Defining Harm

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Lori G. Beaman

Defining Harm: Religious Freedom and the Limits of the Law

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This book is dedicated to
Bethany Hughes, in honour of a beautiful spirit,

and

Carole B., in recognition of the integrity and caring
that judges bring to their work each day.

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Preface

The journey toward this book started when I was practising law in a rural area that is sometimes described as one of the bible belts of New Brunswick. Many of my clients were religiously committed to one faith or another, and I was often intrigued by the ways that their faith manifested in a myriad of forms to challenge my preconceptions about religious commitment. I eventually left the practice of law to return to graduate school but continued to think about how religion impacts both positively and negatively on people, and on the ways that they live their beliefs in the context of their day-to-day lives.

As a feminist and someone who does not belong to a faith community, I often find myself in ideological tension with those whose beliefs and lives I study. At the same time, as a scholar with training in philosophy, sociology, and law, I have been amazed at the unwillingness of many of my colleagues to engage in a serious discussion of religion and society without indulging in a dismissiveness that does little to expand knowledge about the ways that religion intersects with our culture. The tide has turned somewhat in the past five or so years as the global influence of various religious flows has become apparent, and, all of a sudden, religion matters. It has, however, always mattered and was and remains an important part of the daily lives of many people. Religion is integral to the manner in which our nation has been shaped and continues to grow.

In a time when the religious landscape of Canada is shifting through immigration and changing patterns of practice, thinking about the ways in which spiritual beliefs are expressed in day-to-day life and the ways in which the *Canadian Charter of Rights and Freedoms* protects and limits religious freedom has never been more important. Yet, in some measure, scholars and society alike are ill-equipped to deal with the challenges of religious diversity, in part because we have for so long assumed that the religious landscape is static, and additionally because religion has not been taken particularly seriously at an analytical or policy level.

The case of Bethany Hughes offers an opportunity to consider how religion matters. The discussion that follows is not intended to be limited in its implications to this one case but rather is meant to stir debate and discussion about what it means to have a constitutional guarantee of religious freedom and, at the same time, a constitutional balancing of that freedom. Where should we set the boundaries of religious freedom, on what basis, and who should decide? These are not easy questions; their answers deserve both careful consideration and an exploration of and honesty about our own beliefs, values, and prejudices.

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Randy Schmidt has encouraged me to write this book from its very beginning stages. Working with a supportive editor is the key to pulling it all together. Randy has encouraged, requested, and inquired at precisely the right moments.

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Derek MacDonald provides day-to-day caring that makes everything and anything possible.

Finally, there is no doubt that everyone who was involved in Bethany's care – among them her parents, family members, faith community, lawyers, physicians, social workers, nurses, and the judges who heard the various stages of the case – did what they felt was in her best interests. I would like to express my sorrow for her loss to all of those who cared about Bethany.

Defining Harm

1
Introduction: The Culture of Fear and the Risk Paradigm

On 5 September 2002, seventeen-year-old Bethany Hughes died six months after being diagnosed with leukemia. What distinguishes Bethany from most other young people who die in such circumstances is her attempt to refuse portions of the conventional medical treatment for her illness. Specifically, although she embraced life, she refused to receive blood transfusions, citing her religious beliefs as the basis for her decision. Despite her wishes, she was forced, through court order, to receive transfusions. How are we to make sense of religious beliefs that inspire such action? When are religious beliefs characterized as "extreme" or "fundamentalist"? What is the social context in which particular religious beliefs are normalized? How do adherents become labelled as martyrs? Why is martyrdom sometimes celebrated and sometimes condemned? Who is the "normal" religious practitioner and who is the "other"?

The current historical moment is fraught with anxiety about the dangers posited by "the other," who presents as the terrorist, the disease, the religious fanatic, the irresponsible citizen. Narratives constructing the other as someone to be feared, identified, and overcome are worked up on multiple discursive sites that collude and separate and come together again with no apparent logic or consistency. In this context, giving one's life for one's country is noble; giving one's life for one's religion is extreme.

In the following pages, I draw on the story of one young woman and her legal battle to define the parameters of her medical treatment. Bethany Hughes (known to the media as Mia), a baptized member of the Jehovah's Witnesses, refused to accept blood transfusions prescribed by physicians as part of her treatment for cancer.[1] Her story, and the web of power relations implicated in it, is an important one in that it offers a case study of the dynamic intersections of discourses in the governance of the religious citizen. The *B.H.* case, as it was known as it moved through the courts, is a study of a moment in time of the socio-legal treatment of religious freedom. In what follows, I engage in an exploration of the intersection of

discourses in the governance of the religious citizen, specifically how law, medicine, social work, and religion are brought together to fashion the story of Bethany and her struggle to shape her cancer treatment in a manner that accorded with her spiritual beliefs.

