging boundary between the public and the private is tied to a particular image of the individual self that corresponds with the purposes of equality described in *Miron v Trudel* and to the idea of harm embraced by the Ontario Courts, as described above. From this view, the dignity of the individual is inherent, connected solely to her merit, capacity and circumstance, and shorn from any identification she has with a particular group. Dignity, merit and capacity are conceptually separated from belonging to a community, or, rather, they become the basis by which one belongs to the community of the legal profession. In either case, if the legal profession and those who join the profession are to reflect the image of human dignity protected by the transformed vision of equality and discrimination embedded in the *Charter*, then the public profession of the law is separated quite drastically from the communal religious aspects of human life.⁸⁹

Taking into account these various dimensions of harm, dignity, conceptions of the self and the public/private division makes it quite difficult to say with any categorical certainty how the *Charter* value of equality and non-discrimination applies to the TWU Covenant. Determining whether hurtfulness constitutes harm for the purposes of identifying discrimination under section 15 is a factual analysis driven by context and focused on the impact that the hurt has on perpetuating the discrimination of LGBTQ people.⁹⁰ The chief indicia of discrimination developed in the jurisprudence

88. *Ibid* at para 117. The Court stated: “It remains the fact that TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield.” *Ibid*. Witten argues that the *LSUC* decision reconfigures the public/private divide with a more aggressive secular drive than historically appears in Canadian law. Witten, “Tracking Secularism”, *supra* note 33 at 217–18.

89. This certainly stands in contrast to the vision of TWU’s proposed law school, which links the ultimate good of the individual with a program of Christian transformation driven by participation in Christian community. The purpose of the Covenant is meant to affirm the dignity of the individual and to support the development of their capacities. But the idea of what dignity is, and how it is supported, is attached to the conformity of the individual, through discipline in community, to the revealed truth of God.

90. The core concern is whether the TWU Covenant perpetuates arbitrary disadvantage or historical discrimination. For the Supreme Court of Canada’s current approach to the “arbitrary disadvantage” requirement, see *Kabkenistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 16, 18, 20, [2015] 2 SCR 548 [*Taypotat*]; *Quebec v A*, *supra* note 72 at para 332, Abella J, dissenting in result. The Court asks whether the disadvantage “fails to respond to the actual capacities and needs of the members of the group and instead impose burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”. *Taypotat*, *supra* note 90 at para 20. It further asks whether a “disadvantage” is “one that perpetuates prejudice or that stereotypes”. *Quebec v A*, *supra* note 72 at para 171. Such a disadvantage must be an “expression of prejudice”, that portrays “aspirations” as not equally deserving of respect, and that devalues the image of the persons in question. *Ibid* at paras 198–99. The scope

seem to focus on perpetuating prejudice or stereotypes that devalue the image of persons or portray them as not equally deserving of respect and opportunity.⁹¹ The trickiness of how all of the different dimensions of section 15 feed into a coherent analysis is on full display in the recent Supreme Court of Canada jurisprudence on section 15.⁹²

Whether and how the hurtful aspect of harm proposed by the Ontario courts can be taken into account in legal analysis is not clear. It is possible to assume that differential treatment of a historically disadvantaged group in fact does contribute to the perpetuation or promotion of an unfair social characterization of the group and that the differential treatment has an impact tantamount to harm because of the fact that the group is already vulnerable.⁹³ This might suggest that allowing a law school to regulate its students according to religious principles that treat LGBTQ people differently (as the TWU Covenant does) might indeed contribute to the perpetuation of an unfair characterization of LGBTQ people—even though the harm is more symbolic than direct. However, this idea must also be grounded in a flexible and contextual analytic approach to the nature of the impact on the group in question.⁹⁴ In addition, the fuzziness that surrounds exactly what constitutes the perpetuation of discrimination, either through prejudice, stereotypes or otherwise, remains

and impact of the denial must also be taken into account. See *ibid* at paras 200, 327.

91. The precise role of prejudice and stereotyping in the discrimination analysis is unclear due to the constant fluctuation in the evolution of the section 15 jurisprudence. For further commentary on this evolution, see Koshan & Hamilton, *supra* note 72.

92. The recent SCC decision, *Quebec v A*, is shockingly fractured. *Supra* note 72. There are four different decisions written with varying points of overlap and divergence on all parts of the section 15 and section 1 analyses, which defy a clear *ratio decidendi* of the case on the important question of how section 15 applies. *Taypotat* offers some clarity by adopting the judgment of Abella J, especially the analysis at paragraphs 319 to 347, in *Quebec v A* (*supra* note 72) as the leading approach to section 15 analysis. *Taypotat*, *supra* note 90. However, *Taypotat* does not nullify or exclude the other judgments in *Quebec v A*, and so does not solve the unique range of possibilities that are available in a section 15 analysis. For further discussion of the difficulty involved in trying to decipher the ratio of *Quebec v A*, see Michelle Biddulph & Dwight Newman, “Equality Rights, Ratio Identification, and the Un/Predictable Judicial Path not Taken: *Quebec (Attorney General) v A* and *R v Ibanescu*” (2015) 48:1 UBC L Rev 1.

93. See *Taypotat*, *supra* note 90 at para 20, quoting *Quebec v A*, *supra* note 72 at para 332. See also *Quebec v A*, *supra* note 72 at para 176, LeBel J. Craig observed a similar “symbolic” feature operating in *Whitcott*, which allows the court to infer the harm that results from speech that perpetuates prejudice and stereotypes can be assumed when dealing with a historically disadvantaged minority group. Craig, *supra* note 84 at 637.

