

Making room for faith  
in  
English dispute resolution proceedings

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as a thesis for the degree of  
Doctor of Philosophy by Research in Theology  
in June 2011

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## Abstract

The case of Baby MB (*An NHS Trust v MB* (A child represented by the CAFCASS as Guardian ad Litem) [2006] EWHC 507 (Fam) [2006] 2FLR 319 reveals some of the difficulties faced by persons of faith when they are involved in legal proceedings in the English law courts. It raises the question of whether faith is relevant when decisions are taken in court, and if so how it is relevant. What high profile healthcare cases like this also illustrate is that there are legal cases that involve not just legal issues, but also ethical and faith issues. However, when these cases come to court they are framed as though they are primarily legal disputes that require a purely legal solution. While judges address the legal issues, they are reluctant to address the ethical and faith issues, and if they do address the ethical and faith issues, they address them in strictly legal terms. These difficulties are not restricted to one faith but encompass all faiths, and they are not restricted to litigants but also include representatives of Christian churches who make submissions to court. Although the difficulties are often revealed in healthcare cases they are not restricted to these cases but include other types of legal case and extend to employment tribunals. These cases raise important questions about how courts and tribunals deal with persons of faith, how we understand conflict and resolve disputes, the nature and aim of law, the relationship between law, ethics and religion, the role of judges, and how we perceive and deal procedurally with cases that involve issues of faith. This thesis will explore these issues, and discuss whether room can be made for faith in English Dispute Resolution proceedings, and if so, how this might be accomplished.

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## Introduction

The case of Baby MB<sup>1</sup> reveals some of the difficulties faced by persons of faith when they are involved in legal proceedings in the English law courts. It raises the question of whether faith is relevant when decisions are taken in court, and if so how it is relevant. What high profile healthcare cases like this also illustrate is that there are legal cases that involve ethical and faith issues. However, when the cases come to court they are framed as though they are primarily legal disputes that require a purely legal solution. While judges address the legal issues, they are reluctant to address the ethical and faith issues, and if they do address the ethical and faith issues, they address them in strictly legal terms. These difficulties are not restricted to persons of one faith, but instead encompass all faiths. The difficulties are also not restricted to litigants but extend to representatives of Christian churches who make submissions to court. Although the difficulties are often revealed in high profile healthcare cases they also extend to many other types of legal case and to employment tribunals. This raises the question, how have we arrived at a place where the English legal system seems to be so inhospitable to persons of faith, and are there any solutions to this problem? I suggest three main reasons: first, because conflict has come to be understood in narrow legal terms and the legal process tends to proceed adversarially and eschews mediation; second, because the reigning paradigm of law in Britain emerged at the Enlightenment and self consciously sought to distance itself from religious or metaphysical questions; thirdly, and relatedly, because of the privatisation of belief. Together these developments have provided the environment where issues of faith have come to be regarded as ‘irrelevant’ when disputes are heard in the law courts.

I will argue that the influence of these assumptions seriously distorts legal judgements where faith commitment plays a part. If judges dismiss issues of faith as “irrelevant”, or deal with them in only legal terms, then persons of faith do not receive “substantive” justice.<sup>2</sup> This is a serious issue in a multicultural society where disputes arise between persons of faith and those who do not share their faith or values. In addressing such disputes a normative approach is needed that views conflict and the resolution of disputes in a way that is culturally sensitive, that makes room for faith, and seeks a broader range of solutions, either instead of, or in addition to the legal interests. This could be achieved in two ways. The first is outside of the formal legal system through the process of mediation. The second is through changes to the legal system and the

legal profession. I explore the first in the fourth chapter. The second I address in chapters two, five and six.

Overall I will argue that mediation could be employed to address some disputes involving issues of faith. Mediation, put simply, is a process where an impartial third party assists the parties in dispute to resolve their differences. As it is an informal process that does not involve legal rules relating to inadmissibility of evidence, depending on the model of mediation employed, it would provide room for the perspective and faith of a person not only to be heard and respected, but also taken into account in the decision-making process. It would also provide room for a representative of a faith community to either act as a spokesperson for a person of faith, and/or as a co-mediator. A further advantage of mediation for Christians is that it has its roots in biblical teaching and it provides a way of settling disputes for Christians who do not want to go to law. However, I concede that in some cases mediation may not be available, or may not succeed, or may not be appropriate, and that these cases will go to court.

Making room for the perspective and faith of individual litigants through changes to the legal system and the legal profession is more problematic because there are a number of formidable obstacles to faith being taken into account. One way in which room could be made is through judicial reasoning. Maleiha Malik has devised an ‘interpretive’ model of law.<sup>3</sup> This is a hermeneutical approach to judicial reasoning, which, if implemented, would enable a judge to take a litigant’s perspective and faith into account, on the grounds that it reveals the inner motivation and culpability of litigants. While I agree that if room is to be made for faith changes will need to be made to judicial reasoning, I will argue that this is only one part of a much bigger picture because there would need to be other changes made to the legal system. The first relates to how judges understand conflict and address disputes. The re-emergence of mediation in the 1960’s in America and the UK has illustrated that conflict can be understood in ways other than in narrow legal terms. The challenge is to find ways in which the lessons learned from mediation could be applied in legal cases. The second relates to how judges understand the nature of law and the relationship between law, ethics and religion. The debates between proponents of legal positivism, natural law, and legal pluralism illustrate that the nature of law and its relationship with ethics and religion can be understood in a variety of ways. The significance of the different approaches can be seen in judicial reasoning.

Judges who have been influenced by legal positivism understand law as separate from ethics/morals and religion, and they therefore treat ethics and religion as ‘irrelevant’ to their decisions and not justiciable. I will argue that in a multicultural society our understanding of the nature of law and its relationship to ethics and religion needs to change to become more sensitive to cultural diversity, and that the Hebrew Bible and the New Testament can make important contributions to this debate. The third change relates to the way in which legal cases are conducted. At present the approach to cases is adversarial, which has a tendency to produce ‘winners’ and ‘losers’. I will argue that procedurally we need to move away from an adversarial system to a system that deals with disputants in a more relational and dialogical manner. Again the Hebrew Bible and the New Testament can make important contributions to this debate. For example, in the Hebrew Bible there is the concept of ‘shalom’ which emphasises the importance of maintaining covenant relationships with God and within the faith community.<sup>4</sup> In the New Testament both the teaching of Jesus and the Apostle Paul emphasise the importance of maintaining loving relationships, and their teaching encourages Christians to settle their disputes through face-to-face dialogue, rather than go to court (Mt. 18: 15; 1Cor. 6: 1-6). The fourth area of change relates to the legal profession who need to adapt and become more culturally aware and sensitive to issues of faith. This would involve changes in matters such as, judicial reasoning, understanding the importance of faith in the lives of litigants, and being willing to work with representatives of faith communities to resolve disputes that involve faith.

I will argue that some medical doctors such as George Engel and Arthur Kleinman provide examples to those in the legal profession of the need for change, the extent of the changes needed, the time-scale of changes, and how the legal profession can become more culturally aware and sensitive to issues of faith. This is because Engel and Kleinman have journeyed from a place of not accommodating the perspective, culture and faith of a patient to a place where they are convinced of the need to do so. They have devised models that enable the perspective and faith of their patients to be taken into account in the doctor-patient relationship, and in decisions about a patient’s healthcare.<sup>5</sup> I will argue that these models could be adapted and applied by judges in order to facilitate understanding, and to enable the perspective and faith of litigants to be accommodated in legal cases. I will also argue that the Christian healthcare chaplain illustrates the role that representatives of faith communities could play in helping to

resolve disputes not only in hospital, but also in wider disputes through mediation and by assisting judges to resolve cases involving issues of faith.

The questions that are raised by the case of Baby MB and other legal cases that involve issues of faith sit within the context of much wider debates about the place and role of religion in the public sphere. These debates have arisen in response to a number of factors including: a) changes in religious observance - in parts of Western Europe church attendance has declined, whereas in other places in the world such as in South America there has been a resurgence of interest in religion; b) challenges posed by cultural and religious diversity in democratic societies such as America and the countries of Western Europe; c) events such as the Salman Rushdie affair; and d) the rise of religious extremism that has led to the killing of abortionists in America. The subject matter of the debates is wide-ranging and includes: discussions about the relationship of religion to modernity,<sup>6</sup> civil society,<sup>7</sup> healthcare,<sup>8</sup> law<sup>9</sup> and the state;<sup>10</sup> the parameters and restraint of religious freedoms such as the use of religious reasons in political decisions,<sup>11</sup> and religious language in public debates<sup>12</sup> and the wearing of religious dress, (Islamic headscarf and burkah) and religious symbols (the cross)<sup>13</sup> in public.

Two debates have a particular bearing on the subject matter of this thesis. The first concerns the relationship between religion and law in multicultural societies such as England. I will discuss in Chapters 1 and 2 the challenges that faith poses to English judges and to legal theory. The second debate is set within the context of the challenges that social pluralism poses to liberal democratic societies and concerns two related questions. First, is it appropriate to use religious reasons to justify political decisions? An example of this debate is John Rawls' *Political Liberalism*.<sup>14</sup> Second, is it appropriate to use religious language in the public sphere? An example of this debate is, Jürgen Habermas' *Religion in the Public Sphere*.<sup>15</sup> These questions have a bearing on whether religious beliefs should be granted weight in legal cases. Before I outline some of the issues involved in the debate about public discourse I want to touch on two underlying concerns and fears that are often revealed in the language with which these debates are conducted.

On the one hand, some are concerned that there are those who would seek to *impose* religious beliefs on a democratic society that is both religiously diverse and where some

hold no religious beliefs at all. In this case there is a fear that religion may play an inappropriate role, as it arguably did in the religious wars of the sixteenth and seventeenth centuries. This fear has been fuelled more recently by events such as the Salman Rushdie affair, the killing of abortionists in America and 9/11. On the other hand, others are concerned that there are those who would seek to marginalise or silence religious voices in the public sphere. In this case there is a fear of secular hegemony, rooted in secular ideology and the comments and arguments of anti-religious secularist. This fear has been fuelled by recent debates.

Secular ideology takes various forms. One form is the “secularization theory”, (the key idea of which can be traced to the Enlightenment) and is simply that ‘modernization necessarily leads to a decline in religion, both in society and in the minds of individuals.’<sup>16</sup> The sociologist Peter Berger has argued that it is this idea and the assumption that we live in a secularized world that has proved to be false.

‘The world today, with some exceptions to which I will come presently, is as furiously religious as it ever was, and in some places more so than ever.’<sup>17</sup>

Berger does not doubt that modernization has had some secularizing effects but points to the complex relationship between religion and modernity.

‘To be sure, modernization has had some secularizing effects, more in some places than in others. But it has also provoked powerful movements of counter-secularization. Also, secularization on the societal level is not necessarily linked to secularization on the level of individual consciousness. Certain religious institutions have lost power and influence in many societies, but both old and new religious beliefs and practices have nevertheless continued in the lives of individuals, sometimes taking new institutional forms, and sometimes leading to great explosions of religious fervour. Conversely, religiously identified institutions can play social or political roles even when very few people believe or practice the religion that the institutions represent. To say the least, the relation between religion and modern entity is rather complicated.’<sup>18</sup>

Berger does concede, however, that there are two exceptions to this desecularization thesis. The first is Western Europe where with increasing modernization there has been an increase in the key indicators of secularization.<sup>19</sup> But he points out that although the facts are not disputed recent works in the sociology of religion in France, Britain and Scandinavia have questioned the term “secularization” as applied to these developments.

‘A body of data indicates strong survivals of religion, most of it generally Christian in nature, despite the widespread alienation from the organized churches. A shift in the institutional location of religion, then, rather than

secularization, would be a more accurate description of the European situation.<sup>20</sup>

Grace Davie has pointed to similar findings<sup>21</sup> and has illustrated how the data can be interpreted in different ways.<sup>22</sup> Davie has also argued that Western Europeans are unchurched populations rather than simply secular, and has coined the phrase “believing without belonging”.<sup>23</sup>

The second exception is what Berger refers to as, ‘an international subculture composed of people with Western-type higher education, especially in the humanities and social sciences, that is indeed secularized.’<sup>24</sup> It is this subculture that is the principal “carrier” of progressive, Enlightenment beliefs and values. Although the members of this subculture may be thin on the ground they are very influential as ‘they control the institutions that provide the “official” definitions of reality, notably the educational system, the media of mass communication, and the higher reaches of the legal system.’<sup>25</sup> If Berger is correct in his observations then this could potentially have important consequences for how participants who profess religious beliefs are viewed and dealt with in English legal cases. I will return to this in Chapter 1.

Another form of secular ideology is the “secular thesis” which is summarised by Bhikhu Parekh as follows:

‘The secular thesis can take several forms of which two are the most common. In its weaker version it separates state and religion and maintains that the state should not enforce, institutionalize or formally endorse a religion, be guided by religious considerations in its policies and treatment of citizens, and should in general retain an attitude of strict indifference to religion. In its stronger version it also separates politics and religion and maintains that political debate and deliberation should be conducted in terms of secular reasons alone. Although religion might matter a great deal to individuals, qua citizens they should rise above their religious beliefs and be guided by secular reasons alone, partly because political life is only concerned with secular matters and partly because secular reasons are the only ones they all share in common.’<sup>26</sup>

A number of assumptions about religion underlie the secular thesis.

‘Secularists ..... argue that religion and politics are wholly different activities, pertain to different areas of life, and should be kept separate. In their view, religion is a personal matter, politics a public and communal activity. Religion is concerned with other-worldly destiny of the human soul, politics with the affairs of this world. .... Since the two are different, religion has little of value to contribute to political life, and such contribution as it might make is outweighed by the havoc it can easily cause.’<sup>27</sup>

The assumptions undoubtedly have a grain of truth within them - nevertheless they are misleading, and have produced a distorted caricature. For example, Christianity has, from its inception, always been understood as both a personal and communal faith. Christians have a personal faith, but they also meet together in public acts of worship. Whilst Christians have, at certain times historically more than others, been concerned with the condition of the soul and focussed on a life after death, they have also put their faith into practice by caring for the sick and the poor. Indeed, the New Testament teaches that faith is a prelude to good works (Eph. 2: 9-10), and that faith must be combined with works (Js. 2: 14-26). Christians, often motivated by their faith, have contributed enormously to healthcare, science, education and other areas of social life, including politics, and they continue to do so.

The strong secular thesis that political debate should be conducted in secular terms includes arguments for neutral<sup>28</sup> or impartial<sup>29</sup> politics, or that religious argument just be supported by secular/public reasons.<sup>30</sup> Reasons given to support this thesis are that arguments from religious premises to political conclusions in religiously plural societies where citizens are deeply divided on issues are often rhetorically ineffective, can cause offence, and can imply disrespect to those who do not share those premises.<sup>31</sup> Further, such argument is imprudent, improper or both,<sup>32</sup> and religious reasons are inappropriate for public dialogue because they can produce political and religious divisiveness, and non-Christians may feel left out of debate and feel resentful.<sup>33</sup>

Parekh has argued that the strong secularist thesis runs into a number of difficulties. To begin with secular reasons are not politically and culturally neutral. They represent a particular worldview that those who hold a religious worldview do not accept.<sup>34</sup> Michael Perry has made a similar point and argues that 'the only truly neutral or impartial practice of political justification is one that lets everyone rely on her relevant conviction.'<sup>35</sup> Secondly, Parekh argues that to suggest that those who hold religious beliefs should be guided by secular reasons is to discriminate against them.

'Secular citizens are able to lead whole and integrated lives whereas religious citizens, who are required to bracket out their deepest beliefs, are subject to moral incoherence and self-alienation. This is not to say that they cannot for political purposes suspend their beliefs, but rather that the self-abstraction involved devalues much of what gives meaning to their lives, deprives them of a moral compass, and involves an invidious form of self-imposed censorship. Allowing them to be guided by their religious beliefs but banning them from using these to defend their views in public does not improve the situation. It introduces self-alienation at a different level by requiring them to speak in a

language different to the one in which they think.’<sup>36</sup>

I would argue that it also betrays a lack of understanding of the importance of faith for the believer. Stephen Carter, for example, has noted that religion is often treated as ‘a hobby, something done in privacy, something that mature, public-spirited adults do not use as the basis for politics.’<sup>37</sup> But, as Nicholas Wolterstorff has argued, this is not the case for many religious believers.

‘It belongs to the *religious convictions* of a good many religious people in our society *that they ought to base* their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do so. It is their conviction that they ought to strive for wholeness, integrity, integration, in their lives: that they ought to allow the Word of God, the teachings of the Torah, the command and example of Jesus, or whatever to shape their existence as a whole, including, then, their social and political existence. Their religion is not, for them about something other than their social and political existence; it is *also* about their social and political existence. Accordingly, to require of them that they not base their decisions and discussions concerning political issues on religion is to infringe, inequitably, on the free exercise of their religion.’<sup>38</sup>

Thirdly, Parekh argues that the thesis is impracticable, counterproductive and unwise.

‘It is impractical for there is no way of enforcing it. It is counterproductive as it is likely to alienate religiously minded citizens from the political system and create a crisis of legitimacy. It is unwise because it deprives political life of both the valuable insights religion offers and the moral energies it can mobilize for just and worthy causes.’<sup>39</sup>

Jeffrey Stout argues that it is respect, together with transparency and public accountability, that make it imperative that those who hold religious beliefs should be encouraged to speak out and state their reasons for political decisions.

‘If they are discouraged from speaking up in this way, we will remain ignorant of the real reasons that many of our fellow citizens have for reaching some of the ethical and political conclusions they do. We will also deprive them of the central democratic good of expressing themselves to the rest of us on matters about which they care deeply. If they do not have the opportunity, we will lose the chance to learn from them, and to critically examine, what they say. And they will have good reason to doubt that they are being shown the respect that all of us owe to our fellow citizens as the individuals that they are.’<sup>40</sup>

But others, like Charles Taylor, take the issue of respect a step further. In *Multiculturalism and the Politics of Recognition*<sup>41</sup> Taylor argued that identity is shaped partly through recognition and dialogue.<sup>42</sup> Misrecognition or non-recognition shows not just a lack of respect, it can lead people to suffer real damage, harm or oppression. Further, recognition is not just a courtesy we owe to others - it is a real need.<sup>43</sup> From

this it seems that placing constraints on the way in which religious believers are able to participate in public dialogue goes to the heart of issues of identity, and runs the danger of causing real harm.

The secularist theories have a direct bearing on the question of whether issues of faith are ‘relevant’ when a resolution is being sought to a dispute between a person of faith and a non-believer. If one were to follow the secularist argument a person of faith would either be expected to remain silent concerning issues of faith, or be expected to speak in a language that is not her own. Non-believers would have little chance of knowing that an issue of faith is at the root of a dispute. If a person of faith is expected to deny a vital part of her personhood, and is not allowed to live authentically, then there is a danger that she will be left alienated from self, others and the legal system, and marginalised in society. Non-believers will not have the opportunity of coming to an understanding of the person of faith, or her faith position. Consequently, although there may be a legal settlement, there may be no resolution of the underlying reasons that led to the dispute. I will argue that from a theological perspective a person of faith would not receive ‘substantive’ or ‘shalom’ justice.

In Chapter one I will begin by drawing on a number of legal cases and on the work of Anthony Bradney<sup>44</sup> in order to illustrate a range of difficulties faced by persons of faith in the English law courts.

In Chapter two I will draw on the work of H.L.A. Hart,<sup>45</sup> John Finnis,<sup>46</sup> and Werner Menski,<sup>47</sup> and outline the debates between proponents of legal positivism, natural law, and legal pluralism, about the nature of law, and the relationship between law, morals, and religion. I will consider what contributions that Hebrew law and the New Testament can make to modern debates about law, and to the question of how best to address modern legal cases that involve issue of faith. I will examine different understandings of the concept of toleration, and how it has been employed as a reason to accommodate religious beliefs and practices on an ad hoc basis in the English legal system, and outline some of the reasons why religion has been tolerated, and the challenges that accommodation poses.

In building a case for taking faith commitments seriously in Chapter three I turn to an example from healthcare. I will begin by outlining the importance of culture and faith in

the negotiation of meaning in the doctor and patient, and discuss the important role that narrative plays in this process. I will outline the theological importance of narrative for both the individual Christian and the Christian community. By drawing on the story and work of James Hopewell I will outline four narrative genres, and illustrate how Christians draw on their faith to create narratives to make sense of illness. Just as patients, family and friends tell stories (within which are implicit models) in order to make sense of an episode of serious illness, the medical profession have developed medical models with which they explain their understanding of disease and illness. I will outline four medical models, and compare how they view patients' issues of faith. I will compare the four medical models with a number of ways of unfolding the Christian narrative and discuss how the respective models might interact in the doctor-patient relationship. I will also discuss four approaches to the challenge of competing narratives. Finally, I will consider the role of the Christian Healthcare Chaplain and how she might be able to provide informal help in resolving disputes between doctor and patient that involve issues of faith.

In Chapter four I will examine how conflict is understood and addressed through the process of mediation, and consider whether it might provide an alternative way of dealing with disputes that involve issues of faith, rather than the disputants having to go to court. Also whether in mediation the perspective and faith of disputants would not just be heard and respected, but also taken into account in the decision-making process.

In Chapter five I will consider whether room could be made for faith in English legal cases. I will begin by outlining Maleiha Malik's 'interpretive' model of law.<sup>48</sup> I will argue that this is only one part of a much bigger picture of changes that would be needed to accommodate the faith of individual litigants. I will therefore discuss a number of obstacles to the accommodation of faith, and consider some of the ways in which these obstacles might be overcome. I will then return to the medical models that I outlined in Chapter three, and explain how three of these might be adapted and applied in legal cases. Finally, I will discuss what the changes I have suggested would mean for judges and the legal system, as well as for persons of faith, and our ideas about law and justice.

In Chapter six I will revisit six of the legal cases that I outlined in Chapter one, and examine what difference it might have made to the participants and outcome, if the

changes that I have suggested in Chapters four and five had been implemented in the cases.

In the final Chapter I will briefly reprise the argument and conclusion of each of the preceding six chapters, in order to provide an overview and evaluation of the research.

## Notes

<sup>1</sup> *Baby MB (An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem))* [2006] EWHC 507 (Fam) [2006] 2FLR 319.

<sup>2</sup> Perry Yoder, *Shalom* (London: Spire imprint of Hodder & Stoughton, 1989), 82-83.

<sup>3</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law: Essays in Legal Theory*, eds. Peter Oliver, Sionaidh Douglas Scott, and Victor Tadros (Oxford and Portland, Oregon: Hart Publishing, 2000), 129-149.

<sup>4</sup> Yoder, *Shalom*, Chapter 2.

<sup>5</sup> George L. Engel, "The Need for a New Medical Model," *Science* 196 (1977); Arthur Kleinman, *The Illness Narratives* (New York: Basic Books, 1988).

<sup>6</sup> Peter Berger, ed. *The Desecularization of the World* (Grand Rapids, Michigan: William B. Eerdmans Publishing company, 1999); Daniele Hervieu-Leger, *Religion as a Chain of Memory* (Oxford: Polity Press, 2000).

<sup>7</sup> David Herbert, *Religion and Civil Society* (Aldershot: Ashgate Publishing Limited, 2003).

<sup>8</sup> Harold G. Koenig, Michael E. McCullough and David B Larsen, *Handbook of Religion and Health* (Oxford: Oxford University Press, 2001).

<sup>9</sup> Peter Oliver, Sionaidh Douglas Scott, and Victor Tadros, eds. *Faith in Law: Essays in Legal Theory* (Oxford and Portland, Oregon: Hart Publishing, 2000).

<sup>10</sup> David Fergusson, *Church, State and civil society* (Cambridge: C.U.P., 2004); Adrian Hastings, *Church and State* (Exeter: University of Exeter Press, 1991); *Church and State: Report of the Archbishops' Commission* (London: Church Information Office, 1970).

<sup>11</sup> Kent Greenwalt, *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988); Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford: Oxford University Press, 1993); Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square* (Lanham, Maryland: Rowman & Littlefield Publishers Inc., 1997); Jeffrey Stout, *Democracy and Tradition* (Princeton, New Jersey: Princeton University Press, 2004); John Rawls, *Political Liberalism* 2nd ed. (New York: Columbia University Press, 2005).

<sup>12</sup> Jürgen Habermas, *Religion in the Public Sphere*.

[http://www.sandiego.edu/pdf\\_library/habermaslecture03115\\_c939cceb2ab087bdc6df291ec0fc3fa.pdf](http://www.sandiego.edu/pdf_library/habermaslecture03115_c939cceb2ab087bdc6df291ec0fc3fa.pdf) (accessed June 3, 2008).

<sup>13</sup> Mark Hill and Russell Sandberg, "Is Nothing Sacred? Clashing Symbols in a Secular World," *Public Law Autumn* (2007): 488-506.

<sup>14</sup> Rawls, *Political Liberalism*.

<sup>15</sup> see note 11 above.

<sup>16</sup> The "secularization theory" refers to a body of literature from the 1950's and 1960's by historians and social scientists. Peter Berger "The Desecularization of the World: A Global Overview," in *The Desecularization of the World*, ed. Peter L Berger (Grand Rapids, Michigan: William B. Eerdmans Publishing Company 1999), 2-4.

<sup>17</sup> *Ibid.*, 2.

<sup>18</sup> *Ibid.*, 3.

<sup>19</sup> *Ibid.*, 9 Berger lists the key indicators of secularization as including, the level of expressed beliefs, (especially those that can be called orthodox in Protestant or Catholic terms), and, the level of church related behaviour-attendance at services of worship, adherence to church dictated codes of personal behaviour (especially with regard to sexuality, reproduction and marriage), and recruitment to the clergy.

<sup>20</sup> *Ibid.*, 10.

<sup>21</sup> Davie has pointed to the findings of the 1981 and 1990 European Values System Study Group (EVSSG) who remain 'cautious about using the term secularization, even in regard to Western Europe, for the data are complex, even contradictory, and clear-cut conclusions are difficult.' Grace Davie, "'Europe: The Exception That Proves the Rule?'" in *The Desecularization of the World*, ed. Peter L Berger, 68.

<sup>22</sup> Grace Davie, "'Europe: The Exception That Proves the Rule?'" in *The Desecularization of the World*, ed. Peter L Berger, 78-83. By drawing on the work of Steve Bruce, Jose Casanova and Daniele Hervieu-Leger, Davie illustrates how the European data can be interpreted in very different ways. Steve Bruce offers a classic restatement of the "secularization theory". The basis of his argument is that individualism threatened the communal basis of religious belief and behaviour, while rationality removed many of the purposes of religion and rendered many of its beliefs implausible. The main premise of Jose Casanova's work is that the confusion concerning the effects of secularization can be clarified by separating what passes as one theory into three different propositions. 1. Secularization as differentiation of the secular spheres from religious institutions and norms. 2. Secularization as decline in religious beliefs and practices. 3. Secularization as marginalization of religion to a privatized sphere. If this premise is correct

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then the fruitless debate about secularisation will only come to an end when sociologists begin to examine and test the validity of each of the three propositions independently of each other. Daniele Hervieu-Leger's understanding of religion in the modern world emerges from the definition of religion as a specific mode of believing. The key points are (a) the chain that makes the individual believer a member of a community – a community that gathers past, present, and future members – and (b) the tradition (or collective memory) that becomes the basis of that community's existence. Hervieu-Leger argues that modern societies (especially in Europe) are less religious, not because they are increasingly rational, but because they are less and less capable of maintaining the memory that lies at the heart of their religious existence. They are in effect amnesiac societies.

<sup>23</sup> Ibid.

<sup>24</sup> Berger "The Desecularization of the World," in *The Desecularization of the World*, 10.

<sup>25</sup> Ibid.

<sup>26</sup> Bhikhu Parekh, *Rethinking Multiculturalism*, 2<sup>nd</sup> ed. (Basingstoke: Palgrave Macmillan, 2006), 322.

<sup>27</sup> Ibid., 321-2.

<sup>28</sup> Bruce Ackerman has argued for neutral politics: 'A citizen should (seek to) justify political choice to fellow citizens only on the basis of moral premises shared with all to whom she is justifying the choice. As Ackerman explains, "My principle of conversational restraint does not apply to the questions citizens may ask, but to the answers they may legitimately give to others' questions: whenever one citizen is confronted by another's question, he cannot suppress the questioner, nor can he respond by appealing to (his understanding of) the moral truth; he must instead be prepared, in principle, to engage in a restrained dialogic effort to locate normative premises both sides find reasonable." Bruce Ackerman, *Social Justice in the Liberal State* (1980); B. Ackerman "What is Neutral about Neutrality?" *Ethics* Jan. 1983, at 372; B. Ackerman (1989) 86 *J Philosophy* 5, 17-18- all cited in Michael J Perry, *Love and Power* (New York & Oxford: Oxford University Press, 1991), 9ff, 147 notes 4 & 5.

<sup>29</sup> 'For Nagel "impartial" political justification is "impersonal" justification: justification "from a standpoint that is independent of who we are." Thomas Nagel, "Moral Conflict and Political Legitimacy," (1987) 16 *Philosophy and Public Affairs* 215, 218 cited in Perry, *Love and Power*, 11ff.

<sup>30</sup> Rawls, *Political Liberalism*, xlix.

<sup>31</sup> Jeffrey Stout quoting John Rawls, in Jeffrey Stout, *Democracy and Tradition* (Princeton N.J., and Oxford: Princeton University Press, 2004), 65.

<sup>32</sup> Jeffrey Stout quoting Richard Rorty in Stout, *Democracy and Tradition*, 64.

<sup>33</sup> Kent Greenawalt, *Religious Convictions and Political Choice* (New York and Oxford: Oxford University Press, 1988), 219-220.

<sup>34</sup> Parekh, *Rethinking Multiculturalism*, 323.

<sup>35</sup> Perry, *Love and Power*, 15.

<sup>36</sup> Parekh, *Rethinking Multiculturalism*, 323.

<sup>37</sup> Stephen L. Carter, *The Culture of Disbelief*, (New York: Anchor Books, 1994), 54.

<sup>38</sup> Nicholas Wolterstorff, 'The Role of Religion in Decision and Discussion of Political Issues,' in *Religion in the Public Square*, Robert Audi and Nicholas Wolterstorff (Lanham, Maryland: Rowman & Littlefield Publishers Inc., 1997), 105.

<sup>39</sup> Parekh, *Rethinking Multiculturalism*, 324.

<sup>40</sup> Stout, *Democracy and Tradition*, 64.

<sup>41</sup> Charles Taylor, *Multiculturalism and "The Politics of Recognition"*, Princeton, New Jersey: Princeton University Press, 1992), 32-33.

<sup>42</sup> Ibid.,

<sup>43</sup> Ibid., 25-26.

<sup>44</sup> Anthony Bradney, "Faced by Faith," in *Faith in Law: Essays in Legal Theory*, eds. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 89-105.

<sup>45</sup> H.L.A.Hart, *The Concept of Law* 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1997).

<sup>46</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1992).

<sup>47</sup> Werner Menski, *Comparative Law in a Global Context*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2006).

<sup>48</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 129-149.

## Chapter 1

### Difficulties faced by persons of faith in dispute proceedings

In a religiously plural and multicultural country such as England it is inevitable that disputes will arise from time to time between persons of faith and those who do not share their faith. If the parties to a dispute are unable to reach an agreement the dispute may, depending on the type of case, end up in the English Law Courts, or in alternative dispute resolution proceedings, such as an Employment Tribunal. In this Chapter I will examine a number of legal cases and draw on the work of Anthony Bradney<sup>1</sup> in order to illustrate the difficulties faced by persons of faith in such cases. I will focus on the responses of the judges to religion, and ascertain whether they were prepared to discuss, come to an understanding, or grant any weight, to issues of faith raised by litigants. My concern with all the case studies is to illustrate the difficulties faced by persons of faith, and to highlight the wider issues that these difficulties raise. The case of Baby MB<sup>2</sup> and other high profile healthcare cases, illustrate the way that courts seek to address issues in a very narrow legal way, bracketing out questions of faith. The problems raised by this apply to all faith communities. Serious questions are raised about how courts and tribunals deal with persons of faith, how conflict is understood and addressed, how law and its relationship with ethics and religion is understood, the role of judges in cases involving issues of faith, and the resolution of disputes that involve issues of faith.

#### Section I - Legal case studies

##### Case Study 1 - Baby MB

The first case that I will examine is the case that I mentioned in the Introduction, Baby MB (*An NHS Trust v MB (A child represented by the CAFCASS as Guardian Ad Litem)*) [2006] EWHC 507 (Fam) [2006] 2FLR 319.

The case involved an 18-month-old child suffering from a very severe form of spinal muscular atrophy, a degenerative and progressive condition. The child's condition had deteriorated and his doctors considered it unethical to keep him alive. The NHS Trust therefore applied to the High Court to withdraw treatment on the basis of the 'best

interests' of the child. The father of the child, a practising Muslim, refused to consent to the removal of a ventilator stating:

“One of my beliefs is that it is not right for people to choose whether another person should live or die”.... “No one knows exactly when the God who gives life takes it. We all have a certain time to die and should leave the decision to God.”<sup>3</sup>

In reply Mr Justice Holman stated,

“This case concerns a child who must himself be incapable, by reason of his age, of any religious belief. An objective balancing of his own best interests cannot be affected by whether a parent happens to adhere to one particular belief, or another, or none. I have the utmost respect for the father’s religious faith and belief, and for the faith of Islam, which he practises and professes. But I regard it as irrelevant to the decision which I have to take and I do not take it into account at all.”<sup>4</sup>

Setting aside whether or not one agrees with what the father has said, we see that there is no discussion of the faith issues, or whether weight should be accorded to them.

Instead, the judge decides that the issues of faith raised by the child’s father are ‘irrelevant’, and therefore decides not to let them enter the decision-making process.

Earlier the judge also made the following comment:

“I wish to stress and make clear, however, that I myself am not concerned with any ethical issues which may surround this case. My task, difficult enough in itself, is to decide, and only to decide, where the objective balance of the best interests of M lies. If I decide that it is not in his overall best interests to continue with a given form of treatment, in particular with continuous pressure ventilation, then I must say so; and it will follow as a matter of law (and I will declare) that it is lawful to withdraw or withhold that form of treatment. The ethical decision whether actually to withdraw or withhold it must be made by the doctors concerned. Judges are neither qualified to make, nor required, nor entitled to make ethical judgements or decisions.”<sup>5</sup>

The judge’s comments reveal that the case involves medical, legal, ethical, and faith issues but when the case reaches the Court the judge frames the case as though it were a legal problem that requires a legal solution. Faith issues are not discussed, nor are they allowed to enter the decision-making process. The judge makes a clear distinction between the law and ethics, a distinction that derives from legal positivism, a highly contested view of law, as I shall show in the next chapter.

This case raises an important issue. Was the judge correct - are issues of faith really ‘irrelevant’ when disputes are being heard between persons of faith and those who do not share that faith? Should the judge have dismissed the father in the way that he did,

and refused to discuss, or allow issues of faith to enter the decision-making process? I will argue in this thesis that issues of faith are indeed relevant when explicitly raised.

## Case Study 2 - The con-joined twins Jody and Mary

The second case study relates to the case of the conjoined twins Jody and Mary, *Re A (children) (conjoined twins: surgical separation)*.<sup>6</sup>

Jodie and Mary were conjoined twins who were joined at the lower abdomen. Jodie was capable of independent existence, but an operation to separate the twins would inevitably result in the death of Mary who was alive only because a common artery enabled her sister to circulate oxygenated blood for both of them. If there were no operation they would both probably die within three to six months because Jodie's heart would fail. The doctors who were caring for the twins wanted to operate to separate them but the parents of the twins refused to give consent. The hospital therefore applied to the High Court for a declaration that the proposed operation would be lawful and in the best interests of both twins.

This is part of the parents' statement that explains why they were not prepared to consent to the operation:

““We have of course had to give serious consideration to the various options as given to us by our daughters' treating doctors. We cannot begin to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive. That is not what we want, and that is what we have told the doctors treating Jodie and Mary. In addition, we are also told that if Jodie survives and that is not known at all, then she is going to be left with a serious disability. The life we have .... is remote... with very few, if any facilities which would make it extremely difficult not only for us to cope with a disabled child but for that disabled child to have any sort of life at all ... We have very strong feelings that neither of our children should receive any medical treatment. We certainly do not want separation surgery to go ahead as we know and have been told very clearly that it will result in the death of our daughter, Mary. We cannot possibly agree to any surgery being undertaken that will kill one of our daughters. We have faith in God and are quite happy for God's will to decide what happens to our two young daughters. ... .””<sup>7</sup>

The parents are Roman Catholics and the root of their objection to separation is that the twins are equal in their eyes and they cannot agree to kill one even to save the other. The parents interpreted the proposed medical intervention as an act which would

involve killing Mary, and they would not be complicit in the killing.

The Roman Catholic Archbishop of Westminster Cormac Murphy-O'Connor was allowed by the Court to make submissions in support of the parents of the children.

Listed below are the five overarching moral considerations, which governed his submissions:

(i) 'Human life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission.

(ii) A person's bodily integrity should not be invaded when the consequences of doing so are of no benefit to that person; this is most particularly the case if the consequences are foreseeably lethal.

(iii) Though the duty to preserve life is a serious duty, there is no such duty when the only available means of preserving life involves a grave injustice. In this case, if what is envisaged is the killing of, or a deliberate lethal assault on, one of the twins 'Mary', in order to save the other, 'Jodie', there is a grave injustice involved. The good end would not justify the means. It would set a very dangerous precedent to enshrine in English case law that it was ever lawful to kill, or to commit a deliberate lethal assault on, an innocent person that good may come of it, even to preserve the life of another.

(iv) There is no duty to adopt particular therapeutic measures to preserve life when these are likely to impose excessive burdens on the patient and the patient's carers. Would the operation that is involved in the separation involve such 'extraordinary' means? If so, then quite apart from its effect on Mary, there can be no moral obligation on doctors to carry out the operation to save Jodie, or on the parents to consent to it.

(v) Respect for the natural authority of parents requires that the courts override the rights of parents only when there is clear evidence that they are acting contrary to what is strictly owing to their children. In this case, the parents have simply adopted the only position they felt was consistent with their consciences and with their love for both children.<sup>8</sup>

This case involved medical, ethical, legal and faith issues, but how did the judges frame the case? Ward LJ begins by stressing the parameters, as he sees it, of the Court's role.

"I am well aware of the inevitability that our answer will be applauded by some but that as many will be offended by it. Many will vociferously assert their own moral, ethical or religious values... It is, however, important to stress the obvious. This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation – a situation that is quite unique."<sup>9</sup>

Robert Walker LJ makes a similar point in relation to submissions that were made to the Court by the Roman Catholic Archbishop of Westminster:

“The five points made by the Archbishop are entitled to profound respect. ... But ultimately the court has to decide this appeal by reference to legal principle, so far as it can be discerned, and not by reference to religious or individual conscience.”<sup>10</sup>

From the outset both judges frame the case as though it were a legal problem that requires a legal solution. Ward LJ draws a distinction between law and morality, whereas Walker LJ draws a similar distinction between law and religion. By separating law from morality and religion both judges adopt a legal positivist point of view. Both stress that their decision is to be made on the basis of legal principle alone. This is the reason that the Archbishop’s submissions, which included a number of specific arguments based on legal advice, achieved more success from the Court than those of the parents. I will return to discuss them in Chapter 6.

In the light of the comments made by the judges what were their attitudes toward the parents’ faith? Ward LJ describes the parents as ‘devout Roman Catholics’ who ‘sincerely believe that it is God’s will that their children are afflicted as they are and they must be left in God’s hands.’<sup>11</sup> Robert Walker LJ makes similar comments:

“There are to my mind particularly strong reasons for having regard to the parents’ views in this case. They have sincerely held religious views (formed after discussion with a priest near the hospital, and now backed by the Archbishop of Westminster).”<sup>12</sup>

Both judges regarded the parents as ‘sincere’ in their religious beliefs. Ward LJ’s attitude towards the parents’ religious beliefs was revealed in response to considering the role of the Court and the issue of parental reasonableness. He began by considering the question, ‘Is the court reviewing the parents’ decision, or does the court look at the matter afresh after giving due weight to the parental wish?’ Pointing to the case of *Re T (a minor) (wardship: medical treatment)*<sup>13</sup> he confirmed that the Court’s role was the latter. In that particular case one argument put forward was that ‘the court should not interfere with the reasonable decision of a parent.’ In considering parental reasonableness in that case Waite LJ said:

“It is a mistake to view the issue as one in which the clinical advice of doctors is placed in one scale and the reasonableness of the parent’s view in the other.... It can only be said safely that there is a scale, at one end of which lies the clear case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind; and that at the other end lie highly problematic cases where there is a genuine scope for a difference of view between parent and judge. In both situations it is the duty of the judge to allow the court’s own opinion to prevail in the perceived paramount interest of

the child concerned, but in cases at the latter end of the scale, there must be a likelihood (though never of course a certainty) that the greater the scope of genuine debate between one view and another the stronger will be the inclination of the court to be influenced by a reflection that in the last analysis the best interests of every child include an expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature.”<sup>14</sup>

What can be seen here is the acknowledgement from Waite LJ that there is a scale in operation. At one end is the parent who opposes medical intervention on the basis of scruple or dogma, and at the other cases where there is scope for genuine difference and debate between parent and judge. In response, Ward LJ revealed how he saw the views of the parents of the twins.