This book offers a genealogy of religious freedom in a social climate of risk and fear.[2] It is not about Jehovah's Witnesses per se; nor, in many ways, is it about Bethany Hughes. Her case offers an entry point for an examination of religious freedom at a particular time. It also opens up the possibility of the exploration of the themes of governance, freedom, agency, and the expert in the intersection of multiple discursive contexts. The *B.H.* case acts as a refractor of points of power relations and their attendant web of social relations. A study of the local and specific contours of power relations and the social context in which they occur reveals both the particulars of Bethany Hughes' attempts to define herself as a religious citizen and the ways that power accumulates around religious identity and citizenship. The specificities of power relations as they play out in *B.H.* cannot be generalized to all religious freedom cases, but they do act as a reminder or map for possible nexes of discourse that work to bind the definition of religious freedom. From this perspective, power also includes the notion of resistance, which in turn shapes the productive processes of power relations. The legal process is a particularly interesting vantage point from which to observe power and resistance. New arguments and ways of shaping definitions are produced through it. Religious minorities both win and lose cases, but it is the manner in which the decisions are reached that is most telling.

By nexes of discourses, I mean the coming together or convergence of, for example, religion, law, medicine, and social work. In the analysis of *B.H.,* law offers a beginning vantage point precisely because legal decisions are a storehouse of written (although not always) information that contributes to the discursive construction of "the facts" and "the truth" from which deconstruction can begin. However, the legal representation is only one version of "the facts," and it must be considered in the wider regulatory context that includes a multiplicity of experts and authorities. There are three important points here: first, the "facts" are discursively constructed depending upon the vantage point. For example, the attending physician will recount the story differently than will the religious citizen. Second, there are discursive intersections – places where versions coalesce to produce an ostensibly seamless story. And third, there is no ultimate truth or real version of the facts that it is possible to recover. What is most interesting for our purposes is the way in which various bits of information are discursively produced to arrive at a version of the facts. Gaps in the story are revealed by attending to tensions within and between discourses and to the resistances to the process of fact production. In short, both discursive

production and resistance are important parts of a consideration of religious freedom and the boundaries around it.[3]

Despite its use of case law as a site for analysis, *Defining Harm* is not a legal analysis. *Legal* analyses remain within the rules of the game. *Critical sociolegal* analysis attempts to identify extra-legal links, or, perhaps more accurately, to put law in context. Such analyses do not (nor should they) play by the rules of the legal game or within the tautological boundaries of legal discourse. This is not to say that the rules and boundaries don't shift, but that there is a particular logic to legal analysis that works to exclude other analytical possibilities. In part, playing outside the rules is an aspect of the decentring of law. It is partly in keeping with this strategy that I have chosen the series of decisions that I refer to throughout the book as the *B.H.* case. A legal analysis might suggest that the focus should be on a Supreme Court or Court of Appeal decision that would be a better representation of precedent. However, my concern is not with precedent but with power. Lower court decisions offer interesting insight into the complexities of power relations as they play out at the intersection of discourses.

Power relations become an important site of exploration in this context. More specifically, the articulation and definition of harm, whether actual or risked, is a central focus of those relations, both inside and outside the law, and in the space between. As Robert Orsi (2003, 172) argues, "religion is one of the more effective media by which social power is realized in bodies, just as religion shapes, orients and limits the imagination." The mediation of power through religion employs its own discursive framework that shapes the normative construction of the religious believer as engaging in "real" religious practices. Whether these take the form of religious orthodoxy accusing the religious liberal of a lack of commitment or a fluid hegemonic impetus that sees a minority characterized as a "cult," religious discourse is full of tension, resistance, and at best a tenuous unity. In this context, religious symbols come to act as signifiers of membership, and they reproduce the constructive markers of difference. This is so both for the hegemonic voices of religion, symbolized by the Christian cross, as well as for those on the margins, as symbolized, for example, by the hijab or the kirpan.[4]

Power relations transcend discursive boundaries, and so the construction of religion by religion is only one component of a genealogical picture of religious freedom. Power relations are entangled in a broader web of social meanings that are also in flux. It is for this reason that we must attend to the social spaces in which those relations occur. Fear, including a renewed fear of "the other," is part of that space. The threat of terrorism is a specific manifestation of the fear of "the other," and though terrorism exists as a real threat, it in part plays on fears that the social fabric of the nation is being dramatically altered by "minorities," a broad category of otherness

that shifts through the playing out of power relations. These must be situated in a complex social web that recognizes that, at the intersection of the culture of fear and its attendant moral panics, what is at stake is morality, nationhood, and the loss of hegemonies. Religion is a key player in this intersection, and here the residue of Christian hegemony is particularly insidious, in part because of the pervasiveness of the notion that we live in a secular society.