94. See *Quebec v A*, *supra* note 72 at para 331. Chief Justice McLachlin also relied heavily on the context of the situation, noting in her separate opinion that the stigma attaching to non-married spouses historically has recently faded. *Ibid* at para 411. This contextual perspective was affirmed in *Taypotat*, *supra* note 90 at para 18.

unclear in the jurisprudence. Arguments could certainly be made either way regarding the TWU Covenant.⁹⁵

The balance that is struck between the public interest of the law societies and the religious rights of TWU (per *Doré*) depends on how the harm to the equality of LGBTQ people is integrated into the institutional concerns of the law society. Since it is not clear whether the harm to LGBTQ people flowing from the TWU Covenant constitutes discrimination under section 15 of the *Charter*, the question becomes whether there is a valid statutory objective for the law society to pursue equality for LGBTQ people beyond the purview of section 15 of the *Charter* and, if there is, whether it is sufficiently strong to outweigh TWU's religious rights. This might well be so. But the merger performed in the decisions of the Ontario courts between the LGBTQ interest and the Law Society's public interest obscures rather than illuminates these important questions.

The challenges that come through the way the language of discrimination and equality are used, both in translating TWU's evangelical practice into the language of section 2(a) and in articulating opposition to that practice through the language of section 15, show that the objective demands of the law in this dispute are evasive. The dispute is not about harm, legal institutions or religious freedom, *per se*. Rather, it is about what taking all of these together implicates. Behind the somewhat awkward legal arguments put forward on either side of the dispute, there are unaddressed social questions regarding the structure of religion in public and private spaces as well as the nature and role of the courts in sorting out the dispute over TWU's proposed law school. The discourse surrounding the TWU dispute, both from the perspective of TWU and its opponents, has so far proved to be inadequate. The legal arguments for and against accrediting TWU's proposed law school speak past each other because there is something missing in the legal account given.

III. Framing Law, Community and Language

The analysis of the dispute over the accreditation of TWU's proposed law school, so far, has shown two very different accounts of what the law demands and some of the associated social structural implications. TWU argues that

95. For evidence of these competing arguments, see Witten, "Tracking Secularism", *supra* note 33; Bateman, *supra* note 33; Robert E Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34:2 NJCL 173.

religious freedom demands protection for the evangelical mission of bridging the private and public. The Law Societies and the Ontario courts argue that equality laws demand that the divide between public and private cannot be bridged but must be vigorously maintained. TWU's argument claims robust protection for collective constructions grounded in individual religious belief, seemingly in spite of other interests and concerns that persist in the public realm. The Law Societies and Ontario Courts see the principle of equality and non-discrimination in terms that structure the public space in such a way as to exclude consideration of anything other than individual merit.

This dissonance also shows something about the social nature of the law itself, which can be seen by drawing on the communal function of language and the process of translation. In the conflict over TWU's proposed law school, the law is simultaneously the subject and the object of the interaction between TWU and the Law Societies. The law provides the language by which either side represents its interests, but these interests are expressed through the language of the law as meeting the demands of the law itself. The law has a dual function, acting as a tool by which the parties accomplish their own goals and, at the same time, exerting its own force on how the conflict will be resolved between the parties. The two very different accounts of law provided by TWU and the Law Societies persist within a shared frame of reference provided by the law.⁹⁶ The law, therefore, reflects a key paradox of language—"we create it, by speaking, and yet it creates us, for without it we could not speak".⁹⁷

The tension that exists in the dual function of law, as something that can be used and as something that has its own force and gravity, is the grounding point for a community of speakers. James Boyd White talks about this in terms of fidelity. White says that fidelity is the "central ethical imperative" of interpretation, and that fidelity in interpreting a text reflects the same kind of imagination and self-assertion that goes into the creation of an original

96. I have to admit here my indebtedness to all of the participants (presenters and attendees) in a discussion that followed a presentation I gave on the TWU law school proposal at the 2016 Canadian Law and Society Association Annual Conference as part of a panel titled "The Trinity Western Controversy and Foundations of Constitutional Law". I want to acknowledge Benjamin L. Berger's question during the discussion in particular, which turned my attention to explore this alternate way of framing the dispute over the accreditation of TWU's proposed law school.

97. Harold J. Berman, *Law and Language: Effective Symbols of Community*, ed. by John Witte Jr (Cambridge: Cambridge University Press, 2013) at 45. See also Bernard S. Jackson, *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985) at 24–27 (Jackson notes the overlap between law and language in terms of a common tension between individualism and collectivism).

text.⁹⁸ Change is an aspect of fidelity.⁹⁹ Fidelity in interpretation is expressed through the individual and communal activities of people that understand themselves to be committed to a text. The text becomes meaningful in the ways that the community treats it through its use.¹⁰⁰ Those who use, or used, a language are bound together through the relationships established by this common use. As Harold Berman explained:

Language is a dramatic expression of social confrontation, whereby men affirm, sustain, renew, and create social relationships. It is at the same time the collective memory of such confrontations experienced in the past, the deposit left by history in our social consciousness, and hence a basis for a common future.¹⁰¹

We use the language that we inherit; we do not invent it. By using language, we identify ourselves as members of a community and a tradition.¹⁰² At the same time, by using language we also participate in shaping it for future use.