“I would wish to say emphatically that this is not a case where opposition is prompted by scruple or dogma.’ The views of the parents will strike a chord of agreement with many who reflect on this dilemma.”<sup>15</sup>

Walker LJ makes the following comment about the parents’ beliefs.

“Their views might be described as controversial but (unlike the objections to blood transfusion held by the Jehovah’s witnesses) they are not obviously contrary to the view accepted by society. Still less are their views contrary to those generally accepted in the remote community from which they have come to this country.”<sup>16</sup>

What we can see from this is that the judges’ underlying concern are cases where believers are unyielding in the faith, and where the beliefs that they hold may diverge from those that are generally accepted within society. However, while the parents of the twins were clearly unyielding in their faith, Ward LJ clearly thought that the case was one where there was a genuine scope for difference between the parents and judges. Walker LJ thought that the parents’ views were not contrary to those accepted by society. However, it is worth noting that early on in his judgement Ward LJ dealt with the issue of public concern and why the Court was involved at all. He makes a startling statement concerning this issue:

“I am satisfied that there has been the closest consultation between the medical team, the parents, their friends, their priest and their advisers. Just as the parents hold firm views worthy of respect, so every instinct of the medical team has been to save life where it can be saved. Despite such a professional judgment it would, nevertheless, have been a perfectly acceptable response from the hospital to bow to the weight of the parental wish. However, fundamentally the medical team disagreed with it. Other medical teams may well have accepted the parents’ decision. Had St Mary’s done so, there could not have been the slightest criticism of them for letting nature take its course, in accordance with the parents’ wishes.”<sup>17</sup>

In other words, had the doctors involved in treating the twins decided to follow the parents' wishes, then the matter would probably not have ended up in court. Andrew Bainham argues that Ward LJ surely goes too far and that it is difficult to square with other portions of his judgement.

“This is difficult to square with other portions of his judgement in which he emphasises the duty on both parents and the hospital to act to save Jodie and, in the case of the parents, even speculates on whether they might have been criminally liable under the Children and Young Persons Act 1933 or in manslaughter for neglecting to authorise the operation. It is also difficult to reconcile with modern ideas of children's rights....”<sup>18</sup>

However, Ward LJ goes on to explain the reason why the doctors sought the Court's ruling.

“Here sincere professionals could not allay a collective medical conscience and see children in their care die when they know one was capable of being saved. They could not proceed without parental consent. The only arbiter of that sincerely held difference of opinion is the court. Deciding disputed matters of life and death is surely and pre-eminently a matter for a court of law to judge. That is what courts are here for.”<sup>19</sup>

Allowing for the fact that the judges did not think that the parents were being unreasonable, were the judges willing to give weight to the parents' wishes? Ward LJ acknowledges the importance of the parents' views.

“As parents of the children, their views are a very important part of this case. It is right therefore, that I set them out as fully as possible.”<sup>20</sup>

He then considered what weight should be given to the parents' wishes.

“Since the parents have the right in the exercise of their parental responsibility to make the decision, it should not be a surprise that their wishes should command great respect. Parental right is, however, subordinate to welfare.”<sup>21</sup>

The point that Ward LJ goes on to stress is that the Court will only interfere with parental rights if the welfare of a child is at stake. Both Ward LJ and Robert Walker LJ quoted the following passage from the judgement of Bingham MR in *Re Z (a minor) (freedom of publication)* [1995]

‘I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of a court is to exercise an independent and objective judgement. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. Its judgment may of course be wrong. So may that of the parent. But once the

jurisdiction of the court is invoked its clear duty is to reach and express the best judgment it can.’<sup>22</sup>

The parents’ views are therefore to be respected and their decision given due weight. But in the end it is the Court’s decision to make on the basis of the welfare and ‘best interests’ of the children. This case differs from that of Baby MB<sup>23</sup> in that the judges were prepared to consider the parents’ views, which included issues of faith. However, before allowing those views into the decision-making process the parents faced a sliding- scale test of the acceptability of their faith position. Having passed that test the parents’ views were accorded due weight in the decision-making process, but were ultimately over-ruled by the Court on the legal grounds of ‘best interests’. The criteria for deciding the ‘best interests’ of the children did not include faith interests. However, as I will show in case study four, the criteria on which ‘best interests’ is based can include faith interest, depending on the circumstances of the case.

The next two case studies, *Re E (A Minor) (Wardship: Medical Treatment)*<sup>24</sup> and *Re P (Medical Treatment: Best Interests)*<sup>25</sup> relate to two teenage Jehovah’s Witnesses who refused blood transfusions.

### Case Study 3 - Re E

In the case of *Re E (A Minor) (Wardship: Medical Treatment)*<sup>26</sup> a hospital authority sought leave of the court to treat A, a young man aged 15 years and 9 months, who was suffering from leukaemia. The hospital wished to treat A with the conventional treatment of four drugs. The first two drugs directly attack the leukaemia cells, whereas the other two are non-specific and attack everything they meet including the bone marrow. The attack on the bone marrow reduces the body’s ability to produce the necessary blood cells. As a result, there is a requirement for blood transfusions to be administered as part of the treatment. There is an alternative, but less effective treatment, which only involves the administration of the first two drugs. A, and his parents were devout Jehovah’s Witnesses and A refused to consent to that part of the treatment that involved blood transfusions.

On an ex parte application two days earlier A had been made a ward of court. In response A’s parents argued that as A was so close to his 16<sup>th</sup> birthday, an age where

A's consent to treatment would be required under section 8 of the Family Law Reform Act, and following the judgement in the Gillick<sup>27</sup> case (that a child under 16 years can make a decision regarding medical treatment when he achieves a sufficient level of understanding and intelligence and fully understands what is proposed), that the court should not intervene in wardship proceedings.<sup>28</sup>

The position of A and his parents regarding the conventional medicine was set out by Mr. Justice Ward as follows:

“The hospital have been unable to follow the conventional treatments because A and his family are devoted and strongly devout members of the Jehovah's Witness belief, and it is contrary to the tenets of their faith to permit transfusions of blood. A indicated his refusal to that blood transfusion and was then supported and continues to be supported by his parents who likewise refuse to give that consent, although in all other respects they consent to the treatment of the hospital.”<sup>29</sup>

“The parents oppose this application with a quiet but powerful reliance upon their religious beliefs.”<sup>30</sup>

What were Mr Justice Ward's responses to the beliefs of A and his parents? He began by acknowledging that A's religious convictions were 'deeply held and genuine.' But he had three concerns.<sup>31</sup> The first was a legal concern – undue influence.

“Without wishing to introduce into the case notions of undue influence, I find that the influence of the teachings of the Jehovah's Witnesses is strong and powerful. The very fact that this family can contemplate the death of one of its members is the most eloquent testimony of the power of that faith. He is a boy who seeks and needs the love and respect of his parents whom he would wish to honour as the Bible exhorts him to honour them. I am far from satisfied that at the age of 15 his will is free. He may assert it, but his volition has been conditioned by the very powerful expressions of faith to which all members of the creed adhere.”<sup>32</sup>

The second concern was simply that the views that A held as a teenager might change, as he got older.

“I respect this boy's profession of faith, but I cannot discount at least the possibility that he may in later years suffer some diminution in his convictions.”<sup>33</sup>

The third concern can be explained by the way in which Mr Justice Ward interpreted the parent's action in supporting A's decision and indeed A's decision. He began by quoting the American judge Justice Holmes in the case of *Prince v Massachusetts* (1944) 321 US Reports 158:

“Parents may be free to become martyrs themselves, but it does not follow that they are free in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make choices for themselves.”

In the same vein Mr Justice Ward then hammers the point home with his own comments.

“There is compelling and overwhelming force in the submission of the Official Solicitor that this court, exercising its prerogative of protection should be slow to allow an infant to martyr himself. In my judgement, A has by the stand he has taken thus far already been and become a martyr for his faith. One has to admire – indeed one is almost baffled by – the courage of the conviction that he expresses. He is, he says, prepared to die for his faith. That makes him a martyr by itself.”<sup>34</sup>

Mr Justice Ward interpreted the parents’ support and A’s decision in terms of martyrdom and was baffled by it. As Bradney has commented, ‘it seems unlikely that A would have seen his death as martyrdom.’<sup>35</sup> Mr Justice Ward then went on to explain that his jurisdiction in wardship proceedings was a protective one.

“But I regret that I find it essential for his well-being to protect him from himself and his parents, and so override his and his parents’ decision. In this judgement – which has been truly anxious – I have endeavoured to pay every respect and give great weight to the religious principles which underlie the family’s decision and also to the fundamental human right to decide things for oneself. That notwithstanding, the welfare of A, when viewed objectively, compels me to only one conclusion, and that is that the hospital should be at liberty to treat him with the administration of those further drugs and consequently with the administration of blood and blood products.”<sup>36</sup>

This case involves medical, legal, ethical and faith issues. Although the judge emphasised that great weight had been given to the religious principles that underlay the family’s decision ultimately ‘the welfare of the child’ dominated his decision. In many ways the outcome was not surprising but what may have surprised some was the argument from ‘martyrdom’. Although the judge cited an American legal case to support this argument he made no attempt to ascertain from A, or his parents, how they understood and felt about their decision to refuse treatment.

#### Case study 4 - Re P

In the case of *Re P (Medical Treatment: Best Interests)*<sup>37</sup> a Jehovah’s Witness aged 16 years and 10 months had an inherited condition called hypermobility syndrome, the

symptoms of which included a tendency to bleed because of the fragility of blood vessels. The patient had suffered a ruptured aorta and he and his parents independently expressed to the treating doctors their objection to the use of blood or blood products. The doctors did not treat with blood products in part because they thought that the treatment would be futile. Although the crisis passed and there was no evidence of serious ongoing bleeding the underlying problem that caused the crisis had not been resolved. The hospital therefore sought leave to administer blood if the patient's condition became 'life-threatening.'

What were the judge Mr Justice Johnson's responses to John's religious beliefs and that of his parents?

“I have to seek to achieve what is best for John, and I put at the forefront of my consideration his wishes. He is nearly 17. He is a young man whose religious faith must surely demand the respect of all about him. In a world in which religious or indeed any other convictions are not commonly held, John is a young man to be respected. So, too, the wishes of his loving and committed parents. They do not want him to die. They want what is best for him and their assessment of what is best for him is that he should be spared the administration of blood and blood products.”<sup>38</sup>

The judge's comments reveal that he was clearly aware of the relevance of John's age, and that subsequent to the legal decision in *Re E* above, A had, on the age of 18, exercised his right to refuse blood transfusions, with the consequence that he died. Although the judge 'respects' John's faith, the judge appears to view the world in secular terms where religious or any other convictions are not commonly held. On what basis then did the judge make his decision? First, he considered the issue of imposing medical treatment on a young man against his will. He quoted Lord Donaldson in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*<sup>39</sup> who said:

“Co-operation between doctor and patient is at the heart of medical treatment if it is to be successful, and treatment which is imposed against the will of the patient is surely to be avoided at all costs.”

Mr Justice Johnson clearly took on board John's wishes and was reluctant to overrule them. However, his prime concern was that he had to seek to achieve what was best for John.

“Nonetheless, looking at the interests of John in the widest possible sense – medical, religious, social, whatever they be – my decision is that John's best interests in the widest senses will be met if I make an order in the terms sought by the NHS Trust with the addition of those extra words, 'unless no other form of treatment is available.’”<sup>40</sup>

Here 'best interests' include religious interests.

The difficulties that believers face in English legal cases are likely to be more acute in the case of what Anthony Bradney has referred to as 'obdurate' believers.<sup>41</sup>

## Section II - Anthony Bradney and 'obdurate' believers

'Obdurate' believers are, according to Bradney, 'those comparatively rare individuals who do not see their religion as being private or peripheral,<sup>42</sup> whose religion is key to their identity,<sup>43</sup> central to their lives, so that it determines their behaviour in most, if not all respects.<sup>44</sup> While 'obdurate' believers can be believers of any faith (including Christians), statistically they appear to include a higher percentage of Hindus, Muslims and Sikhs.<sup>45</sup> As a result, both the religious and cultural traditions of many obdurate believers may be different from the cultural traditions that are central to the history of Britain, and these traditions may separate them from the rest of the community and lead them to be treated differently from other citizens. However, it is also the unyielding nature of the faith of all obdurate believers that in itself separates them from the wider community, and will lead to them 'being treated differently and, arguably, not equally with other citizens'.<sup>46</sup>

Bradney's definition of 'obdurate' could certainly include many more believers, and in particular Christians, than he might have imagined. Surely there are many 'persons of faith' who do not regard their faith as either private or peripheral. It is virtually analytic to faith that it is central to a believer's life and affects their decisions and behaviour. What would faith mean if it did not change sense of identity, life, decisions and behaviour? However, I accept that there will be some believers whose faith will be understood by some as 'unyielding' in its nature and expression, when compared to others.

What Bradney considers 'obdurate' belief can also change if social mores and the law change. The issue of homosexuality can illustrate this point. Prior to 1967 male homosexual practice was a criminal offence in the United Kingdom. In England and Wales homosexual acts taking place in private between consenting males of 21 years or

over were decriminalised by the Sexual Offences Act 1967.<sup>47</sup> Since then attitudes have gradually continued to change within society toward homosexuality and this has been reflected in further changes in the law. Homosexuality was decriminalised in Scotland in 1980,<sup>48</sup> and in Northern Ireland in 1982;<sup>49</sup> the age of consent was reduced in England and Wales in 1994<sup>50</sup> to 18 years and in 2001 to 16 years.<sup>51</sup> From December 2005 homosexuals of both sexes in England and Wales aged 16 and over, are now legally able to enter into civil partnerships.<sup>52</sup> But it is the provisions of The Equality Act (Sexual Orientation) Regulations 2007 No. 1263<sup>53</sup> that have had a profound impact on what Bradney considers ‘obdurate’ believers. In April 2007 it became unlawful to discriminate on the grounds of sexual orientation in relation to the access to goods and services. The regulations specifically included the services provided by adoption agencies. Roman Catholic adoption agencies were then faced with a decision. The agencies could either comply with the law and continue to offer their services, or continue to follow the teaching of the Catholic Church (which prevented them from placing children with homosexuals), in which case they would have no alternative but to close.<sup>54</sup> Jim Richards, director of the Westminster agency, has pointed out that the issue is a tussle between two rights - the right of faith-based organisations wishing to practice and be true to the teaching of the Church, and the rights of homosexuals not to be discriminated against.<sup>55</sup> Responses to the legislation have been mixed. Some agencies cut their links with the Catholic Church in order to comply with the law. One agency closed and three others decided to try to change their constitution to allow them to specifically refer only to married couples.<sup>56</sup> The point to note, however, is that Roman Catholics who oppose this particular law might now, according to Bradney, be considered as ‘obdurate’ believers, in a way that prior to the 2007 Act they might not have been.

Bradney argues that ‘obdurate’ religious belief is widely misunderstood in British society primarily because ““one sometimes gets the feeling that religion is like stamp-collecting or playing squash, a minor hobby.””<sup>57</sup> He points to the fact that church attendance has declined in England, and that many religious believers appear to hold lightly to their faith.<sup>58</sup> I would also argue that secular ideology adds to this impression by portraying religion as a private affair and not likely to be significant to the public life of believers. These attitudes toward religion lead Bradney to suggest that:

‘a general failure to understand, let alone empathise with, the obdurate believer is understandable. Primacy of faith, indeed primacy of any clear and extensive

philosophical viewpoint, is inimical to the way in which British society now functions.’<sup>59</sup>

Bradney contrasts an obdurate believer’s faith in what he describes as, ‘the timeless and boundless significance of their religious system,’<sup>60</sup> with Anthony Giddens’ interpretation of modernity’s “‘reflexivity ... [which involves] the susceptibility of most aspects of social activity, and material relations with nature, to chronic revision in the light of new information or knowledge.’<sup>61</sup> Giddens argues:

“[T]o live in the universe of high modernity is to live in an environment of chance and risk, the inevitable concomitants of a system geared to the domination of nature and the reflexive making of history. Fate and destiny have no formal part to play in such a system, which operates (as a matter of principle) via what I shall call open human control of the natural and social worlds.”<sup>62</sup>

This leads Bradney to conclude that ‘obdurate believers do not, cannot, experience this “high modernity” because their identity and thus their actions are tied to what is, for them, a pre-ordained system of values and commitments. Modernity in modern Britain and obdurate religious belief are polar opposites as forms of consciousness.’<sup>63</sup>

This argument needs to be nuanced. Believers should not be viewed through a stereotypical lens. Whilst there will always be individuals who find it challenging to integrate their faith with the rapid changes that are taking place in certain fields, such as science, this does not necessarily mean that the same individuals are unable to reflect and respond to changes in other areas. Similarly, whilst religious beliefs may well be timeless they are, certainly in the case of Christian beliefs, being continually retold and presented in new ways for each generation. A religious tradition is not a static phenomenon, but is embodied through a group of believers, who are embedded within a particular culture and society, and who respond as individuals in varying degrees to change.

Bradney argues that there are two reasons why it is important to analyse how ‘obdurate’ believers are treated in court. First, they represent a significant section of the population.<sup>64</sup> Secondly, because the analysis of the interaction between obdurate believers and the court ‘provides a paradigmatic account of the law, highlighting differences and difficulties that are likely to occur in a less sharp form, even when the encounter is between the law and those who are more restrained in their faith.’<sup>65</sup> This second point is worth emphasising - there are likely to be differences and difficulties in the interactions between all believers and the court but these will be more acute in the

case of ‘obdurate’ believers.

Bradney sets out three legal cases as illustrations of the ‘strains that can arise when British courts judge obdurate believers.’<sup>66</sup> He makes it clear that these are not ‘an exercise in empirical sociology’, but the cases ‘show problems that have occurred in the interaction between judges and believers, that these problems are likely to recur, and that these problems are important.’<sup>67</sup>

The first case, *Chauhan v Ford Motor Company*<sup>68</sup> was heard by the Employment Appeal Tribunal in 1984.

‘Chauhan claimed exemption, under section 58(4) of the Employment Protection (Consolidation) Act 1978, from a union maintenance agreement providing for compulsory trade union membership for Ford employees, on grounds of his religious beliefs. Chauhan had at one time been a union member but that membership had lapsed. He had never previously referred to his religious beliefs during the course of his employment. It was only when the matter of his lapsed membership was raised with him that he revealed his religious beliefs. In evidence in support of his claim Chauhan cited Lecture IV in the *Laws of Manu*, which describes the need for male Hindus to retire to the forest after they have discharged their family responsibilities as part of the process of spiritual growth, which should occur during each individual's life. He had, he asserted, reached a stage in his life when trade union membership was no longer appropriate because he should withdraw from worldly pursuits. He offered to pay a sum to charity which was the equivalent of the trade union membership dues.’<sup>69</sup>

The Tribunal rejected Chauhan’s application and he lost his claim for unfair dismissal. In their judgement the Tribunal (in a passage approved by the Employment Appeal Tribunal) argued that:

“In order to make a judgement on a man’s beliefs and motivations it is necessary to take account of his actions as well as his words. For our own part, we find it extremely difficult to reconcile the applicant’s three-year silence with his protestations of conscience.”<sup>70</sup>

Bradney notes that on a superficial analysis the tribunal’s attitude seems unremarkable. The *Laws of Manu* can be used to justify Chauhan’s claim. However, on a closer reading they do seem to demand more than a mere refusal to join a trade union. What they call for is a complete withdrawal from the material world, which does not sit well with Chauhan’s wish to retain employment. In other words, his actions do seem to be at odds with his religious beliefs. But if this were the case, why did Chauhan refuse to join the union, but at the same time offer to pay a sum equivalent to the union dues to charity, and thereby remove the financial advantage of not being a union member?

Bradney argues that to make sense of the situation and assess the validity of the tribunal's approach one needs to look at the position of a Hindu litigant in a secular court of a country with a Christian tradition. In Hindu theology and practice there is nothing unusual in Chauhan's wish to withdraw from the world but this ideal, 'like other Hindu ideals must be translated into actual practices which are affected by the geographical and social location which the believer finds himself in.'<sup>71</sup> If a believer lives in India he may well be able to withdraw and live in a forest, and be revered by the local population and obtain food by begging. But if, like Chauhan, he lives in London he would not be able to do so. Bradney notes that 'Knott has shown how traditional Hindu temple practices in Leeds have to accommodate themselves to the particular local circumstances of their setting.'<sup>72</sup> He concludes from this that a partial withdrawal from the material world may be all that a believer such as Chauhan could manage in his particular geographical and social location.

Bradney then poses two questions. First, 'according to what standard did the tribunal find Chauhan's behaviour so unreasonable as to lead it to doubt that he was genuine?' Bradney notes that Chauhan only did what many Hindus believe ought to be done. Although his attempt was imperfect, in most theologies failure is seen as part of the nature of the religious life, where frail humanity seeks to live according to divine standards. Secondly, 'did a secular tribunal, operating in the context of a Christian social tradition, understand the theological, social and psychological subtleties and complexities of someone who was part of the Hindu diaspora?'<sup>73</sup> Bradney argues that 'while it might be right legally to hold that to "make a judgment on a man's beliefs and motivations it is necessary to take account of his actions as well as his words," in applying that test it is necessary to remember that actions are frequently culturally contingent.'<sup>74</sup> The failure on the part of the tribunal to take into account the cultural context and their failure fully to understand Chauhan's worldview explain why the tribunal did not think that Chauhan was genuine in his religious motivation.<sup>75</sup>

The second case study relates to Barbara Janaway who in June 1985 sought an order of certiorari to quash a decision by Salford Area Health Authority to uphold her dismissal as a medical receptionist. The High Court, the Court of Appeal and finally, the House of Lords heard the case.<sup>76</sup>

'Janaway was a medical receptionist and had been asked to type a letter which she understood to be a letter of referral to make an appointment for a patient to undergo an abortion. Before taking up her job she had not been told that she would have to type correspondence which related to abortions. Janaway was a

Catholic and held to the traditional Catholic position that abortions were morally wrong. She therefore refused to type the letter. Janaway argued that she was entitled to the protection of section 4(1) of the Abortion Act 1967 which allows anybody who would otherwise be required “to participate” in abortions to refuse that participation on grounds of conscience. In a series of judgments all three courts rejected the claim. Janaway was wrong, the court said, in claiming that she was participating in abortion if she typed the letter as requested. The nine judges who gave judgment in this case were divided about why Janaway was wrong. Some judges turned to the criminal law’s concept of participation for assistance; others sought, a “plain English” interpretation of the idea. All nine judges agreed that, whatever “participate” meant it did not mean what Janaway thought it meant.<sup>77</sup>

The result was that Janaway had no protection under section 4. Bradney notes that on first analysis the Court’s attitude is unremarkable. By using traditional and familiar legal tests Janaway was found not to have met the criteria set out in the Abortion Act 1967. But on a deeper analysis a more complex picture emerges, with similarities to the Chauhan case. Both Janaway and Chauhan sought the protection of a statutory provision that was intended to protect the individual conscience. Provisions, that on the face of it, should assist ‘obdurate’ believers. However, both found that they were not protected.<sup>78</sup> Chauhan was told that his actions showed that he was not genuine in his religious beliefs whereas, Janaway was told that notwithstanding her own belief that she would be participating in an abortion by typing a referral letter, she was not participating in a matter that was forbidden by her religion. ‘In both Chauhan and Janaway it was held that actions, in Janaway’s case proposed actions, did not match the religious beliefs claimed by the litigants.’<sup>79</sup>

In Janaway’s case, unlike Chauhan’s, the judges did not refuse to accept that her religious beliefs were genuine. However, the majority of the judgments turned on an ordinary language construction, rather than a technical interpretation of the law. Bradney argues that the Court implicitly held that Janaway’s view of the actions required of her by her employers was either irrational or unreasonable, and they also chose to deny the legitimacy of Janaway’s religious worldview. I am not sure that I would go as far as Bradney to say that the Court denied the legitimacy of her worldview as it implies that the Court engaged in discussion with Janaway concerning her beliefs, which they clearly did not do. However, what is undeniable is that the Court did not accept Janaway’s interpretation of ‘participation’. As a result the Court deprived section 4(1) of much of its effect by substantially limiting those who come under its protection.

Bradney points out, however, that a different approach to the interpretation of section 4 is not hard to envisage. Section 4 was not part of the original Bill, but was added during its passage through the House of Commons in response to those who argued that Roman Catholics would have to leave the Health Service if the Bill passed into law without a conscience clause.<sup>80</sup> It was therefore intended to protect the consciences of those who worked in the Health Service from the potential mischief involved if no protection were included. A mischief approach to statutory interpretation would begin by asking, what potential mischief did the statutory provision try to remedy, and then interpret the provision in such a way that fulfilled its purpose.<sup>81</sup> Bradney argues that if a mischief approach to statutory interpretation were employed it would seem appropriate to begin an inquiry into the application of the section with the following questions. Does the litigant genuinely believe that they will be participating in an abortion? Is such a belief reasonably held in the light of their religious convictions? This type of approach would serve to protect someone in Janaway's position and also prevent Health Service staff from using a conscience clause illicitly as a way of avoiding contractual duties.<sup>82</sup>

The third study relates to the 1995 case of *Re ST (A Minor)*.<sup>83</sup>

'This wardship case concerned an attempt by a grandmother to have the care and control of her grandson, S, transferred from her daughter, NT, to herself. The sole ground for the grandmother's action was the fact that her daughter and grandson were living communally in a group, which was part of the new religious movement now known as The Family. The Family has acquired a degree of public infamy as a result of allegations, which surround its attitude to sexuality, and in particular its attitude to child sexuality.'<sup>84</sup>

Ward LJ rejected the grandmother's application. Bradney is concerned in this study to highlight the comments and attitudes of Ward LJ toward the mother and The Family.

What is clear is that Ward LJ was troubled by the priority NT placed on her faith.

“NT's closing words to me were to plead with me not to denigrate the Law of Love. [The Family's central doctrine]. It was an extraordinary observation from her. I would have expected her to plead with me not to remove her son. Many mothers, often totally hopeless mothers, have begged for that mercy. But NT did not. It was as if the integrity of the Law of Love was more important to her than S. Where is her sense of priorities?”

Unlike the case of Chauhan, in *Re ST* the court does not claim there is a mismatch between beliefs and actions. But it does involve the judge questioning whether the expression of beliefs is an acceptable view of the world.

In his judgement Ward LJ says that he was “disturbed” by the “fervour” with which members of The Family held their convictions and noted that they could not be swayed by “common sense”. At other places he commends them when their beliefs accord with mainstream Christianity.

“The Family do not deny their belief is healing by faith. They assert it. *They are fully justified in doing so. It is an established tenet of Christian belief.* [emphasis added]”<sup>85</sup>

Bradney notes that Ward LJ,

‘created a contrast between a religiosity which is dominated by a simple, overwhelming faith which ignores the “common-sense” beliefs of society and one which is milder, more uncertain of itself, and which accords more closely to the mainstream of Christianity. The latter is acceptable; the former is not.’<sup>86</sup>

In giving judgement Ward LJ required the mother NT and members of The Family to accept a number of conditions. One required NT to put the welfare of her son S before commitment to The Family. Leading members of the Family were obliged to accept their founder’s responsibility for some past instances of child abuse. Another condition stated that NT was permitted to retain custody of her son only when Ward LJ became convince of her “maturity” as evidenced by the moderation of her religious beliefs.<sup>87</sup> In other words the judge demanded a change in the way in which the religious community and the litigant behaved.<sup>88</sup>

Caroline Bridge has made similar observations<sup>89</sup> concerning the Court’s attitude in the 1998 case, *Re L (Medical Treatment: Gillick Competency)*.<sup>90</sup> This case involved a teenage Jehovah’s Witness who refused blood transfusions.<sup>91</sup> Although it should be noted that in *Re ST* and *Re L (Medical Treatment: Gillick Competency)* the Court were concerned with the welfare of minors, in both cases what seemed to trouble them was the unyielding nature of the litigant’s faith. As Bridge notes:

‘Some clue as to the part religious beliefs played in the court’s assessment of L’s competence is provided by the evidence of a child psychiatrist. He described her religious faith as strongly held ‘*not lending itself to discussion.*’<sup>92</sup> The apparent rigidity of her views and the unquestioning stance she adopted were contrasted unfavourably with the more ‘*constructive formulation of an opinion which occurs with adult experience*’. The court accepted this opinion. The implication is that an adult would think through her views more wisely than a teenager, using experience and reasoned reflection to temper belief. An adult believer would, supposedly, be able to enter into dialogue with the broader secular society and be prepared to modify or change her position. She would not, supposedly, adhere to the doctrines of her espoused religion as wholeheartedly and uncompromisingly as a teenager.’<sup>93</sup>

In coming to their judgement in *Re L* the Court decided in favour of what they took to be the teenager's welfare, rather than recognise the teenager's autonomy and her religious beliefs.

Here we see the differences in values and priorities, which underlie the difficulties with, so called 'obdurate believers'. Bradney notes that, 'In the widely cited case of *C v C* a child custody decision, Balcombe LJ held that judges, when exercising their discretion, should "start from the basis that the moral standards which are generally accepted in the society in which the Judge lives are more likely than not to promote .... [the child's] welfare."<sup>94</sup> Such an approach characterises not only the area of law relating to child custody disputes but also many other areas of law where the religion of a litigant becomes part of the legal issue before the court.'

"Moral standards which are generally accepted in society" are both an evidentiary test of the *bona fides* of the litigant, as for example in *Chauhan*, and a normative standard to which the believer must adhere, as, for example, in the *Thornton v Howe*<sup>95</sup> morality test in the law relating to charities. A failure to live by such standards frequently becomes, in the law's eyes, a failure to live in an acceptable manner. In a society such as Great Britain, dominated as it is by secular liberal *mores*, obdurate believers will invariably live by standards which are different from those which are general in society or take the standards which are general and apply them in a more rigid and unwavering manner. There is, thus, at root, an incompatibility between the law and the believer.<sup>96</sup>

Bradney notes that this is illustrated in the case of *Re ST* by Ward LJ's question, "where is her sense of priorities?" The answer for the 'obdurate' believer is with his or her religion. As a result *Chauhan* and *Janaway* lost their jobs and *NT* risked losing the custody of her child. But as Bradney explains:

'They were willing to sacrifice that which most people in Britain see as being central to their lives, work and family. But had they acted otherwise they would have lost all that which gave their lives purpose, shape and direction. For each of these litigants, as with any obdurate believer, their religion with its values and duties is the organising principle that makes everything else, including work and family, possible.'<sup>97</sup>

Bradney contrasts this approach with the idea that pervades modern civil society, the balancing of conflicting rights and principles when making decisions. Moderation comes through balancing principles. But for obdurate believers this is problematic as their faith is their priority. Likewise, where most people accept that their identities are formed through the balancing of a number of factors including: family and social relations, faith, education, job, culture, ethnicity, their gender and life experiences, it is

the religion and faith alone of obdurate believers that makes them who and what they are.<sup>98</sup> ‘To block that source, to ask them to doubt or ignore their religious belief, is a radical attack on their sense of self.’<sup>99</sup>

Bradney argues that the efficacy of Balcombe LJ’s test in *C v C*, not just in custody cases but in its reflection of widespread legal practice, is debatable in any society that pretends to liberal aims.

‘A pluralistic, multi-racial, multi-religious society is one which has to accommodate a wide range of social practices. A liberal society is one which does not make value choices for its members. That which is commonly done is not necessarily that which is right. It is not necessarily the only thing that is right. This has been recognised by the courts. In *C v. C* Balcombe LJ, having enunciated his general morality test, immediately went on to add that “standards may differ between different communities” within British society. Obdurate believers will be members of a “different community” where “standards may differ” and should be treated as such by the courts. Yet, whilst a liberal society does not prescribe the values that its citizens adhere to, it does not allow for complete freedom of choice in values. Standards may differ, but not infinitely. Value choices by one member of the society which impinge upon the ability of others to make value choices will not be permitted. I may not, for example, in the name of racial superiority, claim the right to practise apartheid. An obdurate believer may thus come from a community whose values are both different and also unacceptable in a liberal society. But in showing that the value choice is not acceptable in society, a heavy burden is put on those who wish to forbid that choice. For example, when it is argued that a value choice will be unacceptable if it causes “harm” to others, the notion of harm ought to be seen in a strong sense. .... If courts are to show that obdurate religious believers are not simply from a community where values differ but from a community whose values are to be forbidden, judicial practice ought to pay less attention to the question of which social practices are commonly accepted and more attention to the need to show that the social practices, which flow from particular religious beliefs are positively, strongly and directly harmful to people other than the believers. Judicial practice must acknowledge that difference and damage are not the same things.’<sup>100</sup>

I will return to this in Chapters 2 when I discuss the issue of whether religious beliefs should be accommodated within the legal system.

In his observations about the attitudes of the courts toward religious believers, Bradney is not alone. The editors of *Law and Medical Ethics*, in their discussion of cases involving the medical treatment of minors, make the following comment:

‘We have yet to encounter a case in the United Kingdom which displays a significant degree of sensitivity to the cultural and religious mores of parents.’<sup>101</sup>

Bradney concludes that the conflict highlighted between law and religion in the three

case studies is structural. What separates the three cases is the level of information available to the courts. In the case of *Janaway* there was no discussion about her religious beliefs, and in *Chauhan* the Court heard just from the litigant. However, in the case of *Re ST* the judge heard from seven expert witnesses and the mother lost less heavily than could have been predicted. What Bradney means here is that the mother could have lost custody of her son, but she retained custody subject to meeting certain conditions. From this Bradney argues that what is needed is for judges to spend time learning about unfamiliar religious cultures.<sup>102</sup> Of course this can be time-consuming. Even calling expert witnesses does not easily allow for this educative process to take place because a period of time is needed to reflect on the information received. For example, in the case of *Re ST*, Ward LJ took 75 days to hear the case and then nearly a year to prepare his judgement. Bradney concludes that while this is undoubtedly good practice it is not conducive to the smooth running of an already overburdened court system.<sup>103</sup>

Werner Menski makes a similar point about the education of judges in the area of foreign laws and ethnic and minority customs, stressing that judges ‘desperately need expert help.’<sup>104</sup> While I accept that judges do receive education and training relating to ethnic cultural and religious diversity under the heading of ‘equal treatment,’<sup>105</sup> I would argue that the arguments advanced by Bradney and Menski point to a more general role that representatives of faith communities could play in educating the legal profession, and to a specific need for representatives of faith communities to assist judges in helping to resolve cases involving issues of faith and religious laws, beliefs and practices.<sup>106</sup> I will touch on this point again in Chapter 5. However, I would also argue that representatives of faith communities could have a much wider role in helping to resolve disputes between persons of faith and those who do not share that faith. For example, in Chapter 3 I will argue that Healthcare Chaplains could play an important role in helping to resolve disputes over healthcare decisions that have arisen as a result of issues of faith. This role has the potential to help disputants avoid legal proceedings altogether. In Chapter 4 I will argue that there could also be a role for representatives of faith communities in other types of dispute. For, example, representative of faith communities could play an important role in the process of mediation either, as a spokesperson for a person of faith, or as a mediator or co-mediator.

## Conclusion

I have focused in this Chapter on the difficulties faced by persons of faith in the English law courts and an Employment Tribunal. In *An NHS Trust v MB*<sup>107</sup> the father's faith was said to be 'irrelevant'. Consequently, issues of faith were not discussed and not allowed to enter the decision-making process. In the case of the conjoined twins<sup>108</sup> the parents' faith was deemed 'sincere' but subjected to a sliding-scale test of acceptability. In *Re E*<sup>109</sup> the parents were described as 'devout' but accused by the judge of subjecting their son A to martyrdom. Although the judge cited an American legal case to support his argument concerning martyrdom, he did not discuss with A or his parents how they understood their decision. In *Re P*<sup>110</sup> the judge described the world as, 'a world in which, religious and indeed any other convictions are not commonly held.'<sup>111</sup> In *Chauhan v Ford Motor Company*<sup>112</sup> the Employment Tribunal was not convinced of the genuineness of Chauhan's faith even though they had no direct discussion with him about his faith. Nor did they understand that Chauhan's response to the religious texts upon which he relied was adapted due to the geographical and social environment within which he lived. In *Janaway v Salford Area Health Authority*<sup>113</sup> there was no discussion of faith issues. The judges did not accept Janaway's interpretation of 'participating' in an abortion. If they had done so, this might well have enabled Janaway to have claimed protection under section 4(1) Abortion Act 1967, and prevented the 'mischief' for which s 4(1) was designed. In *Re ST*<sup>114</sup> the judge did take extensive witness evidence in support of NT. Consequently, NT was able to retain custody of her son subject to certain conditions, which included making changes in her religious priorities. The case studies show that the difficulties faced by persons of faith in the English law courts are not restricted to persons of one faith, but instead encompass all faiths. The difficulties are not restricted to litigants but extend to representatives of Christian churches who make submissions to court. Although the difficulties are often revealed in high profile healthcare cases they also extend to many other types of legal case and to employment tribunals, which raises the questions why persons of faith experience such difficulties, and why the courts appear to be so inhospitable towards issues of faith.

Bradney has argued that there are likely to be differences and difficulties in the interactions between *all* believers and the court but these will be sharper in the case of

‘obdurate’ believers. As we have seen the root of the problem that courts have with ‘obdurate’ believers relates to differences in values and priorities.

‘In a society such as Great Britain, dominated as it is by secular liberal *mores*, obdurate believers will invariably live by standards which are different from those which are general in society or take the standards which are general and apply them in a more rigid and unwavering manner. There is, thus, at root, an incompatibility between the law and the believer.’<sup>115</sup>

Bradney also argued that the difficulties experienced by obdurate believers are structural. The case studies reveal that the less information that the judges had about the religious beliefs the more acute the difficulties for the obdurate believer. This points to the need for judges to receive more education in cultural and religious issues. I have also argued that it also points to a role for representatives of faith communities who could be enlisted to support judges in coming to an understanding of a litigant’s faith.

While I agree with the reasons that Bradney has given to explain the difficulties faced by persons of faith I would also argue that it is only part of a much bigger picture. In the next chapter I will show that many of the difficulties spring from the dominance of legal positivism, whilst in the fourth chapter I will show that conflict has not always been understood and addressed primarily in legal terms. The re-emergence of mediation has revealed that conflict can be understood and addressed in a number of different ways, and some of these enable issues of faith to be taken into account and given weight in the decision-making process.