Three clarifications are necessary at this point. First, the argument here is about social context, not social causes. Fear of terrorism does not *cause* the shaping of the boundaries of religious freedom. It is one part of the social landscape. Second, Christian hegemony is not conceptualized here as a causal force. Moreover, I use this concept in a fluid and nuanced manner that departs somewhat from its more traditional Marxist-rooted definition, a position I elaborate on more fully in Chapter 2. There is ample evidence of struggle around definitions of religion that render a "hard" image of hegemony of limited use in this context. The patterns of power relations are, however, sufficient to support a "soft," or more nuanced, concept of Christian hegemony. Further, although conceptually somewhat distinct, the acknowledgment of at least a quasi-establishment of mainstream Christian religion by scholars as diverse as M.H. Ogilvie (1990) and Mariana Valverde (2006) lends support to the argument that there is a need to consider carefully the concept of a Christian hegemony in the process of sorting through the interpretation of religious freedom in Canada. To be sure, the boundaries are constantly under negotiation, and ultimately hegemony may prove to be a minor conceptual tool in the analysis of religious freedom. Third, the notion of sedimentation plays an important role in the present discussion. It is an attempt to recognize structural influences without being dominated by them. This follows James Beckford's (2003) approach to the study of religion generally and the mid-range concept of social constructionism, which he describes as being between the radical and modest positions. Sedimentation acknowledges patterns of power relations without reifying their existence. In other words, the idea of sedimentation leaves open the possibility of changes in such patterns. In part, such changes occur through resistance.

Bethany Hughes' resistance to medical treatment in its prescribed form in the spring of 2002 must be considered in this broader network of power relations. As we will see, her beliefs and her resistance to treatment were transmuted by the courts into a wish to die, which taps into a heightened fear of those who would die for a cause, particularly a religious cause. Religious "extremism," the fear of the other, a pervasive "will to health," and a pervasive fear of death in our culture[5] are all important considerations in understanding the *B.H.* case specifically and religious freedom generally. Bethany's resistance triggers a moral panic button related to "respect for

life" and the perceived lack thereof that has accompanied discussions of genetic modification, cloning, and so on. Fear is translated into specific moral panics regarding the potential erosion of the social fabric of the nation. Frequently, religious minorities inadvertently press these panic buttons, especially when their beliefs and activities threaten a Christian hegemony that is itself in flux and under revision.

At first blush, this link between fear and panic and the prescription of the boundaries of religious freedom might seem to be a bit tenuous. Isn't it, after all, primarily Muslims, particularly fundamentalist Muslims, who are targeted by the politics of fear when it comes to religious freedom? My argument is not that legal regulation of religious minorities has been *caused* by fear of religious "extremism" and terrorist acts. Rather, it needs to be *understood* in this context. The legislative responses to the events of 11 September 2001, for instance, are only one specific example of the ways in which religious minorities are legally regulated.[6] Fear of religious "extremism" or ideology is not new, nor is the legal regulation of religious groups. Moreover, the production of fear must be understood as an ongoing process of power relations in which there is a tension between the recognition and protection of religious freedom on the one hand and a fear of the religious other and boundary setting on the other.

Contextualizing a discussion of religious freedom in the culture of fear and moral panics might at first glance seem like an odd choice. However, they set the tone for the calculation of risk, in terms of those beliefs and activities that are identified as risky – to arrive at measures of harm and to posit solutions for harm reduction and risk management. Fear and moral panics are productive in that they engender strategies of response. They contribute to the pervasiveness of the process of defining, measuring, and constructing risk of harm as knowledge, and they rely on the use of the "expert" to assist and guide those processes.

Fear and risk are intimately related. The diversity of contexts in which risk of harm has become an important player in the definition of knowledge is illustrated by its use in debates around, for example, the Kyoto Accord, in which opposing camps tried to instill fear by "outrisking" each other, one side through horror stories about the impending doom for the environment, the other about impending doom for the economy. Both these assessments of harm are based in fear and emotional blackmail, employing a variety of versions of positivistic science as a handmaid to fear mongers and risk producers, and relying on a North American culture that has embraced both risk and fear as central motifs.

Risk and fear are worked up, facilitated, and invoked on a daily basis, in a multitude of contexts. Risk of harm presents through the foods we eat, genetic modification, environmental toxins, the cloning of human beings, the risk of disease (to children from strangers and family, to women from

partners and strangers), and now, from the unknown terrorist who lives on the other side of the world, in our country, or next door. Risk assessment and the targeting of risky and at-risk populations are racialized, class-connected, and gendered. Minimizing risk of harm and harm reduction are the bases upon which the public is coaxed (and threatened) to accept the potential presence of the US (and Canadian) military in foreign countries, as well as the passage of anti-terrorist laws that subject citizens to increased surveillance and the creation of information files to be stored for use in future assessment of risk.