White refers to this process as the “translator’s impossible ethic”, which he defines as meaning to be faithful to the original as well as to the world into which the text comes.¹⁰³ Interpreting and applying the old to the new changes both the meaning of the old and the order of the new—meaning is added or subtracted and transformation occurs.¹⁰⁴ Translation, according to White, does not involve the transfer of meaning from one context into another. Instead, translation is more like a performance given in response to the text in question—translation is an act of creating something new.¹⁰⁵

Wrestling with the different uses of the law and its different meanings through legal interpretation and legal argument draws connections between different ways of seeing the world. This includes connecting the context where the legal rule originates (either as a case or piece of legislation) and the context of the current situation.¹⁰⁶ It also includes connecting the expectations, experiences and linguistic differences of all the parties involved in a legal conflict—

98. White, *Justice as Translation*, *supra* note 2 at 243. See also Jackson, *supra* note 97 at 265–310.

99. See Lawrence Lessig, “Fidelity in Translation” (1993) 71:6 *Tex L. Rev* 1165 at 1169–73. Lessig stated that “some changes can be *changes of fidelity*”. *Ibid* at 1169 [emphasis in original.]

100. See White, *Justice as Translation*, *supra* note 2 at 34–35. See also James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Abingdon, UK: Routledge, 2012) at 130–31.

101. *Supra* note 97 at 43.

102. *Ibid* at 44.

103. James Boyd White, *From Expectation to Experience* (Ann Arbor: University of Michigan Press, 1999) at 109 [White, *Expectation to Experience*].

104. See MacLean, *supra* note 100 at 136.

105. White, *Justice as Translation*, *supra* note 2 at 252.

106. See White, *Expectation to Experience*, *supra* note 103 at 102–06.

such as between lawyers, between clients, with witnesses and with the judge. The meaning of the law that emerges is not so much about the bare results of a case, but much more about the way in which the case is conceived of and talked about, and about the kinds of relationships that this activity makes.¹⁰⁷

Although in one sense the resolution of the conflict over the accreditation of TWU's proposed law school will require a choice to be made between the competing understandings of the law, the actual fact of the choice made is not as important as the process by which it is made and the relationships established through the process. Choosing a particular result and the way that the result is framed in terms of the language, process and obligations of the law, involves the translation between the different claims made, the parties involved and the law. Choice does not end interaction and exchange, but adjusts the orientation of the interaction and exchange. Choice feeds back into the exchange, providing new opportunities for interpretation and the translation of particular perspectives, interests and experiences into the language of the law.¹⁰⁸

If the law in the TWU situation is thought to involve the clear and unambiguous application of legal principle to the context of the case, then it is hard to see the arguments levied and the decisions rendered so far as anything but a complete disaster. But if, on the other hand, the law is understood in terms of the process of translation, then the emerging tensions, gaps and cracks lose their menace. Indeed, these gaps provide the space for law to grow. As James MacLean argued: “[W]e need to stop thinking about law under the terms of its decisional imperative and more in terms of a forum for encouraging free and unrestricted dialogue, an opportunity for distilling and discovering ideals that will lure us into future commitments”.¹⁰⁹

The analogy of language and translation shows that the law is not just the language being used or the text in dispute. Rather, the law embodies *the process of overlap and interaction* between TWU and the Law Societies. In mediating the interaction between TWU and the Law Societies in this way, the common language of the law acts as a type of community, which is both *for* and produced *by* the conflict. This view of language and law draws our attention away from the substantive legal principles at play in the TWU situation and more toward the way that the application of these principles shapes a shared social reality.

107. See White, *Justice as Translation*, *supra* note 2 at 222; MacLean, *supra* note 100 (“judges do not simply apply rules to facts, they also have to think about what they are thinking about and about how they are thinking about it” at 137).

108. See MacLean, *supra* note 100 at 136–38.

109. *Ibid* at 99.

The way the resolution of the case is framed must foster this sense of mutual belonging and participation in the linguistic community of the law.

The social aspect of harm, which I have located around the public/private divide, reflects this form of linguistic feedback. The indeterminate notion of harm is a placeholder by which TWU and the legal community assert themselves and grapple with the expectations of the law in a tangible way. The way that harm is used as a legal category helps establish and modify the discursive community in which the dispute between TWU and the Law Societies occurs. The dissonance that exists in the translations of the arguments put forward by TWU and the legal community should be made central to how the demands of law are conceptualized and how the legal resolution of the dispute is configured. Doing this shifts our attention away from searching for an objective notion of harm and opens us up to new possibilities for recasting the way we approach the conflict over TWU's proposed law school. The attitudes that foster translation help define the conceptual parameters that can sustain an ongoing dialogue between TWU and the Law Societies.

IV. The Structure of the Relationship Between TWU and the Law Societies

In cases like this, where much can be said on either side, where ambiguity in terminology lurks everywhere and where presumptions about social organization are particularly influential, it is vital to take into account the way that the case is conceived and talked about and the kinds of relations that this conceiving and talking establish.¹¹⁰ As I have argued so far, the current trajectory of the legal conflict over the accreditation of TWU's proposed law school is problematic because it fails to engage some of the central issues at stake in the case and feeds a narrative that makes such an accounting difficult, if not impossible. Focusing on the relational dimension of legal analysis supplements the balancing of legal rights (duties, harms, costs, etc.) with a view of the narrative and discursive qualities of the activity of the law. I will trace this relational dimension of the dispute through the comparison sometimes drawn between the TWU situation and the American case *Bob Jones University v United States*.¹¹¹

110. See White, *Justice as Translation*, *supra* note 2 at 222.

111. 461 US 574 (1983) [*Bob Jones*]. For another discussion of the comparison between the TWU cases and *Bob Jones*, see Mary Anne Waldron, "Analogy and Neutrality: Thinking about Freedom of Religion" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 249.