Lord Woolf has referred to the courts as ‘final arbiters’ in complex medical cases such as the conjoined twins.<sup>116</sup> The question is, is it acceptable or indeed advisable in a religiously plural and multicultural society for final arbiters to be those who understand and address disputes in narrow legal terms, who understand law as separate from ethics and religion, and who view issues of faith as either ‘irrelevant’, or subject them to a test of acceptability? Are these the final arbiters that persons of faith would really want, or could there be an alternative? In the subsequent chapters I will argue that there are indeed alternatives to the current approach and in the following chapter I address the understanding of law.<sup>117</sup>

## Notes

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- <sup>1</sup> Anthony Bradney, "Faced by Faith," in *Faith in Law: Essays in Legal Theory*, eds. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 89-105.
- <sup>2</sup> *An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2 FLR 319.
- <sup>3</sup> *Ibid.*, 334.
- <sup>4</sup> *Ibid.*
- <sup>5</sup> *Ibid.*, 327.
- <sup>6</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.
- <sup>7</sup> *Ibid.*, 985-6.
- <sup>8</sup> *Ibid.*, 1068; A copy of the text of the full submissions entitled *The Roman Catholic Diocese of Westminster, A Submission by Archbishop Cormac Murphy O'Connor, Archbishop of Westminster, to the Court of Appeal in the case of Central Manchester Healthcare Trust v Mr and Mrs A and Re A Child (By her Guardian Ad Litem, The Official Solicitor)* can be found at - [http://www.rcdow.org.uk/textonly/cardinal/default.asp?content\\_ref=45](http://www.rcdow.org.uk/textonly/cardinal/default.asp?content_ref=45). (accessed September 7, 2009).
- <sup>9</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 969.
- <sup>10</sup> *Ibid.*, 1069.
- <sup>11</sup> *Ibid.*, 969.
- <sup>12</sup> *Ibid.*, 1057.
- <sup>13</sup> *Re T (a minor) (wardship: medical treatment)* [1997] 1 All ER 906, [1997] 1 WLR 242.
- <sup>14</sup> *Ibid.* [1997] 1 All ER 906 at 917-918, [1997] 1 WLR 242 at 254.
- <sup>15</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.
- <sup>16</sup> *Ibid.*, 1057.
- <sup>17</sup> *Ibid.*, 987.
- <sup>18</sup> Andrew Bainham, "Resolving the unresolvable: The case of the conjoined twins," *Cambridge Law Review* 60(1) (2001): 49-53.
- <sup>19</sup> *Re A (children) (conjoined twins: surgical separation)*, 987.
- <sup>20</sup> *Ibid.*, 985.
- <sup>21</sup> *Ibid.*, 1006.
- <sup>22</sup> *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961 at 986 [1997] Fam 1 at 32 cited in *Re A (children) (conjoined twins: surgical separation)*, 1006, 1056.
- <sup>23</sup> *An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2 FLR 319-346.
- <sup>24</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.
- <sup>25</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) [2004] 2FLR 1117.
- <sup>26</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.
- <sup>27</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112, [1986] 1 FLR 224, [1985] 3 WLR 830, [1985] 3 All ER 402, HL.
- <sup>28</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.
- <sup>29</sup> *Ibid.*, 388.
- <sup>30</sup> *Ibid.*, 389.
- <sup>31</sup> *Ibid.*, 393.
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*, 394.
- <sup>35</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Abingdon: Routledge-Cavendish, 2009), 119.
- <sup>36</sup> *Re E (A Minor) (Wardship: Medical Treatment)*, 394.
- <sup>37</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) [2004] 2FLR 1117.
- <sup>38</sup> *Ibid.*
- <sup>39</sup> *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, [1993] 1 FLR 1, [1992] 4 All ER 627, CA.
- <sup>40</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) 1120.
- <sup>41</sup> Bradney, "Faced by Faith," in *Faith in Law*, 89-105.
- <sup>42</sup> *Ibid.*, 90.
- <sup>43</sup> T. Modood, "Culture and Identity" in *Ethnic Minorities in Britain*, T. Modood et al. (London: Policy Studies Institute, 1997), 297 cited in Bradney, "Faced by Faith," 90 note 7.
- <sup>44</sup> B. Parekh, "Religion and Public Life" in *Church, State and Religious Minorities*, T. Modood (ed.), (London: Policy Studies Institute, 1997), 21 cited in Bradney, "Faced by Faith," 90 note 8.
- <sup>45</sup> A survey found that around 9 in 10 Sikhs, Hindus and Muslims said that religion was important to the way that they led their lives, compared to only six in ten Christians. Social Focus on Ethnic Minorities

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(London: HMSO, 1996) 14-15; T. Modood, "Culture and Identity" in *Ethnic Minorities in Britain*, T. Modood et al. (London: Policy Studies Institute, 1997), 297 both cited in Bradney, "Faced by Faith," in *Faith in Law*, 90, notes 9 and 7.

<sup>46</sup> Bradney, "Faced by Faith," in *Faith in Law*, 90.

<sup>47</sup> Sexual Offences Act 1967

[http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1967/cukpga\\_19670060\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1967/cukpga_19670060_en_1) (accessed August 3, 2009).

<sup>48</sup> The Criminal Justice (Scotland) Act 1980.

<sup>49</sup> The Homosexual Offences (Northern Ireland) Order 1982.

<sup>50</sup> Criminal Justice and Public Order Act 1994.

[http://www.opsi.gov.uk/acts/acts1994/ukpga\\_19940033\\_en\\_16#pt11-pb4-11g145](http://www.opsi.gov.uk/acts/acts1994/ukpga_19940033_en_16#pt11-pb4-11g145) (accessed August 3, 2009).

<sup>51</sup> The Sexual Offences (Amendment) Act 2000.

[http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen\\_20000044\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000044_en_1.htm) (accessed August 3, 2009).

<sup>52</sup> Civil Partnership Act 2004. Relates to consenting homosexuals aged 16 years or over. Those aged between 16-18 years require parental consent to enter civil partnerships.

[http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040033\\_en2#pt1-11g1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en2#pt1-11g1) (accessed July 28, 2009).

<sup>53</sup> The Equality Act (Sexual Orientation) Regulations 2007 No. 1263

[http://www.opsi.gov.uk/si/si2007/uksi\\_20071263\\_en\\_1](http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1) (accessed July 28, 2009).

<sup>54</sup> Cardinal Cormac Murphy-O'Connor, the leader of the Roman Catholic Church in England and Wales, was reported as having written to Cabinet ministers saying that the teaching of the Catholic Church prevented its adoption agencies from placing children with homosexuals. If they were forced to act against their consciences it would mean that they would be discriminated against on the grounds of belief. He warned that the closure of agencies would be a wholly avoidable "tragedy".

"Catholic adoption agencies adjust to gay rights legislation," *BBC News Channel*, Tuesday January 23, 2007.

<http://www.communitycare.co.uk/Articles/2009/01/110466/how-catholic-adoption> (accessed July 19, 2009).

<sup>55</sup> Terry, Philpot, "Catholic adoption agencies adjust to gay rights legislation." January 21, 2009.

<http://www.communitycare.co.uk/Articles/2009/01/110466/how-catholic-adoption> (accessed July 19, 2009).

<sup>56</sup> Ibid. and Ethan Cole, "Catholic adoption agencies to comply with equality laws," *ChristianToday*, January 12 2009.

[http://www.christiantoday.com/article/catholic\\_adoption\\_agencies\\_to\\_comply\\_with\\_equa](http://www.christiantoday.com/article/catholic_adoption_agencies_to_comply_with_equa) (accessed July 19, 2009).

<sup>57</sup> K. Knott, *Religion and Identity, and the Study of Ethnic Minorities in Britain* (Leeds: University of Leeds Community Religions Project, 1986), 4 cited in Bradney, "Faced by Faith," Bradney, " in *Faith in Law* 90 note 11.

<sup>58</sup> In one survey 40 per cent of religious believers questioned felt that their religion made no difference to their day-to-day lives. *Social Trends*, Vol. 26 (London, The Stationery Office, 1996), 225 cited in Bradney, "Faced by Faith," in *Faith in Law*, 90, note 12.

<sup>59</sup> Ibid., 90-91.

<sup>60</sup> Ibid., 91.

<sup>61</sup> A. Giddens, *Modernity and Self-Identity* (London: Polity Press, 1991), 20.

<sup>62</sup> Ibid., 109.

<sup>63</sup> Bradney, "Faced by Faith," in *Faith in Law*, 91.

<sup>64</sup> Ibid. Bradney acknowledges that church attendance has declined, but also points to the fact that ten per cent of the population of the United Kingdom still attend church at least once a month. This amounts to several million people. While he accepts that not all of these are obdurate believers the number that are, is still likely to be sizable. *ibid.* 91, note 16 The UK is reported to have the lowest rate of active church membership (15 percent) in Europe (*Social Trends*, Vol. 24 (London. The Stationery Office, 1994), 145). The total population in 1994 was 58.4 million (*Social Trends*, Vol. 27 (London: The Stationary Office, 1997) 16). 15 per cent of 56.6 million is 8.76 million; Church attendance is reported to have fallen to 3.27 million in 2005 source Peter Brierley (ed) *UK Christian Handbook Religious Trends No. 5: The Future of the Church*, London: Christian Research, 2005, table 2: 2 cited in

[http://www.tomorrowproject.net/pub/1\\_GLIMPSES/Individuals\\_identity\\_and\\_value](http://www.tomorrowproject.net/pub/1_GLIMPSES/Individuals_identity_and_value) (accessed May 3, 2007).

While church attendance has fallen substantially since 1990 if one also includes believers of other faiths in the calculation then Bradney is surely correct to say that the total number of obdurate believers included in these groups will be sizeable.

<sup>65</sup> Bradney, "Faced by Faith," in *Faith in Law*, 91.

<sup>66</sup> Ibid., 91-92.

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- <sup>67</sup> Bradney, "Faced by Faith," in *Faith in Law*, 91-92.
- <sup>68</sup> *Ibid.* Bradney's comments on the case are based on the full transcript of the judgement, which can be found on the LEXIS database. *Chauhan v Ford Motor Company*.  
<http://www.lexisnexis.com/uk/legal/search/casessubmitform.do>. (accessed September 21, 2009).
- <sup>69</sup> Bradney, "Faced by Faith," in *Faith in Law*, 92.
- <sup>70</sup> *Ibid.*, 92.
- <sup>71</sup> *Ibid.*, 94.
- <sup>72</sup> K.Knott, "Hindu Temple Rituals in Britain: The Reinterpretation of Tradition" in *Hinduism in Great Britain*, ed. R Burghart (London: Tavistock Publications, 1987); and K.Knott, *Hinduism in Leeds* (Leeds: Community Religions Project, University of Leeds, 1986), Ch. 3.
- <sup>73</sup> Bradney, "Faced by Faith," in *Faith in Law*, 94.
- <sup>74</sup> *Ibid.*
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *R v Salford Area Health Authority*, (The Times, 13 Feb. 1987); *R v Salford Area Health Authority, Janaway v Salford Area Health Authority* [1989] AC 537.
- <sup>77</sup> Bradney, "Faced by Faith," in *Faith in Law*, 94-95.
- <sup>78</sup> *Ibid.*, 95.
- <sup>79</sup> *Ibid.*, 95-96.
- <sup>80</sup> See, for example, Bernard Braine, *House of Commons Standing Committee Reports 1966/67*, Vol. X, col. 551 and Norman St. John Stevas, col. 561. Specific reference was made to nurses, doctors and midwives but there was also a more general reference to members of the medical professions. cited in Bradney, "Faced by Faith" in *Faith in Law*, 96 note 30.
- <sup>81</sup> Heydon's Case (1584) 3 Co. Rep. 7a cited in Bradney, "Faced by Faith," in *Faith in Law*, 96 note 31.
- <sup>82</sup> Bradney, "Faced by Faith," in *Faith in Law*, 96.
- <sup>83</sup> *Ibid.*, 96-98 The case was unreported and there is no record of it on the LEXIS database. There was a news report of it in the Guardian, 25 Nov. 1995. But Bradney's comments on the case are based on a transcript of it that he received from The Family.
- <sup>84</sup> Bradney, "Faced by Faith," in *Faith in Law*, 96-97 note 35 For an essay on the academic literature on The Family see J. Saliba, "Scholarly Studies on The Family/the Children of God: A Comprehensive Survey" in *Sex, Slander, and Salvation* ed. J.Lewis and J. Gordon Melton (Stanford, Cal., Center for Academic Publication, 1994).
- <sup>85</sup> Bradney, "Faced by Faith," in *Faith in Law*, 98.
- <sup>86</sup> *Ibid.*
- <sup>87</sup> *Ibid.*
- <sup>88</sup> *Ibid.*, note 37 Bradney acknowledges that the decision of Ward LJ was not necessarily incorrect. The judge was bound in law to attend only to the best interests of the child in the case, not the religious needs of the parent or the theological position of the religion involved. Moreover his judgement was based on a full examination of expert evidence and contains a balanced account of The Family, which is in marked contrast to some earlier judicial comment on new religious movements. For a more detailed consideration of this case in the context of the law relating to child custody see A Bradney, "Children of a Newer God" in *Children in New Religious Movements* ed. S.Palmer and C. Hardman (New Brunswick N.J: Rutgers University Press, 1999), 210.
- <sup>89</sup> <sup>89</sup> Caroline Bridge, "Religious Beliefs and Teenage Refusal of Medical Treatment," *The Modern Law Review* (1999): 588.
- <sup>90</sup> *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810.
- <sup>91</sup> Bridge, "Religious Beliefs and Teenage Refusal of Medical Treatment," 588.
- <sup>92</sup> *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 812 Emphasis was added by Bridge.
- <sup>93</sup> Bridge, "Religious Beliefs and Teenage Refusal of Medical Treatment," 588.
- <sup>94</sup> *C v C* [1991] 1 FLR 223 at 230.
- <sup>95</sup> *Thornton v Howe* (1862) Beav. 14.
- <sup>96</sup> Bradney, "Faced by Faith," in *Faith in Law*, 100-101.
- <sup>97</sup> *Ibid.*, 101.
- <sup>98</sup> *Ibid.*, 102, note 49.
- <sup>99</sup> *Ibid.*, 102.
- <sup>100</sup> *Ibid.*, 102-103.
- <sup>101</sup> J.K. Mason, R.A.McCall Smith and G.T.Laurie, ed. *Law and Medical Ethics*, 6<sup>th</sup> ed. (London: LexisNexis UK, 2003), 317.
- <sup>102</sup> Bradney, "Faced by Faith," in *Faith in Law*, 100, note 42.  
Bradney acknowledges that judges do receive training relating to racial and ethnic differences. See <http://www.jsboard.co.uk> (accessed July 24, 2009).
- <sup>103</sup> Bradney, "Faced by Faith," in *Faith in Law*, 100.

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<sup>104</sup> Werner Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, ed. Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman (Copenhagen: DJOF Publishing, 2008), 54.

<sup>105</sup> Judges receive education and training from the Judicial Studies Board (JSB). Education relating to issues of ethnic, cultural and religious diversity is listed under the heading of 'equal treatment'. It is the function of the Equal Treatment Advisory Committee (ETAC) 'to assist and support all judges and judicial office-holders to fulfil the obligations of the judicial oath by being equipped to recognise the many ways in which social, cultural and other differences may have a bearing on the conduct of cases and the wider judicial role.' In the Equal Treatment Bench Book education on religion is included in Chapter 3 under the heading, 'Discrimination on the basis of belief or non-belief.'  
[http://www.jsboard.co.uk/downloads/annual\\_report\\_2009\\_web.pdf](http://www.jsboard.co.uk/downloads/annual_report_2009_web.pdf) (accessed July 24, 2009).

<sup>106</sup> *Ibid.* In the Judicial Studies Board 2008-9 Annual Report the ETAC confirm that the JSB have this year completed an initial list for a directory of external expert advisors in relation to the different diversity strands, e.g. race, gender, sexual orientation, religion, and belief.

<sup>107</sup> *An NHS Trust v MB (A child represented by the AFCASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2 FLR 319.

<sup>108</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.

<sup>109</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.

<sup>110</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) [2004] 2 FLR 1117.

<sup>111</sup> *Ibid.*, 1120.

<sup>112</sup> *Chauhan v Ford Motor Company*.

<http://www.lexisnexis.com/uk/legal/search/casessubmitform.do>. (accessed September 21, 2009).

<sup>113</sup> *R v Salford Area Health Authority*, (The Times, 13 Feb. 1987); *R v Salford Area Health Authority, Janaway v Salford Area Health Authority* [1989] AC 537.

<sup>114</sup> Bradney, "Faced by Faith," in *Faith in Law*, 96-98 The case was unreported and there is no record of it on the LEXIS database. There was a news report of it in the Guardian, 25 Nov. 1995. But Bradney's comments on the case are based on a transcript of it that he received from The Family.

<sup>115</sup> Bradney, "Faced by Faith," in *Faith in Law*, 100-101.

<sup>116</sup> The Right Honourable Lord Woolf, 'Are the Courts Excessively Deferential To The Medical Profession' *Medical Law Review* (Spring) 9(1) (2001): 1-16.

## Chapter 2

### Law, morals, and religion: separation or accommodation?

In the Introduction I argued that there were three underlying reasons why persons of faith often experience difficulties when disputes in which they are involved end up in the English Law Courts. The first is the way in which conflict is understood and addressed in narrow legal terms, and I will return to this issue in Chapter 4. The second is the way in which law has come to be understood as separate from morals or religion due to the influence of legal positivism. The third is the way in which religion is often portrayed as being a purely private matter. In this chapter I will examine the second reason, which is how law is understood. I will begin in Section I by focussing on how law is understood by proponents of legal positivism, natural law and legal pluralism. I will outline the models of law of H.L.A.Hart, John Finnis and Werner Menski, and consider how they understand law and its relationship with morals and religion. In Section II I will discuss what contribution the Hebrew Bible and the New Testament can make to modern debates about law. In Section III I will explore the concept of toleration and consider how English Law has accommodated religious beliefs and practices. I will argue that law can be understood in many different ways, and the legal positivists' understanding of the concept of law is just one way of viewing law. The Hebrew Bible makes three important contributions to the debate about law. First, the focus in Hebrew law was on maintaining relationships, rather than on obedience to rules. Second, the aim of the law was 'shalom', which is often translated into English as 'peace'. However, 'shalom' did not mean merely an absence of conflict. Rather, it refers to 'a state of well-being or all rightness' between persons on a physical, social and ethical level, and is closely linked with justice. The third contribution is the illustration of judges and priests, secular and religious authorities working together to address cases that involved civil and faith issues. The New Testament teaching makes an important contribution relating to how conflict can be addressed. At the heart of New Testament teaching is an ethic of grace, love and forgiveness, rather than a legal code. Christians are therefore challenged to try to settle disputes with one another, rather than go to law. I will return to this topic in Chapter 4 when I discuss mediation. Finally, the concept of toleration has developed over time and can be understood in a variety of ways. What is clear though, is that religious beliefs have been accommodated in an ad hoc manner into English law for centuries under the guise of toleration. However, Bradney's work poses

the question - should the wishes of individual believers be accommodated? While it may not be possible to accommodate the wishes of each believer, I will argue that judges should be prepared to discuss, engage with, and try to come to an understanding of the issues of faith raised by each litigant, and accommodate them when they can. However, I acknowledge that there are a number of formidable obstacles that will need to be addressed if issues of faith of individual believers are to be given room to be discussed, understood, and accommodated in legal cases, and I will return to discuss these issues in Chapter 5.

The legal cases of Baby MB<sup>1</sup> and the Conjoined Twins<sup>2</sup> that I outlined in Chapter 1 illustrate how some judges understand law as being separate from ethics and religion. I will therefore begin in Section I (a) by examining how Legal Positivism and, in particular, the work of H.L.A. Hart, has influenced how some judges view law.

## Section I – Law, morals and religion

### a) Legal positivism and the ‘Separation Thesis’

The tradition of English Legal Positivism derives from the work of John Austin (1790-1852). Following Bentham’s rejection of natural law (‘nonsense on stilts’) and, in Enlightenment fashion, rejecting divinely revealed law, Austin defines law as ‘the command of a sovereign backed by a sanction’.<sup>3</sup> A command ‘encompasses the concept of a sanction (the evil that will probably be incurred in case of non-compliance), the concept of superiority (the power of forcing compliance with one’s wishes) and the concept of obligation or duty.’<sup>4</sup> From the start this concept incurred severe criticism, on the grounds that it fails to explain the varied content of laws or the range of persons to whom laws are normally applicable, and that commands are not a satisfactory way of describing customary law. However, like utilitarianism, it has survived philosophical critique and been the standard version of law assumed by judges, as we saw in the previous chapter. Importantly for my thesis it emerges from a period when philosophers in Britain and France were trying to separate ethics and politics from religion. As a form of positivism it was followed by Comte, who likewise wished to replace the murky and outdated waters of religious belief with clear rational principles.

All forms of legal positivism espouse the ‘Separation Thesis’, the contention that there is no necessary connection between law and morals, or law as it is, and law as it ought to be.<sup>5</sup> Strict (or strong or exclusive) positivists insist on observing the Separation Thesis at all times, whilst others, such as Hart, who are known as soft (or weak or inclusive) positivists, accept the possibility (but not the necessity) of taking moral factors into account.<sup>6</sup> However, McLeod notes that ‘soft positivism’s concession that moral factors *can* be relevant when identifying the existence of law must not be taken to be a wholesale surrender to the constitutive strand of the natural law tradition’.<sup>7</sup> This is because even the softest positivists would want to maintain ‘the separation between law and morals for the purpose of limiting the power to the moral sphere of those (such as religious leaders) whose moral authority has not been endorsed by any form of law-making.’<sup>8</sup> The reason behind this is the concern that religious laws or beliefs will be imposed on non-believers by coercion using the law. This concern is rooted in the religious wars of the sixteenth and seventeenth centuries, but is also fuelled by the teaching of some natural law theorists who seem to imply that an unjust law is not a law.<sup>9</sup> As I will show in Section I (b) John Finnis argues that this is not an accurate representation of natural law theory.

Legal positivists do not deny the importance of morality, but want to separate the questions what is law? And what is good law?<sup>10</sup> Natural law, on their account, conflates the two questions.<sup>11</sup> For legal positivists the first question ‘is essentially a question of fact, to be answered by empirical reference to, and an analysis of, objective social phenomena.’<sup>12</sup> The second question seeks to evaluate law, and seeks to judge it in terms of whether it is good or bad.<sup>13</sup> In what follows I will look at Hart’s account of this discussion.

In *The Concept of Law* Hart argues that legal rules are a species of social rules.<sup>14</sup> He begins by considering social habits and social rules. He acknowledges the similarity between social habits and social rules in that the behaviour in question is repeated when occasion arises by most of a group of people. But he argues that there are three differences between social habits and social rules. In the case of a ‘habit’ it is enough that behaviour converges, and if there is a deviation it need not be a matter for any form of criticism. But if it is a social ‘rule’ then any deviations are likely to be regarded as lapses or faults, which will be open to criticism, and will be met by pressure to conform. Secondly, if there are any lapses of a social ‘rule’ it will be regarded as good reason for

criticism by those making the criticism, and by those to whom the criticism is made.

Thirdly, social rules have an 'internal' aspect, which Hart describes as follows:

'What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'. These are the crucial features which distinguish social rules from mere group habits ..'<sup>15</sup>

Social 'rules' therefore provide a guide to human conduct and standards of criticism of that conduct.<sup>16</sup> But Hart acknowledges that there are different types of social rules, and in order to illustrate the difference between social rules he draws a distinction between being 'obliged' to do, or not do, something, and being under an 'obligation' to do something.<sup>17</sup> Hart illustrates the distinction by the example of a gunman A, who orders B to hand over money, and threatens to shoot him if he does not comply. While we might say that B was 'obliged' to hand over the money (because B feared what might happen if he did not), it would not describe the situation correctly if we were to say that B had an 'obligation' or 'duty' to hand over the money.<sup>18</sup> Hart argues that 'to say that one is 'obliged' to do something is often a statement about the beliefs and motives with which an action is done.'<sup>19</sup> In other words B feared the consequences if he did not hand over the money. But to say that someone had an 'obligation' to do something is a different type of statement.

'Thus the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience. Moreover, whereas, the statement that someone was obliged to do something, normally carries the implication that he actually did it.'<sup>20</sup>

Hart argues that to understand the general idea that a person has an obligation to do something one needs to turn to a different social situation, which unlike the gunman situation includes the existence of social rules.

'This situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behaviour a standard, is the normal, though unstated, background or proper context for such a statement; and secondly, the distinctive function of such a statement is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it.'<sup>21</sup>

Hart then explains when social rules can be understood as imposing obligations.

‘Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organised system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals’ respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we may be inclined to classify the rules as a primitive or rudimentary form of law..... What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations’<sup>22</sup>

Note that Hart is beginning to distinguish between moral and legal rules, but before dealing with this in depth he sets out two further characteristics of obligation that can be added to the primary one.

‘The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So too rules which require honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are thought of in terms of either ‘obligation’ or perhaps more often ‘duty.’ Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.’<sup>23</sup>

Hart concedes that there are similarities between legal and moral rules.

‘They are alike in that they are conceived as binding independently of the consent of the individual bound and are supported by serious social pressure for conformity; compliance with both legal and moral obligations is regarded not as a matter for praise but as a minimum contribution to social life to be taken as a matter of course. Further both law and morals include rules governing the behaviour of individuals in situations constantly recurring throughout life rather than special activities or occasions, and though both may include much that is peculiar to the real or fancied needs of a particular society, both make demands which must obviously be satisfied by any group of human beings who are to succeed in living together. Hence some forms of prohibition of violence to person or property, and some requirements of honesty and truthfulness will be found in both alike.’<sup>24</sup>

However, he distinguishes between legal and moral rules by citing four characteristics of moral rules, which I have summarised below:

(i) Importance. 'It is manifested in many ways: first, in the simple fact that moral standards are maintained against the drive of strong passions which they restrict, and at the cost of sacrificing considerable personal interest; secondly, in the serious forms of social pressure exerted not only to obtain conformity in individual cases, but to secure that moral standards are taught or communicated as a matter of course to all in society; thirdly, in the general recognition that, if moral standards were not generally accepted, far-reaching and distasteful changes in the life of individuals would occur.' Importance is not essential to the status of legal rules. A legal rule may be regarded as unimportant and yet remain a legal rule until repealed. (ii) Immunity from deliberate change. 'It is characteristic of a legal system that new legal rules can be introduced and old ones changed or repealed by deliberate enactment, even though some laws may be protected from change by written constitution .... By contrast moral rules or principles *cannot* be brought into being or changed or eliminated in this way.' (iii) The voluntary character of moral offences. 'If a person whose action, judged *ab extra*, has offended against moral rules or principles, succeeds in establishing that he did this unintentionally and in spite of every precaution that it was possible for him to take, he is excused from moral responsibility, and to blame him in these circumstances would itself be considered morally objectionable. Moral blame is therefore excluded because he has done all that he could do. In any developed legal system the same is true up to a point; the general requirement of *mens rea* is an element in criminal responsibility designed to secure that those who offended without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to the law, should be excused. A legal system would be open to serious moral condemnation if this were not so, at any rate in cases of serious crimes carrying the punishment. Nonetheless admission of such excuses in all legal systems is qualified in many different ways.' (iv) The form of pressure. 'If it were the case that whenever someone was about to break a rule of conduct, *only* threats of physical punishment or unpleasant consequences were used in argument to dissuade him, then it would be impossible to regard such a rule as part of the morality of society, though this would not be any objection to treating it as part of the law. Indeed, the typical form of legal pressure may well be said to consist in such threats. With morals on the other hand the typical form of pressure consists in appeals to the respect of the rules, as things important in themselves, which is presented to be shared by those addressed. So, moral pressure is characteristically, though not exclusively exerted not by threats or by appeals to fear or interest, but by reminders of the moral character of the action contemplated and of the demands of morality.'<sup>25</sup>

Michael Martin argues that it is doubtful that the four conditions in themselves are capable of distinguishing legal rules from moral rules.<sup>26</sup> However, Davies and Holdcroft argue that there is an alternative argument that Hart could have used, and that is that a legal system has a *monopoly* over the use of physical sanctions. If a moral system were to use physical sanctions it would be because it was authorised to do so by the legal

system. In other words, ultimate power resides in the legal system, and not in the moral system.<sup>27</sup>

Having distinguished legal rules from other social rules Hart then defines a legal system as the combination of primary and secondary rules. Primary rules are those that impose either positive or negative obligations.<sup>28</sup> Secondary rules include: the rule of recognition, which enables people to recognise the rules that are law, from those that are not;<sup>29</sup> rules of change, which enable the primary rules to be changed, either by introducing new rules or eliminating others;<sup>30</sup> and rules of adjudication, which identify the individuals who are to adjudicate and define the procedure to be followed.<sup>31</sup> Hart distinguishes between rules that are law and rules that are not. Generally speaking the rules that are law include those enacted by Parliament, those incorporated from the European Community, judicial decisions that become precedents and customs that are recognised by law.<sup>32</sup> Hart's understanding of law therefore tends to be restricted to that which is enacted by the state. As a result, religious laws, beliefs and practices are not included in Hart's definition of legal rules. Werner Menski has shown how this approach to law has led to unjust consequences,<sup>33</sup> and as a result he argues for a very different concept of law, which I will outline in Section I (c). There has been much debate about whether law should be defined in terms of state law, or whether law can be defined more widely to include, for example, religious laws.<sup>34</sup> I will discuss this issue in Section I (c). However, it is worth noting that religious laws, beliefs and practices could come within Hart's definition of law if they are specifically accommodated in a legal system by being enacted by statute. I will discuss this further in Section III.

Having set out his concept of law Hart then considers the relationship between laws and morals. He acknowledges that there are many different types of relations between them, and that the development of law has been profoundly influenced by morality. But he argues that this is very different from saying that a legal system must exhibit some conformity to morality or justice, or must rest on a conviction that there is a moral obligation to obey it.

‘Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.’<sup>35</sup>

However, Hart does concede that both law and morals have a ‘minimum content of natural law’.<sup>36</sup> The starting point of this argument is the assumption that the aim of

humans living together is survival. Hart reflects on five truisms about human nature and the world to show that there are certain rules of conduct that any social organization must contain if it is to be viable. The five truisms on which Hart reflects are: (i) human vulnerability, (ii) approximate equality, (iii) limited altruism, (iv) limited resources and (v) limited understanding and strength of will.<sup>37</sup> From his reflection on these truisms Hart concludes that there is a necessity for a number of rules of conduct as follows: (i) rules that provide restrictions on the use of violence, (ii) a system of rules relating to mutual forbearance and compromise, (iii) rules relating to property, (iv) obligation-creating rules and (v) sanctions if rules are not obeyed. Hart describes these rules as, ‘universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims,’ and he refers to them as, ‘the *minimum content* of Natural Law’.<sup>38</sup>

Hart’s idea of the ‘minimum content of Natural Law’ has not been uncritically accepted. Freeman notes that ‘it is premised on biology and psychology’, but ‘clothing them in scientific and social-scientific language does not avoid the recognition that what Hart is doing, is deducing moral principles and legal norms, from facts.’<sup>39</sup> Hart is thereby charged with transgressing Hume’s law, of obtaining an ‘ought’ from an ‘is’. This is a criticism that legal positivists often raise against Natural Law theories, and I will return to this when I discuss Finnis’ modern adaptation of Natural Law in the next section. Secondly, Freeman argues that the ‘minimum content’ provides little guidance. Although it indicates that we need rules against violence or to protect property, it does not specify what these should be.<sup>40</sup> McLeod, on the other hand, argues that despite Hart’s use of the phrase, ‘minimum content of natural law,’ it could be argued that this simply deals with certain aspects of law that are essential to the functioning of society.<sup>41</sup>

However, Simmonds draws an interesting parallel between Hart’s use of the value of survival and the work of John Finnis.<sup>42</sup> Simmonds notes that when considering why Hart invokes the value of survival, Hart gives two answers. The first is that ‘our concern is with social arrangements for continued existence, not those with a suicide club.’<sup>43</sup> The second, is that this desire for survival ‘is reflected in whole structures of our thought and language, in terms of which we describe the world and each other.’<sup>44</sup> When referring to survival Hart discards,

‘...as too metaphysical for modern minds, the notion that this is something antecedently fixed which men necessarily desire because it is their proper end or goal. Instead, we may hold it to be a mere contingent fact which could be

otherwise, that in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end that men do desire.<sup>45</sup>

But Hart immediately qualifies this as follows:

‘Yet even if we think of it in this common-sense way, survival has still a special status in relation to human conduct and in our thought about it, which parallels the prominence and the necessity ascribed to it in the orthodox formulations of Natural Law. For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of thought and language, in terms of which we describe the world and each other. We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival, which is accepted as an aim.’<sup>46</sup>

Simmonds suggests that Hart attributes to the value of survival the status of an objective good, and that this is similar to Finnis’ argument.

‘The value is inextricably bound up with our entire outlook upon the world and our relations with other human beings. Consequently, it is not clear that any alternative outlook is available to us: the value is a constitutive feature of “our” world. Seen in this way, Hart’s argument might be thought to resemble the argument of a natural lawyer such as Finnis. Finnis seeks to demonstrate the existence of certain objective goods by showing how they are presupposed by all of our practical reasoning and practical understanding: they provide our intellectual access to the entire world of human life and action. Hart could be said to do the same with the more minimal value of “survival”.’

Simmonds then argues:

‘Once we see the similarity, at this point, between the arguments of Hart and Finnis, we are led to ask a series of interesting questions. Are there, for example, other values apart from survival that are reflected in whole structures of thought and language? May we not in this way arrive at a somewhat richer notion of human flourishing, going beyond mere survival? And may that not in turn justify the construction of a more contentious concept of law, including elements that go beyond or supplement Hart’s focus on public ascertainability?’<sup>47</sup>

I will return to this in Section I (b) when I outline Finnis’s concept of law.

An important critic of positivism, and in particular, of Hart’s concept of law as a system of ‘rules,’ is Ronald Dworkin. Dworkin disagrees with Hart in three particular areas. He denies that law is comprised of only one type of standard, ‘rules’, that questions of law and issues of morality must be kept strictly separate when the nature of law is being discussed, and that judges have discretion that amounts to legislative power.

The differences between Hart and Dworkin are illustrated by the question of what happens when the rules run out. What do judges do in cases when the law does not seem to provide an answer? Hart's solution is that language is open-textured, and that the meaning of any given word will be made up of a core and penumbra.<sup>48</sup> Judges faced with the situation where the rules run out use their discretion. This has been interpreted as making a new rule, or altering the meaning and range of the application of existing law.<sup>49</sup> It is Hart's idea that judges make law in 'hard cases' that Dworkin attacks. He argues that it is undemocratic and, if true, would make law retroactive.<sup>50</sup> Instead, Dworkin argues that when lawyers reason or dispute about legal rights and obligations, particularly in hard cases, 'they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards.'<sup>51</sup> Dworkin defines 'policy' and 'principle' as, follows:

' I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). 'I called a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'<sup>52</sup>

The distinction between the two is that 'principles are propositions that describe rights; whereas, policies are propositions that describe goals.'<sup>53</sup> When there are two conflicting policies judges will choose between them. However, according to Dworkin, when a policy and a principle conflict, the rights, described as principles, act as "trumps". The rights serve to protect the individual against measures that are aimed at advancing collective goals. Rights are therefore claims that individuals can make that their interests should not be sacrificed for collective goals.<sup>54</sup> Dworkin distinguishes between 'absolute rights' that cannot be extinguished or restricted, and 'less than absolute rights' that may be restricted in exceptional circumstances.<sup>55</sup> Policies, principles and other sorts of standards together make up what Dworkin refers to as the 'moral fabric' of a society and they serve to protect interests that society regards as valuable. They are normally referred to as abstract rights, such as the right to life, liberty and human dignity. It is the idea of rights that enables Dworkin to argue that morality is, or should be, part of law.<sup>56</sup>

In his earlier work Dworkin also argued that when judges are making decisions they are not limited to rules, but can draw on policies, principles and other standards. This led

Dworkin to argue that judicial discretion is limited, and that judges do not have the discretion to make new law. Instead, because of the existence and operation of legal principles there is always a 'right answer' in relation to the question, 'who has the right to win?' Dworkin invents a judge, Hercules, who has superhuman skills, to illustrate his argument. Hercules has exceptional powers of analysis and deduction and draws on standards that Dworkin has outlined to justify his decision in 'hard' cases, and come to the one right answer.<sup>57</sup> The point that Dworkin tries to make is that judges will try to find some justification for their reasoning. However, in later work Dworkin has stepped back from the 'right argument' thesis. Perhaps, because in reality judges are fallible and do sometimes get it wrong, and because many believe that judges do make law, which leads to the thesis being difficult to sustain.

For Dworkin the key difference between 'rules' and 'principles' is that rules operate in an all or nothing' manner. 'If the facts that a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.'<sup>58</sup> If two rules conflict they cannot both be valid, but the conflict might be explained by way of an exception to the rule. A description of the rule will therefore be incomplete without reference to the exceptions.<sup>59</sup> Principles, on the other hand, do not operate in the same way. Principles have a dimension that rules do not – the dimension of weight. Although a principle may provide a reason for a case to be decided in a particular way, it does not necessarily mean that the case has to be decided in that way. Principles can conflict, and if they do conflict they can be weighed and balanced against one another.<sup>60</sup> This leads Dworkin to a specific criticism of Hart's concept of law, namely that the 'rule of recognition' cannot deal with principles.

'I might summarize the argument I made in this way. I said that the thesis that there exists some commonly recognized test for law is plausible if we look only at simple rules of the sort that appear in statutes or are set out in bold type in textbooks. But lawyers and judges, in arguing and deciding lawsuits, appeal not only to such black-letter rules, but also to other sorts of standards that I called legal principles,...

In reply to these criticisms Hart acknowledges that he said too little about adjudication and principles in his original thesis but he refuses to accept the sharp contrast drawn by Dworkin between legal principles and legal rules, and the idea that a valid rule, unlike a principle, always determines the case. Hart characterises Dworkin's idea that a legal system consists of all-or-nothing rules and non-conclusive principles as 'incoherent',

but argues that this can be ‘cured’ by accepting that the distinction between rules and principles is a matter of degree.<sup>62</sup> He replies to Dworkin’s charge that the rule of recognition cannot deal with principles by arguing that at least some principles could come within the rule’s operation.<sup>63</sup> This argument, however, implies that other principles cannot. In the next section I will examine how proponents of Natural Law, and in particular John Finnis, view the nature of law and its relationship with morality and religion.

## b) Natural Law

In Western legal history natural law can be traced to ancient Greece.<sup>64</sup> Elements of natural law can be found in the writing of Sophocles (496-406 BCE),<sup>65</sup> Aristotle (384-322 BCE),<sup>66</sup> the Stoics,<sup>67</sup> Cicero (106-43 BCE),<sup>68</sup> St. Augustine (354-430),<sup>69</sup> St. Thomas Aquinas (1225-74)<sup>70</sup> and Grotius (1583-1645).<sup>71</sup> Although the theories are diverse what they have in common is the idea that there is a ‘natural’ law or justice that predates and transcends positive or man-made law, and which acts as a standard by which humans can order their lives and by which positive law can be judged. What is understood as ‘natural’ law varies depending on the particular theory, and whether it is theological or secular, but it can include: the providence of God, the law of Nature or Reason, and universal principles.

Aquinas defined law as ‘an ordinance of reason for the common good made by the authority who has the care of the community and promulgated’.<sup>72</sup> For Aquinas there are four types of law, eternal, natural, divine and human. Eternal law is ‘a dictate of practical reason issued by a sovereign who governs a complete community’.<sup>73</sup> As Aquinas believed that God governs the whole universe divine reason is portrayed as the source of eternal law. Natural law is ‘the sharing in the eternal law by intelligent creatures.’<sup>74</sup> Human laws are principles drawn from natural law,<sup>75</sup> and divine law is that part of eternal law that God has given to humans, such as that found in the Hebrew Bible and New Testament.<sup>76</sup> Aquinas taught that law is enacted for the common good, and that this is linked to the common end, which is the happiness and well-being of the community.<sup>77</sup>

In *Natural Law and Natural Rights*<sup>78</sup> John Finnis has developed a modern version of Natural Law, which is a reinterpretation of Aquinas’ work. Finnis commences with the

statement. ‘There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.’<sup>79</sup> He therefore begins from the reason or purpose for law, which he argues is to secure human goods. He refutes the idea that an evaluation of the social institution of law can be preceded by a value-free description and analysis of the institution, as it exists in fact. The reason he gives is that:

‘the evaluations of the theorist himself are an indispensable and decisive component in the selection and formation of any concepts for use in description of such aspects of human affairs as law or legal order.’<sup>80</sup>

Finnis then sets out what he regards as the principles of natural law, which are:

‘(i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realised, and (ii) a set of basic methodological requirements of practical reasonableness which distinguish sound from unsound practical thinking and which provide the criteria for distinguishing between acts that are reasonable and acts that are unreasonable, i.e. between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of moral standards.’<sup>81</sup>

Finnis argues that the principal concern of a theory of natural law is:

‘to explore the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation. And the principal jurisprudential concern of a theory of natural law is to identify the principles and limits of the Rule of Law, and to trace the ways in which sound laws, in all their positivity and mutability, are to be derived (not usually, deduced) from unchanging principles – principles that have their force from their reasonableness, not from any originating acts or circumstances.’<sup>82</sup>

Finnis lists seven basic forms of human good including: life; knowledge; play; aesthetic experience; sociability (friendship); practicable reasonableness and ‘religion’.<sup>83</sup>

Religion is defined widely to include fundamental questions about the nature and origin of the cosmos and the place of humanity within it.<sup>84</sup> Finnis acknowledges that the list is not exhaustive and that ‘there are countless objectives and forms of the good.’<sup>85</sup> But he argues that on analysis the others will be found to be ‘ways or combinations of ways of pursuing ... and realizing ... one of the seven basic forms of good or some combination of them.’<sup>86</sup> Finnis argues that the goods are objective, basic, equally fundamental, pre-moral and self-evident.<sup>87</sup> But by good, or basic value, he does not mean that the goods are moral in themselves.