Fear and risk play off each other and invoke a particular kind of reactionary culture that reinforces fear and perceptions of risk. These in turn become embedded in notions of justice, played out in law through the use of tests for risk of harm, and aided by the expert who can help sift through the mass of information to present the "real" risks involved. The expert is a physician, a social worker, a scholar of religion, an actuary, a forensic analyst. Positivist measures and language are invoked to construct knowledge of risk of harm as an authoritative statement of what should be feared and to what degree.

In this book, I examine the culture of fear and its more specific application, the risk of harm in the context of religious freedom. Within this culture of fear, risk assessment has become a way to placate, to render the out-of-control in control, to offer security. In this social climate, fear of the other is pervasive, especially the religious other (which often combines with the immigrant other, the Native American other, and the sexual other). An extensive genealogy is necessary to illuminate the moment that poses, for example, the "legitimate" science of reproductive technology against the cloning claims of the Raelians, or the desire of a young person to join the armed forces against the desire of a young woman to refuse a blood transfusion, or a denomination's demand for a 10 percent tithe against a "cult" that, because it pays its church leaders, incurs criminal charges for fraud. Although the measure of religious freedom is performed on the stage of risk of harm and the backdrop of fear, there are multiple discursive intersections that form part of a narrative of religious freedom.

In a cultural climate in which security concerns have pushed a panic button, risk of harm has become an important tool in the abrogation of rights, particularly as religion plays a role in the identification of "risky" groups. Increasingly, we see both the language of risk entering rights discourse and limits on freedom that play on risk assessment. I examine the variety of possibilities for risk of harm as a discursive tool in legal terrain involving rights and freedoms. The culture of fear is reinvented and reimagined through law in the invocation of the risk of harm test. In assessing limits on human rights such as religious freedom, the courts have turned to measures of risk and the likelihood of harm to determine the boundaries

of rights. The idea that risk can be measured, assessed, controlled for, and minimized has entered legal discourse with a vengeance, so much so that the determination of what constitutes a reasonable limitation of rights and freedoms "in a free and democratic society" increasingly relies on actuaries of fear in multiple contexts.

The culture of fear and moral panics is an area of scholarship that has been the focus of a great deal of intellectual energy in the past few years. Viewed from a constructionist perspective and a functionalist paradigm, the discussion is often cast in a somewhat monolithic manner as one of social cohesion/social order: "Whether moral panics touch down around talk shows, gangsta rap, or cartoon characters, their goal is to disarticulate 'the people' from 'the popular' in order to re-establish the moral authority of the middle-class moral order and its version of 'America,' identifying its manners and mores as the sine qua non of civil society and democratic life" (Tavener 2000, 65). Stanley Cohen (1972, 28) argued that moral panics served to reinforce the status quo or social stability. In moral panics, as he explained them, "a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests." Cohen's use of the concept of moral panic, which follows the Durkheimian tradition, speaks to the notion of hegemony and its preservation. There is a certain currency to this approach in that it identifies hegemonic forces, or places of power sedimentation. However, such a conceptualization offers a somewhat unidimensional picture of moral panic and fear, and a singularly hierarchical focus on power, when it addresses power at all, that needs to be replaced with a more dynamic sense of time, space, and power. The notion of a moral panic as it is employed here follows the conflict tradition that does not posit such panics as useful for society, but rather emphasizes the smaller group and the power relations that form part of its struggle (see Jenkins 1992; Hier 2002).[7] The circuitous nature of power has been described by Michel Foucault as a net. Although not without its critics, this understanding of power forces both a genealogical approach with attention to shifts in power relations, and the erosion and rebuilding of layers of sediment. It also encourages attention to the resistance that accompanies the exercise of power. The courts are a meeting place of discursive energies that bring power sedimentation and resistances into view.

The law offers us a particularly interesting place to begin this exploration, as it is law's privileged status in relation to truth that renders it a critical site for examination. Law holds itself out as a producer of truth, weighing and assessing evidence to reach a reasoned, objective conclusion, while at the same time encoding fear and moral panics. Law taps into a central feature of governmentality wherein the centralized sovereign is replaced by a system of self-governance, or governance from a distance. Truth production plays an important role in providing beacons for control of the self.

"Governmentality involves a power which operates through truth" (Pavlich 2001, 151).[8] Moreover, as Carol Smart (1989) argues, law positions itself at the apex of truth-producing discourses. Further, it employs the services of other discourses such as those of the "psy" professions (psychiatry and psychology, specifically) to solidify that position. Power relations in law are productive, however, not only from a "truth" perspective, but also in that law produces accounts of facts through case reports and court proceedings that open up windows for their viewing. Such a vantage point is not always available to the researcher in other discourses.