Like TWU, Bob Jones University (BJU) is a private religious school that had religiously based rules guiding student conduct.¹¹² The *Bob Jones* case arose when the Internal Revenue Service (IRS) revoked BJU's tax-exempt status on the basis that BJU's student code of conduct was racially discriminatory.¹¹³ Prior to 1971, BJU refused to admit any black students, and after 1971 admitted them only if they followed the university guidelines restricting interracial dating and marriage.¹¹⁴ Similar to TWU, BJU's legal argument was that its discriminatory policy should be permitted because it was a private school, the policy was grounded in religious beliefs, and that the code of conduct merely asked black students to respect the university's standards while attending the school.¹¹⁵

Drawing on the similarities between TWU and the *Bob Jones* case, Elaine Craig, one of the more outspoken opponents of accrediting TWU's proposed law school to date, asserted that there is no principled way to distinguish discrimination on the basis of sexual orientation and discrimination on the basis of race.¹¹⁶ If a Law Society would say "no" to racial discrimination in law school, then they must also say "no" to discrimination on the basis of sexual orientation in law school.¹¹⁷ In this argument, sexual orientation discrimination and racial discrimination are equated in two senses. First, both are understood to be fundamental aspects of personal identity.¹¹⁸ Second, sexual acts are considered to be inalienable from the identity aspect of sexual orientation just as skin colour cannot be removed from racial identity.¹¹⁹ From this point of view, to ask an LGBTQ person to not engage in LGBTQ sexual activity while at TWU is the same as asking a black person to not date a white person while at BJU.

Whether or not the similarities drawn between sexual orientation and racial discrimination are defensible, it is important to take note of the ways in which their alignment affects how the TWU law school dispute is cast in terms of law. First, setting the inalienability of sexual acts and personal identity in opposition to the freedom of religion pushes the conception of religion further

112. *Bob Jones*, *supra* note 111 at 579–82.

113. *Ibid* at 581.

114. *Ibid* at 579–82.

115. *Ibid* at 602, 605. See also Craig, *supra* note 84 at 659.

116. *Supra* note 84 at 659.

117. *Ibid* at 659.

118. See *BCCT*, *supra* note 31 at para 69 (describing the fundamentality of sexual orientation to personal identity).

119. See Craig, *supra* note 84 at 637–38 (describing the inseparability of sexual practices from identity).

toward the distinction drawn between religious belief and religious action. The TWU Covenant is not considered to be a proxy for religious belief, but is a form of action separate from belief.¹²⁰ This is the way that the Ontario Court of Appeal employed *Bob Jones*, citing it as an example of the distinction between state action that interferes with religious belief itself and state action that denies a benefit because of the impact of that religious belief on others.¹²¹

The tension within religious freedom—the (in)separability of belief and action—is resolved with surprising simplicity. The Court said that “the LSUC’s decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others—members of the LGBTQ community”.¹²² Although religious belief and action are distinguished in Canadian law, the tension of distinguishing and holding these two things together is neither lost nor resolved in the jurisprudence.¹²³ Dividing TWU’s religious belief from its religious action (in the TWU Covenant) in an attempt to insulate religious beliefs from the regulation of religious practices, as the Ontario Court of Appeal did, overlooks the tension in Canadian law of simultaneously distinguishing and protecting religious belief and action.

Secondly, separating religious codes of conduct from religious belief has the effect of marginalizing within legal discourse the meanings and rationales that exist for religious action.¹²⁴ Levelling the differences between sexual orientation and race discrimination in the TWU and *Bob Jones* cases signals the erasure of the moral, philosophical and theological arguments that might be used to engage (and distinguish) the two practices. In the TWU Covenant, it seems not to be “because I am gay” that I cannot have sex with another man, but rather it is because the act of two men having sex with each other is con-

120. See *BCCT*, *supra* note 31 at para 72.

121. *LSUC ONCA*, *supra* note 3 at para 136.

122. *Ibid* at para 138.

123. See e.g. *Loyola*, *supra* note 31 (where the inescapability of the Catholic perspective in teaching about religion, culture and ethics is simultaneously recognized and denied). See also *Chamberlain v Surrey School District No 36*, 2002 SCC 86, [2001] 4 SCR 710 (where the religious perspective of the school board members was recognized as inalienable, but simultaneously restricted in the role that it could play in making decisions of public policy); Richard Moon, “The Supreme Court of Canada’s Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in Public Schools” in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011) 321 at 323–24 (Moon argues that it is incoherent to try to recognize both religious and civil values in public—for him, public education—by dividing them along public/private lines and insulating them from each other).

124. *Cf* Bateman, *supra* note 33 at 92 (Bateman pointed out that the aspect of the TWU Covenant dealing with sexual behaviour is often considered separately from its theological context, which is to engender a whole religious lifestyle grounded in a more complete theological worldview).

trary to TWU's understanding of Christian doctrine that I cannot have sex with another man. This is different than the prohibition in *Bob Jones*, where it is very clearly "because I am black" and "because you are white" that two people cannot have sex.¹²⁵ More important though is the fact that the prohibition in *Bob Jones* is based upon a hierarchy of race and the theological meanings attached to racial difference. The TWU Covenant is about the morality of sexual activity, not a hierarchical view of sexual orientation as such. The ethics and morality of sexuality are grounded in deeply theologized understandings of human anthropology and physiology, which endow sexuality with divine purpose and design.¹²⁶

Overlooking the theological, philosophical and moral particularities of the TWU Covenant and the *Bob Jones* dating policies allows two radically different ideas to be grouped together and dealt with as a single phenomenon. This means that the TWU Covenant can only be defended on the basis of the fact that it is religious and cannot be engaged in any other way. Despite the fact that the Supreme Court of Canada in *Amsalem* established the principle that courts are not to decide questions of theology, there is no reason for courts to avoid engaging with religious ideas altogether.¹²⁷ To the contrary, courts are not alleviated of the responsibility to address religious matters where a question of religious freedom or other civil or property rights are at issue.¹²⁸ Many Canadian cases discuss questions of theology and church organizational structure in detail in order to determine property and civil rights.¹²⁹ In the TWU dispute, the theological and religious differences between the TWU Covenant and the *Bob Jones* case are important *factual* distinctions that cannot be ignored without crippling the legal analysis and legal judgment. Refusing to consider them puts TWU into the awkward position of having to defend its Covenant through a

125. *Bob Jones*, *supra* note 111 at 580–81.