‘To think of knowledge as a value is not, as such, to think of it as a ‘moral’ value; ‘truth is a good’ is not, here, to be understood as a moral proposition, and ‘knowledge to be pursued’ is not to be understood, here, as stating a moral obligation, requirement, prescription or recommendation. In our reflective

analysis of practical reasonableness, morality comes later.’<sup>88</sup>

As well as being identified as one of the human goods practical reasonableness is defined as a whole methodology of reasoning. It is the good of practical reasonableness that structures the pursuit of the other goods, ‘by guiding one’s commitments, one’s selection of projects, and what one does in carrying them out.’<sup>89</sup>

The basic requirements of practical reasonableness include:

‘a coherent life plan, no arbitrary preferences among values; no arbitrary preferences among persons; detachment and commitment; the (limited) relevance of consequences: efficiency within reason; respect for every basic value in every act; the requirements of the common good; and following one’s conscience.’<sup>90</sup>

It is the basic requirements of practical reasonableness that transform the seven pre-moral human goods into a theory of morality.

‘Each of the requirements has a place in rational choice of commitments, projects, and particular actions. Each, moreover, contributes to the sense, significance, and force of terms such as ‘moral’ ‘[morally] ought’, and ‘right’; not every one of the nine requirements have a direct role in every moral judgement, but some moral judgments do sum up the bearing of each and all of the nine on the questions in hand, and every moral judgment sums up the bearing of one or more of the requirements. .. Suffice it to say that each of the requirements can be thought of as a mode of moral obligation or responsibility.’<sup>91</sup>

To understand how human goods provide a basis for morality they need to be understood in the context of communal life and in the light of the ‘common good’.

‘For there is a ‘common good’ for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, and religion, and freedom in practical reasonableness are good for any and every person. And each of these human values is itself a ‘common good’, inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions. These two senses of ‘common good’ are to be distinguished from a third, from which, however, they are not radically separate. This third sense of common good is the one commonly intended throughout this book, and it is a set of conditions, which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community ... The common good in this sense is a frequent or at least a justified meaning of the phrases ‘the general welfare’, or ‘the public interest’.’<sup>92</sup>

Finnis is at pains to make clear that the definition ‘neither asserts nor entails that the members of a community must all have the same values or objectives (or set of values or objectives).’<sup>93</sup> Rather, ‘it implies only that there be some set (or set of sets) of

conditions which needs to obtain if each of the members is to attain his own objectives.<sup>94</sup> The ‘common good’ is therefore a set of conditions within which human beings can exercise practical reasonableness and pursue diverse forms of flourishing. Finnis then argues that in order to secure the ‘common good’ what is needed is the institution of law, the focal meaning of which, is as follows:

‘Rules made in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a ‘complete’ community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community’s co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.’<sup>95</sup>

Finnis understands the nature of law in the light of how it provides an ordering of society that furthers the ‘common good’. He is aware, however, that law can be used in ways that are oppressive and that do not further the ‘common good’. Two questions flow from this. Is an unjust law, still a law? If a law is unjust, should it be obeyed? Finnis addresses directly the charge made by positivists that according to natural law theory unjust laws are not laws. He argues that he knows of no natural law theories that have this as anything other than a subordinate theorem.<sup>96</sup> Here he relies on the distinction between the ‘focal’ or central meaning of the concept of law and a peripheral meaning. Law’s nature is understood in the ‘focal’ sense when it serves the common good. However, when law is used to oppress it is understood as a ‘corruption’ of law. Finnis notes that Aquinas understood unjust laws as ‘more outrages than laws’ ‘not law but a corruption of law’, or more precisely, ‘not a law *simpliciter*’, or in the focal sense. He did nevertheless recognise that unjust law had ‘the character of law in one important respect: it is the command of a superior to his subordinates (and in this respect is calculated to render the members of a community ‘good’ through their compliance with it – not [of course] good simpliciter, but good relative to that [tyrannical, unreasonable] regime.’<sup>97</sup> In the natural law tradition, therefore, unjust laws are considered to be valid laws, but not in the focal sense. But should unjust laws be obeyed? Finnis provides a nuanced answer. He examines four ways in which this question might be understood. First, ‘will non-compliance make me liable to sanction?’ He argues that this meaning is the least likely meaning. Rather, what a person is in effect asking is, will I get away

with it? Second, given that the law is unjust, if I fail to comply with it, will I be able to persuade the court to change the law? Finnis argues that this depends on the principles of precedent and interpretation that operate within the particular legal system. Third, can an unjust law create a moral obligation to obey in the same way as a just law? While he does not deny that unjust laws are laws, Finnis argues that an unjust law does not give rise to a moral obligation of obedience. Fourth, is there a moral obligation to obey an unjust law that derives not from its legality but from some ‘collateral’ source? Finnis argues that such an obligation may exist where the result of disobedience would be to weaken the legal system as a whole.<sup>98</sup>

Reactions to Finnis’ theory have been mixed. Hart saw ‘very great merit’<sup>99</sup> in his account. Neil MacCormick commented that it requires us to ‘abandon our caricature version of what a natural law theory is’.<sup>100</sup> However, L Weinreb has raised a number of fundamental questions about Finnis’ version of natural law and its reliance on the notion of self-evidence.<sup>101</sup> He has criticised Finnis as offering “natural law without nature” so that he ends up relying upon claims that certain propositions in normative ethics and political theory are self-evidently true.<sup>102</sup>

There are three particular criticisms that have been made against natural law theories. The first is that proponents of natural law derive ethical norms from facts. The philosopher David Hume (1711-76) in his *Treatise of Human Nature*<sup>103</sup> criticised the logical basis of natural law and the ‘fallacy of seeking to derive an *ought* from an *is*.’ Ian McLeod provides two examples of syllogistic reasoning to clarify the criticism.

First,

‘All animals breed  
Humankind is a species of animal  
*Therefore*  
Humankind breeds.

Contrast this with the following:

All animals breed  
Humankind is a species of animal  
*Therefore*  
Humankind ought to breed.’<sup>104</sup>

In the second example the premises are statement of fact, whereas the conclusion is a statement of moral value. ‘According to Hume, all natural law seeks to derive conclusions in the form of value judgements from propositions in the form of facts, and

is therefore logically unsound.’<sup>105</sup> Finnis conceded that the criticism that natural lawyers derive ethical norms from facts was substantially true of Stoic theory, and some Renaissance theories. However, he argues that this is not true of Aquinas.<sup>106</sup>

‘On the contrary, Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic norms of good and evil and which can be adequately grasped by anyone of the age of reason ... are *per se nota* (self-evident) and indemonstrable.<sup>107</sup> They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about ‘the function of the human being’, nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are derived (though not innate). Principles of right and wrong, too, are derived from these first, pre-moral principles of practical reasonableness, and not from any facts, whether metaphysical or otherwise. When discerning what is good, ..... intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically); but there is no good reason for asserting that the latter operations of intelligence are more rational than the former ... The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have. Aquinas considers that practical reasoning begins not by understanding this nature from the outside ... but by experiencing one’s nature ... from the inside, in the form of one’s inclinations. But again there is no process of inference... Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).’<sup>108</sup>

Weinreb, however, is not convinced, and argues that Finnis’ concept of self-evidence is mistaken. ‘The belief that, if one reflects carefully about the human condition, the principles of moral action are a self-evident basis for the determination of concrete obligations, is itself mistaken.’<sup>109</sup> However, McLeod argues that Finnis ‘is going beyond the essentially negative point that he regards Hume’s objection to natural law as misconceived, and is seeking to argue that the principles of right and wrong are rational.’<sup>110</sup>

Secondly, as I noted earlier legal positivists object to natural law on the grounds that it includes morality in such a way that it can become a part of law. Strict positivists insist on observing the separation of law and morals at all times, whereas, ‘soft’ positivists accept the possibility (although not the necessity) of taking moral factors into account. Thirdly, legal positivists claim that natural law theories argue that an unjust law is not law. However, as I have outlined Finnis has produced a nuanced answer to this claim. While arguing that unjust laws lack moral authority and therefore give rise to no moral obligation of obedience, he does not deny that they are laws.<sup>111</sup>

The final model of law that I will outline is that proposed by Werner Menski who seeks to respond to the challenges posed by Asian migrants to the United Kingdom.

### c) Menski - Legal triangles and a 'kite' - legal pluralism

The model of law that Menski has produced has been shaped and formed over thirty-five years experience of working as a lawyer with Hindu and Muslim migrants to the United Kingdom. Menski has observed at close quarters the difficulties that these migrants pose to English judges and to the English legal system, as he has acted as an expert witness in many legal cases. The migrants, inconveniently for the legal system, do not leave their religious and cultural baggage at the airport when they enter the United Kingdom. Instead, they continue to want to live by their religion and customs. Menski has observed four stages in the way in which migrants have navigated the English legal system. First, in the 1970's many Hindu migrants were ignorant of English law and failed to register their Hindu religious marriages. If a husband deserted a Hindu wife she had no protection under English law.<sup>112</sup> The second stage arrived when the migrants learned the English law and registered their marriages. However, they did not abandon their religious law but instead held two weddings. English law only recognised the secular ceremony whereas the migrants attached more importance to the religious ceremony. By 1988 Menski observed that British Asians were constructing mixed systems of law. What developed was a hybrid law, a form of legal pluralism.<sup>113</sup> The third stage, according to Poulter's model of temporary pluralism, should have resulted in ethnic minorities abandoning their religious and customary ritual in order to follow secular English law.<sup>114</sup> But Menski observed that in reality this did not happen. In most cases, even in mixed marriages, there is seldom just a secular registration. Instead, the Asians were building the requirements of English law into their customary traditions. In 1988 Menski argued, that:

'English family law could not afford to ignore these adaptive processes. It was insufficient to see them as social phenomena of peripheral legal relevance, because the basic facts 'on the ground' and people's perceptions of them diverged grossly from the official legal view. Law and reality simply did not match Poulter's assimilation model.'<sup>115</sup>

The fourth stage emerged after 9/11 and 7/7. Menski is now hearing that many Muslims in Britain are simply refusing to follow English legal requirements, even though they

are aware of them.<sup>116</sup>

Menski has found that just as British Asians, whether Hindu, Sikh or Muslim, will normally want a religious/customary wedding they may also seek an Asian form of divorce settlement. As a result, many panchayats, or their Muslim equivalents, Shariah councils, that operate in Britain have no official legal status but help parties to find solutions. 'Operating in the shadow of the official law, this contributes to new forms of 'living law' (Ehrlich 1936),<sup>117</sup> *angrezi shariat*, British Muslim law (Pearl and Menski 1998)<sup>118</sup> or *angrezi dharma*, English Hindu law.'<sup>119</sup>

Menski is influenced by the work of Eugen Ehrlich,<sup>120</sup> Sally Falk Moore<sup>121</sup> and Masija Chiba.<sup>122</sup> Menski argues that the common factor in their work is that they all recognise that state law is not the only means through which society is regulated. Menski claims that Ehrlich, Moore and Chiba have all been critical of positivism's domination, and have illustrated how social rules act as equivalents of legal norms.<sup>123</sup> In a modified version of Chiba's tripartite model of 'official law', 'unofficial law' and 'legal postulates',<sup>124</sup> Menski constructs a triangular model of law.

'Law is composed of combinations of three types of law, namely social norms, state laws and values/ethics, with overlapping boundaries, all inevitably interrelated and constantly forced to compete and sub-triangulate, since law everywhere is almost always a plural entity. Since culture and custom are found everywhere in this pluralistic field, law contains social and ethical elements, even if it is state law..... Since religion and culture are hardly ever separate entities, they are ever-present as legal factors in this triangular arena of negotiation and compromise between inevitably conflicting expectations.'<sup>125</sup>

Menski's triangular model involves the interaction of state law (represented by positivism), religion/ethics/morality (represented by natural law) and social norms (represented by socio-legal approaches to understanding law). Legal pluralism is the fourth methodological approach, which is placed in the centre of the triangle. The centre of the triangle represents 'perfect' justice as the result of the equilibrium between the various competing sources. But as it is in the nature of social equilibria to be unstable there will be a continuous need for renegotiation of this central ideal.<sup>126</sup> The model is complex in that there are further layers of plurality created by the interactions.<sup>127</sup> Menski has since developed the triangular model into what he has called a 'kite,' a structure with four corners, and added international law into the equation.<sup>128</sup>

Menski is a legal pluralist. Gordon Woodman has defined legal pluralism as 'the

condition in which a population observes more than one law,’ and ‘law’ as, ‘any normative order which is observed by a population of persons.’<sup>129</sup> Woodman identifies two forms of legal pluralism as follows:

‘Deep legal pluralism exists in so far as different laws observed by a population are distinct laws with their own, different sources of authority. It thus exists in culturally diverse societies. Another situation which may be referred to as legal pluralism is that where one law contains within itself distinct bodies of norms, originating historically from different sources, but all having currently the same ultimate source of authority. This latter type of legal pluralism commonly exists with state laws and so has been referred to as state law pluralism.’<sup>130</sup>

Criticisms have been raised about the concept of legal pluralism. Brian Tamanaha argues that pluralists confuse the idea of law.<sup>131</sup>

‘Legal pluralists insist that the state does not have a monopoly on law. This is the core credo of legal pluralism: there are all sorts of normative orders not attached to the state which nevertheless are law. These non-state ‘legal’ orders range from pockets within state legal systems where indigenous norms and institutions continue to exert social control, to the rule-making and enforcing power of social institutions like corporations or universities, to the normative order which exists within small social groups. .... As should be immediately apparent, so generous a view of what law is slippery slides to the conclusion that all forms of social control are law. Not only does the term ‘law’ thereby lose any distinctive meaning – law in effect becomes synonymous with normative order...’<sup>132</sup>

This raises a number of questions. How is law to be distinguished from other normative systems? What makes a social rule legal?<sup>133</sup> If social rules are to be included in the definition of law how do social and legal rules relate to one another? Gunther Teubner identifies a central weakness of legal pluralism as follows:

‘Postmodern jurists love legal pluralism ... The crucial question of how to reconstruct, in postmodern architecture, the connections between the social and legal fields finds a highly vague answer: interpenetrating, intertwined, integral, superposed, mutually constitutive, dialectical ... we are left with ambiguity and confusion.’<sup>134</sup>

William Twining also notes a number of difficulties.

‘First, conceptual problems arise about when, where and how to draw distinctions between legal and non-legal phenomena, and between legal orders, systems, traditions and cultures. Secondly, very few orders or systems of norms are complete, self-contained and impervious. Thirdly, coexisting normative and legal orders interact in complex ways. “Sometimes they compete or conflict, sometimes they sustain or reinforced each other; often they influence each other through interaction, imposition, imitation and transplantation.” Fourthly, there is a tendency to “romanticised” pluralism. Pluralism may be progressive; it may also be quite the reverse. Fifthly, it is wrong to conflate “normative pluralism” with the idea of a pluralistic approach to or the bringing of multiple perspectives

to bear on a phenomenon.’<sup>135</sup>

I will return to discuss some of the difficulties that are associated with accommodating religious laws in Section III.

Woodman has made a number of criticisms of Menski’s triangular model.<sup>136</sup> To begin with he notes that positivism and natural law employ very different methodologies. He wonders whether socio-legal approaches can be understood as a ‘theory’ and argues that they have no authority in the sense that they can provide reasons for action. He therefore thinks that ‘there cannot be a realistic triangular diagram which shows positivism, natural law and socio-legal approaches somehow interacting to form a “globally valid, plurality-conscious analysis of law.”’ He notes that Menski appears to argue that where there are different opinions on an issue, each widely held, it is necessary to accommodate them all in a general theory. Woodman asks - does not this relativism reduce objectivity to absurdity? He argues that ‘there is no justification to assert that every legal system must of necessity include all three elements, neither are there any reasons to conclude that ‘perfect “justice”’, whatever that means, is indicated by an ‘equilibrium’ between the three.’<sup>137</sup> Instead, Woodman suggests that,

‘If his diagrams referred, and claimed to refer only to the state, religion/ethics/morality and society as the sources of the content of laws the value of his study would be clear. There are and have been many societies in which the observed, effective laws are as a matter-of-fact derived in part from prescriptions of the state, in part from the ethical beliefs held by some members, and in part from acceptance of customary practices. One could go further, taking the notion of a legal ‘source’ as that which is seen in a particular community as giving general authority to norms. There are and have been many societies in which there was a general acceptance that authority was carried by the state, by the teachings of a religion, and by the popular acceptance of customary norms.’<sup>138</sup>

To be fair to Menski one of his concerns is that positivists argue that ‘law’ is that which is enacted by the state. The effect of this is to reduce the status of religion. What Menski is seeking to do through his model is to put religion onto an equal footing with state law, and create an environment of mutual respect where dialogue and negotiation can take place. Menski’s model raises important questions, not only for the Asian community, but also for ‘obdurate’ and indeed all believers. If religious laws, beliefs and practices are to be acknowledged as part of the legal system what does this mean in practise?

I will return to the issue of the accommodation of religious beliefs and practices in Section III and again in Chapter 5. But before that I will consider what the Hebrew Bible and New Testament teaching might have to contribute to modern debates about the nature of law, and how to understand and address conflict.

## Section II - Law and the Bible

### a) Law in the Hebrew Bible

While I concede that Hebrew law is to be understood predominantly in terms of a theocratic system, and cannot and should not be applied directly to modern English law, which is set within a very different social and cultural context, I would argue both that it can be helpfully contrasted with modern models of law, and also that it can make a number of significant contributions to modern debates about the nature and aim of law, and how to address 'difficult' cases.

The context for the giving of the Mosaic Law is the story of the liberation of the Israelites from the slavery of Egypt (Ex. 20: 2; Deut. 5: 6). The law is understood in the light of God's saving grace and represents the basic requirements for life within a covenant relationship with God (Deut. 6: 20-25, 7: 7-12). Perry Yoder has argued that this has important consequences for how we understand law and our obedience to it.<sup>139</sup> In order to illustrate his point he contrasts legalism and obedience, which he argues are two different ways to understand law.

'Legalism views law as imposed obligation; obedience is a response to divine grace and freedom.... obedience is a response to what God has already done, while legalism is doing right to gain a reward. ... Thus obedience understands law in the context of grace and history;... Legalism, on the other hand, believes we must do what is right in order to earn God's favour or love.'<sup>140</sup>

The Hebrew word *torah* is often translated into English as 'law' but in the first instance it referred to a teaching, a doctrine and a decision given for a particular case.<sup>141</sup> The teaching related to a way of life - life in covenant relationship with God and with one another. *Torah* therefore came to represent the whole body of rules governing the relations between the Israelites and God and with one another. The function of *torah* was to safeguard the covenant,<sup>142</sup> and as such, the focus was on the maintenance of covenantal relationships rather than on rules. The meaning of *torah* as 'instruction' also

pointed to the purpose of the law being the guidance of God's people, and the end of the law not in mere obedience to rules, but in the knowledge of God and his will.<sup>143</sup> *Torah* came to represent the first five books of the Hebrew Bible, the Pentateuch containing God's instructions to his people in their social, moral and religious life.<sup>144</sup> Law, religion and morality were therefore intimately connected.

I would argue that the Hebrew law's focus on people and relationships is still significant for cases today. This is because lawyers often lose sight of the relationships, and indeed the people involved in a dispute, because the focus is on the interpretation and application of legal rules. I would argue that the significance of the law's focus is relevant today because it is the difference between obtaining a legal settlement, and being able to resolve a dispute. If the focus is on the application of legal rules a person may well obtain a legal settlement, but not necessarily resolve underlying difficulties that exist in the relationship, which led to the dispute in the first place. I will return to this issue in Chapter 4 when I discuss the process of mediation.

The aim of Hebrew law was shalom.<sup>145</sup> The Hebrew *salem* (from which comes the Hebrew noun *shalom*) refers to being uninjured, safe and sound, or whole.<sup>146</sup> Although shalom is often translated as 'peace,' in Hebrew shalom is more than just peace it is God's vision for humankind.<sup>147</sup> There are three major meanings of shalom. On a physical or material level it refers to 'a state of well-being, an all rightness', but much more than that<sup>148</sup> it includes: physical health and wholeness, abundance and prosperity (Jer. 33: 6; Ps. 73: 3), as well as freedom from illness, poverty and war (Lev. 26: 4-6; Ezk. 34: 25-29). On a social level shalom refers to positive good relationships between nations, groups and individuals (1 Kings 5: 12; Judges 4: 17).<sup>149</sup> Shalom is closely linked to justice and the fruit of righteousness (Is. 32: 16-17). Injustice is therefore the measure of absence of shalom in society.<sup>150</sup> On the moral or ethical level shalom means honesty and absence of deceit in dealing with one another.<sup>151</sup> The concept of 'shalom' can be contrasted with the English adversarial system that in many instances encourages an attitude of 'winner takes all'.<sup>152</sup> I will return to this issue in Chapter 5. Shalom can also be contrasted with one of the functions of modern law, which is the maintenance of peace, often understood as the absence of conflict. However, the concept of 'shalom' has a much deeper and extensive meaning, and as I will show by drawing on the work of Yoder it is closely related to the type of justice that is administered.

The purpose of Hebrew law was to remind the Israelites of God and his liberation (Deut. 8: 11-18). But it also embodied certain values that were central to the community. The Israelites had been liberated from oppression and so they were not to oppress others<sup>153</sup> (Ex. 22: 21-22, 23: 9; Deut.24: 17). Many of the laws are therefore concerned to meet the needs and protect the rights of the poor, weak and needy (Ex. 22: 25-26, 23: 11; Deut. 24: 19-22). Yoder argues that the purpose of the law was to promote and maintain a liberated community, and to continue God's liberating work in order to bring about shalom.<sup>154</sup> As a result he argues this transforms our ideas about law and justice.

'The laws, of course, do not apply themselves; people need to be willing and able to implement them. In this regard, we know that the structure of a society and its institutions governed day-to-day operation more than do abstract rules. Indeed, law can be seen as a reflection of these institutions, and a guide to their operation. As a result, justice tends to become understood as procedure - justice results when the applicable law has been carried out. In this view of justice laws become norms which in themselves determine whether justice is done. From this view of the law can arise the belief that following the law is a litmus test of justice. In this framework of thinking, the question of legality (is it legal? is it according to the law?) replaces the question of justice, (is it right or just?). In contrast to this procedural understanding of justice, shalom depends on justice understood substantively: justice is done when a just okay state of affairs is the result. On this view, legality is not the test of justice, because laws themselves are unjust if they do not bring about a just result. Instead, the litmus test of justice is whether the powerless and oppressed received aid and liberation so that there might be shalom. .... These two different views of justice have significant consequences for the role of law in society. When we understand justice procedurally, the law becomes a conservative force - it operates to maintain the status quo because it is primarily concerned with carrying out rules. When we understand justice as substantive, then law operates to transform society by instituting an equitable set of social relationships within the society. This latter function was, of course, the concern of biblical law. The implication of this seems to be that only as justice passes this test, will it be shalom justice and lead to shalom. Shalom will not result from procedural justice alone.'<sup>155</sup>

Yoder draws a distinction between two types of justice, and it is a distinction that I would argue is important and is relevant even today. If we return to the case studies that I discussed in Chapter 1, the persons of faith undoubtedly received 'procedural' justice in that the 'rules' of law were applied correctly in their cases. But did they receive 'shalom' or 'substantive' justice? I would argue that they did not, because the issues of faith that were important to them and gave meaning to their lives were not discussed or understood.

Hebrew law also provides an interesting illustration of advice on how ‘difficult’ cases could be addressed. In Israel the Elders or heads of families in the clan dealt with disputes and trials in each town. They sat at the gate of the town where all the town’s affairs were discussed (Pr. 31: 23). The Deuteronomic prescriptions also provided for the appointment of judges (Deut. 16: 18-20), and for a final court of appeal in Jerusalem that included a judge and at least one priest.<sup>156</sup>

‘If a judicial decision is too difficult for you to make between one kind of bloodshed and another, one kind of legal right and another, or one kind of an assault and another - any such matters of dispute in your towns - then you shall immediately go up to the place that the Lord your God will choose, where you shall consult with the levitical priests and the judge who is in office in those days; they shall announce to you, the decision in the case. Carry out exactly the decision that they announce to you from the place that the Lord will choose, diligently observing everything they instruct you. You must carry out fully the law that they interpret for you or the ruling that they announced to you; do not turn aside from the decision that they announce to you, either to the right or to the left’ (Deut. 17: 8-11).<sup>157</sup>

A similar pattern can be seen in the reforms instituted by Jehoshaphat.

‘Moreover, in Jerusalem Jehoshaphat appointed certain Levites and priests and heads of family of Israel, to give judgment for the Lord and to decide disputed cases. They had their seat in Jerusalem. He charged them: ‘This is how you shall act in the fear of the Lord, in faithfulness, and with your whole heart; whenever a case comes to you from your kindred who live in their cities, concerning bloodshed, law or commandment, statutes or ordinances, then you shall instruct them, so that they may not incur guilt before the Lord and wrath may not come on you and your kindred. Do so, and you will not incur guilt. See, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishmael, the governor of the house of Judah, in all the king’s matters; and the Levites will serve you as officers. Deal courageously, and may the Lord be with the good!’ (2 Chron. 19: 8-11).

In a theocracy the distinction between religious and civil law may have been a somewhat artificial one, and there may not have been a clear distinction drawn between the types of case ruled on by priest and judge.<sup>158</sup> However, what the illustration acknowledges is that there were cases that involved both civil and religious issues, and that could transverse civil and religious authorities. The illustration acknowledges the need for civil and religious authorities to work together to address ‘difficult’ cases. I would argue that this illustration is still relevant today. There are still ‘difficult’ cases today that involve not just legal issues, but also complex ethical and faith issues. Bradney and Menski have argued that there is a need for judges to receive assistance from representatives of faith communities in cases that involve issues of faith.<sup>159</sup> However, judges are often reluctant to receive this assistance. I would argue that this is

because when cases end up in the law courts judges frame them as legal problems that require a purely legal solution, and this situation is compounded by judges who understand law as being separate from ethics and religion. In these circumstances issues of faith are regarded as 'irrelevant' and not justiciable.

## b) Law in the New Testament

By the time of the New Testament various Jewish groups held different views on the law, an extensive casuistry had developed around the basic legal norms, and customs and oral traditions sat alongside the law.<sup>160</sup> E.P. Sanders notes from Josephus' observations, that Jews were loyal to the law.<sup>161</sup> However, Palestine was part of the Roman Empire and the Romans brought with them their own distinctive law, so the Jews were under Roman rule and law, as well as Jewish law. Philip S. Alexander has set out a complex picture of the different types of laws that existed,<sup>162</sup> which confirms that legal pluralism was a fact of life in Palestine. The Romans accommodated both Jewish courts (local and Sanhedrin) and Jewish laws.

In the New Testament there is a sense in the teaching of Jesus and the Apostle Paul that Christ's law of love transcends the Jewish laws of the time. In the Gospel of Matthew especially at (Mt. 5: 21-48) Jesus' teaching is portrayed as surpassing the letter of the law to focus on the 'intent' or motive of the person (Mt. 5: 21-22, 27-28, 38-39, 43-44).<sup>163</sup> Where the Mosaic Law states, 'love your neighbour and hate your enemy', (Lev. 19: 18; Deut. 23: 6; Ps. 41: 10), Jesus' command is to, 'love your enemy and pray for those who persecute you' (Mt. 5: 43-48). All four Gospels emphasise the centrality of love in one way or another. The commandments to love God, and to love one's neighbour as oneself, are said to sum up the law (Mk. 12: 28-34; Lk. 10: 25-28). Jesus also gives his disciples a new commandment, 'Just as I have loved you, you also should love one another.' (Jn. 13: 34-35, 15: 12). There is also teaching on the way in which believers are to behave and treat one another. They are not to judge one another (Mt. 7: 1-5; Lk. 6: 37-42), and they are to forgive (Mt. 6: 14-15, 18: 21-22, 23-35; Mk. 6: 14-15), and settle disputes, as far as possible, within the church (Mt. 18: 15-17). Similar themes are picked up and included in the teaching of the Apostle Paul. For Paul love is the fulfilment of the law (Rom. 13: 8, 10), and the law is summed up as, 'love your neighbour as yourself (Rom. 13: 9). Paul teaches that believers are to love one another (Rom. 13: 8), not to judge (Rom. 14: 13), and to forgive (Eph. 4: 32; Col. 3: 13). Paul

also exhorts the believers to settle disputes within the church, rather than pursue lawsuits in the courts before unbelievers (1 Cor. 6: 1-7). There is a sense then that Christians are to try to live without law, or at least without recourse to the law courts, and instead live a life of love and forgiveness. There is, however, no formal structure or framework to enable this to happen, other than the teaching about the way in which the believers are to treat one another. At the heart of the New Testament therefore, there is an emphasis on an ethic of grace, rather than on a legal code.

The significant contribution provided by the New Testament teaching of Jesus and the Apostle Paul is on how to address conflict. Christians are challenged to settle disputes, rather than go to the law courts. I will return to this topic in Chapter 4 when I discuss the process of mediation.

In the next section I will examine the concept of ‘toleration’ and how it has been employed as a reason to support the idea of accommodation of religious laws, beliefs and practices in the English legal system.

### Section III - The accommodation of religious laws, beliefs and practices

Religious beliefs and practices have been accommodated in English law on an ad hoc basis since The Toleration Act 1689, when Nonconformists were granted freedom of worship. The basis for accommodating religion was the concept of ‘toleration’, which J. Horton explains as follows:

‘At the heart of the idea of toleration - what might be characterised as the core concept of toleration - is a deliberate choice not to interfere with the conduct of which one disapproves. Three components of this core conception of toleration can be identified. First there must be some conduct which is disapproved of (or at least disliked). Second, this disapproval must not be acted upon in ways which coercively prevent others from acting in the disapproved manner. Third, this refusal to interfere must be more than mere acquiescence or resignation.’<sup>164</sup>

Peter Nicholson’s definition is narrower and focuses on moral disapproval.

‘Toleration is the virtue of refraining from exercising one’s power with regard to others’ opinion or action although that deviates from one’s own over something important, and although one morally disapproves of it.’<sup>165</sup>

This has led Mary Warnock to argue that toleration can be understood in a weaker form as ‘dislike’ and a stronger form as ‘moral disapproval’.<sup>166</sup> But the definitions also point

to a problem with tolerance. Why tolerate something of which one dislikes or morally disapproves? T.S. Eliot illustrates a second problem. Eliot once said, 'The Christian does not want to be tolerated.' Maurice Cranston has pointed out that Eliot did not mean that the Christian wanted martyrdom. 'He simply meant that the Christian did not wish to be 'put up with', or to be 'endured'- which is what toleration means: the Christian desired something better – respect, honour, esteem; to be positively welcomed and wanted as a member of society.'<sup>167</sup> There are a number of arguments that are commonly advanced to justify toleration, which can provide answers to both of these problems. Joseph Raz summarises two justifications, the Harm Principle and the appeal to social peace:

'First, principled reasons for restricting the use of coercion. The Harm Principle, for example, prescribes that no one may be coerced except in order to restrain him from causing harm to others or to punish him for causing harm to others. By this principle, conduct of members of minority cultural groups which does not harm others may not be criminalized. Arguments of the second type, commonly relied upon to justify tolerance, appeal to considerations of public peace, social harmony, and the legitimation of the system of government, all of which may be jeopardised by the resentment and hostility of minorities, which are not allowed to continue with their religious and cultural activities and practices.'<sup>168</sup>

Susan Mendus argues that there are three kinds of justifications for toleration.<sup>169</sup> The first is that toleration is a requirement of prudence. This is similar to the second argument employed by Raz. There may be times when it is prudent to tolerate that which one dislikes because to be intolerant would promote unrest and civil strife. Mendus observes that the argument from prudence, unless supplemented by further argument, is often thought to be unsatisfactory and incomplete. This is because it does not explain what is wrong with intolerance, but only suggests why it may be inexpedient; it draws no moral limits on toleration but implies that anything must be tolerated in so far as it promotes (relative) peace; and it only applies when it will actually promote peace.<sup>170</sup> Mendus' second justification is that toleration is a requirement of rationality. This argument takes two forms. Mendus begins with John Locke's claim in *Letter on Toleration*, 'that intolerance of religious belief is fundamentally irrational, since people cannot be compelled to hold religious beliefs other than those they do in fact hold.'<sup>171</sup> Mendus argues that Locke made this claim because he believed that religious belief was a matter of conscience and not the will, and he thought that coercion was just doomed to fail. For the second strand of the argument Mendus draws on the work of Karl Popper whose starting point is Voltaire's argument that,

‘Toleration is a necessary consequence of our being human. We are all products of frailty: fallible and prone to error. So let us mutually pardon each other’s follies. This is the first principle of human rights.’<sup>172</sup>

Popper couples this idea of fallibility with the belief that rational discussion may help humans to correct their mistakes and approach nearer to the truth, even if agreement is not reached.<sup>173</sup> Read together they generate a presumption in favour of tolerance. A refusal to tolerate is therefore a form of intellectual arrogance, blindness to the possibility that ‘I may be wrong and you may be right.’<sup>174</sup> Mendus’ third justification is that toleration is a requirement of morality. There are two strands to this argument.

‘The first holds that since people are essentially diverse creatures, there may not be one way of life that is best for all. Of course, it does not follow from this that any life is as good as any other. Only that there may be a variety of different forms of life suitable to people of different temperament or with different aspirations and ideals. Since those different ways of life may compete, even conflict, with one another, yet since they are all equally valuable to the people who lead them, toleration will be required. The second strand of the argument insists that, even if there is one way of life which is best for people, it is more important that they discover it for themselves than it be imposed on them from without.’<sup>175</sup>

Mendus links this to another justification of tolerance - respect for persons.

‘Most commonly, toleration is of and by persons, and the tolerator’s disapproval of the tolerated is compatible with his acting virtuously in tolerating precisely because such action alone can show due and proper respect for persons. A belief in persons as essentially autonomous (self-regulating) agents, entitled to direct the course of their own lives, generates an argument for toleration as distinct from indifference or licence, since what is required by such an ethic is precisely that I act morally well in allowing others to dictate their own actions, even though I morally disapprove of such actions. Indeed arguments from autonomy tend to construe toleration as the right of the tolerated, not merely as a virtue in the tolerator: toleration is something which may be claimed as an entitlement, since it is this alone which displays due and proper respect for persons in all their diversity.’<sup>176</sup>

What the justifications illustrate is that tolerance can be understood purely as having a negative content – being left in peace and not coerced into religion. This would be Locke’s understanding. However, others such as Mendus interpret tolerance as having a positive content, which includes being respected as an autonomous agent. Michael Walzer explains toleration on a continuum.<sup>177</sup>

‘Understood as an attitude or state of mind, toleration describes a number of possibilities. The first of these, which reflects the origins of religious toleration in the sixteenth and seventeenth centuries, is simply a resigned acceptance of difference for the sake of peace. People kill one another for years and years, and then, mercifully, exhaustion sets in, and we call this toleration. But we can trace

a continuum of more substantive acceptances. A second possible attitude is passive, relaxed, benignly indifferent to difference: "It takes all kinds to make a world". A third follows from a kind of moral stoicism: a principled recognition that the "others" have rights even if they exercise those rights in unattractive ways. A fourth expresses openness to the others; and curiosity; perhaps even respect, a willingness to listen and learn. And, furthest along the continuum, there is the enthusiastic endorsement of difference: an aesthetic endorsement, if difference is taken to represent in cultural form the largeness and diversity of God's creation or of the natural world; or a functional endorsement, if differences viewed, as in the liberal multiculturalist argument, as a necessary condition of human flourishing, one that offers individual men and women in the choices that make their autonomy meaningful.<sup>178</sup>

Mendus argues that the justifications for toleration are not mutually exclusive, but can be employed together. However, there may be occasions when they may come into conflict with one another. Mendus illustrates this with the example of the case of a Muslim teacher (employed under a full-time contract by a local education authority) who wanted every Friday afternoon off of work so that he could attend the local mosque for prayers.<sup>179</sup> Mendus suggests that in this case the argument from morality would favour tolerance, but that the argument from prudence may well pull in the opposite direction.<sup>180</sup> As it transpired the Muslim teacher lost his case in the Court of Appeal. It is worth noting, however, that the three Court of Appeal judges were not unanimous. Lord Scarman was the lone dissenting voice appealing for understanding and the accommodation of religious practices, in order to avoid discrimination.<sup>181</sup>

Bradney notes that tolerance towards religion in Britain takes two forms. The first involves not practising coercion, which is a negative form.<sup>182</sup> An example of non-coercion is Article 9 (Freedom of Thought, Conscience and Religion) of the European Convention for the Protection of Human Rights and Freedom, which is incorporated into The Human Rights Act 1998.<sup>183</sup> Although the right to hold and change religious beliefs under Article 9 (1) is absolute, the right to manifest one's religion or beliefs can be limited under Article 9(2).<sup>184</sup> The second form of tolerance is a positive form and involves 'sometimes doing things to facilitate the religious lives of believers so as not to interfere with their conduct.'<sup>185</sup> One example of toleration in a positive form is the exemption for Sikhs from wearing crash helmets whilst riding motorcycles.<sup>186</sup> Another includes the granting of individual rights against discrimination, such as those on the grounds of religion. A recent example is The Employment Equality (Religion or Belief) Regulations 2003.<sup>187</sup> These regulations prohibit employers from discriminating on the grounds of religion in the areas of employment and training. However, an exemption is

included in Section 7(3) for employers with an ethos based on religion or belief, where because of the nature or context of the employment a particular religion or belief is a genuine occupational requirement. In other words, if the Church of England advertises the post of inter-religious affairs research assistant, as they have done recently, they can include a reference to Section 7(3) of the regulations in the advertisement. This makes clear that the post is exempt from the regulations, as the post-holder will represent the Church of England within the inter-faith environment.

Accommodation of religion and religious groups that goes beyond toleration has been described as ‘affirmation’.<sup>188</sup> Stephen L. Carter explains what affirmation entails.

‘The accommodation of a religious group’s faith traditions in an otherwise applicable legal framework can best be envisioned as a form of affirmative action. Recognising both the unique historical circumstances of the religions and the importance of nurturing their continued existence, the state chooses to grant them a form of differential treatment.’<sup>189</sup>

Carter makes clear however that this does not mean that the state endorses the claims of a particular religion. Examples of affirmation in England include the state funding of church schools, and the charitable status of churches that enable them to claim tax relief on gifts. In these cases accommodation of religion takes the form of affirmation of a group rather than the individual believer, although the individual believer benefits as a member of the group.

Menski has made an interesting observation to the effect that since 2002 the accommodation of religion and culture has entered a new phase.<sup>190</sup> He points to two possible reasons for this. The first relates to the realisation that English law does not regulate substantial numbers of marriages and divorces in Britain. The second relates to the financial markets. He notes that the Muslim refusal to deal with interest (*riba*) has contributed to significant (but skilfully hidden) provisions in the Finance Act 2003. Likewise, ‘the Adoption and Children Act 2002 introduces into English law the concept of ‘special guardianship’, which Menski thinks is probably designed, without this being explicit, to include the Islamic concept of *kafala*, an Islamic fostering arrangement which takes into account the Muslim prohibition on adoption, because *shari’ah* law does not accept the fiction that the adopted child could join the bloodline of the new parent. Thus, it allows a child to be transferred to a different family without the normal full consequences of an adoption in English law.’<sup>191</sup> But there is no indication in the provisions of the Act that it may specifically apply to Muslim families.<sup>192</sup> Menski also

notes that the Divorce (Religious Marriages) Act 2002 provides relief for Jewish couples but not Muslim couples.<sup>193</sup> He therefore asks, what about Muslim wives?<sup>194</sup> Menski argues that ‘sooner or later the demands of basic justice and equity will force English law to address the negative implications of non-recognition of Muslim personal law and other aspects of religion and culture.’<sup>195</sup> But this does beg the following questions. Are there any difficulties associated with accommodation? How far should accommodation go? If Menski is correct that some accommodations for Muslims are being carried out surreptitiously then it seems that the Government is sensitive in trying to meet the needs of religious groups, but is also aware of the negative reaction that some accommodations might engender if they were made public. This negative reaction was apparent following Archbishop Rowan Williams’ lecture on civil law in February 2008.