Carol Smart offers some insights about legal discourse that are key to understanding law's place in the definition of religious freedom. Although she has been criticized for giving over too much power to law, her explication of legal discourse remains a convincing account of its imperviousness to voices outside the boundaries of what law itself establishes as normal. Smart (1989, 59) describes law as a hermetically sealed, self-perpetuating system.[9] She encourages resistance to law by "de-centring it," a proposition that remains largely unexplained in her work. Implicit in the notion of decentring is the possibility of resistance and an affirmation of agency. That Smart envisions resistance as being possible deflects criticisms that her analysis of law is too privileging to law. Decentring, then, involves strategies that employ extra-legal techniques. These strategies are built up locally, rather than globally.

Smart (1989, 4) argues that law "disqualifies alternative accounts of social reality." It does not, however, disqualify *all* accounts of social reality. Rather, law privileges some, discounts others, and excludes others with its own logic. Thus, in *B.H.,* we see the courts embracing medical prescriptions for blood transfusions while simultaneously discounting the efficacy of alternative treatment strategies. The courts ignore three medical experts who affirm that Bethany is a mature minor, choosing the opinions instead of her father and a social worker. One of Smart's contributions is the identification of the silencing power of law, as well as that of other discursive frameworks. Integral to this insight are the truth-producing claims of law. Legal method presents as an objective process by which the truth is found.[10] In the process, other voices or ways of seeing are silenced or minimized or sometimes appropriated. Law is able to render some things "unsayable" – as being outside the boundaries of what is possible. So too is medicine able to produce the silencing effect. But, as Smart (1989, 4) points out, it is important to qualify the notion of law, "since using this concept in the singular tends to imply that law is a body of knowledge/rules which is unified in intent, theory and practice." Key to understanding the power of law, and of any discursive framework, is its amorphous state. In particular, competing claims within discourses open spaces for resistance. Smart argues for resistance primarily through decentring, which is an important

strategy, but one that is not always foreseeable, or possible. Spaces often open in unexpected ways.

This point is well illustrated by debates about same-sex marriage within the gay and lesbian community. This debate demonstrates the multiple shapes resistance can take. For those who advocate the extension of marriage to same-sex couples, resistance is formulated within the context of existing discursive frameworks. The positive impact of this is that the boundaries of normal are stretched. The negative result is that the bringing of same-sex couples within the purview of that framework arguably places them within the grasp of state mechanisms of governance. A decentred approach would operate outside the bounds of law and would work to meet the needs of same-sex couples without resort to the marriage framework. However, pushing the boundaries of marriage may open an important space of resistance by challenging, and possibly shattering, the heteronormative impetus of the idea of marriage, and perhaps more importantly, family. In short, writing at this moment, I cannot possibly predict all the outcomes of resistance within the discursive framework. This recognition is critical to thinking about governance, resistance, and the power of law. Law has the ability to "impose its definition of events on everyday life" (Smart 1989, 4), but that ability is both relational and limited. Law's unity is an "appearance" that can be challenged, resisted, and turned back on itself.

One other aspect of Smart's work is important for the exploration of the tensions between religious beliefs and scientific knowledge. She (1989, 11) says:

> Law's claim to truth is not manifested so much in its practice, however, but rather in the ideal of law. In this sense it does not matter that practitioners may fall short of the ideal. If we take the analogy of science, the claim to scientificity is a claim to exercise power, it does not matter that experiments do not work or that medicine cannot find a cure for all ills. The point is that we accord so much status to scientific work that its truth outweighs other truths, indeed it denies the possibility of others.

In the case of religious beliefs, especially when they are minority beliefs, law and science collude to exclude the possibility that spiritual beliefs should be entertained as a prescriptive or explanatory system. Prayer and God are given room only insofar as they do not challenge or conflict with scientific discourse. This might seem to be an odd statement, given that the Charter explicitly notes the "supremacy of God" in its preamble, but in the battle of discourses science reigns. Religion weighs most heavily when it is within traditional Christian form. The notion that we live in a secular society is sometimes reified by law with very little examination of what, exactly, that statement means.

Society is not so neatly divided into secular and sacred realms; nor is law. The rough edges of this divide allow in the "supremacy of God" and the use of the bible to swear oaths. There is a sense in which we need to cover all the bases – in the likely chance that there is no afterlife, we need to protect and prolong this life. Science and law collude to establish the techniques by which this is to be achieved. God acts as an insurance policy, but courts have a difficult time understanding people who use religion as a prescriptive and explanatory structure for their day-to-day lives.