126. See e.g. Douglas Farrow, *Desiring a Better Country* (Montréal: McGill-Queen's University Press, 2015), ch 2.

127. *Supra* note 26 at para 50.

128. See *Bruker v Marcovitz*, *supra* note 30 at paras 18, 41–45.

129. See e.g. *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 at 173–74, 97 DLR (4th) 17; *Ukrainian Greek Orthodox Church of Canada et al v The Trustees of the Ukrainian Greek Orthodox Cathedral of St Mary the Protectress et al*, [1940] SCR 586 at 591, [1940] 3 DLR 670; *Pankerichan v Djokic*, 2014 ONCA 709, 123 OR (3d) 131; *Bentley v Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, 326 DLR (4th) 280; *Delicata*, *supra* note 29; *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, 404 DLR (4th) 48, leave to appeal to SCC granted, 37273 (13 April 2017); *United Pentecostal Church of Chipman v Chipman Pentecostal Church Inc*, 2001 NBQB 49; *Mott-Trille v Steed*, 27 OR (3d) 486, 1996 CanLII 7955 (Ont Ct (Gen Div)); *MacLachlan v Capilano Christian Assembly*, 2003 ABQB 159; *Kong v Vancouver Chinese Baptist Church*, 2014 BCSC 1424, 17 CCEL (4th) 108; *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101, 382 DLR (4th) 150.

version of religious freedom that also protects racial discrimination (or worse), which leaves TWU (and those who support it) appearing to support racist theology (which it does not).

Flattening the theological and philosophical distinctions between the TWU Covenant and the *Bob Jones* case treats the product of internal religious discourse differently than the product of other forms of rational discourse. The reasons that support religious positions are treated either as inherently irrational or as irrelevant simply because they appear in a religious context. Lumping together theories of racial hierarchy with theories of sexual morality renders the reasons that distinguish them of lesser value to the “true” or “ultimate” moral discourse of the law. This ignores both the rational aspect of religious discourse and the non-rational aspect of legal discourse. Legal discourse is set above the fray of the messiness in which religion is caught up.¹³⁰ The content of religious dialogue is irrelevant; only the effects of the end product of the dialogue—whether it causes harm—are considered relevant to legal discourse. This denies that there is a connection between the religious and the public, and the possibility that the religious discourse might contain insights that escape the vision of public discourse. Alienating legal analysis from the theological bases of religious action blinds us to the limitations and difficulties involved in using legal principles like harm, discrimination, religious freedom and public interest. In other words, it reinforces the problems and challenges identified in the first half of this article.

A third effect that flows from aligning racial and sexual orientation discrimination is that the particularities of social-historical context are passed over. Racial discrimination at a private university in 1970s America has a very different symbolic significance than the discrimination against LGBTQ people at a private university in Canada in 2017. Racial equality in America, between black and white people especially, became central to national, political and constitutional identity through the experience of the Civil War.¹³¹ The American Civil

130. See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 12 (Berger identifies the same dynamic but in terms of the cultural fray that law perceives itself to stand above).

131. See generally Clayborne Carson, “American Civil Rights Movement” in *Encyclopaedia Britannica*, online: <www.britannica.com/event/American-civil-rights-movement>; Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge: Cambridge University Press, 2001). See also James M McPherson, “Out of War, a New Nation”, *Prologue Magazine* 42:1 (Spring 2010) 6, online: <www.archives.gov/publications/prologue/2010/spring/newnation.html>; Alexander Tsesis, “Introduction: The Thirteenth Amendment’s Revolutionary Aims” in Alexander Tsesis, ed, *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York: Columbia University Press, 2010) 1.

Rights Movement in the 1950s and 1960s precipitated significant legal changes in favour of racial equality and provoked questions about the systemic implementation and enforcement of equality rights.¹³² It is this special history, along with the volatility of racial tensions in 1970s America, which gave the practice of racial segregation at BJU particular legal salience. The IRS action against BJU had an existential overtone for the national and political identity of America; the Bob Jones decision confirmed the basic commitment of the American national, political and constitutional community to racial equality.¹³³

Sexual minorities have a very different place in the national, political and constitutional identity of Canada than racial minorities in America. The historical marginalization of non-heterosexuality in Canada, which was often quite drastic, is remarkable (and shameful).¹³⁴ The former criminalization and punishment of homosexuality in Canada is an ugly blemish on our legal history.¹³⁵ Without question, this negative history informs the way that the TWU Covenant is perceived. TWU's institutional stance that LGBTQ sexuality is deviant will likely be felt by many as hurtful and perpetuating views on sexuality that fuelled (and fuel) the mistreatment of sexual minorities. However, the *social, political and constitutional* dimensions of the hurt flowing from the TWU Covenant does not appear equivalent to those of *Bob Jones*. Canada's history regarding sexual minorities has no equivalent to the American Civil War. This is not to say that the TWU cases must be decided in favour of TWU. Rather, the sense of "elementary justice"¹³⁶ at stake in *Bob Jones*, which is also present in the TWU cases—that all people should be treated with dignity and respect—does not lead to the conclusion that the TWU cases must be decided the same way as *Bob Jones*. This article has argued throughout that even the most basic notions of justice, such as the notion of harm, engage social contextual dimensions when being applied in law. The difference in social, political and constitutional context between

132. See Carson, *supra* note 131.

133. *Supra* note 111 at 595. "Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history". *Ibid* at 595, 604.