Menski has highlighted one potential problem associated with the ad hoc accommodation of religious beliefs and practices. Some Muslims have been unhappy that Sikhs have been accommodated and not Muslims. To a certain extent this problem will recede as Muslims are accommodated. Mendus and the case of Ahmad highlight another problem, and that is that some interpret accommodation as ‘preferential’ treatment, and there is a danger that it could lead to unrest. There can therefore be a fine line to be walked between accommodation and keeping the peace.

Other problems associated with accommodation of religious laws have been highlighted by Woodman.<sup>196</sup> He begins by distinguishing between two types of recognition of laws, institutional recognition and normative recognition. Institutional recognition ‘exists where a law accepts the existence of institutions of another law, and provides that the activities of those institutions or some of them produce legally valid effects.’<sup>197</sup> An example of this occurred in British colonies under the policy of indirect rule. Another example is the Jewish Beth Din, which acts as an arbitration tribunal between Jewish couples in matters such as divorce. Woodman argues that this type of recognition is sometimes seen as threatening the recognising law with a serious loss of social control. It is therefore less likely that state laws will concede recognition in areas relating to state criminal law or public security. Normative recognition ‘consists of the recognising law providing that in certain cases the norms of the other law will be applied by the institutions of the recognising law, instead of its own norms. The norms of the

recognised law are thus replicated in the recognising law.’<sup>198</sup> An example of this was British colonial law.

‘A major practical problem in normative recognition is that it often entails the application and enforcement within the recognising law of the body of norms which has been developed in a different social and legal environment and reflects different values. A simple, direct adoption of these norms into the legal environment of the recognising law is rarely possible. This is the aspect, in the field of law, of the problem for any culture of accommodating another culture with which it coexists. An obvious, but perhaps soluble aspect of this problem is that those who operate the institutions of the recognising law may be ignorant of its norms, may have no reliable sources of information about them, and maybe ill-equipped to understand them when they do receive information. A more difficult aspect of the problem is the impossibility of fitting the norms of another law without modifying them into the institutional settings of the recognising law.’<sup>199</sup>

The trend in accommodations since 2002, which Menski has observed would seem to provide another type of recognition. In this case the Islamic norms do not appear as exemptions for Muslims, but instead are incorporated into and become part of English law, and are capable of being applied to the whole population.

In legal cases, however, the question arises as to whether the religious beliefs and practices of the individual believer should be accommodated, and given weight in the decision-making process. Bradney’s three case studies support the argument that they should be taken into account. The case of Chauhan illustrates the importance of the Court being informed not only of the religious beliefs and practices of the litigant, but how they are to be applied in a particular culture. The case of Janaway illustrates the importance of the Court taking into account a litigant’s interpretation and point of view, in order to avoid mischief and discrimination. And the case of *Re ST* illustrates the important role of expert witnesses in helping to inform and educate judges who may have limited knowledge and expertise in religion. Another reason why religious beliefs and practices should be accommodated is related to the issue of identity. Charles Taylor argues that identity is shaped partly through recognition and dialogue.<sup>200</sup> Misrecognition or non-recognition shows not just a lack of respect, it can lead people to suffer real damage, harm or oppression. Further, ‘recognition is not just a courtesy we owe to others - it is a real need’.<sup>201</sup> If the religious beliefs (which for all believers are part of their identity, and for ‘obdurate’ believers are a key to their identity) are not recognised then this can lead to harm. However, Rowan Williams in his lecture on civil law alerts us to two possible dangers relating to identity:

‘There is a recognition that our social identities are not constituted by one exclusive set of relations or mode of belonging – even if one of those sets is regarded as relating to the most fundamental and non-negotiable level of reality, as established by a ‘covenant’ between the divine and the human (as in Jewish and Christian thinking; once again, we are not talking about an exclusively Muslim problem). The danger arises not only when there is an assumption on the religious side that membership of the community (belonging to the *umma* or the Church or whatever) is the only significant category, so that participation in other kinds of socio-political arrangement is a kind of betrayal. It also occurs when secular government assumes a monopoly in terms of defining public and political identity. There is a position – not all unfamiliar in contemporary discussion – which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state, in such a way that any other relations, commitments or protocols of behaviour belong exclusively to the private and of individual choice. As I have maintained in several other contexts, this is a very unsatisfactory account of political reality in modern societies; but it is also a problematic basis of thinking of the legal category of citizenship and the nature of human interdependence.’<sup>202</sup>

If Williams is correct, then both the judge who dismisses religious beliefs out of hand and the ‘obdurate’ believer - each have something to learn, and I would argue that that is to engage in a meaningful dialogue, instead of talking past one another. I will return to this point in Chapters 5 and 6 and the case study relating to Baby MB.<sup>203</sup>

In the Introduction of the thesis I discussed the debate about whether religious reasons should be allowed to support arguments in the public sphere. One reason that they should be allowed is that of public accountability, and so that they can be subject to critique. This principle can be applied to the religious beliefs of litigants in legal cases. Another reason is that faith traditions have something positive to offer society and from which society can learn. For example, Christianity has a long tradition of caring for the poor, sick and vulnerable in society.

Finally, should the legal system attempt to accommodate the wishes of each individual believer? Bradney thinks not as he explains:

‘The aim cannot be to create legal systems where the wishes of each believer are accommodated. Religious beliefs can be mutually incompatible with each other. Religious beliefs can treat other people, non believers, as objects in the service of religion. Religious beliefs can be, by whatever standards are chosen, as unreasonable and as undesirable as any other form of belief. Religious beliefs may fail to recognise the priority of radical autonomy. At the same time, these beliefs remaining genuine religious beliefs. The need is that those who frame and administer legal systems to decide how to accommodate religions and, where there is no accommodation for religion, to have a justification for that stance. Discrimination on grounds of religious belief within a legal system will

be justifiable in some cases. What is never justifiable is inadvertent discrimination on grounds of religion within the legal system or discrimination which is based on an inaccurate view of the religion in question.<sup>204</sup>

While it may not be possible to accommodate the wishes of each believer, I would argue that judges should be prepared to discuss, engage with, and try to come to an understanding of the issues of faith raised by each litigant, and accommodate them where they can. However, there are a number of formidable obstacles that will need to be addressed if issues of faith of individual believers are to be given room to be discussed, understood, and accommodated, in legal cases, and I will return to discuss these in Chapter 5.

## Conclusion

In this chapter I began by focussing on the work of Hart, Finnis and Menski in order to illustrate the different ways in which proponents of legal positivism, natural law, and legal pluralism understand the nature of law, and its relationship with morality and religion. For the purposes of intellectual clarity legal positivists tend to separate two questions. What is law? And what is good law? What is law, is regarded as a question of fact, whereas, what is good law, is regarded as an evaluative question. Legal positivists do not agree on the description of law. Austin viewed law as ‘commands’, Kelsen as a hierarchy of norms, and Hart as a system of rules. What links legal positivists is the ‘Separation Thesis’, the contention that there is no necessary connection between law and morals, or law as it is, and law as it ought to be.<sup>205</sup>

However, even with this there is no agreement, with some positivists maintaining a strict separation, and others, such as Hart, conceding some connection. These ideas about the nature of law, and its relationship with morals and religion, can be contrasted with those held by proponents of legal pluralism and natural law. Legal pluralists, such as Menski want to include legal, ethical and religious norms in their understanding of law, whereas, for Finnis the starting point is the common good. What can be seen from the debates between proponents of legal positivism, natural law and legal pluralism is that there is no agreement about the nature of law, nor is there agreement about the relationship between law, morals, and religion. Hart’s interpretation of legal positivism has been hugely influential, but it is only one view of the nature of law and its relationship to morals and religion. I would argue that the significance of the different approaches is revealed in judicial reasoning in the case studies in Chapter 1. Judges who

have been influenced by legal positivism understand law as being separate from ethics and religion. Consequently, they treat ethics and religion as ‘irrelevant’ to their judicial decisions, and therefore not justiciable. This begs the question, if our understanding of law was different from that of legal positivism how would it affect judicial reasoning? I will return to this issue in Chapter 5.

I also considered what the Hebrew Bible and New Testament might have to contribute to debates about the nature of law. I have argued that Hebrew law can make three specific contributions. First, the focus in Hebrew Law was on people and relationships, rather than on the application of legal rules. I have argued that the significance of this for legal cases today is the difference between obtaining a legal settlement, and being able to resolve a dispute. If the focus is on the application of legal rules a person may well obtain a legal settlement, but not necessarily resolve underlying difficulties that exist in the relationship, which led to the dispute in the first place. I will return to this issue in Chapter 4 when I discuss the process of mediation. Secondly, the aim of Hebrew law was ‘shalom’ which is often translated in English as peace. However it did not just mean an absence of conflict, but instead related to a sense of ‘all rightness’ between the disputing parties on a physical, social relationship and moral level. Yoder contrasts ‘procedural’ justice and ‘shalom’ justice. The difference between the two types of justice is important, and I have argued that it is still relevant today. If we return to the case studies that I discussed in Chapter 1 the persons of faith undoubtedly received ‘procedural’ justice in that the ‘rules’ of law were applied correctly in their cases. But did they receive ‘shalom’ or ‘substantive’ justice? I would argue that they did not, because the issues of faith that were important to them, and gave meaning to their lives, were not discussed or understood. The third contribution is the illustration that we find in the Hebrew Bible of judges and priests working together to address cases. There is an acknowledgment that cases could involve both civil and religious issues, and could transverse both civil and religious authorities. There is also an acknowledgement that the civil and religious authorities needed to work together to solve what are described as ‘difficult’ cases. I would argue that the same is true today. There are difficult cases that involve not just legal issues, but also complex ethical issues, and issues of faith. Bradney and Menski have argued that in cases that involve issues of faith judges need expert help from representatives of faith communities.<sup>206</sup> I argued in Chapter 1 that this points to a more general role that representatives of faith communities could play in educating the legal profession, and to a specific need for representatives of faith

communities to assist judges in helping to resolve cases involving issues of faith and religious laws, beliefs and practices.<sup>207</sup> I will touch on this point again in Chapter 5. I also argued that representatives of faith communities could have a much wider role in helping to resolve disputes between persons of faith and those who do not share that faith. In Chapter 3 I will argue that Healthcare Chaplains could play an important role in helping to resolve disputes over healthcare decisions that have arisen as a result of issues of faith. This role has the potential to help disputants avoid legal proceedings altogether. In Chapter 4 I will argue that there could also be a role for representatives of faith communities in other types of dispute. For, example, representative of faith communities could play an important role in the process of mediation either, as a spokesperson for a person of faith, or as a mediator or co-mediator.

At present judges are often reluctant to accept help from representative of faith communities. I would argue that this is because judges understand and address disputes in narrow legal terms, and because they see law as being separate from ethics and religion. Consequently, issues of faith are regarded as ‘irrelevant’ or not justiciable. In Chapter 6 I will illustrate that when representatives of faith communities have been allowed to make submissions to court they have been more successful when they address judges in legal terms. Although this is understandable, it is also rather ironic, bearing in mind that both Bradney and Menski argue that the help that judges really need, is in gaining an understanding of the issues of faith that are affecting particular disputes.

I also considered what contribution the New Testament could make to modern debates about law. I argued that the important contribution that it makes is in how we can address conflict. At the heart of the New Testament is an ethic of grace and forgiveness, rather than a legal code. What the New Testament teaching of Jesus and the Apostle Paul offer is a challenge to Christians to try to settle their disputes, rather than go to law. I will return to this issue in Chapter 4 when I discuss the process of mediation.

I have briefly outlined different ways in which the concept of toleration is understood. What can be seen from the history of toleration is that it has been utilised as a reason for the ad hoc accommodation of religious beliefs and practices into English law. But Bradney’s work raises the question of whether an individual believer’s wishes should be accommodated. I have argued that whilst it may not be possible to accommodate the

wishes of each believer, judges should be prepared to discuss, engage with, and try to come to an understanding of the issues of faith raised by each litigant, and accommodate them where they can. There are a number of arguments that I have cited that support this position. First, if issues of faith are not discussed, understood, and taken into account in legal decisions, then this can adversely affect the outcome of the case for the person of faith. This is illustrated in the case of Chauhan outlined in Chapter 1. Secondly, whether or not issues of faith are discussed and understood is a matter of justice. If they are not, it begs the question whether persons of faith are receiving ‘substantive’ justice. Thirdly, as faith is integral to the identity of the person, if it is ignored, or misunderstood, real harm can be done.<sup>208</sup> Fourthly, Maleiha Malik argues that if the faith of individual believers is not accommodated then there is a danger that persons of faith will feel alienated from the legal system.<sup>209</sup> I acknowledge however, that there are a number of formidable obstacles that need to be addressed if room is to be made for issues of faith of individual believers to be discussed, understood, and accommodated, in legal cases. I will return to discuss these issues in Chapter 5.

In the next chapter I will discuss a further reason why issues of faith of individual believers should be discussed, understood, and accommodated, where possible. This relates to the argument from culture and the negotiation of meaning. I will illustrate this argument with an example from the medical profession, and more specifically through the doctor-patient relationship.

## Notes

<sup>1</sup> *An NHS Trust v MB (A child represented by the CAF/CASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2 FLR 319.

<sup>2</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.

<sup>3</sup> John Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson, 1954).

<sup>4</sup> Herbert Morris 'John Austin' in *The Encyclopaedia of Philosophy* vol 1 (New York: Macmillan 1967), 210.

<sup>5</sup> Howard Davies and David Holdcroft, *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991), 3-4.

<sup>6</sup> Ian McLeod, *Legal Theory* 2<sup>nd</sup> ed. (Basingstoke: Palgrave Macmillan, 2003), 21-22.

<sup>7</sup> *Ibid.*, 23.

<sup>8</sup> *Ibid.*

<sup>9</sup> Kelly argues that Cicero stops short of actually imputing invalidity, as distinct from injustice, to laws infringing the higher law. *De Legibus* 1. 15. 42. J. M. Kelly, *A Short History of Western Theory* (Oxford: Clarendon Press, 1994), 59; McLeod points to St. Augustine's statement, *lex injusta non est lex*, translated as 'an unjust law is not a law'. (*On Free Will*, 1.5.33.). McLeod argues that this may simply be an example of accuracy being sacrificed to brevity with Augustine's true meaning being more accurately represented by para. 1.6.50., which Anthony J. Lisska translates as: 'In temporal [i.e. human] law, nothing is just nor legitimate which human beings do not derive from the eternal law.' (*Aquinas's Theory of Natural Law*, 1996, 269.) McLeod notes that if this translation is preferred, then it is only justice, and not the existence, of human law which is the issue. McLeod, *Legal Theory*, 51.

<sup>10</sup> Davies and Holdcroft, *Jurisprudence*, 3-4; Austin Chinhengo, *Essential Jurisprudence* 2<sup>nd</sup> ed. (London: Cavendish Publishing Limited, 2000), 28.

<sup>11</sup> Davies and Holdcroft, *Jurisprudence*, 4-5.

<sup>12</sup> Chinhengo, *Essential Jurisprudence*, 27.

<sup>13</sup> *Ibid.*

<sup>14</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1997).

<sup>15</sup> *Ibid.*, 57.

<sup>16</sup> *Ibid.*, 255.

<sup>17</sup> *Ibid.*, 82ff.

<sup>18</sup> *Ibid.*, 82.

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

<sup>20</sup> *Ibid.*, 83.

<sup>21</sup> *Ibid.*, 85.

<sup>22</sup> *Ibid.*, 86.

<sup>23</sup> *Ibid.*, 87.

<sup>24</sup> *Ibid.*, 172.

<sup>25</sup> *Ibid.*, 173-180.

<sup>26</sup> Martin argues firstly that one could imagine a society in which a religious leader dictates the moral rules of a society. This leader could change the moral rules as easily as legislatures change legal rules. Secondly, Martin does not agree with the distinction that Hart draws between legal rules being unimportant and remaining law, and moral rules becoming unimportant and no longer being considered moral rules. Martin argues that one could imagine a religious group where the moral system is based on the dictates of a religious leader. He gives the example of a dictate about attending church on a Sunday as being a moral obligation of the faithful. At the beginning the faithful follow the dictate and consider it to be essential to Eternal Life. After many years fewer and fewer people follow the dictate. People in the Church hierarchy fail to insist on its compliance, and the leader becomes too old to care. This would not mean that the rule is no longer a moral rule in the system, but rather that it was no longer considered important. Thirdly, Martin notes that according to Hart it is always an excuse for someone's breaking a moral rule that the person could not keep it. But that this is not the case in the law. Some laws are based on strict liability and no excuse is possible. So in moral responsibility 'ought' always implies 'can', but in legal responsibility this implication does not always hold. However, if we understand someone's legal responsibility as including all and only those things that the law requires the person to do or refrain from doing, then, 'ought' does imply 'can' even in the usual cases of strict liability. Even in strict liability, the law requires that when some event E occurs, a person P1 must do something, for example, pay damages to another person, P2, although E's occurrence was not the fault of P1. It is the presupposition of the law that P1 is able to pay P2. Of course, this presupposition is not always true; P1 may have no money and depending on the circumstances P1 may be excused by the court. So, if interpreted in this way, even in

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strict liability, 'ought' implies 'can'. There is, indeed, a moral analogue to legal responsibility interpreted in this way. Sometimes people have a moral responsibility to do something about events, whose occurrence was not their fault. For example, one has a moral responsibility to save a drowning child (if this can be done without danger to oneself) despite the fact that the child's desperate situation is not your fault. However, legal responsibility may be construed not in terms of what one must do, for example, pay damages, but in terms of some sanction that is imposed. On this construal someone's legal responsibility includes all and only those acts that are subject to legal sanction. Thus there may be a law making possession of a firearm punishable by a year in jail (such a law may be interpreted in terms of strict liability where no excuses are permitted). However, whether the imposition of sanctions on people, without there being at fault distinguishes laws from morality remains to be seen. This brings us to Hart's last criterion for distinguishing morals from laws. According to Hart, legal pressure is characteristically exerted by fear of punishment, while moral pressure is characteristically exerted not in this way but rather by a 'reminder of the moral character of the action and demand of morality'. However, the distinction between law and morality in terms of sanctions cannot be drawn as sharply as Hart supposes. First, one can imagine a moral system that imposes physical sanctions for breaking moral rules. Indeed, there could be a moral system that would impose physical sanctions on people for acts or omissions that they could not help. Thus some religious sect may impose sanctions on its members who no longer believed in God although the non-believers may not be able to help their non-belief. Furthermore, although I have spoken of moral systems that impose physical sanctions in *this* world, some or all systems threatened sanctions after death, for example, in hell. Indeed, if one considers these systems, then it is plausible to suppose that the pressure many moral systems characteristically exert is the fear of punishment. In holding the opposite Hart must be talking about secular moral systems, not religious moral systems, at least not those in the Christian tradition. In addition, many people in modern society follow the law because they believe they have a moral duty to do so; the fear of punishment does not enter into their motivation.

This is a note in the Yale Law Journal, 41-43 - Michael Martin, 'The Legal Philosophy of H.L.A.Hart,' *Yale Law Journal* 84 (1975): 584-607 cited in Davies and Holdcroft, *Jurisprudence*, 67-68.

<sup>27</sup> Davies and Holdcroft, *Jurisprudence*, 68.

<sup>28</sup> Hart, *The Concept of Law*, 81-91.

<sup>29</sup> *Ibid.*, 94-95.

<sup>30</sup> *Ibid.*, 95-96.

<sup>31</sup> *Ibid.*, 97.

<sup>32</sup> McLeod, *Legal Theory*, 80.

<sup>33</sup> Werner Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, eds. Rubya Mehdi, Hanne Petersen, Erik Reenberg and Gordon R. Woodman, (Copenhagen: DJOF Publishing, 2008), 43-62.

<sup>34</sup> Graham Woodman notes that the claim that the only true law is that which is made and enforced by the state (legal centralism), and that religious and customary laws are not properly called law unless the state adopts and treats them as a normative order as part of its law, has been much debated. (See e.g.: J. Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986): 1-55; B.Z.Tamanaha, "The folly of the 'social scientific' concept of legal pluralism," *Journal of Law & Society* 20 (1993): 192-217; G.R.Woodman, "Ideological combat and social observation: recent debate about legal pluralism," *Journal of Legal Pluralism* 42 (1998): 21-59; F. von. Benda-Beckmann, "Who's afraid of legal pluralism?" *Journal of Legal Pluralism* 47 (2002): 37-82 cited in Gordon R. Woodman, "The possibilities of Co-Existence of Religious Laws with Other Laws," in *Law and Religion in Multicultural Societies*, eds. Rubya Mehdi, Hanne Petersen, Erik Reenberg and Gordon R. Woodman, (Copenhagen: DJOF Publishing, 2008), 25-26; Woodman argues: 'Here it may suffice to suggest that there is no empirical distinction between state law and other normative orders which might justify it. Normative orders such as religious laws are frequently seen as obligatory and observed to as great a degree as state laws. This observation is frequently a result at least in part of enforcement by human agents, rather than solely of the demands of the individual conscience. State laws, on the other hand, are never derived entirely from state authority, but incorporate social norms which are observed, frequently because they are enjoined by religion, within their populations.' *ibid.* Woodman, "The possibilities of Co-Existence of Religious Laws with Other Laws," in *Law and Religion in Multicultural Societies*, 26.

<sup>35</sup> Hart, *The Concept of Law*, 185-186.

<sup>36</sup> *Ibid.*, 193.

<sup>37</sup> Hart, *Concept of Law*, 193ff Hart begins with the argument that the goal of society is survival and as a result law and morality should include a specific content, which he calls 'the minimum content theory of natural law'. In the absence of the goal of survival there would be no reason for anyone to voluntarily obey rules, and without a minimum amount of voluntary co-operation, coercion of others who would not voluntarily conform would be impossible. Hart bases his theory on five truisms about human nature. First, human beings are all vulnerable to attack hence the need for the law against killing or inflicting bodily harm. Second, humans beings are approximately equal in mental and physical abilities hence the need for

a system of mutual forbearance and compromise. Third, human beings are neither angels nor devils but are a mean between the two and they have intermittent and limited altruism. To avoid society being destroyed by aggressive tendencies a system of mutual forbearances is not only possible but also essential. Fourth, all human beings have a need for food, clothes and shelter but these resources are limited hence the need for rules respecting property. Fifth, human beings have limited understanding and strength of will, not all understand the concept of long-term interest and even if they do, all, at times, are tempted to prefer their own interests. The result is that a system including coercive sanctions is needed as a guarantee that those who voluntarily obey will not be sacrificed to those who do not. In the light of the facts about human nature and the goal of survival, minimum forms of protection for life, property and a system of forbearances, are a 'natural necessity'. They also provide a rebuttal to the positivist's argument that law and morals can have 'any' content. Hart, *The Concept of Law*, 91ff. Hart is not arguing for a "higher law" in the sense of overriding, eternally just moral or legal principles but instead a sociological base for a minimum content of natural law. (Freeman, *Lloyd's Introduction to Jurisprudence*, 130). The 'natural' of natural law is based on the five truisms of human nature which have been criticised as being vague and uncertain, not dependent on sociological investigation but instead on an intuitive appraisal of the character of the human condition. (D'Entreves, *Natural Law*, 1970,194). Law is essential for survival, without law society as we know it would not survive, instead, it would be the survival of the fittest and meanest, as the weak would have to submit to the strong. Law functions to provide an organisational framework and base to enable society to function. It also acts to protect the weak and the vulnerable and according to Hart that includes all human beings. Hart links the need for law directly to the state of human nature. He paints a picture of human nature as vulnerable, dependent, equal, with a limited capacity to altruism but prone to selfishness and destruction. Hart, *The Concept of Law*, 193-200; There is no mention of god or a place for religion in his theory or for any other goals other than survival. Indeed he envisaged his theory of law as general, descriptive, not tied to any particular legal system or culture, and morally 'neutral'. *Ibid.*, 239-40.

<sup>38</sup> *Ibid.*

<sup>39</sup> M.D.A. Freeman, ed. *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed. (London: Sweet & Maxwell, 2001), 94.

<sup>40</sup> *Ibid.*

<sup>41</sup> McLeod, *Legal Theory*, 83.

<sup>42</sup> N.E.Simmonds, *Central Issues in Jurisprudence* 2<sup>nd</sup> ed. (London: Sweet & Maxwell, 2002), 161-162.

<sup>43</sup> Hart, *The Concept of Law*, 192.

<sup>44</sup> *Ibid.*

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

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

<sup>47</sup> Simmonds, *Central Issues in Jurisprudence*, 162.

<sup>48</sup> Hart, *The Concept of Law*, 124ff.

<sup>49</sup> Hart, *The Concept of Law*, 135; Chinhengo, *Essential Jurisprudence*, 61.

<sup>50</sup> Ronald Dworkin, *Taking Rights Seriously* 8<sup>th</sup> impression (London: Gerald Duckworth & Co. Ltd., 1996), Chapters 2 and 3.

<sup>51</sup> *Ibid.*, 22.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 90.

<sup>54</sup> Chinhengo, *Essential Jurisprudence*, 61.

<sup>55</sup> Dworkin, *Taking Rights Seriously*, 92.

<sup>56</sup> Chinhengo, *Essential Jurisprudence*, 61.

<sup>57</sup> Dworkin, *Taking Rights Seriously*, 105ff.

<sup>58</sup> *Ibid.*, 24.

<sup>59</sup> *Ibid.*, 25.

<sup>60</sup> *Ibid.*, 26.

<sup>61</sup> *Ibid.*, 46.

<sup>62</sup> *Ibid.*, 262.

<sup>63</sup> *Ibid.*, 263ff.

<sup>64</sup> Kelly, *A Short History of Western Legal Theory*, 19ff; McLeod, *Legal Theory*, Chapter 3; Werner Menski, *Comparative Law in a Global Context* (Cambridge: Cambridge University Press, 2006), 134ff.

<sup>65</sup> In the fifth century Athenian Tragedy the *Antigone* of Sophocles, Antigone is faced with a dilemma. Her brother has died in a war attacking Thebes. The king has forbidden the burial of his body, but if he is not buried his soul will not find repose which even a handful of earth will ensure. Antigone is compelled by piety to disobey the king and puts earth on his body. She is then arrested and when brought before the king and asked why she disobeyed she replies: 'These laws were not ordained by Zeus, and she who sits enthroned with gods below, Justice, enacted not these human laws. Nor did I deem that thou, a mortal man, couldst by a breath annul and override the immutable unwritten laws of heaven. They were not born

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today nor yesterday; they die not; and none knoweth whence they sprang. *Antigone* 453-7, cited in Kelly, *A Short History of Western Theory*, 20.

<sup>66</sup> In his *Nicomachean Ethics* Aristotle draws a ‘theoretical distinction between that which is naturally just (*to physikon dikaion*) and that which is the consequence of having been prescribed by positive law (*to nomikon dikaion*): Of political justice [ *to politikon dikaion* = something like ‘the rules governing citizens’] one sort is natural, the other conventional; and the natural sort has the same force everywhere and does not depend upon one’s opinion being for or against it, whereas the conventional sort of rule, while initially it does not matter whether it is fixed one way or the other, once it is fixed, ceases to be a matter of indifference; such for instance as [various arbitrarily fixed amounts of ransoms, sacrifices, etc.]’ *Nicomachean Ethics* 5. 7.1. cited in Kelly, *A Short History of Western Theory*, 20.

<sup>67</sup> Walter J Jones summarises how natural law was understood in Stoicism as follows: The notion of a law of Nature is one expression of the belief that there are certain legal principles and institutions so firmly in the general scheme of things that they represent something inherent in all ordered social existence. The concept was originally bound up with that of physical laws. In the philosophy of the Pythagoreans and Stoics, the whole Universe was conceived as a Cosmos or ordered whole, governed by a creative force called by them Nature or God or the Universal law; and particular things were believed to be an emanation from the Universal through the operation of this Law. Since individual human beings are part of Nature their only chance of achieving Man’s highest purpose and attaining true happiness seem to lie in ordering their lives, according to the law of Nature. To the Stoics, life in accordance with Nature was what was meant by Virtue, for Man’s individual reason should also be a reflection of the Universal Reason, which they held to be the divine element in the Universe and the final standard of conduct. Human laws and institutions thus came to be regarded as the realisation, however imperfect and partial, of the law of Nature, which stands behind them and provides rules by which men should regulate their actions. Walter J. Jones, *Historical introduction to the theory of law*, (Oxford: Clarendon Press, 1956), 98 cited in Menski, *Comparative Law in a Global Context*, 135 & 620.

<sup>68</sup> Cicero drew a distinction between natural law and positive law: ‘law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. They believe that Law is understanding; whose natural function it is to command right conduct and forbid wrongdoing. ... The origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured ... In determining what Justice is, we may begin with that Supreme Law, which had its origin ages before any written law existed or any state had been established.’ *De Legibus* 1. 6. 18-19 cited in Kelly, *A Short History of Western Theory*, 58.

<sup>69</sup> Augustine emphasises the importance of justice by asking, ‘what are states without justice, but robber bands enlarged? (*The City of God* 4 iv.). He also asserts that there must be an ideal law which he equates with the law of the Judeo-Christian God. McLeod, *Legal Theory*, 50-51.

<sup>70</sup> Aquinas drew on the works of Aristotle, the Stoics and Cicero and developed a Christian version of natural law. St. Thomas Aquinas, *Summa Theologiae: Latin text and English translation, introductions, notes, appendices, and glossaries*, (London: Blackfriars in conjunction with Eyre & Spottiswoode, 1963).

<sup>71</sup> Grotius developed a theory of natural law ‘which would have validity even if God had not existed or had not interested himself in human affairs.’ This had the effect of divorcing natural law from a divine being, although he himself disclaimed any such separation, and ascribed natural law to God, its author. Kelly, *A Short History of Western Theory*, 225.

<sup>72</sup> Aquinas, *Summa Theologiae*, Q.90. 4.

<sup>73</sup> *Ibid.*, Q 90.4.

<sup>74</sup> *Ibid.*, Q 91.2.

<sup>75</sup> *Ibid.*, Q 91.3.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, Q.90.3.

<sup>78</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1992).

<sup>79</sup> *Ibid.*, 3.

<sup>80</sup> *Ibid.*, 16.

<sup>81</sup> *Ibid.*, 23.

<sup>82</sup> *Ibid.*, 351.

<sup>83</sup> *Ibid.*, Chapters III ‘Knowledge’ and Chapter IV ‘The other Basic Values’ ‘Life is a first basic value, corresponding to the drive for self-preservation. The term ‘life’ here signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination. Hence it includes, bodily (including cerebral) health, and freedom from pain...’ It also includes the transmission of life by procreation of children; Knowledge – this is speculative knowledge – knowledge that is sought for its own sake; Play – ‘the performance may be solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or ad hoc in its pattern’; Aesthetic experience – ‘Many forms of play, such as dance or song or football, are the matrix or occasion of aesthetic experience.

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But beauty is not an indispensable element of play. Moreover, beautiful form can be found and enjoyed in nature. ... But often enough the valued experience is found in the creation and/or active appreciation of some work of significance and satisfying form'; Sociality (friendship) 'which in its weakest form is realized by a minimum of peace and harmony amongst men, and which ranges through the forms of human community to its strongest form in the flowering of full friendship'; Practical reasonableness – 'the basic good of being able to bring one's own intelligence to bear effectively) in practical reasoning that issues in action on the problems of choosing one's actions and lifestyle and shaping one's own character'; Religion – this is described widely to including exploring questions about the meaning of life and how humans relate to the cosmos, and the origin of the cosmos. Here Finnis allows for those who have faith in a divine being and those who do not.

<sup>84</sup> Finnis, *Natural Law and Natural Rights*, 86-90.

<sup>85</sup> *Ibid.*, 90.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 34 Finnis makes a number of what he calls confident assertions to illustrate that the goods are objective. 83; The goods are basic because all other values that exist are subordinate to them. 90-92; The basic goods are equally fundamental and there is no objective hierarchy amongst them, 92-95; The goods are pre-moral and self-evident.

<sup>88</sup> Finnis, *Natural Law and Natural Rights*, 62.

<sup>89</sup> *Ibid.*, 100.

<sup>90</sup> *Ibid.*, 102-126– Finnis lists the requirements of practical reasonableness. 1. A Coherent Life Plan – '... the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realised but only by one who intelligently directs, focuses, and controls his urges, inclinations, and impulses. In its fullest form, therefore, the first requirement of practical reasonableness is what John Rawls calls are rational life plan of life. Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as the 'plans' or 'blueprints' of a pipe dream, but as effective commitments. ... It is unreasonable to live merely from moment to moment, following immediate cravings, or just drifting.' 2. No Arbitrary Preferences Amongst Values – 'Next, there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values. Any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good, but the commitment will be rational only if it is on the basis of one's assessment of one's capacities, circumstances, and even of one's tastes.' 3. No Arbitrary Preferences Amongst Persons – 'My own well-being ... is reasonably the first claim on my interest, concern, and effort. ... There is, therefore, reasonable scope for self-preference. But when all allowance is made for that, this third requirement remains, a pungent critique of selfishness, special pleading, double standards, hypocrisy, and indifference to the good of others ... whom one could easily help. ... and all the other manifold forms of egoistic and group bias. 4. Detachment and commitment – 'There is no good reason to take up an attitude to any of one's particular objectives, such that if one's project failed and one's object eluded one, one would consider one's life drained of meaning.' 'The .. requirement establishes the balance between fanaticism and dropping out, apathy, unreasonable failure or refusal to get involved with anything. It is simply the requirement having made one's general commitments one must not abandon them lightly.' 5. The Limited Relevance of Consequences: Efficiency, Within Reason – this is the requirement that one bring about good in the world (in one's own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s). One must not waste one's opportunities by using inefficient methods. One's actions should be judged by their effectiveness, by their fitness of their purpose, by their utility, and their consequences... There is a wide range of contexts in which it is possible and only reasonable to calculate, measure, compare, weigh, and assess the consequences of alternative decisions. Where a choice must be made it is reasonable to prefer human good to the good of animals. Where a choice must be made it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property).' Nevertheless Finnis argues that one cannot measure the goods and any attempt to do so is irrational. 6. Respect For Every Basic Value in Every Act – 'one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of the basic forms of human good.' 7. The Requirements of the Common Good - this requirement is related to favouring and fostering the common good of one's communities. 8. Following One's Conscience - this is the requirement that one should not do what one judges or thinks or 'feels' –all-in-all should not be done.

<sup>91</sup> Finnis, *Natural Law and Natural Rights*, 126.

<sup>92</sup> *Ibid.*, 155- 156.

<sup>93</sup> *Ibid.*, 156.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, 278.

<sup>96</sup> *Ibid.*, 351.

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<sup>97</sup> T. Aquinas, *S.T. I-II*, q. 92, a. 1 and 4. cited in Finnis, *Natural Law and Natural Rights*, 363-363 note 12.

<sup>98</sup> *Ibid.*, 354-362.

<sup>99</sup> H.L.A. Hart *Essays in Jurisprudence and Philosophy* (1983), 11 cited in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 7<sup>th</sup> ed. (London: Sweet & Maxwell Ltd., 2001), 132.

<sup>100</sup> Neil MacCormick *Natural Law Reconsidered* (1981) 1 O.J.L.S. 99, 109 cited in Freeman, *Lloyd's Introduction to Jurisprudence*, 132.

<sup>101</sup> 'The scale of the argument and the confidence with which Finnis states his conclusions divert attention from detail. Even as a straightforward moral theory, however, without regard to its credentials as a theory of natural law, everything depends on the capacity of the lists of basic goods and methodological requirements together to yield usable specific, self-evidently true moral principles. Although the lists articulate our unformed judgments with subtlety and insight, they do nothing to resolve the genuine ambiguities and uncertainties that may attend moral choice. The basic goods are not more than clusters of related human experiences usually thought to be valuable, stated with sufficient generality to include anything one may want to include. Finnis observes that they 'lay down for us the outlines of everything one could reasonably want to do, to have, and to be' and concedes that neither his terminology, nor his precise categories are essential to the argument. But if that is so, especially because the methodological requirements prescribe respect for all the basic goods and allow no 'arbitrary' preferences among them, the catalogue of basic goods is scarcely more informative or helpful for the solution of moral issues than Aquinas' injunction, 'Do good and avoid evil.' Finnis gives us a powerful analysis of the ways in which human experience acquires value: as life (or life-sustaining), as knowledge, as play and so forth. He helps us to understand the variousness of human good, without limiting the manner in which we may seek it. The same is true about the methodological requirements of practical reasonableness. They are thoughtful, convincing prescriptions for the good life. Most of us would probably subscribe to them generally and instruct our children, less articulately, along the same lines. But he is whistling in the dark to suppose that they allow only one moral solution to a problem. For the most part, Finnis' elaborations of them are no more definite than the general moral precepts on which we usually rely. (The 'classical non-philosophical expression' of the third requirement is, 'of course', the so-called Golden Rule.) When he indicates concretely how they are to be applied, the result does not inspire confidence in his method as a path to certain truth.' L. L. Weinreb, *Natural Law and Justice* (Cambridge, Mass., Harvard University Press, 1987), Ch. 4, 111-115 cited in Howard Davies and David Holcroft, *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991), 200.

<sup>102</sup> L. Weinreb *Natural Law and Justice*, Ch. 4 & Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind., University of Notre Dame Press, 1987) cited in Freeman, *Lloyd's Introduction to Jurisprudence*, 132.

<sup>103</sup> 'I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of God, or makes observations concerning human affairs; when of a sudden I am surprised to find that instead of the usual copulations of propositions, is and is not, I meet with no propositions that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.' David Hume's *A Treatise of Human Nature*, 1739, Book III, Pt.i, sec. 1 cited in McLeod, *Legal Theory*, 58-59.

<sup>104</sup> McLeod, *Legal Theory*, 59.

<sup>105</sup> *Ibid.*, 58-59, 69.

<sup>106</sup> *Ibid.*, 33, 35.

<sup>107</sup> Aquinas, in *Eth.* V, lect. 12, para. 1018; *S.T. I-II*, q. 94, a. 2; q. 91, a. 3c; q. 5, aa. 4c, 5c. cited in Finnis, *Natural Law and Natural Rights*, 33, note 33.

<sup>108</sup> Finnis, *Natural Law and Natural Rights*, 33-35.

<sup>109</sup> Weinreb, *Natural Law and Justice*, 111-115 cited in Davies and Holcroft, *Jurisprudence: Texts and Commentary*, 203.

<sup>110</sup> McLeod, *Legal Theory*, 112.

<sup>111</sup> Finnis, *Natural Law and Natural Rights*, Chapter XII.

<sup>112</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 43, 46.

<sup>113</sup> *Ibid.*, 46-47.

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<sup>114</sup> S. Poulter, *English Law and Ethnic Minority Customs* (London: Butterworths, 1986) cited in Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 45, 47.

<sup>115</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 48.

<sup>116</sup> Ibid.

<sup>117</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge, Mass., Harvard University Press, 1936).

<sup>118</sup> D. Pearl and W. Menski, *Muslim Family Law* 3<sup>rd</sup> ed. (London: Sweet and Maxwell, 1998)

<sup>119</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 48-49.

<sup>120</sup> Menski is influenced by Ehrlich's idea of 'living' law which Ehrlich contrasts with state law. 'The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usage, and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed, even of those that it has disapproved.' Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York: Arno Press, 1975), 493.

<sup>121</sup> Menski is influenced by Moore's idea of the semi-autonomous social field. Moore argues that 'the law of the central state is but one kind of relementation emanating from one kind of organization. ... It seems incontrovertible that the more complex a society, and the greater the appearance of rational control, the more delegation there will be in government and administration and the more areas of discretion and semi-autonomous activity there will be in the subparts of society, formal and 'informal.' Moore concludes that formal state control through legal regulation will only ever be partial. Moore explains semi-autonomous social fields as follows: 'The semi-autonomous social field is defined and its boundaries identified not by its organisation, (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them. Thus an arena in which a number of corporate groups deal with each other may be a semi-autonomous social field. Also the corporate groups themselves may each constitute a semi-autonomous social field. Many such fields may articulate with others in such a way out of form complex chains, rather the way the social networks of individuals, when attached to each other may be considered as an unending chains.' Sally Falk Moore, *Law as Process* (London, Henley and Boston: Routledge & Kegan Paul, 1978), 29-30, 57-58.