The preamble of the *Charter of Rights and Freedoms* illustrates the discursive tension within law: "Canada is founded upon principles that recognize the supremacy of God and the rule of law."[11] The preamble brings faith and positivism both side by side and head-to-head, as God represents faith, and the rule of law implies an objective working out of legal rules in some sort of orderly fashion. God as a legal marker plays a double role – the reification of mainstream Christianity as a dominant motif in Canadian society, as well as the possibility of introducing arguments based in faith rather than on "reason."[12] The rule of law is neither objective nor value neutral, and the application of law is not achieved uniformly (Bunting 1992). The meeting of faith and reason in the preamble implies an uneasy tension in law that undermines the appearance of unity while at the same time reinforcing the point that part of law's power is its seemingly unified presence as "the law."[13]

If law sets itself outside the social order, then we must remind law of its place. Although law may act as a sorting mechanism for discursive claims, it does not act in isolation from social or cultural processes. Moreover, law and legal process, or legal method, are part of the diffused process of governance. Law relies on religious discourse to sort through the legitimacy of claims to religious freedom; medicine, psychology, and social work provide expertise and intertwine their own discursive sediment with that of law. Law acts, in a sense, as a switching station in discursive intersections. It is thus intimately and profoundly tied up in the mesh of power relations that are, to paraphrase Foucault, everywhere.

Before I introduce the ideas that are explored in Chapter 2, there is one last issue that bears addressing. Both medical and legal discourse situate the issues involved in *B.H.* within the context of Bethany Hughes' age, specifically at what point and under what circumstances a person may consent to or refuse medical treatment. The case is arguably about age if we accept a superficial reading of the issues. However, both law and medicine leave open the issue of consent. In other words, it is possible for a so-called minor to be medically and/or legally constructed as having the capacity to consent. The process by which that happens can reveal a great deal about issues other than consent, as is the case in *B.H.* Later in this book, I employ the case of Scott Starson (who was mentally ill and sought to refuse treatment for his condition) to argue that capacity is manufactured under complex

circumstances. Through the use of his case, which is decidedly not about age, I illustrate the socially and legally constructed nature of the concept of consent. By reducing *B.H.* to an issue of age, we would miss an important opportunity to explore the contours of these complex circumstances. Suspicion about marginal (extreme) religions, beliefs concerning the definition of religion, and concepts regarding the boundaries of freedom are all exposed in a manner that might not prevail in other cases.

In the following pages, I will explore some of the themes set out above as the context in which religious freedom is delineated using the specific example of *B.H.* In Chapter 2, I outline the process by which the case worked its way through the courts. The specific history of the Jehovah's Witnesses is relevant in that it situates Bethany Hughes, her parents, and her faith community in a particular historical moment and cultural milieu. Jehovah's Witnesses are in a unique position on the margins of mainstream religion in that though they are Christian, their distinct beliefs on military service, proselytization, and blood transfusions have affected their ability to bring themselves within the fold of mainstream Christianity and hence within present-day Charter protection. So too, though, have *they* had an impact on the Canadian legal system through litigation. The chapter then details the notion of governance, which in this instance involves multiple discourses and a variety of "experts" who claimed territory over Bethany Hughes' body, mind, and soul. I examine some of the ways in which Bethany Hughes was a single case of an individual body to be governed, as well as a signifier of a broader population that has been constructed as problematic. Jehovah's Witnesses have a long history of litigation in Canada and are an interesting case study in that they represent the messy boundaries of minority/majority faith. They remain on the margins of normal. They are not the only group in this nebulous position, and it is for this reason that the chapter devotes some space to a discussion of the constitution and limitations of categories that rely on the bifurcated schema of minority/majority religious group.

Two important issues arise out of this discussion: first, inscribed in this dividing point are power relations. It is therefore important to consider the ways in which power is conceptualized generally, and specifically in cases of religious freedom. Second, the bifurcation of religious groups into majority and minority relies not simply on a numeric calculation of religious participation, but more accurately on the notion of a religious hegemony. This too is considered in some detail, as the idea of a religious hegemony links to competing conceptualizations of power and of social life, and also to other discursive practices such as the will to life that dominates medical discourse.

Finally, the discursive intersections explored in the Bethany Hughes case do not arise out of a vacuum: rather, there is an interesting history of religious beliefs and practices and their intertwining with medicine, law, social

work, and the state. The faith-healing cases of the late nineteenth century offer an intriguing historical point of comparison. Similar thematic strands emerge, including a nascent will to health, a struggle between positivistic medicine and a holistic approach to the body, legal discourse as arbiter, and the construction of the religious adherent as engaging in excessive behaviour and as lacking the ability to consent. The brief examination of these continuities is not intended to suggest a linear development but rather to reveal the persistence of some patterns of power relations and resistances.