134. See Krishna Rau, "Lesbian, Gay, Bisexual and Transgender Rights in Canada" in *The Canadian Encyclopedia*, by Davida Aronovitch (Toronto: Historica Canada, 2014), online: <www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada/>.

135. Homosexuality was decriminalized in Canada on June 27, 1969. See *Criminal Law Amendment Act, 1968–69*, SC 1968–69, c 38.

136. See *BCCT*, *supra* note 31 at para 70; *Bob Jones*, *supra* note 111 at 592.

the accreditation of TWU's proposed law school and the *Bob Jones* case cannot be overlooked.¹³⁷

Although there are similarities between racial and sexual orientation discrimination, and between TWU and BJU, ignoring their distinctions in the name of equality law establishes a discourse structure that is distinctly flat: the tensions that exist between religious belief and action, and between sexual orientation and sexual activity, are removed; the range of reasons available for discussing religious action and its relation to sexual identity are circumscribed; and the social contextual factors that situate the conflict and characterize the significance of the situation in question are ignored. Embedding a flattened discourse in the legal conflict over the accreditation of TWU's proposed law school will have an effect that reaches well beyond this specific situation to affect the emerging shape of religious freedom and equality law. But more importantly, it also feeds into a narrative that gives structure to social relationships more broadly and the role of the law in society. It is to this point that the discussion will now turn.

V. Reimagining the Relationship Between TWU and the Law Societies

Reflecting on the struggle in American federal discrimination jurisprudence regarding affirmative action programs, American scholar James Boyd White found that there was no readily available legal answer to satisfy the competing claims of injustice at stake.¹³⁸ A similar frustration persists in the litigation over the accreditation of TWU's proposed law school. The concerns of both TWU and the Law Societies are understandable. Finding a solution that recognizes both sets of concerns while constructing a way forward has been evasive. I believe that the way White worked through the question of racial affirmative action in the case of *United Steelworkers of Am-*

137. This includes, as I have just argued, the big historical, political and constitutional differences (like the American Civil War), which speak to the meaning (i.e., harm) of the TWU Covenant. It is important to mention that social context can also include smaller differences, like the difference between tax exemption and the granting of accreditation. See *LSBC BCCA*, *supra* note 3 at para 182 (the Court distinguished the tax exemption at issue in *Bob Jones* and the accreditation at issue in the present case—the former confers financial support (tax relief), whereas the latter merely licenses the activity of an institution (which is otherwise lawful) for the specific purposes of pursuing a legal career). Both the big and small differences help shape the social dimension of the case and should be accounted for in the legal analysis of the refusal to accredit TWU on the basis of the Covenant.

138. White, *Justice as Translation*, *supra* note 2 at 219.

*erica v Weber*¹³⁹ can inspire us to reimagine the way forward in the TWU situation.¹⁴⁰

White did not propose a solution to solve the conundrum of legal doctrine. His rather modest but profound contribution was to draw attention to the importance of the way that people narrate the relationships at stake.¹⁴¹ White noted the contemporary white workers resisted affirmative action laws on the basis that they have no direct personal connection, or family history, to slavery.¹⁴² As a result, for these workers there was no justice in demanding that “we” give up opportunities (to jobs) in order to make up for the historic wrongs suffered by “them”.¹⁴³ Interpreting the law from this perspective looks for a causal connection in order to impute responsibility. White noted that this way of framing moral obligation had two narrative elements—first, it focused on the relationship between contemporary white people and the white slave owners of history; second, it portrayed the contemporary relationship between white and black workers as one of competition between strangers for access to scarce resources (like good jobs).¹⁴⁴ White suggested that the moral equation radically changed if focus was placed on the connection between contemporary white workers and those in history who fought and paid dearly for the emancipation of slaves (rather than on slave owners).¹⁴⁵ The moral obligation that led these men and women to sacrifice so much was not out of a duty to make reparation but rather out of a desire for a better country, where the harms of slavery have no place.¹⁴⁶ In other words, White suggested that we focus the calculation of our moral and legal obligations on the *character of the community to which we all belong*.¹⁴⁷

This narrative turn proposed by White shifts the way that we interpret equality law. Rather than thinking about equality in terms of ascribing fault and allocating costs between strangers, we now see it in terms of the duties and demands of sacrifice and love flowing from a community of friendship.¹⁴⁸ This narrative of a community of friendship enabled White to articulate an

139. 443 US 193 (1979) (considering whether Title VII of the *Civil Rights Act of 1964*, 42 USC § 2000 (1964) was violated by an affirmative action program embedded in the collective bargaining agreement).

140. White, *Justice as Translation*, *supra* note 2 at 218–22.

141. *Ibid* at 216–17, 222.

142. *Ibid* at 220.

143. *Ibid*.

144. *Ibid*.

145. *Ibid* at 221.

146. *Ibid*.

147. *Ibid*.

148. *Ibid*.

interpretation of law that connected the parties to each other in a more meaningful way and justified the demands placed upon them. Embedding friendship within community was crucial because it enabled a link to be drawn between victim and perpetrator as well as between us today and those in the past whom have paid dearly to help purchase a world free from racism. The world we inhabit is a world that we inherit. The obligations we owe, which are crystalized within the law, reflect this inheritance. For White, “such a community is what an inherited constitution is, a cultural legacy: not a penalty paid for the crimes of one’s ancestors, but an opportunity for meaningful action”.¹⁴⁹ Affirmative action in equality law is therefore not about paying a price for past sins, but a call for us to participate in the life of the (national, political and constitutional) community that we inherit.