<sup>122</sup> Menski draws on Chiba's tri-partite model of law as 'official law', 'unofficial law', and 'legal postulates.' 'Official law is the legal system sanctioned by the legitimate authority of the country. State law is ordinarily understood as a typical official law or even the only official law.... But as a matter of nature it is only one among many unofficial laws of a country, however dominant it may appear over the others. For instance, as in most contemporary countries with established religions, religious law may be partially included or accommodated by state law, but partially functioning out of the jurisdiction of the latter, thus forming its only system different from the state. Canon law, Islamic law, Hindu law, Buddhist law and Judaic law are among typical examples. Other examples may be found in the laws of marriage and family, land and farming, local organisations, professional guilds, castes and stratifications, ethnic minorities and so on, insofar as officially sanctioned by state law in one form or another. Each of these unofficial laws of a country is sanctioned first by an authority of its own. But all of them are required to keep consonance with one another. To fulfil this requirement, each of them must, finally, be sanctioned by the state authority.' 'Unofficial' law is the legal system not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country. That general consensus may be either consciously recognised and expressed in formal rules, or unconsciously observed in particular patterns of behaviour. However, not all such unofficial practices, supported by general consensus are to be included in unofficial law. Unofficial law is here limited to those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words, those which distinctively supplement, oppose, modify, or undermine any of the official laws, including state law. The effectiveness of the total system of unofficial law is thus dependent upon the *status quo* of the unofficial law of the country concerned. One of the most important problems of unofficial law is therefore its positive or negative influence upon official law as well as its cultural background. While model jurisprudence has tended to disregard it, unofficial law has been treated in various rubrics in sociological and anthropology, anthropological trends. For example, such rubrics are frequently found as customary law, living law, law in action, primitive law, tribal law, native law and folklore, although their specific connotations should be carefully distinguished from one another.' A legal postulate is 'a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify and orient the latter. It may consist of established legal ideas, such as natural law, justice, equity, and so on in model jurisprudence; sacred truths and precepts emanating from various gods in religious law, social and cultural postulates affording the

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structural and functional basis for a society as embodied in clan unity, exogamy, bilineal descent, seniority, individual freedom, national philosophy, and so on; political ideologies, often closely connected with economic policies, as in capitalism or socialism, and so on. The legal postulates of a country, whether official or unofficial, are as a whole required to keep a certain degree of consonance with one another. But complete consonance cannot be expected. First, because as each legal posture is in support of a particular system of official or unofficial law, the potential of conflict with other systems, as pointed out above, is high. Second, because the legal postulate may tend to upset the *status quo* of its supported official or unofficial law in order to improve or even replace the latter. M.Chiba, *Asian Indigenous Law in Interaction with Received Law* (London and New York: KPI, 1986) cited in Werner Menski, *Comparative Law in a Global Context* (Cambridge: Cambridge University Press, 2006), 124-125.

<sup>123</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 49.

<sup>124</sup> Menski draws on Chiba's tri-partite model of law as 'official law', 'unofficial law', and 'legal postulates.' M.Chiba, *Asian Indigenous Law in Interaction with Received Law*, (London and New York: KPI, 1986) cited in Werner Menski, *Comparative Law in a Global Context*, 124-125.

<sup>125</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 51.

<sup>126</sup> Menski, *Comparative Law in a Global Context*, 186-187.

<sup>127</sup> *Ibid.*, 610-613.

<sup>128</sup> Werner Menski, email message to Anne Harding, 21 July 2009.

<sup>129</sup> Gordon R. Woodman, "The possibilities of Co-Existence of Religious Laws with Other Laws," in *Law and Religion in Multicultural Societies*, eds. Rubya Mehdi, Hanne Petersen, Erik Reenberg and Gordon R. Woodman, (Copenhagen: DJOF Publishing, 2008), 25-26.

<sup>130</sup> *Ibid.*

<sup>131</sup> B.Z. Tamanaha, "The folly of the 'social scientific' concept of legal pluralism," *Journal of Law & Society* 20 (1993): 192-217.

<sup>132</sup> *Ibid.*, 193.

<sup>133</sup> Freeman, *Lloyd's Introduction to Jurisprudence*, 921.

<sup>134</sup> G. Teubner, *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1986) cited in Freeman, *Lloyd's Introduction to Jurisprudence*, 920.

<sup>135</sup> William Twining, *Globalisation and Legal Theory* (London, Edinburgh, Dublin: Butterworths, 2000), 85-86.

<sup>136</sup> Gordon R. Woodman, Book Review of *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, by Werner Menski, *Journal of Legal Pluralism* 52 (2006): 211-212.

<sup>137</sup> *Ibid.*, 213.

<sup>138</sup> *Ibid.*

<sup>139</sup> Perry Yoder, *Shalom* (London: Spire imprint of Hodder & Stoughton, 1989), 74.

<sup>140</sup> *Ibid.*

<sup>141</sup> Roland de Vaux, *Ancient Israel: Its Life and Institutions*, trans. John McHugh (London: Darton, Longman & Todd, 1962), 143.

<sup>142</sup> *Ibid.*, 149.

<sup>143</sup> Robert Banks, *Jesus And the Law In The Synoptic Tradition* (Cambridge: Cambridge University Press, 1975), 39.

<sup>144</sup> Vaux, *Ancient Israel*, 143.

<sup>145</sup> Yoder, *Shalom*, 74.

<sup>146</sup> Leland Ryken, James C. Wilhoit and Tremper Longman III eds. *Dictionary of Biblical Imagery*, (Downers Grove, Illinois, USA, Leicester, England: InterVarsity Press, 1998).

<sup>147</sup> Howard Zehr, *Changing Lenses* (Scottsdale, Pennsylvania: Herald Press, 1995), 130; Walter Brueggeman, *Living Toward A Vision* (New York: United Church Press, 1990), Chapter 1.

<sup>148</sup> Yoder, *Shalom*, 12.

<sup>149</sup> *Ibid.*, 13-14.

<sup>150</sup> *Ibid.*, 14.

<sup>151</sup> *Ibid.*, 16.

<sup>152</sup> While I make this statement I do acknowledge that mediation is now often employed in the English legal system, particularly in relation to small claims and in family law to try to reach settlements.

<sup>153</sup> Yoder, *Shalom*, 79.

<sup>154</sup> *Ibid.*, 80, 82.

<sup>155</sup> *Ibid.*, 82-83.

<sup>156</sup> Vaux, *Ancient Israel*, 152-155.

<sup>157</sup> Ian Cairns notes that, 'scholars have questioned whether a single court would be presided over by both priests and judges. Some have concluded therefore "and the judge..." is a later (Deuteronomic) insertion, designed perhaps to show that the judiciary did not suffer eclipse as a result of the Deuteronomic

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centralization policy. Others take the opposite view, that the Deuteronomic school's special concern for the Levites in the context of the centralization has led them to insert the reference to the levitical priesthood in a context that originally applied only to the judges. Certainty on this point is virtually impossible to achieve. In either case, the addition is Deuteronomic and designed to show that all matters civil and cultic are included within Yahweh's all-embracing torah guidance for the covenant people.' Ian Cairns, *Word and Presence: A Commentary on the Book of Deuteronomy* (Grand Rapids, Michigan: Wm. B. Eerdmans Publishing Co., 1992), 164, see also A.D.H. Mayes *Deuteronomy* (London: Oliphants Marshall, Morgan & Scott, 1979), 268.

<sup>158</sup> Peter, C. Craigie, *The Book of Deuteronomy* (London: Hodder and Stoughton, 1976), 252.

<sup>159</sup> Anthony Bradney, "Faced by Faith," in *Faith in Law: Essays in Legal Theory*, eds. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 89-105; Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 54.

<sup>160</sup> Banks, *Jesus and the Law in the Synoptic Tradition*, 90ff.

<sup>161</sup> See Josephus *Contra Apionem*. II 175-286, especially II. 178, 184, 218-21, 232-35, 277ff cited by E.P. Sanders, *Jesus and Judaism* (London: SCM Press Ltd., 1985), 245 and 396 note 4.

<sup>162</sup> These included: state law (which might be either Roman or that of the prince Herod Antipas), civil law, in the broad sense of law applied through the courts, (which could be divided into 'criminal' and 'private' domains), and religious law (which could be divided into "public" which was largely concerned with the temple, and "private" which was concerned with personal piety). Both civil and religious law were made up of elements derived from the Pentateuch and custom. Philip S. Alexander, "Jewish Law in the time of Jesus: towards a clarification of the problem," in *Law and Religion*, ed. Barnabas Lindars SSF, (Cambridge: James Clarke & Co., 1988), 44-58.

<sup>163</sup> In the debate about Jesus' attitude to the law the question arises as to whether the antitheses are authentic and can be traced back to the historical Jesus. Robert Banks argues that they are authentic and that Jesus did not abrogate the law, but that his teaching in the antitheses transcended the law. Banks, *Jesus and the Law in the Synoptic Tradition*, 182ff; For a different perspective see, James D.G. Dunn, *Unity and Diversity in the New Testament*, (London: SCM Press, 1997), 249-250, Dunn focuses on Matthew's attitude to the law and what seems to be his defence of the law from two abuses. On the one hand is Matthew's polemic against anomia, lawlessness, in particular against what he considers charismatic antinomianism. There seems to have been Christians who believed that they were wholly liberated from the law. On the other hand, Matthew seems to be fighting against too legalistic understanding of the law in rabbinic Judaism. Dunn argues that Matthew uses Jesus' teaching to underscore his conviction that the commandment of love is the heart and essence of the law, rather than Jewish legalism; and for an opposite view see E.P. Sanders, *Jesus and Judaism*, (London: SCM Press, 1985), 20ff Sanders argues that the antitheses are of dubious authenticity.

<sup>164</sup> J. Horton, 'Liberalism, Multiculturalism and Toleration' in *Liberalism, Multiculturalism and Toleration*, ed. J. Horton (London: Macmillan, 1993), 3-4, cited in Anthony Bradney, *Law and Faith in a Sceptical Age* (Abingdon: Routledge-Cavendish, 2009), 36.

<sup>165</sup> Peter Nicholson, "Toleration as a Moral Ideal," in *Aspects of Toleration*, ed. John Horton and Susan Mendus, (1985) cited in Baroness Mary Warnock, "The Limits of Toleration," in *On Toleration*, ed. Susan Mendus and David Edwards, (Oxford: Clarendon Press, 1987), 125.

<sup>166</sup> Warnock, "The Limits of Toleration," in *On Toleration*, ed. Susan Mendus and David Edwards, 126-7

<sup>167</sup> Maurice Cranston, "John Locke and the Case for Toleration," in *On Toleration*, ed. Susan Mendus and David Edwards (Oxford: Clarendon Press, 1987), 101.

<sup>168</sup> Joseph Raz, *Ethics in the Public Domain*, (Oxford: Clarendon Press, 1994), 157.

<sup>169</sup> Susan Mendus, introduction to *On Toleration*, eds. Susan Mendus and David Edwards (Oxford: Clarendon Press, 1987), 5.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid., 5-6.

<sup>172</sup> Voltaire, *Philosophical Dictionary*, 'Toleration' (Paris, 1968) cited in Karl Popper, "Toleration and Intellectual Responsibility," in *On Toleration*, ed. Susan Mendus and David Edwards (Oxford: Clarendon Press, 1987), 18.

<sup>173</sup> Popper, "Toleration and Intellectual Responsibility," in *On Toleration*, ed. Mendus and Edwards, 26ff

<sup>174</sup> Mendus, introduction to *On Toleration*, 6.

<sup>175</sup> Ibid., 8-9.

<sup>176</sup> Susan Mendus, ed. *Justifying Toleration* (Cambridge: Cambridge University Press, 1988), 4-5.

<sup>177</sup> Michael Walzer, *On Toleration* (New Haven and London: Yale University Press, 1997), 10-11.

<sup>178</sup> For a historical account that reveals all of these attitudes, see Wilbur K. Jordan, *The Development of Religious Toleration in England*, 4 vols. (Cambridge: Cambridge University Press, 1932-40) cited in Walzer, *On Toleration*, 11 note 4, 114.

<sup>179</sup> The case to which Mendus referred was, *Ahmad v Inner London Education Authority* [1978] Q.B. 36. The case involved Mr Ahmad, a devote Muslim who was employed by the Inner London Education

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Authority (I.L.E.A.) as a full-time teacher. It was his religious duty to attend Friday prayers at the local mosque. The time of the prayers was from 1pm to 2pm and he was unable to get back to school at 1.30pm to teach his class. He therefore missed 45 minutes of his class each Friday. One headmaster tried to arrange cover as best he could. There was provision in the staff code for leave for Christians on Good Friday, for Jews on the Day of Atonement, and Ramadan for Muslims, but the provision did not apply to working days, like Fridays. The other members of staff thought that it was unfair for Mr Ahmad to have Friday afternoons off each week on full pay. So the issue was referred to the I.L.E.A. They took the view that if he were to have Friday afternoons off for prayers then he could only be fitted in as a part-time teacher, doing four and a half days per week, but they would see that his pension rights were not prejudiced. He was unwilling to accept this proposal and resigned in protest. He claimed compensation saying that his employers' conduct had forced him to resign. The Employment Appeal Tribunal dismissed the employee's appeal from the industrial tribunal's decision that section 30 of the Education Act 1944 did not entitle him to attend religious worship during school hours and that the employers had acted reasonably in dismissing him within the meaning of paragraph 6 (8) of Schedule 1 to the Trade Union and Labour Relations Act 1974. The employee appealed but his appeal was dismissed by the Court of Appeal.

<sup>180</sup> In his judgement Lord Denning commented, 'I venture to suggest that it would do the Muslim community no good – or any other minority group no good – if they were to be given preferential treatment over the great majority of people. If it should happen that, in the name of religious freedom, they were given special privileges or advantages, it would provoke discontent, and even resentment among those with whom they work. As, indeed, it has done in this very case, and so the cause of racial integration would suffer.' *Ahmad v Inner London Education Authority* [1978] Q.B.36.

<sup>181</sup> In his judgement Lord Scarman commented, 'When the section (s.30 Education Act 1944) was enacted, the negative approach to its interpretation was, no doubt, sufficient. But society has changed since 1944: so also has the legal background. Religions, such as Islam and Buddhism, have substantial followings among our people. Room has to be found for teachers and pupils of the new religions in the educational system, if discrimination is to be avoided. This calls not for a policy of the blind eye but for one of understanding. The system must be made sufficiently flexible to accommodate their beliefs and their observances: otherwise, they will suffer discrimination – a consequence contrary to the spirit of section 30, whatever the letter of the law.' *Ahmad v Inner London Education Authority* [1978] Q.B.36.

<sup>182</sup> Bradney, *Law and Faith in a Sceptical Age*, 36.

<sup>183</sup> Article 9: Freedom of Thought, Conscience, and Religion. 9.1 Everyone has the right to freedom of thought, conscience, and religion; this includes freedom to change his religion or belief and freedom, either alone or in common with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

<sup>184</sup> Article 9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of the public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>185</sup> Bradney, *Law and Faith in a Sceptical Age*, 36.

<sup>186</sup> Motor-Cycle Crash Helmets (Religious Exemption) Act 1976.

<sup>187</sup> Statutory Instrument 2003 No. 1660, The Employment Equality (Religion or Belief) Regulations 2003. <http://www.opsi.gov.uk/si/si2003/20031660.htm> (accessed August 18, 2009).

<sup>188</sup> Joseph Raz states that affirmation exists where the state seeks to foster a variety of respected and flourishing groups Raz, *Ethics in the Public Domain*, 157-159.

<sup>189</sup> Stephen L. Carter, *The Culture of Disbelief* (New York: Anchor Books a Division of Random House, Inc., 1994), 126.

<sup>190</sup> Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies* 57.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., 58.

<sup>193</sup> The Divorce (Religious Marriages) Act 2002 provides relief in the situation where a *get* (an agreement in Jewish religious usage that confirms that a Jewish couple are divorced) has not been given by a Jewish husband to his wife. Prior to the 2002 Act if a Jewish wife did not have a *get* she was still regarded as married to her husband in Jewish law, even though she had a divorce in English law. Under Section 10A of the 2002 Act either party to a Jewish marriage may apply to the Court so that a decree of divorce is not made absolute in English law until a declaration made by both husband and wife that a *get* has been granted. Menski, "Law, Religion and Culture in Multicultural Britain," 58.

<sup>194</sup> Menski points out that Muslim wives can have similar problems to Jewish wives in that they can obtain a divorce in English law, but their husband may refuse to give a *talaq*, to release them from the religious marriage/law. The result is that a pious Muslim woman in this situation would be unable to remarry. Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, 58-59.

<sup>195</sup> Ibid., 60.

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<sup>196</sup> Gordon R. Woodman, “The Possibilities of Co-Existence of Religious Laws with Other Laws,” in *Law and Religion in Multicultural Societies*, ed. Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman, (Copenhagen: DJOF Publishing, 2008), 23-42.

<sup>197</sup> *Ibid.*, 33.

<sup>198</sup> *Ibid.*, 34-35.

<sup>199</sup> *Ibid.*, 34.

<sup>200</sup> Charles Taylor, *Multiculturalism and “The Politics of Recognition,”* (Princeton, New Jersey: Princeton University Press, 1992), 32-33.

<sup>201</sup> *Ibid.*, 25-26.

<sup>202</sup> Rowan Williams, *Archbishop’s Lecture – Civil and Religious Law in England: a Religious Perspective.*

<http://www.archbishopofcanterbury.org/1575> (accessed February 9, 2008).

<sup>203</sup> *An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2FLR 319.

<sup>204</sup> Anthony Bradney, “Faced by Faith,” in *Faith in Law: Essays in Legal Theory*, eds. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 89-105.

<sup>205</sup> Davies and Holdcroft, *Jurisprudence*, 3-4.

<sup>206</sup> Bradney, “Faced by Faith,” in *Faith in Law*, 89-105; Menski, “Law, Religion and Culture in Multicultural Britain,” in *Law and Religion in Multicultural Societies*, 54.

<sup>207</sup> Judges receive education and training from the Judicial Studies Board (JSB). Education relating to issues of ethnic, cultural and religious diversity is listed under the heading of ‘equal treatment’. It is the function of the Equal Treatment Advisory Committee (ETAC) ‘to assist and support all judges and judicial office-holders to fulfil the obligations of the judicial oath by being equipped to recognise the many ways in which social, cultural and other differences may have a bearing on the conduct of cases and the wider judicial role.’ In the Equal Treatment Bench Book education on religion is included in Chapter 3 under the heading, ‘Discrimination on the basis of belief or non-belief.’

[http://www.jsboard.co.uk/downloads/annual\\_report\\_2009\\_web.pdf](http://www.jsboard.co.uk/downloads/annual_report_2009_web.pdf) (accessed July 24, 2009).

In the Judicial Studies Board 2008-9 Annual Report the ETAC confirm that the JSB have this year completed an initial list for a directory of external expert advisors in relation to the different diversity strands, e.g. race, gender, sexual orientation, religion, and belief.

<sup>208</sup> Taylor, *Multiculturalism and “The Politics of Recognition,”* 32-33.

<sup>209</sup> Maleiha Malik, “Faith and the State of Jurisprudence,” in *Faith in Law: Essays in Legal Theory*, ed. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 129-149.

## Chapter 3

### Faith and Medical Practice

In the first chapter I gave examples of the way faith was sidelined in legal decisions regarding medical cases, and in the previous chapter I argued that this was due to the influence of legal positivism. This, I argued, was a highly contested view of law, which we have no reason to accept without question. In building a case for taking faith commitments seriously I turn now to the doctor-patient relationship. I will begin in Section I by outlining the importance of culture and faith in the negotiation of meaning. In Section II I will focus on the doctor and patient and the role that narrative plays in the process of the negotiation of meaning. In Section III I will outline the theological importance of narrative for both the individual Christian and the Christian community. By drawing on the story and work of James Hopewell I will outline four narrative genres, and illustrate how Christians draw on their faith to create narratives to make sense of illness. Just as patients, family and friends tell stories (within which are implicit models) in order to make sense of an episode of serious illness, the medical profession also tell stories and have developed medical models with which they explain their understanding of disease and illness. In Section IV I will outline four medical models, and compare how they view patients' issues of faith. In Section V I will compare the four medical models with a number of ways of unfolding the Christian narrative and discuss how the respective models might interact in the doctor-patient relationship. I will also discuss four approaches to the challenge of competing narratives. Finally, in Section VI I will consider the role of the Christian Healthcare Chaplain and how she might be able to provide informal help in resolving disputes between doctor and patient that involve issues of faith.

But, why use a medical example? First, because the medical profession have become increasingly aware of the importance of culture, realising that a negotiation of meaning takes place between doctor and patient. Culture shapes the way in which a patient understands a wide-range of healthcare issues but this, of course, includes faith. I have already touched on the challenges that culture raises for the legal profession in Chapters 1 and 2. What I will add in this chapter is that Law is like a cultural system in that it has its own language and practice that needs to be translated, interpreted and negotiated with disputants. Similarly, culture and faith can shape the way a disputant understands

and responds to a particular dispute. Consequently, a negotiation of meaning takes place between disputants, and between disputants and the judge in cases that involve issues of faith. Secondly, narrative plays an important role in this process of negotiation of meaning as both doctor and patient draw on narratives to make sense of the patient's illness. Similarly, narrative plays a role in the negotiation of meaning in legal cases in that each disputant describes a dispute through narrative, and makes sense of the dispute by drawing on personal, cultural and sometimes spiritual narratives. Thirdly, there are doctors who have journeyed from a place of not accommodating the perspective and faith of their patients, to a place where they are convinced of the need to do so. Consequently, they have devised models that enable the perspective and faith of their patients to be taken into account in the doctor-patient relationship, and in decisions about a patient's healthcare. The significance of this for the legal profession is that these models illustrate how the perspective and faith of an individual can be accommodated, and I will argue that the models could be adapted and applied in legal cases. Fourthly, the role of the Christian Healthcare Chaplain provides an illustration of how representatives of faith communities could help informally in resolving disputes between doctor and patient that involve issues of faith. I will argue that the significance of this is that it also points to a wider role for representatives of faith communities in helping to resolve other types of disputes through, for example, the process of mediation, or by assisting judges in helping to resolve disputes that end up in the law courts.

## Section I – Culture, faith, and the negotiation of meaning

Healthcare professionals have become increasingly aware of the importance of a patient's culture, values and beliefs, as well as a patient's perspective of his or her illness. Clifford Geertz has defined culture as 'webs of significance' and as a search for, and the transmission of, meaning.

'Man is an animal suspended in webs of significance he himself has spun. I take culture to be those webs and that the analysis of it to be ..... an interpretive one in search of meaning.'<sup>1</sup>

'The culture concept ..... denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes towards life.'<sup>2</sup>

Tim Gorringer has suggested that 'culture' is what we make of the world materially,

intellectually and spiritually,<sup>3</sup> and that at every level we are dealing with questions of meaning and value.<sup>4</sup> In healthcare, culture shapes the meaning of a whole range of issues. As Ben Essex has argued:

‘All health problems should be seen within a cultural context. Cultural factors affect people's perceptions of symptoms, aetiology of illness, and urgency, severity and acceptability of treatment. They also affect the responses of the patient and his or her family to illness and its management. The interaction between culture and care is a neglected area of study in most medical schools. It needs to be understood to be able to provide care that is both appropriate and effective.’<sup>5</sup>

As a result of worldwide change involving the movement of large numbers of people<sup>6</sup> healthcare professionals are increasingly likely to care for patients from cultural backgrounds other than their own.<sup>7</sup> Because of different cultural understandings, and the models of health that emerge within those understandings, healthcare professionals, patients, and their families, may not have shared understandings of the meaning of illness, or its management, or of the role of healers, or the decision-making process, or of death, and may not agree on the best strategies to plan for the end of life, or to alleviate pain and suffering.<sup>8</sup> There is therefore a growing acceptance in healthcare of the need for ‘cultural sensitivity’ and ‘cultural competence’.<sup>9</sup> This ‘requires that physicians be aware of how culture shapes patients’ values, beliefs, and world views; acknowledge that differences exist; and respect these differences.’<sup>10</sup> Being ‘culturally sensitive’ and ‘culturally competent’ does not involve just learning about cultural traits. If it did, there would be a danger of stereotyping. Instead, it involves approaching each patient as a unique person, assessing his or her circumstances, and asking pertinent questions. It also involves being aware that a patient’s faith shapes how they understand concepts such as health, sickness, suffering, death and the human person. It also requires that doctors acknowledge their own values and beliefs.

‘Physicians also need to be aware of values, perspectives, and biases that are derived from their own culture of origin and from the biomedical worldview of their professional training. Medicine itself is a cultural system with its own specific language, values, and practices that must be translated, interpreted, and negotiated with patients and their families.’<sup>11</sup>

If healthcare issues are understood and interpreted differently by a patient and his or her doctor then it is likely that there will be different expectations, and this can lead to misunderstandings that can lead to potentially serious health outcomes. To avoid these potential pitfalls the interpretation and negotiation of meaning is of paramount importance.

I would argue that the interpretation and negotiation of meaning is also significant in legal cases because like Medicine, Law is a cultural system with its own specific language and practices that must be translated, interpreted, and negotiated with disputants. Culture and faith can also shape the way a disputant understands and responds to a particular dispute. Consequently, a negotiation of meaning takes place between disputants, and between disputants and the judge in cases that involve issues of faith. This is crucially important, as the cases of Chauhan and Janaway illustrate, because if the interpretation and negotiation of meaning is not addressed, there can be an adverse outcome for persons of faith.

In the next section I will explore the important role that narrative plays in the negotiation of meaning between doctor and patient, and why this is also significant in legal cases.

## Section II – The role of narrative in the negotiation of meaning

“Narrative” is a spoken or written account of connected events or experiences, a story; and also the process or technique of narrating or telling a story. Narrative is not just a literary concept but has been described by Jerome Bruner as a cognitive process.<sup>12</sup> Bruner argues that there are two distinct ways of thinking in which human beings organise experience and construct reality.<sup>13</sup> One is narrative; the other is what he calls the paradigmatic, or logico-scientific mode. One is a good story, the other a well-formed argument.

‘The imaginative application of the paradigmatic mode leads to good theory, tight analysis, logical proof, sound argument, and empirical discovery guided by reasoned hypothesis.’<sup>14</sup>

‘The imaginative application of the narrative mode leads instead to good stories, gripping drama, believable (though not necessarily “true”) historical accounts. It deals in human or human-like intention and action and the vicissitudes and consequences that mark their course.’<sup>15</sup>

According to Donald Polkinghorne narrative is the primary way that human beings give meaning to, and make sense of, experience.<sup>16</sup> It is ‘a meaning structure that organizes events and human actions into a whole, thereby attributing significance to individual actions and events according to their effect on the whole.’<sup>17</sup> It is by means of a plot that people explain their actions and those of others.<sup>18</sup> Bruner points to there being two landscapes in narrative, a landscape of action, and a landscape of consciousness.

Narrative links the outer world of an agent's action, and the inner world of the agent's thoughts and feelings.<sup>19</sup> Narrative is a way in which human beings process their experiences, communicate them to others, and re-arrange them within larger narratives of identity and selfhood.<sup>20</sup> It is also the way through which human beings introduce themselves to one another, and explain who they are.<sup>21</sup> Bruner argues that it is through this process of self-telling that the human 'self' is constructed.<sup>22</sup> Alasdair MacIntyre has suggested that the narrative concept of selfhood has two aspects. On the one hand a human being is the *subject* of a history that is unique and has its own particular meaning, and on the other they are always part of another's story.<sup>23</sup> The narrative of one human being's life is therefore a series of interlocking narratives.<sup>24</sup> MacIntyre has described human beings as 'story telling animals'.<sup>25</sup>

The telling of a story or narrative presupposes that there is a narrator who creates a story, and either a listener or reader.<sup>26</sup> A story can provide the narrator with a voice, and convey the narrator's feelings, attitudes, beliefs, values and point of view. A story draws the listener or reader in, and invites an interpretation.<sup>27</sup> Both the creating of a story, and the interpretation, are active and constructive processes, and both the narrator and the interpreter draw on personal and cultural resources.<sup>28</sup> Where the narrator may intend only one possible interpretation, the listener may, by drawing on his or her personal or cultural resources, provide quite different interpretations.<sup>29</sup> The telling and interpretation of a story is therefore a complex process of negotiation of meaning. This process can run smoothly, but it can also lead to misunderstanding and conflict. Listening to a story and hearing the voice of the narrator is one thing, *understanding* what the narrator means is quite another.

The success of this process of negotiation of meaning is acutely important in the doctor-patient relationship, where the health, and indeed the life of the patient, may depend on it. When a patient meets a doctor the patient will invariably explain her symptoms in the form of a story.<sup>30</sup> Even when the patient is unable to provide an account of her experience a doctor will often obtain the story from family, friends, or medical staff if they have brought the patient in to receive treatment.<sup>31</sup> The patient's story is the original motivating account that is brought to the doctor,<sup>32</sup> and it is crucial because,

'The narrative provides meaning, context, and perspective for the patient's predicament. It defines how, why, and in what way he or she is ill. It offers, in short, a possibility of *understanding* which cannot be arrived at by any other means.'<sup>33</sup>

This *understanding* on the part of the medical practitioner means that he or she has the possibility to encompass something of the psychological, relational, social, and spiritual aspects of the patient. This includes the patient's feelings, beliefs, values, and how the patient makes sense of his or her illness, as well as the effect of the illness on the patient's relationships and work. I will show later in the chapter that these wider aspects of how the patient experiences illness are not always taken into account or understood.

The doctor listens to the patient's story, and may also examine the patient and ask questions of both body and story.<sup>34</sup> The patient's story provides the doctor with the raw data for the clinical investigation, and serves as a guide for diagnostic tests that will either confirm or disprove a diagnosis.<sup>35</sup> The doctor will then prepare the 'medical' story or what the medical profession call a clinical case history.<sup>36</sup> This is constructed from information from the patient's story, and results of the examination and/or diagnostic tests. In preparing the case history the doctor will draw on his or her professional training, biomedical knowledge, medical assumptions about causation, and practical wisdom that comes from experience of treating others with similar diseases.<sup>37</sup> There are now two overlapping stories, the patient's story and the case history. Both stories have the patient and his or her distress in common. Both stories are faced with the same question, what is wrong? Both stories seek answers and a remedy for the patient,<sup>38</sup> but the stories are different. The patient's story concerns the effect of illness in a particular life. The case history concerns the identification and treatment of a disease,<sup>39</sup> and it is the case history that doctors tell to one another when discussing the patient's case.<sup>40</sup>

When a diagnosis is reached the clinical case history or 'medical' story is returned to the patient in a way that explains the diagnosis, prognosis and treatment. This time the doctor tells the story and the patient interprets the story. As Kathryn Montgomery Hunter notes, 'the reinterpreted medicalized narrative may well be alien to the patient: strange, depersonalised, un-lived, un-liveable, incomprehensible or terrifyingly clear.'<sup>41</sup> The patient then embarks on the process of reintegrating the medical story into his or her life story.<sup>42</sup> If the medical story has a positive outcome the reintegration of this story into the patient's life story will be straightforward. If, on the other hand, the medical story provides the patient with a negative diagnosis and poor prognosis the process of reintegration will be far more complex.

At each step of telling and interpretation a negotiation of meaning is taking place. Between the telling and the interpretation misunderstandings and conflicts can, and do, arise because different stories and explanatory frameworks<sup>43</sup> or models<sup>44</sup> are in operation. Howard Brody in *Stories of Sickness*<sup>45</sup> illustrates the various levels of stories and the complexity of meaning negotiation.

‘In healthcare, specifically, we commonly see a nested set of four levels of narrative. At the lowest level we encounter patients’ stories of their episodes of illness. Next we find patients’ life stories, within which they seek to make sense of their illness episodes. Those life stories are in turn nested within the cultural prototypes for general types of story that we think, within our culture, make sense (such as the metaphor of “story as journey”). Finally, we come to transcendental, overarching narratives, which some call “sacred stories,” designed to situate adherents of a belief system within the entire span of human history and the larger cosmos. Ultimately, the meaning of any story is to be found with the entire set of narratives, not at one narrative level alone.’<sup>46</sup>

I would suggest that just as the patient’s story is nested within a set of narratives so the doctor’s story is also nested within a similar set of narratives, and the meaning of their respective stories is found within the entire set.

Narratives operate on a number of different levels in healthcare, but each one can have a direct impact on the doctor-patient relationship. At one level they operate between different cultures that may have different narratives as to what constitutes disease,<sup>47</sup> hold different concepts of the human person,<sup>48</sup> have different understandings of death, dying, and grief,<sup>49</sup> and have different approaches to how decisions are to be made.<sup>50</sup> Narratives also operate within a particular culture. One example of this is where the perceived cause and treatment of disease has varied considerably over time. Different social groups may hold different narratives to identify and negotiate illness. Doctor and patient may also hold different narratives, and different understandings of the doctor-patient relationship, which can lead to different expectations.

Arthur Kleinman in *The Illness Narratives*<sup>51</sup> highlights the role of illness narratives and cultural and personal models of illness.

‘Thus, patients order their experience of illness- what it means to them and to significant others –as personal narratives. The illness narrative is a story that the patient tells, and significant others retell, to give coherence to the distinctive events and long-term course of suffering. The plot lines, core metaphors, and rhetorical devices that structure the illness narrative are drawn from cultural and personal models for arranging experiences in meaningful ways and for effectively communicating those meanings.’<sup>52</sup>

Kleinman notes that within the illness narratives are explanatory models, which are ‘notions or informal descriptions that patients, families, and medical practitioners have about a specific illness episode.’<sup>53</sup> They arise in response to questions such as: What is wrong with me? Why me? Why now? Is it treatable? What do I most fear about this illness or its treatment? Will I survive? Explanatory models are ‘responses to urgent life situations’ and they tend to be ‘informal, often tacit, or at least partially so, and not infrequently they contain contradictions, and shift in content.’<sup>54</sup> Kleinman has described them as ‘cognitive maps’ and suggested that they are ‘anchored in strong emotions, feelings that are difficult to express openly, and that strongly colour one person’s reaction to another’s explanatory models.’<sup>55</sup> Kleinman acknowledges that medical practitioners, as well as patients and their families, hold explanatory models. He notes that patient and family, as well as doctor and patient, may hold different explanatory models.<sup>56</sup>

The psychiatrist George Engel has also written about the significance of models in healthcare.<sup>57</sup> He has defined a ‘model’ as, ‘a belief system utilised to explain natural phenomena, to make sense out of what is puzzling or disturbing.’<sup>58</sup> Engel points out that the more socially destructive or individually upsetting the phenomenon, the more pressing the need of humans to devise explanatory systems. Engel suggests that ‘disease’ is one category of natural phenomenon that humans have a need to explain.<sup>59</sup> As I will show later in the chapter there are a number of medical models that seek to explain disease. Both Engel and Kleinman are aware, however, that there are models that are not scientific or medical. For Kleinman these include the explanatory models held by patients and their family. Engel refers to ‘culturally derived belief systems’ about disease that constitute models, or what he calls ‘popular or folk’ models.<sup>60</sup> I will show later in the chapter that these non-medical models include the illness stories and explanatory models of Christian patients and their families. For example, James Hopewell in *Congregation* has identified a number of different types of stories through which Christians have sought to make sense of their illness experience.<sup>61</sup>

Ian Barbour has shown that models are employed in both science and religion.<sup>62</sup> But do they have the same type of explanatory role in the two areas? Since medicine is heavily influenced by scientific discourse I will draw on recent work on the relationship between scientific and religious models in order to answer this question. The

theologian Sallie McFague in *Metaphorical Theology* states that scientific and theological models differ in the ways that the world is known.

‘Science knows the world from its physical phenomena, while theology knows the world from the perspective of human valuation. Science asks the question, “What is the phenomenon and how does it work?” while theology asks the question, “What is the meaning of life in the world?”’<sup>63</sup>

Barbour in *Myths Models and Paradigms* defines theoretical models in science as, ‘mental constructs devised to account for observed phenomena in the natural world.’<sup>64</sup> Theoretical models in science are therefore employed to explain natural phenomena, and ‘originate in a combination of analogy to the familiar and creative imagination in the invention of the new.’<sup>65</sup> Barbour defines models in religion as, ‘organizing images used to order and interpret patterns of experience in human life.’<sup>66</sup> He explains the relationship between models and narratives as follows:

‘Models are also drawn from the stories of a tradition and express the structural elements that recur in dynamic form in narratives. Models, in turn, lead to abstract concepts and articulated beliefs that are systematically formalized as theological doctrines.’<sup>67</sup>

McFague suggests that models in religion are employed to explain the phenomena of lived existence within a religious tradition, such as Christianity.<sup>68</sup> A patient who is a person of faith may draw on theological narratives to try to make sense of her experience of illness.

I would argue that narratives are also important in the negotiation of meaning in legal cases because disputants will invariably begin by describing the dispute through the telling of a story. Disputants also make sense of the dispute by drawing on personal, cultural and in some cases spiritual narratives. There are also those who argue that conflict is actually constructed through narrative. I will return to this in Chapter 4. Judges, like doctors, hold implicit models of the nature of law and will also draw on legal narratives to make sense of a case. The narratives of disputants and judge will overlap and interact in a similar fashion to the doctor-patient narratives.

In the next section I will explore the theological importance of narrative from the perspective of the Christian faith, and illustrate through the story of James Hopewell how some of his Christian friends drew on theological narratives to make sense of his illness.

### Section III – The Theological importance of narrative

In the Hebrew Bible it is through the biblical narratives that human beings learn about God, his character and about his dealings with them. Human beings also learn about their identity in relation to God (Gen. 1-3). The biblical narratives have a number of functions that can be illustrated by the story of the Exodus. The story reminds the Israelites of who God is, and what God has done for them (Ex. 20: 2; Deut. 5: 6, 6: 12, 8: 11). It also reminds them of their covenant relationship with God, their identity, and whose people they are.<sup>69</sup> They are chosen, loved and holy to the Lord (Ex. 6: 2-8, 19: 5-6; Deut. 7: 6-9). The story shapes the community and reminds them how they are to live in relation to God and each other (Ex. 20-23). The story is not just remembered, it is also re-enacted through the eating of the Passover meal (Ex. 12). Each generation tells the story to the next generation. Remembering and re-enacting the story functions to remind the Israelites of God and their identity in relation to God, and it shapes the community and its moral life, preserves the tradition, and guards against pride and idolatry (Deut. 8: 11-19).

In the New Testament it is through the narratives of the life, death and resurrection of Jesus that God reveals his salvation to the world.<sup>70</sup> It is this salvation that is associated with health and wholeness. Narratives are the way that Christians tend to talk about God.<sup>71</sup> Each generation of Christians tell the Christian story to the next generation and the rest of the world in order to remind them of God, and what God has done through Christ. The Christian community tell the story of God through the public reading of scripture, reciting the creeds, preaching and teaching. When the Christian community gather together to worship they re-enact the story of God in their ritual.<sup>72</sup> Christians therefore celebrate the Eucharist ‘in remembrance of Jesus Christ’ (Lk. 22: 17-20; 1 Cor. 11: 23-26). To be a Christian has been likened to being part of God’s story.<sup>73</sup> The community is shaped by the story.<sup>74</sup> By participating in the story Christians learn of their new identity “in Christ,” and how they are expected to live in relation to God and to others (2 Cor. 5: 17; Eph. 4-6:9). Participating in the story of God and the Christian community helps to shape a Christian’s moral life.<sup>75</sup>

Christian communities transmit stories and traditions of interpretation, and add new stories about their struggles and experiences.<sup>76</sup> The stories carry the interpretative categories that the community uses to understand its life,<sup>77</sup> and include claims about the

nature of God, the self and the nature of the world.<sup>78</sup> The biblical narratives, images and symbols are resources that Christians can draw on to help them negotiate illness, suffering, death and dying. This is illustrated in the story of James Hopewell's last illness.

In *Congregation* Hopewell recounts that following the removal of a tumour from his chest, and the news that his cancer was incurable, he reacted to the news by asking himself a series of questions.