In Chapter 3, the legal rules of the game are set out, including the delineation of religious freedom in the *Charter of Rights and Freedoms*. The legal rules include not only substantive law, but also legal method and the ways in which law uses its own rules to establish relevance and to set the construct for the framing of the issues. This chapter examines the notion of a religious hegemony in greater detail and explores the paradox of the Charter, which both declares the supremacy of God and protects religious freedom. A thematic thread of this chapter, that of the hidden limits on freedom that invoke notions of excess and consent, comes from the work of Nikolas Rose, for whom freedom and its boundaries are central themes. Religious minorities are especially vulnerable to being characterized as engaging in behaviour that is either excessive or that diminishes agency and the ability of an individual to consent. Both excess and consent are central issues in the process of risk identification; the former is the focus of this chapter. In particular, attention is paid to the ways in which notions of moderation and excess play out in the context of religious freedom. The discourse invokes multiple scripts: the hysterical, irrational woman; the irresponsible or helpless child; and the fanatical religious group, all of which are brought together to construct particular behaviours as excessive and as being in need of limits and control.

The identification of excess becomes interfaced with the identification of risk of harm, which then acts as a mechanism for limiting religious freedom. Risk of harm is itself a fluid concept, and, as Mariana Valverde (1999, 184) argues, it acts as a legal joker card, to be played by anyone at the legal gaming table. As the Supreme Court of Canada increasingly employs risk/harm language in its rights discourse, it is essential to consider the power relations around the use of the harm joker card.[14] Harm assessments are an important part of *B.H.* at a number of points. The infringement of Bethany's religious beliefs was weighed against her need for treatment, and risks of modified or no treatment were found to supersede the protection of her beliefs. The manner in which this calculation was made lends insight into the ways in which risk of harm transmutes from case to case.

Risk, though, is only one thread of this genealogy. Uncertainty, or the unknowable, demands a response separate from that of the positivist measures of harm. When confronted with uncertainty, courts invoke a technique

of governance that poses a unique challenge to efforts to resist: the discursive construct of common sense. Assertions such as "it's common sense that" or "everybody knows that" are difficult to counter. Claims about risk of harm can be challenged by alternative data, but common sense is more resistant to counterclaims. Using Clifford Geertz's (1975) classic essay on common sense as a way to work through claims making in reference to "common sense," I examine assumptions about both the nature of justice and the *B.H.* case that enter under the auspices of common sense, or "what we all know." Moreover, I argue that ethnographies of alternative systems of meaning pose other possibilities for the construction of common sense.

In this chapter, I explore the historical aspects of religious excess to draw out some intriguing dimensions of the story of Bethany Hughes. The Christian celebration of Christ's Passion – a narrative in celebration of excess – enables us to gain another view of the context of fear of the religious other. The history of mainstream Christianity is embedded with examples of excess that stand as models for the ultimate expression of faith (the Crusades also serve as a reminder of faith-based excess). There is also a tradition within Christianity that supports the good Christian as the moderate Christian who goes about day-to-day life with careful consideration for self and for others. These twin traditions in Christianity enable the condemnation of excessive conduct while insisting on moderate behaviour as good citizenship. This brief exploration illuminates the shifting boundaries of the "normal" and the "good," and the contested nature of excess. The point of this exploration is not to target Christianity as the singular example of religiously inspired excess, but to remind us of the socially constructed nature of the definitions of excess and moderation.

Chapter 4 takes up the theme of consent in greater detail. It is this twin to excess that acts as a key limiting mechanism or disciplinary practice in the delineation of the boundaries of freedom. Consent in law is articulated as agency in other contexts. Still, in the context of religious freedom, and especially religious minorities, issues of agency frequently translate as implications or outright assertions that the group or adherent in question engages in practices that limit believers' agency. Thus, consent is vitiated and agency reduced or eliminated. Of course, social science has long been preoccupied with the notion of agency: Karl Marx and Friedrich Engels (1967) emphasized its reduction through the structural imperatives of capitalism, Max Weber (1963) attempted a reconciliation, more recently, Anthony Giddens (1991, 1996) has elaborated structuration theory, and feminist theorists have grappled with agency as situated in networks of social relations (see West 1988, 2003; Johnson 2002).

Postmodernism has been accused of eliminating the subject, and consequently the need for any theorizing of agency, from social analysis (see, for example, Archer 2000). Indeed, Rose states explicitly in his work that a theory

of agency is unnecessary. In contrast, I argue that there is a need to theorize agency in order to challenge discursive construction and assumptions about who can act and when. Given that legal processes and law are rife with assumptions about the human agent, it would be remiss to consider religious freedom without a discussion of agency. The articulation of agentic possibility in religious freedom is underwritten with assumptions about the boundaries of normal behaviour, decisions that are risky, and the parameters within which choice is possible. More specifically, the notion that religious adherents are sometimes "brainwashed" or unduly influenced pervades cases in which the boundaries of religious freedom are considered. Playing into this is the valorization of the individual and the minimalization of the collective or relational aspects of life.