Although, as already observed, the Canadian experience of historical discrimination of sexual minorities cannot be equated with the American experience regarding race, White’s re-imagination of the law as a community of character still resonates. One of the central arguments against accrediting TWU’s proposed law school is that access to legal education is scarce, and that to allow TWU to discriminate on the basis of sexual orientation leaves LGBTQ people in an unfair position to compete for access to this scarce resource.¹⁵⁰ Likewise, TWU’s argument that its institution should be insulated from the public process of addressing the social wrongs committed against LGBTQ people refuses to see the TWU community as a fully active and responsible participant in the larger social community. Such arguments view the relationship between TWU, law schools, the legal profession, law students, the public and LGBTQ people as strangers who are fighting against each other for scarce resources and self-protection. Justice is thus a matter of making sure that the fight is equal. Individuals (and communities) are shorn of anything that degrades their ability to fight for their share or their own.

In response to *United Steelworkers of America v Weber*, White suggested that the white steelworkers needed to learn to accept the cost of the affirmative action program as a part of participating in the community inherited through the American Constitution.¹⁵¹ What does this mean for the conflict over the accreditation of TWU’s proposed law school? In TWU, who is parallel to the steelworkers? Who needs to accept whom? The Law Societies say that TWU

149. *Ibid.*

150. See *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722 (Written Argument of the Respondent at paras 83–89, 534); *LSUC ONSC*, *supra* note 6 at para 67.

151. White, *Justice as Translation*, *supra* note 2 at 220–21.

must accept sexual minorities (LGBTQ students), whereas TWU says that the Law Societies must accept religious minorities (the institution of TWU). I do not think that White's proposal helps us decide the direction in which the conflict should be resolved. Rather, he emphasizes that any answer developed through the law must also take account of the social and communal aspects at stake in the dispute.¹⁵²

Though there is much to be said for merit, fair competition and neutrality, which I do not want to contend with, it is important to beware of the effects of embedding the legal discourse of equality in a narrative that is neutered of those things that connect us to others and connect us to a shared past. There is an aspect of justice missing in this formulation. If we approach the interpretation of law solely from the perspective of deciphering and applying a principle that is neutral (e.g., resource competition), the loss of connectivity eventually leads to impasse. Drawing on an ethic that seeks to enhance social relationships (i.e., friendship) in the task of interpreting law makes it possible to evaluate the social effects of legal decisions and to justify the choices made through law in a way that binds people together rather than pulling them apart. Criticizing White's attempt to reframe the American legal perspective as a community of friendship, Sanford Levinson observed: "The constitutive understandings of American life, including its constitutional dimension, have been written in blood as much as forged in conversation."¹⁵³ Levinson's astute insight, which must be acknowledged here, is that naïve faith in the unifying capacity of law is deeply unsatisfying.¹⁵⁴ Insofar as White's project might have overlooked or avoided arguments that threatened the unifying appearance of law, I agree with Levinson.¹⁵⁵ However, Levinson's critique does not, in my view, negate the usefulness of seeing the law as a "community of friendship" but rather helps sharpen our understanding of what its use will achieve. The point of using the community of friendship idea is not to make everyone under the rule of law friends in the sense of obliterating their disagreements. Rather, it is to bring to the foreground the socially constructive aspect of legal conflict. Legal disputes

152. *Ibid* at 221–22.

153. Sanford Levinson, "Conversing About Justice", Book Review of *Justice as Translation: An Essay in Cultural and Legal Criticism* by James Boyd White, (1991) 100:6 Yale L.J 1855 at 1866.

154. *Ibid* at 1864–65.

155. Levinson said that White's solution to the problems of affirmative action, although beautiful, "smells of the scholar's lamp or, perhaps more accurately, the scholar's armchair out of which this book seems to have been written". *Ibid* at 1868. Levinson thought that White cherry-picked his examples and his scholarly interlocutors in order to make the law appear more rosy and peaceable than it actually is. *Ibid* at 1856.

rarely, if ever, lead to a happy and contented unity of different perspectives. Usually there is a gap that remains between different perspectives, despite legal resolution. TWU's litigation experience offers a perfect example of this. Despite having won the *BCCT* case in 2001, TWU continues to fight for its right to maintain the TWU Covenant. The Supreme Court of Canada's decision did not resolve the underlying tension between TWU and its detractors. Framing the legal process of conflict resolution in terms of friendship invites us to focus less on deciphering the "correct" answer to a legal problem or a legal rule and more on discerning the ways in which the legal system can be used to foster a healthy and vibrant democratic community.¹⁵⁶

I do not presume that the legal result reached in the conflict between TWU and the Law Societies will lead to the complete and seamless integration of the parties under the law. Regardless of how the public legal and private religious are demarcated—whether expanding or contracting the public appearance of religious associations—it is equally important to be mindful of and to address the way that the interaction between them is framed. Whether TWU or the Law Societies wins matters less than whether the decision fosters a common commitment to the process of translation and a mutual obligation to participate in a conversational community.

The legal resolution to the dispute over the accreditation of TWU's proposed law school must be situated somehow in-between the arguments of TWU and the Law Societies, incorporating both while establishing neither, enabling the possibility of mutual understanding (not mutual agreement), mutual respect and shared responsibility for preserving the law and the shared world that the parties have inherited. This is a tall order indeed. I propose (at least) two conceptual components to help get us there. The first is the explicit recognition that all of the concerned parties—individual Christian and LGBTQ people, and the groups of TWU and Law Societies—participate together in the community of the law insofar as they are connected by the social production of meaning through the use of the language of the law. This means that the law, its rules, principles and values, must not be used to exclude, alienate or silence the diverse perspectives brought to the conflict. Second, when deciding whether TWU and the Law Societies are being faithful to the law it is also necessary to ask if they are being faithful *to each other*. This means that the arguments and responses given in the language of the law should be attentive to and respectful of the opposing perspective, carefully responding to each other in order to foster common understanding and avoid obscuring each other's claims.