‘What, I asked myself on my hospital bed, was a decent chap like me doing in such deadly circumstances? What on earth was going on? The threat of my death led me to an unprecedented search for meaning. I sought a plausible account of the world to explain my plight. My friends joined the search.’<sup>79</sup>

In the hospital he and his friends tried to find accounts that would disclose the point of his life. The accounts took the form of stories, personal recollections, tales of similar situations, hopes, prayers, and resolutions about the future. Woven into the telling of these accounts was the Christian faith to which he and most of his friends subscribed and which provided the setting for the story. Hopewell refers to the setting as the worldview of a community. He adopts the insight of Clifford Geertz that worldview is the “picture” that a group shares “of the way things in sheer actuality are, their most comprehensive ideas of order.”<sup>80</sup> Over time a community develops a shared sense of what is really going on in the world. It was the need to construct a common satisfactory setting for their lives that Hopewell noticed was evident in the encounters that he had with his friends, and the stories that were recounted around his hospital bed.<sup>81</sup> He noted however that worldviews are fragile and incomplete and no worldview is irrefutable, so there will be events that will challenge its adequacy. He noticed that just at the time when his life was most at threat the stories about the world were told with the most frequency.<sup>82</sup> This is similar to the observation made by Kleinman - that patients’ narratives, and the explanatory models that are implicit within them, are ‘responses to urgent life situations’.<sup>83</sup> At this time of acute crisis Hopewell and his friends struggled to establish an explanation of life that incorporated his condition. As a result his friends proffered their images and experiences. These stories revolved around human bodies and their treatment. ‘Illness, its course and possible cure provided the metaphor by which we characterized our communities and universes’.<sup>84</sup> The stories conveyed different understandings of the meaning of life, the world, evil and death. To distinguish the different understandings Hopewell employed the four narrative genres identified by

Northrop Frye, comedy, romance, tragedy and irony.<sup>85</sup>

The essence of comic stories is not humorous incidents but conveying a happy ending and a positive resolution to a problem. A comic story portrays the world as a place that ultimately integrates its seemingly antithetical elements. Chaplains therefore told stories where they had counselled cancer patients who although initially were terrified of the diagnosis, and in a dire situation, eventually recovered. According to certain cancer therapists as long as the patient does not understand the relationship between person and cancer the malignancy festers.<sup>86</sup> As in comedy there is at first a misunderstanding between mind and body. While this continues the cancer sufferer is unaware that their mental stress aggravates and prolongs the disease. The patient is encouraged to become self-aware and 'get with the cancer' and learn how to envision the cancer and how the body overcomes it. While Hopewell was not promised that he would live happily ever after, the stories portrayed a longer and harmonious life made possible by comic gnosis.<sup>87</sup>

Romantic tales portrayed recovery through spiritual adventure. Sickness was explained as an opportunity for Hopewell to encounter God in a new and personal way by the indwelling of God's love and power. In romantic tales the hero or heroine leave familiar surroundings and embark on a dangerous journey where strange things happen but where a priceless reward is obtained. Likewise Hopewell's friends encouraged him to leave behind his domestic religious routine, seek God and yield wholeheartedly to the promise of God's healing love. This presented a view of a God who works miraculously in the world and would work particularly through Hopewell's body. According to these stories God's Spirit would fill and empower Hopewell in adventure. He would then persist in the face of evil and his body through the Spirit would receive God's gifts and fruits, including the gift of healing. He would be released from his cancer as well as experiencing God's intimate presence.<sup>88</sup>

Tragic tales portrayed the decay of life and the necessary sacrifice of the self before resolution occurs. The self in tragic tales is a hero as in the romantic tale, but unlike the romantic hero, the tragic hero submits to a harshly authentic world. The divine is portrayed as the eternal law or word made plain only to the self subject to it. When Christ is portrayed as a tragic hero he accepts the Cross without the intervention of romantic miracle or comic gnosis. Those who follow Christ live in the shadow of the Cross, suffer, die to self and gain justification only through Christ's death and their

own. These stories stressed the importance to Hopewell about being honest about his condition. He was to get right with God, be reconciled to his life, and his lot, bending his remaining time to God's will. His tragic friends charted his heroic descent into darkness. In tragic tales although death advances, so does the promise of salvation through death.<sup>89</sup>

In ironic stories there are no heroes. Instead, reputedly worthy persons come to naught and good plans go sour. Where events in other genres of story have sacred significance, in irony events have a natural explanation. There are no miracles and life is unjust. Instead of seeking divine intimacy one seeks solace with one's friends. The ironic stories did not offer Hopewell a cure but recognised the absurdity of his situation. He and his friends explored realistically the various scientific therapies that might prolong his life. They avoided the sadness of tragedy. Some prayed with him and anticipated the skill of the medical staff. Hopewell was loved but not led to healing.<sup>90</sup> Ironic stories also illustrate an important point. There will be occasions when a patient or family member cannot make any sense of illness.

Hopewell is not alone in his observation about different types of illness narrative. Arthur Frank in *The Wounded Storyteller* suggests three types, restitution, chaos, and quest.<sup>91</sup> These are similar to Hopewell's comic, ironic and romantic stories. Anne Huntsaker Hawkins in *Reconstructing Illness* has made similar observations and has placed illness pathologies into the categories of death and rebirth, battle, and journey.<sup>92</sup>

Hopewell noted that most stories in Frye's literary analysis blend two adjoining genres and are therefore identified by double terms such as comic-ironies, tragic-romances, or romantic-tragedies.<sup>93</sup> Only the combinations of polar opposites – comedy and tragedy, and romance and irony - are structurally impossible,<sup>94</sup> because their worlds are contradictory.<sup>95</sup> 'Comedy moves from problem to solution, while tragedy moves from solution to problem; romance moves the self to the supernatural, while irony removes the supernatural from the self.'<sup>96</sup> The opposition of these types was evident in the reaction of Hopewell's friends to stories that were not their own. The stories that friends could least understand were those who were the polar opposite. Those who told romantic stories were shocked at the ironic stories. Those who told ironic stories had little patience with the miracles of those who told romantic stories. Those who told tragic stories regarded comic stories as shallow. Those who told comic stories regarded

tragic stories as morbid obsession.<sup>97</sup>

What Hopewell's work reveals is that stories provide a 'window' onto the conceptual world of another, but entering that conceptual world may not be easy. Nevertheless, I would argue that consideration of the genre of stories could be a useful 'tool' for pinpointing areas of misunderstanding and conflict between patient, family and healthcare staff over medical treatment, and provide a starting point for dialogue. As the parties may tell different stories there may be a need for someone to interpret stories, and to facilitate dialogue between the parties. I will return to this topic in Section VI when I discuss the role of the Christian healthcare chaplain.

What Hopewell's work also reveals is that although Christians may draw on their Christian faith to make sense of illness they may interpret it in different ways, and come to different conclusions. The four narrative genres reveal different concepts of God. In the romantic stories God is portrayed as active in the world and capable of miracles; in the tragic stories God is portrayed as passive and one who suffers, and in the ironic stories God is viewed as mysterious, or absent, or at the very least not to be relied upon to alter the situation. In one sense perhaps we should not be particularly surprised by these different understandings, as there is a plethora of different images that the biblical writers use to provide a multi-faceted picture of God. The concept of God held by a person can also have a bearing on his or her decision-making style.<sup>98</sup>

The four narrative genres emphasize different aspects of the human person, explain illness in different ways and hold a different position on miraculous healing. In romantic stories the emphasis is placed on the spiritual aspect of the human person in intimate relationship with God. Illness is explained in terms of spiritual journey and education, and miraculous healings are still possible. In tragic stories the human person is depicted as a suffering physical being, albeit with a spiritual aspect. Illness is understood primarily in physical terms and there is little likelihood of miraculous healings. While death is inevitable, it is not the end. In the ironic stories the emphasis is placed on the physical aspect of the human person whose best chance of survival is the medical treatment. Illness does not have any particular meaning or spiritual connotations. Miracles do not happen. The focus of the comic stories is the disease or illness itself, and the person actually coming to terms with it.

The narrative genres used by Hopewell are a way of categorising the stories of illness, and must therefore be distinguished from the stories found in the Hebrew Bible and the New Testament that, together with the continuing Christian tradition, form what can be loosely understood as the Christian story. The illness stories told by Hopewell's family and friends are also not the Christian story but are drawn from parts of the stories that form the Christian story. In *An Introduction to Pastoral Care* Charles V. Gerkin writes that the fit between a particular life story of a Christian and the Christian story is never exact. Drawing on the work of George Lindbeck Gerkin writes,

‘ ... the dialogue between life stories and the Christian story involves a tension or dialectic. Even though, as Lindbeck has shown, the language, meanings, and even feelings persons use in experiencing their life stories are often drawn from larger cultural stories, including the story of their religious community, life stories have been given a particular cast by the life experiences of the individuals, families, and other groups involved.’<sup>99</sup>

Likewise, I would argue that there is never a perfect match between the illness stories of a Christian patient, and his or her family, and the Christian story. This is because the life experiences of a Christian, and the social and cultural environment in which he or she lives, may well affect the way that he or she interprets illness.

In *Fear No Evil* Canon David Watson tells the story of how he dealt with terminal cancer.<sup>100</sup> The shock of having to come to terms with his own death made him re-examine the basis of his Christian faith.<sup>101</sup> Following a biopsy that confirmed that he had inoperable colon cancer he received prayer for healing from three pastors from America.<sup>102</sup> He was then faced with a question: How far could he trust God for the healing of terminal cancer?<sup>103</sup> Even though he had a strong belief in God he found that he was fluctuating between faith and doubt. He suggests that his problem was primarily cultural. He explains that like many people he was bound by a western scientific worldview. This, like any other world-view, includes a set of presuppositions and assumptions, which we hold (consciously or unconsciously), about the world in which we live.<sup>104</sup> He explains some of these assumptions as follows:

‘For most people the real world is that which we can see, touch, measure and understand. For us, this is not just reality; it is *total* reality. It is what science can explain and the rational mind can grasp... Kant maintained that all knowledge was acquired from a combination of what we can reason with our minds and experience with our senses. ... The widespread assumption is that anything that cannot be proved scientifically is either meaningless, or at least suspect and well avoided. Statements about God are increasingly dismissed as unfounded superstition. Any attempts to heal the sick through faith are opposed (sometimes fiercely) as medically dangerous. We have given the medical profession

authority over life and death, and only through the progress of medical science do we hope to find both the cause and the cure of disease. Everything outside the strict boundaries of science is viewed as dangerous and false. This is the western scientific worldview.’<sup>105</sup>

Watson argues that science has its limits, and that there are things that are outside of the scope and language of science that nevertheless form part of reality. ‘In the same way science cannot comment on the beauty of a sunset or on the love between a man and a woman. Such words as ‘beauty’ and ‘love’ are outside the language of science, but that does not diminish their reality..... As valuable as science undoubtedly is, there are vast stretches of reality which lie beyond its borders.’<sup>106</sup>

However, Watson admits that not only had he been influenced by the scientific worldview, but that this type of thinking had permeated western society and influenced those within the Christian Churches. He notes that as a result, while many orthodox Christians believe that miraculous healings took place in the Gospel stories, many also have great difficulty believing that they could happen today. Hence why some Christians take the view that signs and wonders ended in the apostolic age. Whilst others accept theoretically that God can heal, but in practice assume that God’s healing ministry has passed to the medical profession.<sup>107</sup>

The point to note here is that the cultural environment in which a Christian lives can affect the way a Christian interprets his or her illness experience. I would suggest that this is one reason why conflicts arise between Christian patients and healthcare staff. This is because either a patient finds it difficult to integrate their faith position with developments in science, or because they may be so bound by attitudes that have arisen as a result of cultural change, including the expectations that developments in science have raised, that they lose the ability to draw on the resources of their faith to negotiate terminal illness, suffering and death.

Each patient’s story is unique, and as I will show later in the chapter certain illness stories are more likely to lead to tension and conflicts with medical explanatory models than others. Russell B. Connors, Jr. and Martin L. Smith, writing about conflict over medical treatment in America, suggest that most conflicts relate to patient or family wanting treatment that medical staff regards as inappropriate or ‘futile’.<sup>108</sup> They give two underlying reasons why conflicts arise concerning religious beliefs. The first is that wider social and cultural changes have made it more likely that conflicts will arise

between patient and/or family and healthcare staff. The second relates to the way in which Christians interpret some of the biblical images. This is not because the images are incorrect, but because they are in themselves incomplete, either because they are interpreted over-literally, or because just one image is drawn upon. Connors and Smith argue that Christian theology and pastoral care can make a valuable contribution by offering alternative narratives and symbols that can help reframe understandings about God, miracles, life and death, and provide a wider context for interpreting faith convictions concerning what constitutes appropriate medical treatment.<sup>109</sup>

Underlying the observations of Watson, and Connors and Smith, is the realisation that Christians face particular challenges when trying to make sense of terminal illness, suffering and death, in the light of rapid developments in medical science, and in the midst of social and cultural change. Watson suggests a way forward.

‘What is needed is not a rejection of science in favour of faith, but a widening of our world-view. We need an alternative world-view which embraces humbly all that science can offer and yet appreciates that there is more to come.’<sup>110</sup>

What I propose, therefore, is a model I call the ‘integration’ model, which is set out in Appendix ‘A’ and which is based on the Christian story and yet is flexible and takes seriously the medical and cultural changes of the last hundred years. It draws on the idea that the biblical writers and later Christian tradition often hold several concepts in tension, to make sense of human beings, God, health, illness, medicine, suffering and death.

Just as Christians narrate stories and hold explanatory models to make sense of illness, the medical profession also have explanatory models to explain disease and illness. In the next section I will outline four medical models and compare their understanding of disease, and how each views the religious beliefs of patients.

#### Section IV – Medical models compared and contrasted

There are a number of recognised medical explanatory models that seek to explain disease, including: the bio-medical model, the bio-psychosocial model, the patient-centred model and the meaning-centred model. These models are important because they can influence the way that doctors approach patients and the problems that they present. Doctors are often unaware of the power that such models exert on their thinking

and behaviour because they are rarely explicit. Rather, they form part of the fabric of the educational and cultural background in which doctors are trained.<sup>111</sup>

### a) The Biomedical model

The biomedical model has been the dominant model in Western medicine over the last century.<sup>112</sup> It is a scientific model that was devised by medical scientists for the study of disease,<sup>113</sup> and it understands disease narrowly in biological terms as ‘alteration in biological structure or functioning’.<sup>114</sup> This originates from Virchow’s conclusion that all disease results from cellular abnormalities.<sup>115</sup> It does not take into account the social, psychological and behavioural dimensions of illness.<sup>116</sup> Instead, behavioural aberrations are explained in terms of biochemical or neurophysiological processes. The assumption is that the language of chemistry and physics can ultimately explain biological phenomena.<sup>117</sup> Health is regarded as the absence of disease.<sup>118</sup> The focus and role of the doctor is the understanding, diagnosis and treatment of disease.<sup>119</sup> The patient is regarded as an object of study,<sup>120</sup> a passive recipient of treatment, but expected to cooperate with treatment.<sup>121</sup>

The psychiatrist George Engel accepts that the biomedical model has been successful but he argues that this has come at a cost.<sup>122</sup> As the model focuses on disease the crippling flaw is its neglect of the patient as a person, and of patient care.<sup>123</sup> There is a preoccupation with the human body, which is understood as a ‘machine’. As the model’s underlying principles are reductionism and physicalism the focus is on objective and verifiable data. Any social, psychological, cultural or religious data are ignored as ‘overlay’ or ‘irrelevant’.<sup>124</sup> According to Engel this distorts perspectives, interferes with patient care,<sup>125</sup> and encourages the bypassing of the patient’s verbal account, thereby placing greater reliance on technical procedures and laboratory measurements.<sup>126</sup> The model may contribute to the impression that doctors are insensitive to the personal problems of the patient and their families, and that medical institutions are impersonal.<sup>127</sup> Engel therefore suggested a new model that he called the “bio-psycho-social-cultural” model.<sup>128</sup> This was later shortened to the biopsychosocial model.<sup>129</sup>

### b) The Bio-psychosocial model

The model was described by Engel as ‘a scientific model constructed to take into

account the missing dimensions of the biomedical model.<sup>130</sup> It is based on a systems approach, developed by biologists Paul Weiss and Ludwig von Bertalanffy.<sup>131</sup> Systems theory is based on the observation that nature is ordered as a hierarchically arranged continuum. 'Each level of the hierarchy represents an organized dynamic whole, a system of sufficient persistence and identity to justify being named. The name reflects its distinctive properties and characteristics.'<sup>132</sup> Systems include cell, organ, person, family, community, culture, and society. 'Each system implies qualities and relationships distinctive for that level of organization, and each requires criteria for study and explanation unique for that level.'<sup>133</sup> In other words this is a model that eschews reductionism and understands that nothing exists in isolation. Every system whether a cell or a person is influenced by its environment.<sup>134</sup> The model incorporates the biomedical model but widens it to take into account social, psychological, and cultural data.

The doctor's role in this model is the relief of the patient's distress, and the collection, assessment, and analysis of data, in the light of systems theory. The patient is 'a larger social system,' and data given by the patient identifies other 'systems' (e.g. family, work, church) of which the patient is a part. The patient's religious community would be regarded on this model as one of those systems, and data relating to the patient's religious beliefs and practices could be included in the data collected. The doctor assesses the relevance and usefulness of the data from each level for the patient's care.<sup>135</sup> The patient is regarded as an initiator and collaborator, and not an object of study. The doctor is described as a participant-observer, and has responsibilities to the patient, as well as to the patient's immediate family. The doctor-patient relationship is understood in terms of dialogue and collaboration.<sup>136</sup>

A criticism levelled at this model is that it demands too much of the doctor, particularly in the case of acute illness when time is of the essence. Engel's answer to this is that 'the model does not add anything to what is not already involved in patient care. Rather, it provides a conceptual framework and a way of thinking that enables the doctor to act rationally in areas that had been excluded from a rational approach.'<sup>137</sup>

### c) The patient-centred model

The term 'patient-centred medicine' was first introduced in 1970.<sup>138</sup> It has been described as a clinical method of implementing the bio-psychosocial model,<sup>139</sup> though

Francis Creed has also suggested that it may be considered as a model in its own right.<sup>140</sup> This approach has six interactive components.<sup>141</sup> It incorporates and expands the biomedical model by aiming to understand and treat illness, as well as disease. Disease is diagnosed by objective observation under the biomedical model, but also the doctor ‘actively seeks to enter the patient’s world to understand his or her experience of illness.’<sup>142</sup> The approach requires a balance between the collection of objective and subjective data, and brings body and mind together in order to understand and treat the ‘whole’ person. In seeking to understand and treat the whole person it is recognized that spirituality may play a role in a patient’s life, and in his or her response to illness.<sup>143</sup> In reality a number of obstacles exist, so whether spiritual issues are addressed is debatable. A number of reasons have been given to explain why doctors do not address issues of spirituality. Some doctors have not wanted to engage the patient on issues of spirituality for fear of offending the patient, because it is outside of their expertise,<sup>144</sup> or because of lack of time or training.<sup>145</sup> Others have expressed an interest in discussing spirituality with patients, while recognizing the need to approach this with ‘sensitivity and integrity’.<sup>146</sup> What is acknowledged in the patient-centred model is that serious illness raises questions of meaning. Why has this happened? What will become of me? These are understood as spiritual questions.<sup>147</sup> Whether these questions are addressed is more problematic. Doctor and patient may have different beliefs, and medical training and philosophical orientation has traditionally been focussed on scientific understanding, and has generally ignored the meaning of the patient’s suffering. The doctor’s own personal struggle for meaning may blur the issues, and that ‘painful personal experiences or current spiritual concerns may hamper the doctor’s capacity to listen and ability to remain open to a patient’s concerns.’<sup>148</sup> Unlike the biomedical model in which the doctor was encouraged to maintain a professional distance from the patient, in the patient-centred model the doctor is encouraged to engage with the patient. The doctor-patient relationship could be described as a partnership, and the aim is to share decision-making.

#### d) The meaning-centred model

In the 1970’s Arthur Kleinman introduced a technique that tries to understand how the social world affects and is affected by illness.<sup>149</sup> This formed the basis of what Kleinman called the meaning-centred model, which he outlined in *The Illness Narratives*, published in 1988. It is a rationale for a practical clinical methodology for the care of the chronically ill, and was intended to complement and balance, but not

replace the biomedical model.<sup>150</sup> Kleinman was aware of the time constraints involved in the treatment of the acutely ill, and was keen to stress that he was not offering a panacea for the management of illness problems. In the case of chronic illness, unlike acute illness, the doctor and patient are likely to meet and interact over many occasions. This provides time for a relationship of trust to develop. There is also time to carry out clinical investigations, and time for patient and family to compare strategies with those of the doctor, and the doctor-patient relationship is understood as collaborative.<sup>151</sup>

Kleinman's rationale was to provide 'a framework for assuring that the uniqueness of illness as human experience, in all its many social and personal manifestations, becomes the centre of the healer's gaze.'<sup>152</sup> He begins by defining illness and disease. 'Illness refers to how the sick person and the members of the family or wider social network perceive, live with and respond to symptoms and disability.'<sup>153</sup> 'Disease is the problem from the practitioner's perspective.'<sup>154</sup> The objective is that the doctor treats the illness, not just the disease. This involves empathetic listening, translation, and interpretation.<sup>155</sup> This approach follows from Kleinman's understanding of the illness experience as always being 'culturally shaped.'

'Illness is culturally shaped in the sense that how we perceive, experience, and cope with disease is based on our explanations of sickness, explanations specific to the social positions we occupy and systems of meaning we employ. These have been shown to influence our expectations and perceptions of symptoms, the way we attach particular sickness labels to them, and the valuations and responses that flow from those labels.'<sup>156</sup> 'The doctor's role is likened to that of an ethnographer, historian and biographer.'<sup>157</sup>

Traditionally an ethnographer visited a foreign culture, learned the language, and attempted to see things in the way that the natives did. This began by observation and the establishment of relationships of trust and collaboration. Likewise the doctor conducts a mini-ethnography in order to place himself in the lived experience of the patient's illness.

'This first level of the mini-ethnography reconstructs the patient's illness narrative. The interpretation of the story's four types of meaning- symptom symbols, culturally marked disorder, personal and interpersonal significance, and patient and family's explanatory models – thickens the account and deepens the clinician's understanding of the experience of suffering. Analysis of the narrative's content clarifies what is at stake for the patient and the family.'<sup>158</sup>

The doctor also records a brief life history of the patient, and elicits from the patient and, when feasible, the family's explanatory model of the illness experience. Kleinman

defines explanatory models as, 'the notions that patients, families and medical practitioners have about a specific illness episode'.<sup>159</sup> To elicit the explanatory model of patient and family Kleinman asks a series of questions. 'What do you call this problem?' 'What do you believe is the cause of the problem?' 'What course do you expect it to take?' 'How serious is it?' 'What do you think this problem does inside your body?' 'How does it affect your body and your mind?' 'What do you most fear about this condition?' 'What do you most fear about the treatment?'<sup>160</sup> The purpose of the questions is to stimulate a dialogue between doctor and patient. Kleinman noticed that the explanatory models held by patient and family models are often inchoate and they only begin to take shape as the patient answers the questions raised by the doctor. Although he describes the models as 'cognitive maps', he acknowledges that they are not merely cognitive representations but deeply rooted in the emotional turmoil that accompanies disease.<sup>161</sup> He points out that the model is only what the doctor thinks the patient thinks, not a direct rendering. There is a need to refer back to the mini-ethnography, and the patient to clarify the situation. In the meaning-centred model a patient or family member who held an explanatory model that was informed by the biblical narratives would at the very least have their account heard and respected. The doctor then has the task of explaining to the patient and family his own explanatory model. This is what Kleinman refers to as 'an act of translation' for the practitioner.<sup>162</sup> 'Translation should always be medically informed and oriented towards commonsense meaning and practical action.'<sup>163</sup> Like the patient's model, the doctor's model is often inchoate until expressed, and it changes over time. The doctor is then ready to engage the patient and family in negotiation over treatment. Kleinman has acknowledged that the meaning-centred approach is not without its problems. The questions that the doctor raises with patient and family are intended to stimulate dialogue but can be a conversation stopper if they are misconstrued as intrusive. Likewise, if a medical practitioner has been able to elicit an explanatory model there is a danger that he or she will accept it as if it were unchanging. Further, the meaning-centred model has, at times, been applied as though cultural stereotypes are real, rather than from an understanding that each patient has his or her own story and interpretation of his or her culture. However, when the meaning-centred model is applied with attention to these problems, explanatory models can be extremely useful in clinical dialogue.<sup>164</sup>

Doctors developed the bio-psychosocial, patient-centred, and meaning-centred models because, in the opinion of some at least, the bio-medical model is too narrow, and the

focus is on disease, and not the patient as a person. It is these developments that I would argue are an example to the legal profession. First, because of the gradual movement that took place in medicine from 1960 towards understanding the importance of accommodating a patient's culture, beliefs and values and her perspective of illness. I would draw a parallel between the biomedical model and the model of law encapsulated by legal positivism. Both have a narrow focus on their respective disciplines of medicine and law. Both seek to exclude the perspective and faith of the patient and litigant respectively. As I have shown in Chapter 2 legal positivism has its critics, and some of those argue that the legal positivist's concept of law is just too narrow, in a similar way that Engel and Kleinman have argued that the bio-medical model is too narrow. They too have devised models of law that are more sympathetic to culture and faith. As I will show in Chapter 4 there are also those outside of the legal profession who have devised models that understand and address conflict and disputes in a way that does not focus purely on legal criteria, and is more sympathetic to persons of faith. Secondly, doctors such as Engel and Kleinman have journeyed from a place of not taking into account a patient's perspective and faith, to a place where they are convinced of the need to do so. I would argue that they provide an example to the legal profession of the journey that they too need to make if room is to be made for the perspective and faith of litigants in legal cases. Thirdly, I would argue that the biopsychosocial, patient-centred and meaning centred models could be adapted and applied in legal cases in order that the perspective and faith of an individual litigant could be accommodated. I will return to this in Chapter 5.

Having outlined four medical explanatory models, and the four narrative genres of illness story recounted by Hopewell I will discuss how they might interact.

## Section V - Interaction and responses to competing models

### a) Interaction of models

The four medical models are set out in Table 1 and the four narrative genres recounted by Hopewell are set out in Table 2 below it. It is important to remember that all of these models may be inchoate, implicit and fluid. It is also important to remember that each patient, family member and doctor will have their own unique model and therefore the

models set out on Tables 1 and 2 are only highly oversimplified illustrations of the types of model that are held.

(i) The Hopewell genres of illness narratives and the contribution of the 'integration' model

What is illustrated in Hopewell's story is that Christians respond to illness and suffering in different ways and hold different concepts of God. For example, the romantic genre of story sees God as active, the tragic genre of story sees God as passive, the comic genre of story sees God as an abiding power, the ironic genre of story sees God as mysterious or absent, and the 'integration' model that I began to outline seeks to hold different concepts of God in tension. Each type of story will also tend to emphasise different aspects of illness and the human person. The tendency in the romantic story is to emphasise the spiritual aspect of illness and the human person, whereas in the tragic and ironic stories it is the physical aspect of illness and the human person that are emphasised. In ironic stories illness is understood as biological in origin, and does not have a particular spiritual meaning for the patient. The focus of the comic model is coming to terms with the illness. In the 'integration' model however, the human person is understood as a body-soul unity, so that the physical and spiritual aspects of a person are held in tension. Illness is understood as a physical reality that affects an individual's body, emotions, relationships etc, but also has spiritual significance within the context of God's story.

Finally, in Hopewell's account the polar opposites (e.g. romantic-ironic) had difficulty in understanding each other's conceptual world. This has implications for anyone from a hospital chaplaincy or wider church community who might consider acting as 'interpreter' or 'mediator' between stories.

(ii) Medical-to-medical

What is illustrated by the criticisms raised about the biomedical model, and the subsequent development of other medical models, is that doctors are not in agreement as to the nature and treatment of disease and illness. This has implications for all patients and patient care. It also reveals that while many doctors understand that a patient's spiritual beliefs and practices are important in treating the 'whole' person, in practice there are a number of barriers that may well prevent this from happening.

(iii) Medical-to-Christian

Those holding medical models will engage to varying degrees with the different illness narratives illustrated by Hopewell's story. To what extent they will accommodate a patient's narrative will depend on the type of model held by both doctor and the patient. A doctor who holds a biomedical model will interact and relate best to the ironic genre of narratives and to a lesser extent with the tragic genre. But a doctor holding a biomedical model in which there are no supernatural interactions or surprising overcomings of evil and difficulties may find it particularly difficult to enter the conceptual world of a patient holding to a romantic genre of story. The two models are unlikely to engage in meaningful dialogue and will probably end up talking past one another. I suggest that it is this particular combination of models that is most likely to end in conflict. It will probably only be a doctor who holds a meaning-centred model that will take seriously the romantic genre of narrative. Even then, the doctor will want the patient to engage with the biomedical model, which the patient may or may not be either willing, or able, to do. These interactions are illustrated schematically in Table 3.

Medical staff holding bio-psychosocial or patient-centred models are likely to understand the importance of taking into consideration spiritual matters. If they have the time, expertise and willingness to discuss these matters with patients they will do so. They are likely to accommodate models based on tragic or ironic views of the world and would be able to engage with the 'integration' model, but like those holding the biomedical model they are likely to have more difficulty in accommodating a world view based on a romantic genre of narrative understanding. A doctor holding to a meaning-centred model is most likely to seek to ascertain the narrative/model of a patient. Christian patients who hold any of the range of understandings under consideration will therefore be heard and respected. But the doctor will expect the patient and his or her family to hear and take on board the biomedical model. The doctor will then enter into a negotiation with the patient and his or her family. How successful this is depends on time spent with the patient, the development of a relationship of mutual trust, and a willingness on all parties to try to understand each other's position. I will now examine four possible responses to competing stories and explanatory models.

Table 1 - Medical models

	Medical Models			
	Biomedical model	Bio-psychosocial model	Patient-centred model	Meaning-centred model
Concept of disease	Biological	Biological, psychological, social, and cultural	Holistic	Cultural
Underlying beliefs	Reductionism Physicism Health is an absence of disease Biological data (excludes psychological, social and cultural data)	Systems approach Nothing exists in isolation <i>Incorporates</i> biomedical model and widens it to include psychological, social, and cultural data.	<i>Expands</i> biomedical model by exploring disease and takes into account illness from patient's point of view. Power sharing Brings mind/body together	Narrative method Ethnographic approach <i>Complements</i> biomedical model and is aimed at treating chronic illness
Role of doctor	Diagnoses disease Observes the patient Interrogates/questions patient Assesses data Responsible to patient	Relief of distress Analyses systems Assesses data Responsible to patient and his or her family Educator	Treats 'whole' person Empowers the patient and share power. Finds common ground for treatment	Treats illness, not just disease Empathetic listening, interpretation and translation of patient's story
Role of patient	Object of study Passive recipient of treatment	Larger social system complements doctor Patient's data primary source	Partner	Colleague Collaborator
Doctor-patient relationship	Doctor- expert - Paternalism	Collaboration - Dialogue	Partnership	Collaboration
Decisions	Based on tradition, custom, rules, results of diagnostic tests, past experience, and application and effectiveness of technology	Decisions made from scientific and patient's data assessed in the light of systems and levels	Shared decision-making	Negotiation between doctor and patient.

Table 2 - The genres of story for understanding illness in the James Hopewell story

	Northrop Frye's Narrative Genres			
	Romantic	Tragic	Ironic	Comic
Concept of God	Active	Passive	Mysterious/absent	Abiding power
Concept of disease	Spiritual	Biological/spiritual	Biological	Biological
Underlying beliefs	Disease is understood in spiritual terms as a journey, education, or a test of faith God is the healer. Miracles still take place	Disease is biological but has spiritual meaning. No miracles Suffering/ dying to self Death is not the end. Promise of salvation through death	Disease has natural cause and has no sacred meaning attached to it. Bad things happen to good people. No miracles. Reliance on empirical data and scientific therapies that might stave off death.	At first there is a misunderstanding between mind and body. Patient is encouraged to become self-aware and 'get with the cancer'. Visualising body overcoming cancer. Positive resolution of a difficult situation
Concept of person	Spiritual/physical	Physical/spiritual	Physical	Physical

**Table 3 - Interaction between Frye's narrative genres and the medical models**

Frye's narrative genres	Ironic				
	Tragic				
	Comic				
	Romantic				
		Bio-medical	Bio-psycho-social	Patient-centred	Meaning-centred
		Medical models			

THESE ARE NOT INTENDED TO BE A REPRESENTATION OF A FIELD STUDY.

*Key*



## b) Responses to competing narratives and models

### (i) Exclusion

One response to conflicting stories is 'exclusion'.<sup>165</sup> The biomedical model illustrates this. As disease in this model is understood in biological terms all other data tends to be downplayed or ignored. A vivid illustration of this is a story recounted by Kleinman of an exchange between a patient who has suffered with psoriasis for many years, and a dermatologist.<sup>166</sup> The patient held to a psychosomatic view of the relationship of life stress to illness, whereas the dermatologist was only interested in the illness as far as it gave him clues to the treatment of the disease. The recorded exchange between the two revealed a patient who had difficulty getting her voice heard, and a consultant who became increasingly irritated with the patient. I suggest that a similar situation is likely to occur between a patient holding a romantic genre of illness narrative, with its emphasis on the supernatural, and the struggle between good and evil, and those healthcare professionals holding to a biomedical model. This is because those holding a biomedical model will tend to downplay or exclude data of a spiritual nature. Likewise those holding a romantic understanding are likely to downplay or exclude data of a strictly scientific nature. Exclusion at best, leads to a lack of engagement where the doctor and patient talk past one another. At worst, it can lead to the denying of the legitimacy of the voice of the patient, or indeed the doctor. As we have seen Engel and a number of other writers have therefore suggested that the solution to this problem is to include psychological, social and cultural data into the understanding of disease and illness.

### (ii) Inclusion

The bio-psychosocial model and the patient-centred model seek to treat the illness, as well as the disease. The aim is for the doctor to engage in dialogue with the patient. It is accepted that the patient's spiritual beliefs are relevant for the purpose of treating the 'whole' patient. However, it has also been noted that there are a number of obstacles, (e.g. time constraints, lack of training, the holding of different beliefs or metaphors) which often conspire together to prevent doctors from accomplishing this aim. A response to this might be that too much is expected of doctors. While there is undoubtedly an element of truth in this, I would also suggest that it is one thing to

accept that spiritual beliefs are relevant, and another for dialogue to take place, or if it takes place, for it to be effective.<sup>167</sup> A fundamental problem is that while the bio-psychosocial and patient-centred models include more data they do not alter the fact that doctor and patient may hold different models, and, therefore find that they have difficulty entering each other's conceptual worlds. In other words the bio-psychosocial and patient-centred models do not necessarily provide a mechanism or process for dealing with the root problem of competing narratives and models. I will return to this later in paragraph (iv). Before I do so I want to discuss the problem of whether there should be a process of judging between narratives.

### (iii) Judging between stories

What the four narrative genres and the 'integration' model reveal is that there can be many competing stories. How then should a Christian respond when faced with competing stories? How does a Christian choose which story to adopt? Stanley Hauerwas and David Burrell have argued that adopting different stories leads to different sorts of person.<sup>168</sup> The 'test' of each story is the sort of person that the story shapes. The choices that a person makes reflect his or her own concept of humanity. What this means in effect is that any criteria for judging among stories, will, very probably, not pass an impartial inspection. A fatal flaw in their argument one might think. Undaunted, however, they caution against a counsel of despair, and suggest that it is simply a reminder that on matters of judgement we consult more readily with some persons than others, because we recognize them to be in a better position to weigh matters sensibly.<sup>169</sup> They have suggested the following criteria to compare stories. Any story that is adopted will have to display: (1) power to release us from destructive alternatives; (2) ways of seeing through current distortions; (3) room to keep us from having to resort to violence; and (4) a sense for the tragic: how meaning transcends power. The criteria are not to be understood as being the features that a story might display, but instead, the effect upon those who allow the story to shape their lives. A story (when well constructed) will help a person develop certain skills of perception and understanding.

'Stories, then, help us, as we hold them, to relate to our world and our destiny: the origins and goals of our lives, as they embody in narrative form specific ways of acting out that relatedness. So in allowing ourselves to adopt and be adopted by a particular story, we are in fact assuming a set of practices which will shape the ways we relate to our world and destiny.'<sup>170</sup>

A number of criticisms have been raised about the criteria. To begin with, any criteria will tend to reflect the story from which they are drawn. John Arras has also noted that while one could quibble about the appropriateness of each criterion and the comprehensiveness of the list, the basic problem is that there has to be resort to abstract criteria to resolve conflicts among plausible stories.<sup>171</sup> If one can pick and choose criteria, then it appears that it is the criteria, and not the narratives that are fundamental to the critical function of ethics.<sup>172</sup> While acknowledging that the criteria suggested by Hauerwas and Burrell appear to be idiosyncratic, Arras argues that they could be translated into the language of principles and theory. The first and third of the criteria could be recast as “nonmaleficence” (do no harm). The second criterion could be reread as Marx’s stricture against “false consciousness”. Then a further criterion could be added, the principle of “beneficence” with respect for individuality or personal autonomy, or an ideal of human flourishing. The criteria would then resemble W. D. Ross’s prima facie duties.<sup>173</sup> Narrative ethics would then have to have recourse to a set of independent criteria or principles based on the rightness of actions, or on the type of character that a story might shape. The problem that Arras believes that this creates is that it forfeits the supremacy of narrative over abstract principles.<sup>174</sup> This highlights the debate in bioethics between those who consider that principles are at the heart of the moral life, and narrativists who understand communication to be at its core.

Another reason for keeping in mind the importance of principles as well as narrative is that they could provide a useful counter-balance to ‘subjectivism’. Arras has noted the post-modern trend for the petit recit or ‘little narrative’.<sup>175</sup> Arras argues that the post-modern observer seeks a kind of legitimation through the telling and retelling of stories, instead of grounding or justifying discourses on traditional distinctions between fact and fiction, knowledge and custom, truth and ideology. ‘It refuses to seek a final resting place in some moral, social, or scientific bedrock that will put an end to disputation and conversation once and for all.’<sup>176</sup> For Arras the maxim that epitomizes this trend is that ‘we should always strive to keep “moral space” open for more dialogue.’ He argues that this can lead to an “ethics of voice” that is concerned with who gets to tell the story. Arras points to the work of Arthur Frank who in *The Wounded Storyteller* rescues patients’ narratives of their illness experiences and encourages them to find their voice, rather than submit to the reductionistic and objectifying categories of modern medicine. In the end everyone gets to tell his or her own story. As Arras notes this might move one to say, “Nice story, but so what?” What is the connection with the telling of the

story and “the truth”?<sup>177</sup> The issue that Arras has with Frank is the way in which Frank privileges the “little story” and the individual’s search for coherence, over a central function of ethics as traditionally conceived, which is the passing of judgement on actions, policies, and character traits.<sup>178</sup> As Arras points out, some stories that are internally coherent may yet be morally repugnant, and fit objects for moral disapproval.<sup>179</sup> He also argues that the temptation to fetishize the “little narratives” can be at the expense of broader social understanding and critique. While acknowledging that there is an important place for patients’ illness narratives within the often stifling modernist medical culture, Arras warns that the overemphasis on the “little story” can render us ‘purblind to larger social patterns, and events that must be grasped and understood, if we are to achieve a fully rounded and adequate picture of our social world.’<sup>180</sup> Arras suggests that Frank, ‘should be concerned not just with the individual stories, but also with larger sets of relationships or recurring patterns that might cast new light on these stories and suggest common strategies for social improvement.’<sup>181</sup> For Arras the challenge is that ‘we all need to think much harder how to acknowledge our individuality and situatedness without the possibility of abandoning social criticism. Instead of just noticing (and even celebrating) our differences, we also need to understand how our differences are intertwined in a larger social tapestry.’<sup>182</sup>

Another reason for retaining an element of evaluation and critique of individual stories is provided by John Hardwig<sup>183</sup> who has, like Arras, noted that there is a preoccupation with autobiography, or more particularly, the stories of patients’ lives and their illnesses, in narrative bioethics. Hardwig argues that autobiographies are both epistemologically and morally suspect. He points to four epistemic problems: (i) ignorance; (ii) innocent mistakes; (iii) self deception; and (iv) lies. There are many things that a person does not know about the events that affect their lives. A person can never be in the position of having all the available information upon which to base an autobiography. The story that one tells is reliant upon the information that one has at the time and one’s interpretation of events. Some events cannot be fully explained without information from others. According to Hardwig an autobiography is therefore epistemologically limited by ignorance and the information available. Hardwig points out that these are failures to *know* others completely enough. Another more important problem, however, is that there is always much that a person does not know about him or her self. Innocent mistakes can be made because a person does not know him or her self very well, or what they want in a particular situation. Another problem with

autobiography is that a person tends to cast him or her self in a favourable light. Self-assessment and self-judgement is seldom the most accurate guide. Another issue is that a person will tell different stories for different audiences. Some or all may be true or may be inaccurate. Hardwig refers to the work of Joanne Lynn who writes that some seriously ill and dying patients are desperately trying to be a “good patient”.<sup>184</sup> They want to do a good job of dying in front of doctors, family and friends – their audiences. Hardwig argues that if Lynn is correct then the autobiographies of terminally ill patients, including their statements about what treatment they want, will usually be shaped by their desire to meet the norms and expectations of different audiences. Another group of issues associated with autobiography is lying and self-deception. A person is more likely to convince another of the truth of a story if he or she believes it. Lying can therefore lead to self-deception. Likewise, the desire to make a favourable impression can also have the effect of creating confusion between what a person wants, and the other person’s expectations. Hence it may be difficult to judge when a patient makes a decision about treatment whether it is what they want, or whether they want to want what others expect, or indeed whether they know what they want.<sup>185</sup>

Hardwig points to another reason for concern with reliance on autobiography, and that is that it can lead to two forms of oppression.<sup>186</sup> In an autobiography the patient will tend to see him or her self as the main character. In reality however, the patient is not the only character in his or her story. The story of a patient’s life includes many characters. Hardwig acknowledges that reliance on the autobiographies of patients reflects and reinforces patient-centred bioethics, and seems entirely justified and noble as the aim is advocacy for the vulnerable. But he points out that in focussing on the patient’s story there may be a tendency to ignore or dismiss the ramifications on the lives of the rest of the family. This can lead to the silencing of family members. Decisions are then made on the basis of the patient’s interests, and his or her story, at the expense of members of the patient’s family. The effect of such decisions is to treat the patient’s family as of marginal importance, bit players in the patient’s story. The inference is that they are patient support systems and their interests are morally irrelevant. Hardwig’s complaint is that in a patient-centred ethic the question is not asked whether it is morally legitimate to impose such burdens on the family. Further, that a patient-centred ethic *requires* the patient’s interests to be placed above all other interests.<sup>187</sup> While I am sure that most healthcare professionals would disagree with Hardwig and argue that they try to consult with family members and take their views

into account when decisions are made, the dangers that Hardwig illustrates and warns against are certainly not only possible, but may well be a reality in some cases.