Within social scientific research on religious minorities, the issue of how people come to their spiritual beliefs has been highly controversial. The result has been a split between two groups of scholars, one of which embraces the brainwashing notion and uses the language of cults; the other, employing the language of new religious movements, upholds the idea that adherents are socialized, not brainwashed. Although this battle has taken place primarily over groups that are relatively new to the religious scene, the assumptions involved permeate the discourse.[15] The residual effect of the battle over brainwashing has been to instill in judges and popular perception the commonly held belief that religious groups, especially minority or marginalized groups, brainwash their adherents. The science on brainwashing that spoke to harm was one way to sidestep a head-to-head confrontation on the grounds of morality.[16] Marginalized religious groups are especially susceptible to such constructions of their beliefs. Although explicit references to the use of brainwashing as a mechanism for social control have decreased, their effects remain through a diminished portrayal of agency for those involved in marginalized religious groups. My use of the term "brainwashing" is in no way intended to reify it, or to support a position that would lend it validity. Rather, its use is intended to alert the reader to the undercurrents that are at play in the description of religious groups who are outside the mainstream. Courts remain suspicious of strong religious beliefs that fall on the margins of majority religion, whether they are Christian, Wiccan, First Nations, or Muslim, for example. One of the ways in which courts deal with this suspicion is to construct the believer as somehow being without, or under impaired, agency. I have deliberately chosen the word "brainwashing" in order to name this construction of the religious believer for what it is. The debates over this terminology, as well as the very existence of such a phenomenon, are discussed more fully in Chapter 4. As James Richardson points out, the term has been largely discredited in the legal arena, and for good reason (Richardson 1991, 1996; Ginsburg and

Richardson 1998; Richardson and Introvigne 2001; Côté and Richardson 2001). However, the concept is insidious, and remains in use even if the term has largely disappeared in legal cases in recent years.

Implicit in power relations is resistance. In the game of risk assessment, individuals/groups deploy their own calculations of risk and harm. So, for example, medical diagnoses and prescriptions are countered with other expert opinions about prognosis and alternative treatment possibilities. Resistance stretches boundaries and shifts limits. It is not linear, but rather local and specific, yet, at least in law, connected to other resistances. Bethany Hughes resists in law in part by invoking similar cases in which issues of law and fact coincide with hers. She resists physically when the transfusions are administered. She presents alternative medical evidence. She seeks out other treatment possibilities. The hegemonies of discourses are met with counter-hegemonies and local strategies that play on those spaces where resistance is possible.

However, proofs such as medical evidence and other sciences marshalled as resistance in the game of risk are the wrong game pieces when the play shifts to one in which the players attempt to establish their moral superiority. Thus, in *B.H.,* scientific counterproof (that there are other treatment possibilities and that, at best, the proposed treatment is successful only half of the time) is ignored or downplayed, and the court, by characterizing the believer as incapacitated, enters the terrain of brainwashing (by emphasizing the "undue influence" of Bethany's mother and faith community). Similarly, in a Supreme Court of Canada decision involving an infant with Jehovah's Witness parents, some of the Supreme Court justices conclude that parents who deny their children blood transfusions are not worthy of being considered for rights.[17] The basis for resistance is the very rights terrain that the participants are constructed as being unworthy to enter. James Tully (1995) argues that rights regimes are often exclusionary in their terms, resulting in a battle that is destined to be lost before it has even begun. Paradoxically, for some groups of people, rights are unrepresentative of their worldview, and yet the only possible aid for its preservation is an engagement with a framework that, from the outset, excludes them. Even basic legal protections seem to exclude some groups of people. This critique has been especially well developed by those who reflect on First Nations peoples and human rights (see Chartrand 2001; Martin 2002; Razack 2002; Samson 2001).

The concluding chapter returns to some of the broader issues that arise out of the exploration of the intersection of risk, harm, and the limits of religious freedom. The manifestation of fear around the religious other has profound implications for the boundaries within which religious freedom may be exercised. Techniques of governance of multiple discourses converge, reinscribing the will to health, the good citizen, the normal family,

and the religious moderate on the body and soul of the religious other, who both complies and resists. Power relations are enacted at the local level in specific contexts but also connect to hegemonic and counter-hegemonic sedimentations.

The stakes in the issue of religious freedom debates are not just about spiritual beliefs and practices. In the United States, religion has been cast as an essential component of the good society (Bellah et al. 1991, 1985) with religion, in this view, "meaning a denominationally neutral version of Christianity recast as an ethical system" (Orsi 2003). Religion becomes a defining characteristic of citizenship. In Canada, with less fanfare but equal commitment, we have adopted an approach that assumes the existence of a Christian nation. This is admittedly overlaid with a constitutional mandate regarding both religious freedom and multiculturalism, which means that there is space for redefinition of the religious mainstream. Thus, society and Christianity become intertwined in complex ways, perhaps most profoundly through the links between "the Christian nation" and democracy.[18] In the following pages, some of the complexity of these connections will be explored.