156. See White, *Justice as Translation*, *supra* note 2 at 223.

From this point of view, the legal discourse surrounding the TWU dispute has been grossly inadequate. In an ideal world, the parties would frame their legal arguments in a way that recognizes the influence of their own perspectives on the legal questions, engages the other side honestly and transparently (i.e., avoiding mischaracterizations and distortions), and proposes solutions that are integrative and constructive—this is what it would mean for the parties to be “faithful to each other”. The analysis of the legal perspectives of TWU and its detractors earlier in this article showed that both sides of the dispute have failed in this regard. The analysis focused more on the ways that the Ontario Courts reinforced a narrative that distorts rather than clarifies the interests and claims at stake. This was intended to highlight the important and unique way that the courts, in addition to the parties, contribute to the narrative and discourse of a legal dispute. The decisions of the Ontario Courts contributed to the problem rather than its solution. Not only did the they alienate religious perspectives and brand TWU’s religious practice as contemptuous, they also refused to consider LGBTQ equality concerns in their own right and instead co-opted them as ultimately being about the integrity and purpose of the Law Society. Colonizing LGBTQ interests and alienating the TWU claim rendered both groups passive in relation to the law’s pursuit of perfection. The law (and its institutions) is portrayed as the only active agent in the story.

One practical way to help re-narrate the TWU dispute to address this would be disentangling the LGBTQ interests from the interests of the legal profession. This does not deny the possibility of weighing the two equality concerns together in the balancing against TWU’s religious claim (*à la Doré*), but insists that the distinctiveness between them be fastidiously defined and maintained. This would help avoid portraying the TWU Covenant as presumptively discriminatory and harmful, which tends to alienate TWU’s religious perspective. Furthermore, it would shift the focus of the equality public interest mandate of the Law Societies beyond a narrow idealization of institutional integrity to include broader questions about diversity within legal education.

Even though courts have limited influence over the way that the tools of legal language are used by the parties, they are nevertheless able to build a narrative and discourse within the law that helps make a community of friendship possible. Focusing the legal analysis of the TWU dispute on the points of convergence and divergence between the parties, exposing the subterranean force of their differing perspectives, maintaining the distinctions between the public interest mandate of the Law Societies and the concerns of the LGBTQ community, and being careful not to baldly accept or alienate TWU’s evangelical perspective from the legal analysis will set the parties up to engage in an ongoing discussion that is friendly and conducive to mutual understanding.

Conclusion

The legal aspect of the dispute over the accreditation of TWU's proposed law school, when approached through the lens of language and translation, is filled with dissonance and tension. What I have attempted to do in this article is turn our attention away from thinking about the content of the law as a way to resolve the dispute and instead to focus our thinking on the function of the law in structuring the relationships at stake in the dispute.

The evangelical perspective of TWU does not fit well into the law of religious freedom in Canada. Recognizing the dissonance here points us to the underlying social questions that lie at the heart of the dispute. How is religion dealt with in relation to the division between public and private spheres of life? The challenge posed by TWU's proposed law school is that its evangelical mission seeks to bridge the private religious and the public lives of its students. The social stakes of the situation are clarified by the decisions of the Ontario Courts to uphold the LSUC refusal to accredit TWU's proposed law school. The questions raised by the evangelical effort to cross the boundary between private religious and public life were exacerbated by appealing to the ambiguous notion of hurtfulness as a basis for finding discrimination. The tipping point came from eliding the distinction between the discriminatory effects of the TWU Covenant and its impact on the institutional goals of the legal profession. The dispute morphed from a matter regarding the treatment of sexual minorities by a religious institution into a matter of the relation between private religion and public law.

Reconstructing the relationship between TWU and the Law Societies starts by reimagining the narrative by which the legal dispute is constituted. The challenge is to structure the discursive movement of translation back and forth between the two opposing perspectives in such a way as to guard against vacating the relationship between them, established through law, of its social interactive aspect. Rather than looking at the law as allocating costs and benefits between strangers in an empty economy of competition and self-protection, we can draw inspiration from the possibility of seeing law as a community of friendship. Friendship draws attention to the conditions of belonging and participation that enable conflict to create meaning. In response to the concern raised by Stanley Fish in the quotation at the beginning of this article, a community of friendship is not apolitical and does not seek to sidestep ongoing conflicts; rather, it reframes, or translates, conflict from a struggle that ends in victory and defeat to an ongoing process of constructing and reconstructing common ground.

Although the Law Societies and TWU have two separate ways of seeing the world, their separation does not have to lead to alienation *if* the interaction

between them is understood in the communal and relational terms of language and translation. This is no simple thing—it requires that each recognize the limitations of its own perspective, and to see that the world they inhabit together is incomplete and constantly subject to change. The interaction between them must be seen as a dialogue that evolves through mutual participation rather than as the forced application of reified legal principles to determine the outcome of the situation. Such a view does not afford the simplicity of choosing between giving TWU total autonomy as a religious institution or expanding the reach of the public values embedded in the legal profession. Rather, TWU and the Law Societies must be seen as common users of a common legal language and, therefore, part of a common community constituted through the law. If this is so, then both are responsible to work toward building a shared future on common ground, and the obligation they both have to be faithful to the law also requires them to be faithful to each other.