Hardwig also argues that another form of oppression is where a person is forced to live as a character in someone else's story. This flows from the fact that we are not just tellers of stories, but also active agents living our lives. We all attempt to live out a script and in order to fit recalcitrant reality into that story we can either employ deception or self-deception, or we can shape reality to fit our story. But it can become a form of oppression if we attempt to force others to live as characters in our stories. Hardwig suggests that this tends to happen in family settings but points out that it can also affect outsiders. For example, the frustration felt by a doctor and nursing staff in providing futile medical treatment 'can be as a result of the professional debasement that can result when health professionals are forced to play an assigned role in the patient's or family's preferred story.'<sup>188</sup> This can create a situation where there is a fundamental loss of freedom and autonomy, and the other is deprived of the opportunity to author his, or her, own story.<sup>189</sup>

Given then the distorting effects that overemphasis on a single autobiographical story may have, it is important to consider the value of comparing stories. Comparing stories can reveal and challenge ignorance, innocent mistakes, self-deception and lies, and guard against oppression. It can provide the opportunity for different voices to be heard, different points of view to be put forward and for explanation and understanding to take place.<sup>190</sup> Comparing stories can also reveal expectations, values, beliefs, power relations, motives and fears, points of agreement, as well as points of disagreement, and can do more work than principles alone.

'If moral activity . . . is not simply *what* people end up agreeing on, but *how* they come to agreement and how each party goes away *feeling* about the agreement (in terms of the degree to which one's integrity and dignity having been preserved), then it would appear that the story and counter-story have the power to do a great deal more moral work than the principles, and the work gets done, at least in part because the narratives provide good reasons why the actors should do as they do.'<sup>191</sup>

Another reason for comparing stories is that not all stories are equal as some provide for human flourishing in a way that others do not. Hauerwas and Burrell allude to this and provide criteria that seek to compare stories and a way of seeing through distortions. H. L. Nelson argues that in order to critique a story you need a different story, a counter-

story.<sup>192</sup> A counter-story is needed to illustrate what is wrong or deficient in the original story.<sup>193</sup> Comparing stories can therefore be a valuable exercise in listening, dialogue, evaluation and critique. However, stories can only positively be compared when the tellers of the stories have similar amounts of power in the situation. This again reveals the weaknesses of a purely biomedical model, in which the clinicians are regarded as having the knowledge, and are the controllers of the resources – just as also it shows the weakness of a model in which the views of the patient's minister is sovereign over all other influences.

- (iv) Story and counter-story: listening, dialogue, evaluation and critique.

The meaning-centred medical model appears to offer a process of listening and dialogue whereby the stories of medical practitioner, patient and family can be compared and evaluated. The originator of the model, Kleinman, was wise enough to understand that for dialogue between doctor and patient to be effective it needed certain prerequisites.<sup>194</sup> Stories require time, patience, trust, empathy, understanding, and good listening and communication skills. The meaning-centred model is therefore geared toward the care of the chronically ill, where the doctor is likely to see the patient on a number of occasions over an extended period of time. This provides time for the patient to tell his or her story, but for this to happen requires an environment where a relationship of mutual trust has developed. The doctor listens to the patient's story, conducts a mini-ethnography,<sup>195</sup> takes a brief life history of the patient,<sup>196</sup> and ascertains the explanatory model of patient and family. The doctor must also be willing to explain his or her own explanatory model in such a way that the patient can understand.<sup>197</sup> The doctor is then ready to engage the patient and family in negotiation. At the very least the doctor should show respect for the patient's explanatory model. The challenge for the doctor is to engage with the patient as colleagues involved in care as collaboration.<sup>198</sup> The doctor begins by comparing the explanatory models and determines points of disagreement. The doctor must then encourage the patient and family to respond to his model, hear their criticism and actively help them to negotiate areas of conflict. As part of the negotiation the doctor must expose his own uncertainty and limits of understanding.<sup>199</sup> The doctor must also examine his model (and like the ethnographer) be aware of his own personal and professional biases that might adversely affect treatment.<sup>200</sup> As Kleinman summarises, 'The negotiation may end up in a compromise that is closer to the patient's position, or closer to the doctor's position, or may be a joint lesson in

demystifying professional and public discourse.<sup>201</sup>

On the face of it the meaning-centred model acknowledges and addresses the issues that prevent the bio-psychosocial and patient-centred models from being effective, and it aims to facilitate dialogue. Kleinman is helpful in suggesting that doctors should be aware of their own explanatory models. I would suggest however, that he is probably overly optimistic to expect medical practitioners to be aware of personal and professional biases that may adversely affect treatment, let alone to compromise their professional position. That is not to say that it cannot be done, merely that it is not easy to achieve. Another point to note is that dialogue in this model is predominantly aimed at accommodation within an overall Western biomedical cultural framework. The biomedical framework appears therefore to be the dominant story into which all other stories, including the Christian and other faith stories, are accommodated. The effect is that the underlying assumptions and presuppositions of the Western biomedical framework are not necessarily challenged or critiqued as effectively as they could be if stories were regarded as operating on an equal playing field. However, in the meaning-centred model there is the potential for the stories/models of doctor and patient and family to interact in a way that could possibly transform both. Whether this can be achieved in practice is, of course, another matter.

As there is a continual negotiation of meaning that takes place between doctor and patient there will inevitably be occasions when misunderstandings occur and disputes arise over treatment. In the next section I will outline the role of the Christian Healthcare Chaplain and explore ways in which the chaplain might be able to help to resolve misunderstandings and disputes that arise involving issues of faith.

## Section VI – The role of the Healthcare Chaplain

In a hospital there may be many pastoral carers, Christian and non-Christian, ordained and lay, and they may include family, friends, and colleagues of a patient, as well as chaplains and chaplaincy volunteers. While many Christians will visit and care for the sick, the Christian healthcare chaplain has a unique position and role, because he or she provides pastoral care not only to the patient, but also to the patient's family, and the healthcare staff.

‘Since the advent of the NHS in 1948 the primary role of chaplains has been widely accepted as meeting the spiritual needs of patients, carers, staff and students. .... hospital chaplains are ministers to organizations and those who constitute them. This scope gives chaplains a unique position in a hospital  
,<sup>202</sup>  
....

Where the primary focus in healthcare is on the patient’s physical state and what must be done to preserve it, the chaplain’s presence is a reminder that a person and his or her life has other dimensions.<sup>203</sup> Specifically, the chaplain is a reminder of the spiritual dimension,<sup>204</sup> and symbolizes and represents the community of faith. Part of the Christian healthcare chaplain’s pastoral function includes the “ministry of presence”.<sup>205</sup> This is a reminder of God’s faithfulness and presence to his people especially in times of distress and great need (Is. 43: 1-4), and of Jesus, Immanuel – ‘God with us’ (Mt. 1: 23). In *Suffering Presence* Stanley Hauerwas argues that medicine needs the Church because of this ability to be present with the sick.

‘Because of God's faithfulness, we are supposed to be a people who have learned how to be faithful to one another by our willingness to be present, with all our vulnerabilities, to one another. For what does our God require of us other than our unfailing presence in the midst of the world's sin and pain? Thus our willingness to be ill and to ask for help, as well as our willingness to be present with the ill is no special or extraordinary activity, but a form of the Christian obligation to be present to one another in and out of pain. .... Thus medicine needs the church not to supply a foundation for its moral commitment, but rather as a source of the habits and practices necessary to sustain the care of those in pain over the long haul. For it is no easy matter to be with the ill, especially when we cannot do much for them other than simply be present.’<sup>206</sup>

Often the most appropriate response to serious illness and suffering is silence. This is illustrated in the story of Job, where after Job’s calamitous loss his friends sat with him for seven days and seven nights and did not utter a word, ‘for they saw that his suffering was very great’ (Job 2: 13). A pastoral carer may at first remain silent and just ‘be present’ with patient or family in their time of need. The ministry of ‘presence’ however is more than just ‘being there’ it is being available with one’s total awareness and listening self.’<sup>207</sup>

‘Listening involves more than just hearing the words. It means being attentive to the emotional communication that accompanies the words. It means listening for the nuances that may give clues to the particular, private meanings that govern a person’s inner life. It means listening for inner conflicts, unspoken desires, unspeakable fears, and faint hopes.’<sup>208</sup>

This creates a space for the patient or family to tell his, her or their story.<sup>209</sup>

‘In their work, chaplains pay close attention to the patient’s story and their concerns around meaning, purpose, ultimate significance, suffering and death.

These are spiritual questions, which, sometimes voiced only to the chaplain, assist in determining the patient's underlying values and consequent choices in the face of difficult dilemmas. Usually, a chaplain meets a patient or family, the story is told, and the chaplain learns how they perceive the illness. Chaplains are trained to listen with a particular sensitivity that allows them to draw out the narrative. Sharing one's story can contribute to healing, even if it requires the storyteller to come to terms with the inevitability of death.<sup>210</sup>

The chaplain may utilise aids such as a genogram<sup>211</sup> or ecomap<sup>212</sup> to facilitate the telling of the patient's story, and to place the story within the context of family, and wider relationships. Alternatively, the chaplain might use a framework of questions or prompts within which to explore spirituality more generally. This provides a focus to establish some key aspects of a person's spiritual needs,<sup>213</sup> including the significance of beliefs in the experience of injury or illness, and in making healthcare decisions.<sup>214</sup> This is similar to the approach suggested by Kleinman to ascertain the explanatory models of patient and family.<sup>215</sup> By drawing on the work of Kleinman, John Patton likens the work of the pastoral carer to that of mini-ethnographer.<sup>216</sup>

'The task of ethnography is to discover the story of a particular group of people. The ethnographer attempts to understand their myths, rituals, and daily activities. The key ethnographic task is observation, and the ethnographer is the one who establishes relationships of trust and collaboration in which further observation can be conducted. The ethnographer is particularly skilled in drawing upon knowledge of the context to make sense of behaviour. The interpretation made will benefit from the ethnographer's having one foot in the culture being studied, and one foot outside it.'<sup>217</sup>

'The good clinician or pastor is a "mini ethnographer" because he or she takes on these tasks for an individual, family, or small group rather than for the whole tribe or culture.'<sup>218</sup>

By their training chaplains are aware and in touch with their own story and spirituality, and are therefore more likely to hear it in another.<sup>219</sup> Chaplains are also in a position to hear the stories told not only by patients and their family, but also those told by healthcare staff. The chaplain is in a unique position to gain insight into multiple perspectives, and may be called upon to interpret.

'Chaplains also function as 'Interpreters of texts'. ... This could never be more true than in the multi-faceted world of the NHS. Chaplains work across the Trust and must understand the languages of different groups; doctors, nurses, administrative staff, assistant staff, other faith groups, patients and families. Frequently they are called to translate for patients who do not understand the medical jargon, for staff who do not understand patients' spiritual pain language, for families confused by hearing too many voices giving conflicting information.'<sup>220</sup>

The Christian healthcare chaplain is a bearer of God's story and the Christian tradition, as well as being a member of the community of faith, and is therefore in a position to be able to interpret and translate the faith of the Christian patient and family to the healthcare team. The chaplain may also be able to help the patient to articulate a particular belief in such a way that the healthcare team have a clearer understanding of the issues involved.<sup>221</sup> Or the chaplain may act as an advocate for a patient or family.<sup>222</sup> The chaplain's role of translator has been described as 'standing in middle ground' 'occupying a gap' and occupying 'the uncomfortable space between two languages, between two ways of seeing things, or between two points of view.'<sup>223</sup> Iain Macritchie explains what this role of translation involves.

'It is essentially spiritual, in that it is primarily the discovery of meaning. The most basic task of a translator is to say, as clearly as is possible, what something means. For the chaplain this involves discovering, uncovering, and recovering the meaning in any given situation, in any given dialogue, or gap, which is essentially a spiritual exercise. Closely related to this is the preservation of personhood. When so much else in the hospital environment is robbing the individual of that sense of individuality and personhood, again, it is the essentially spiritual task of the chaplain, as translator to affirm, in the very act of translation, an individual's uniqueness and personhood.'<sup>224</sup>

In Section III I argued that stories provide a window onto the conceptual world of the one narrating them. The stories that the chaplain hears, interprets and translates may reveal potential areas of misunderstanding or conflict, and the chaplain may be able to facilitate dialogue between the parties.

'Chaplains also .... act as mediator between patients, families and staff when there is a misunderstanding or disagreement about the course of treatment. Many times such conflicts arise because of lack of communication, and often "ethical dilemmas" are embedded in them. Chaplains have training and experience in understanding the underlying dynamics that may be fuelling such a situation. For example, in the case where a family is pushing for inappropriate treatment, the chaplain will work to help them accept the inevitability of death. At times power struggles can happen between families who want one course to be followed and staff who want another. The chaplain is in a position to mediate and diffuse such struggles, facilitating conversation and understanding before the issue escalates to the level of a complaint or legal action.'<sup>225</sup>

If the underlying problems relate to ethical issues then the chaplain may be able to explore the issues with patients, family and healthcare team. Pastoral care includes guidance, which may range from being able to create a space where issues can be voiced, and supporting the patient or family while they are trying to come to a decision,<sup>226</sup> to outlining and discussing with patient or family the various options.

Some conflicts however are not easy to resolve. The conflict may be the result of the interaction of the stories held by the patient and/or family and healthcare staff. Embedded within the stories are explanatory models that include concepts of illness, disease, the human person, the doctor-patient relationship, suffering, death, miracles and God. The Christian healthcare chaplain is in a unique position to be able to listen to the various stories and ascertain the root of the conflict. It may be that there is a mismatch of expectation because the parties hold different understandings of the doctor-patient relationship. It could be that a doctor holds a biomedical model and the patient or family hold a romantic genre of narrative, relying on supernatural interventions to resolve their struggles. The conceptual world of the patient or family that is revealed in their story will provide clues as to what is at stake for the patient or family. It may reveal strong emotions like fear or grief that need to be acknowledged and expressed, before a consensus on treatment can be achieved. Alternatively, the conflict may be the result of how a patient or family interpret a particular biblical image, narrative, or belief. Often it is the way in which concepts are interpreted that leads to conflict. Connors and Smith have proposed that re-imagination or reframing may help to diffuse conflict in such situations.<sup>227</sup> Re-imagination is a “lens widening” process that is based on the assumption that the religious belief or conviction that has led to the impasse is grounded in one, or a few particular images, or an image that has been interpreted literally. A particular image may not be false, just incomplete. Biblical images are therefore best understood in concert with those images, symbols and stories that point to a wider truth.<sup>228</sup>

Connors and Smith accept that widening religious imagery is a delicate process, and that it would be inappropriate to manipulate religious images and symbols merely to browbeat a patient or family into submitting to what the doctor advises. However, they also suggest that it is equally inappropriate for a healthcare team to be held hostage by a patient or family. The effort to widen religious imagination is therefore grounded ethically in a communal context. They point out that while it would be quite wrong to forget that end-of-life choices are profoundly personal choices made by patient and family, it would also be wrong to forget that they are also communal (including religiously communal) and social.<sup>229</sup>

I would suggest that the Christian Healthcare Chaplain could play a significant role in the process of re-imagination. An illustration is a case where a patient who was

terminally ill was being fed through a feeding tube. The healthcare team advised the patient that further treatment would not alleviate her condition and that the tube needed to be removed. They ask for the patient's consent to remove the tube. The patient was extremely distressed and the healthcare team called for the chaplain. The chaplain listened to the patient's story and ascertained 'what was at stake' for the patient. It transpired that the patient's distress was caused because she had interpreted that by giving her consent to the removal of the tube she would be "killing herself." This was deeply distressing for her as it was against her religious beliefs. The chaplain also discovered that the only thing left in life that gave the patient any pleasure was eating. The chaplain suggested that perhaps the removal of the feeding tube could be interpreted in a different way - as the opportunity for the patient to enjoy the only pleasure left to her, a proper meal. The patient's interpretation was 'reframed', her spiritual distress was relieved, and the conflict between patient and the healthcare staff was resolved.<sup>230</sup> In this case the chaplain understood the underlying religious belief and 'reframed' it without recourse to biblical stories or images. In other cases recourse to biblical material may be necessary.

To explain how this might take place I will draw on the work of Charles V Gerkin and Walter Brueggeman. Gerkin points to the importance of stories in pastoral care, and in *An Introduction to Pastoral Care* he sets out a narrative-hermeneutic model of pastoral care.<sup>231</sup> This model 'emphasises the human penchant for structuring life according to stories, and the power of interpretation to shape life and express care.'<sup>232</sup> Gerkin locates pastoral care in the centre of the dialogical space between the communal story of the Christian community, and the many life stories of those who are related to the community. The role of the healthcare chaplain in this model of pastoral care is to facilitate a dialogue between the life story of the patient and the Christian story. Gerkin accepts that there is a tension or dialectic between the life stories and the Christian story. This is because although life stories will be drawn from larger cultural stories, including the stories of religious community, they have a particularity of their own. 'The images and meanings attached to those stories have been given a particular cast by the life experiences of the individuals, families, and other groups involved.'<sup>233</sup> There will never be a perfect match between any particular life story and the Christian story.<sup>234</sup> Likewise, I would argue that there is never a perfect match between the illness story of a patient and/or family and the Christian story.

How then might the chaplain bring the patient's illness story into dialogue with the Christian story in a way that re-imagination can take place? To a large extent this will depend on the need of the individual patient and family. There is no one formula that can be applied in every case. Instead, the chaplain must listen to the patient's story and try to ascertain what is at stake for a particular patient and family. The approach must be tailored to fit each individual. If the root of the conflict relates to a particular biblical image or concept, then one approach might be to carefully and sensitively suggest an alternative in order to help provide the patient or family with a different perspective. I would suggest that a helpful tool in this process might be the 'integration' model that I have outlined in Appendix 'A'.

Connors and Smith suggest that the most effective settings for re-imagination are not hospitals, but churches and places of worship. Another approach that might facilitate the process of re-imagination is for the patient or family to attend the liturgy in the hospital chapel. It is in this setting that the patient and family are reminded of God's story and the many images and symbols of God's loving care. David Lyall draws on Walter Brueggemann's work on imagination to make the following point.

'It is the telling of the Christian story and the celebration of the liturgy which provide the material that 'funds' the imagination and which enables pastoral care to be transformative of human lives.'<sup>235</sup>

The Christian story has the power not only to widen narrow concepts or images, but also to transform the patient's story through re-imagination. For Brueggemann 'pastoral care is essentially a liturgical enterprise' and so he encourages those receiving pastoral care to regularly attend the liturgy of the pastoral care community.

'The theological ground for such a practice is that health does not emerge out of the immobilized parishioner or out of the wits of the pastor, but out of the memory of the tradition that has long mediated life and health in the community... The liturgic act intrudes a 'third voice' into the pastoral conversation – the voice of the Gospel.'<sup>236</sup>

It is through the liturgy that the story of God in its many forms (bible readings, creeds, prayers, hymns, Eucharist and blessings) is read, spoken, sung, heard and enacted by patient and family. If pastoral care is understood as located in the dialogical space between the Christian story and the life/illness story of the patient then the liturgy is an important part of that pastoral process. It is through the liturgy that the Christian story and the life/illness story of the patient are brought together and into dialogue. The liturgy therefore provides a sacred space where re-imagination and transformation can

take place.

As the chaplain is not part of the clinical team she has neither clinical responsibility, nor power, and therefore is in a unique position. During the decision-making process it would therefore be possible for the chaplain to ask pertinent questions such as: is the suffering that the patient is experiencing ennobling? Is it manifesting the fruits of the Spirit, and bringing the patient and family closer to God, or is it demeaning, eliciting only impatience and lack of love? Likewise, is the treatment that the healthcare staff administering drawing out new reservoirs of care and understanding in the clinical team, and will it elicit a more loving response to the next patient, or will it put the service under further strain? The requirements of decision-making in healthcare will tend to commend a consequentialist approach within a deontological or principlist framework. The chaplain can operate in part as a kind of virtue ethicist.

In many cases the support that is offered by the Christian healthcare chaplain is welcomed, and can help patient, and or family, to navigate the complex emotions associated with terminal illness, and the difficult decisions that may have to be made concerning medical treatment. In the majority of cases the very fact that someone like the chaplain makes time and space to hear the story of patient and family will help to diffuse potential conflicts. But there will always be a small minority of cases where the relationship between patient, and or family, and healthcare staff breaks down, or where the strategies that I have suggested in this chapter do not work. In those cases I would suggest that there are two potential courses of action. The first is that the parties could be referred to mediation. The alternative is that one or other of the parties can make an application to the High Court for a decision to be made by a High Court judge.

## Conclusion

The medical profession have become increasingly aware of the role of culture and the importance of taking into account a patient's culture, beliefs and values, as well as a patient's perspective on his or her illness. This is because culture shapes the way a patient understands a wide-range of healthcare issues. Faith can also act like cultural beliefs in that it can shape how a patient understands concepts such as health, sickness, suffering, the human person and death, and it can also affect a patient's decisions about treatment. Medicine is like a cultural system in that it has its own language and practice

that needs translation, interpretation and negotiated with patients. There is therefore a continual process of negotiation of meaning that takes place between doctor and patient.

The significance of culture in legal cases is that Law, like Medicine, is a cultural system in that it has its own language and practice that needs to be translated, interpreted and negotiated with disputants. Similarly, culture and faith can shape the way a disputant understands and responds to a particular dispute. Consequently, a continual process of negotiation of meaning takes place between disputants, and between disputants and the judge in cases that involve issues of faith.

Narrative plays an important role in the process of negotiation of meaning. Narrative is a way in which human beings order and make sense of experience. In the doctor-patient relationship both doctor and patient draw on narratives to make sense of the patient's illness. Narratives provide a window onto the conceptual world of another, but as the story of James Hopewell illustrates it may not be easy to enter or understand that world. However, I have argued that the analysis of narratives provides a way in which sticking points in disputes could be identified. I have also argued that narrative plays a role in the negotiation of meaning in legal cases in that each disputant will inevitably begin by describing a dispute by telling their story. Similarly, disputants will make sense of the dispute through drawing on personal, cultural and sometimes spiritual narratives. I will return to this issue in Chapters 4.

Just as patients draw on narratives to make sense of illness, the medical profession draw on narratives to make sense of disease. Doctors who have seen the need for this have devised models that enable the perspective and faith of their patients to be taken into account in the doctor-patient relationship, and in decisions about a patient's healthcare. Analogous models need to be devised by the legal profession and I will return to this issue in Chapters 5 and 6.

What the story of James Hopewell and my discussion about the interaction of doctor-patient narratives reveals is that some narratives are more likely to cause misunderstandings and dispute than others. The role of the Christian healthcare chaplain illustrates that representative of faith communities could play a significant role in helping to resolve misunderstandings and disputes that involve issues of faith in healthcare. I have also argued that this also points to a wider role that representatives of

faith communities could play in helping to resolve other types of disputes through, for example, the process of mediation, or by assisting judges in helping to resolve disputes that end up in the law courts. I turn to the issue of mediation in the next chapter.

## Notes

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- <sup>1</sup> Clifford Geertz, *The Interpretation of Culture* (London: Hutchinson, 1975), 5.
- <sup>2</sup> *Ibid.*, 89.
- <sup>3</sup> Timothy Gorringer, *Furthering Humanity* (Aldershot: Ashgate, 2004), 3.
- <sup>4</sup> *Ibid.*, 9.
- <sup>5</sup> Ben Essex, *Doctor's Dilemmas and Decisions* (London: BMJ Publishing Group, 1994), 270.
- <sup>6</sup> For example in 2005 an estimated 565,000 migrants arrived to live in the UK for at least a year. In the same period 380,000 people emigrated from the UK for a year or more.  
<http://www.statistics.gov.uk/cci/nugget.asp?id=260>
- <sup>7</sup> J.C. Barker, 'Cultural diversity – changing the context of medical practice,' *West J Med* 157(1992): 248-54 (PMID: 1413764) cited by Lavera M. Crawley et. al 'Strategies for culturally effective end of life care,' *Ann Intern Med.* 136(9) (2002): 673 and note 10.
- <sup>8</sup> Crawley, 'Strategies' *Ann Intern Med.* 136(9) (2002): 673; Barbara A.Koenig and Jan Gates-Williams, 'Understanding Cultural Difference in Caring for Dying Patients' *West J Med.* 163(3) (1995): 244-9.
- <sup>9</sup> 'Cultural competence' refers to knowledge and skills rather than attitudes. Healthcare staff should have a sound knowledge of cultural values, beliefs and health behaviours, as well as skills in communication, use of interpreters, and attention to nonverbal communication. cited in Crawley "Strategies" *Ann Intern Med* 136(9) (2002): 673-9.
- <sup>10</sup> Crawley, "Strategies," *Ann Intern Med* 136(9) (2002): 676.
- <sup>11</sup> RA Hahn and A.D.Gaines, 'Physicians of Western medicine: an introduction' *Cult Med Psychiatry* 6 (1982): 215-8 [PMID: 7172710] and A Kleinman, 'Writing at the Margin: Discourse between Anthropology and Medicine' Berkeley, CA: Univ of California Pr. 1995 cited in Crawley, 'Strategies,' *Ann Intern Med.* 136(9) (2002): 676 and notes 44 and 45.
- <sup>12</sup> Jerome Bruner, *Actual Minds, Possible Worlds* (Cambridge Massachusetts: Harvard University Pr., 1986).
- <sup>13</sup> *Ibid.*, 11.
- <sup>14</sup> *Ibid.*, 13.
- <sup>15</sup> *Ibid.*
- <sup>16</sup> Donald E. Polkinghorne, *Narrative Knowing and the Human Science* (Albany NY: State University of New York Press, 1988), 1.
- <sup>17</sup> *Ibid.*, 18.
- <sup>18</sup> *Ibid.*, 21.
- <sup>19</sup> Bruner, *Actual Minds, Possible Worlds*, 14.
- <sup>20</sup> Yiannis Gabriel, "The voice of experience and the voice of the expert – can they speak to each other?" in *Narrative Research in Health and Illness*, ed. B. Hurwitz, B., T.Greenhalgh, and V.Skultans, (Oxford: Blackwell Publishing Ltd., 2004), 169.
- <sup>21</sup> Stanley Hauerwas, *The Peaceable Kingdom*, 2<sup>nd</sup> ed. (London: SCM, 2003), 26.
- <sup>22</sup> Jerome Bruner, *Making Stories* (Cambridge, Massachusetts: Harvard University Press, 2003), Ch. 3.
- <sup>23</sup> Alasdair MacIntyre, *After Virtue*, 3<sup>rd</sup> ed. (London: Duckworth, 2007), 217.
- <sup>24</sup> *Ibid.*, 218.
- <sup>25</sup> *Ibid.*, 216.
- <sup>26</sup> Trisha Greenhalgh and Brian Hurwitz, "Why study narrative?" in *Narrative Based Medicine*, ed. Trisha Greenhalgh and Brian Hurwitz (London: BMJ, 2002), 3-16.
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Linda C Garro and Cheryl Mattingly, "Narrative as Construct and Construction" in *Narrative and the Cultural Construction of Illness and Healing*, edited by Cheryl Mattingly and Linda C Garro (Berkeley: University of California Pr., 2000), 1.
- <sup>29</sup> *Ibid.*, 1-3 Garro and Mattingly give the example of Laura Bohannon's 1966 account of what happened when she told the story of Shakespeare's *Hamlet* to a group of Tiv men in West Africa. Initially Bohannon was quite confident that the story had only one possible interpretation. Instead, her telling of the story provoked numerous opportunities for the Tiv elders to present alternative interpretations of why the story unfolds as it does. The interpretations recast the story in ways consistent with how the Tiv understood the social and moral order.
- <sup>30</sup> Arthur Kleinman, *The Illness Narratives* (New York: Basic Books, 1988), 96.
- <sup>31</sup> Kathryn Montgomery Hunter, *Doctors' Stories* (Princeton, New Jersey: Princeton University Pr., 1991), 128.
- <sup>32</sup> *Ibid.*, 13.
- <sup>33</sup> Greenhalgh and Hurwitz, "Why study narrative?" in *Narrative Based Medicine*, 3-16.
- <sup>34</sup> Hunter, *Doctors' Stories*, 128.

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<sup>35</sup> Ibid., 130.

<sup>36</sup> Trisha Greenhalgh and Brian Hurwitz, "Why study narrative?" in *Narrative Based Medicine*, 3-16.

'Hippocrates introduced the historical conception of disease, the idea that diseases have a course, from their first intimations to their climax or crisis, and thence to their happy or fatal resolution. Hippocrates thus introduced the case history, a description, or depiction of the natural history of disease – precisely expressed by the old word 'pathography'. Such histories are a form of natural history – but they tell us nothing about the individual and his history; they convey nothing of the person, and the experience of the person, as he faces, and struggles to survive, his disease. There is no 'subject' in a narrow case history; modern case histories allude to the subject in a cursory phrase ('a trisomic albino female of 21'), which could as well apply to a rat as a human being. To restore the human subject – we must deepen a case history to a narrative or tale: only then do we have a 'who' as well as a 'what', a real person, a patient, in relation to disease – in relation to the physical.' Oliver Sacks, *The Man Who Mistook His Wife for a Hat* (London: Picador, 1986), preface; 'The clinical case history – the standardised features of the illness experience which doctors and medical students select from the patient's narrative – represents, at best, the intersection between a particular patient world and the abstract world of medical knowledge, about which patients may know little.'

<sup>37</sup> Hunter, *Doctors' Stories*, 130.

<sup>38</sup> Ibid., 126.

<sup>39</sup> Ibid., 13.

<sup>40</sup> Ibid., 5-7.

<sup>41</sup> Ibid., 13.

<sup>42</sup> Ibid. A life story has been defined by Charlotte Linde in C. Linde, *Life Stories*, (New York: O.U.P.

1993) as, 'the sum total of all narratives about the course of a lifetime.' cited by Howard Brody, *Stories of Sickness* 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2003), 72.

<sup>43</sup> Anna Donald, "The Words we Live in," in *Narrative Based Medicine*, ed. Trisha Greenhalgh and Brian Hurwitz (London: BMJ, 2002), 17-26, 22.

<sup>44</sup> Kleinman, *The Illness Narratives*, Ch. 7.

<sup>45</sup> Howard Brody, *Stories of Sickness*, 30.

<sup>46</sup> Ibid.

<sup>47</sup> Anna Donald, "The Words we Live in," 17-26.

Chinese Medicine has a different physiology for the human body and identifies many diseases that Western Medicine does not, but omits others such as depression that Western Medicine accepts.

<sup>48</sup> Daniel Fu-Chang Tsai, "How should doctors approach patients? A Confucian reflection on personhood", *Journal of Medical Ethics* 27 (2001): 44-50.

<sup>49</sup> Barbara A Koenig and Jan Gates-Williams, "Understanding Cultural Difference in Caring for Dying Patients" *West J Med.* 163(3) (1995): 244-249.

<sup>50</sup> LaVera M.Crawley and P.A. Marshall, and B.A.Koenig, "Strategies for Culturally Effective End-of-Life Care," *Ann Intern Med.* 136(9) (2002): 673-679.

In Western medicine emphasis is placed on individual patient autonomy and the individual patient who makes the decision about treatment, whereas in some other cultures the patient is understood in relation to others and the emphasis is on the patient's family who make the decision.

<sup>51</sup> Kleinman, *The Illness Narratives*.

<sup>52</sup> Ibid., 49.

<sup>53</sup> Ibid., 121.

<sup>54</sup> Ibid., 121-122.

<sup>55</sup> Ibid., 122.

<sup>56</sup> Arthur Kleinman, Leon Eisenberg, and Byron Good, "Clinical Lessons from Anthropologic and Cross-Cultural Research," *Annals of Internal Medicine* 88 (1978): 251-258.

<sup>57</sup> George L. Engel, "The Need for a New Medical Model," *Science* 196 (1977): 129-136.

<sup>58</sup> Ibid., 130.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> James F. Hopewell, *Congregation*, ed. Barbara G. Wheeler (Philadelphia: Fortress Pr., 1987), Ch. 4.

<sup>62</sup> Ian Barbour, *Religion and Science* (London: SCM Press Ltd., 1998), Ch. 4.

<sup>63</sup> Sallie McFague, *Metaphorical Theology* (Philadelphia: Fortress Pr., 1982) 106-7.

<sup>64</sup> Ian Barbour, *Myths, Models and Paradigms* (London: SCM Pr. Ltd., 1974), 6.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., 7.

<sup>67</sup> Barbour, *Religion and Science*, 110.

<sup>68</sup> Ibid., 94.

<sup>69</sup> David S. Cunningham, *Christian Ethics: the End of the Law*, (London & New York: Routledge, 2008), Chapter 2.

- <sup>70</sup> Stanley Hauerwas, *The Peaceable Kingdom*, 2<sup>nd</sup> ed. (London: SCM Pr., 2003), 25-29.
- <sup>71</sup> Michael Goldberg, *Theology and Narrative* (Ashfield: Abingdon, 1982) cited in Stanley Hauerwas, *The Peaceable Kingdom*, 25.
- <sup>72</sup> Stanley Hauerwas, *The Hauerwas Reader*, eds. John Berkman and Michael Cartwright (Durham, N.C.; London: Duke University Press, 2001), 149; Stanley Hauerwas, *A Community of Character* (Notre Dame, Indiana: University of Notre Dame Press, 1986), 52.
- <sup>73</sup> Hauerwas, 'Christianity: its not a Religion its an Adventure' in *The Hauerwas Reader*, 522.
- <sup>74</sup> Hauerwas, *The Hauerwas Reader*, 590.
- <sup>75</sup> Cunningham, *Christian Ethics*, Chapter 3.
- <sup>76</sup> Barbour, *Religion and Science*, 142.
- <sup>77</sup> H. Richard Niebuhr, *The Meaning of Revelation* (New York: Macmillan, 1941) cited in Barbour, *Religion and Science*, 142.
- <sup>78</sup> Hauerwas, *A Community of Character*, 91.
- <sup>79</sup> Hopewell, *Congregation*, 55.
- <sup>80</sup> Clifford Geertz, *The Interpretation of Cultures* (London: Hutchinson & Co., 1975), 127.
- <sup>81</sup> Hopewell, 'Congregation' .55.
- <sup>82</sup> *Ibid.*, 56.
- <sup>83</sup> Kleinman, *The Illness Narratives*, 121-122.
- <sup>84</sup> Hopewell, *Congregation*, 57.
- <sup>85</sup> Northrop Frye, *Anatomy of Criticism* (Princeton: Princeton University Pr., 1971), 158-239.
- <sup>86</sup> Hopewell refers here to O. Carl Simonton, Stephanie-Matthews Simonton, and James L Creighton, 'Getting Well Again: A Step-by-Step Self Help Guide to Overcoming Cancer for Patients and Their Families' (Toronto: Bantam Books, 1978).
- <sup>87</sup> Hopewell, *Congregation*, 58-59.
- <sup>88</sup> *Ibid.*, 59-60.
- <sup>89</sup> *Ibid.*, 60-61.
- <sup>90</sup> *Ibid.*, 61.
- <sup>91</sup> W. A. Frank, *The Wounded Storyteller* (Chicago: Chicago University Pr., 1995), Chapters 4-6.
- <sup>92</sup> Anne Hunsaker Hawkins, *Reconstructing Illness*, 2<sup>nd</sup> ed. (West Lafayette, Indiana: Purdue University Pr., 1999), Chapters 2 and 3.
- <sup>93</sup> Hopewell, *Congregation*, 61.
- <sup>94</sup> Frye, *Anatomy of Criticism*, 162.
- <sup>95</sup> Hopewell, *Congregation*, 61.
- <sup>96</sup> *Ibid.*, 61-62.
- <sup>97</sup> *Ibid.*, 62.
- <sup>98</sup> Kenneth I Pargament, Joseph Kennell, William Hathaway, Nancy Grevengeod, Jon Newman and Wendy Jones, "Religion and the Problem-Solving Process: Three Styles of Coping" *Journal for the Scientific Study of Religion*, 27 (1) (Mar. 1988): 90-104.
- <sup>99</sup> Charles V. Gerkin, *An Introduction to Pastoral Care* (Nashville: Abingdon Press, 1997), 111-112.
- <sup>100</sup> David Watson, *Fear No Evil* (Wheaton, Illinois: Harold Shaw Publishers, 1992).
- <sup>101</sup> *Ibid.*, 9.
- <sup>102</sup> *Ibid.*, Ch. 8.
- <sup>103</sup> *Ibid.*, 73.
- <sup>104</sup> *Ibid.*, Chapter 11.
- <sup>105</sup> *Ibid.*, 74-75.
- <sup>106</sup> *Ibid.*, 75-76.
- <sup>107</sup> *Ibid.*, 76.
- <sup>108</sup> Russell B. Connors, Junior and Martin L. Smith, "Religious Insistence on Medical Treatment: Christian Theology and Re-Imagination," *The Hastings Center Report*, 26: 4 (1996): 23-30. <http://links.jstor.org/sici?sici=0093-0334%28199607%2F08%2926%3A4%3C23%2ARIOMTC%3E2.0.CO%3B2-3> (accessed April 1, 2008).
- <sup>109</sup> *Ibid.*
- <sup>110</sup> Watson, *Fear No Evil*, 79.
- <sup>111</sup> George L Engel, "The Clinical Application of the Biopsychosocial Model," *Am J Psychiatry* 137 (5) (1980): 535- 544.
- <sup>112</sup> Derick T Wade, "Do biomedical models of illness make for good healthcare systems?" *BMJ* 329 (2004). <http://www.bmj.com/cgi/content/full/329/7479/1398> (accessed November 25, 2007).
- <sup>113</sup> George L. Engel, "The Need for a New Medical Model: A Challenge for Biomedicine," *Science* 196 (1977), 130.
- <sup>114</sup> Kleinman, *The Illness Narratives*, 5-6.

- <sup>115</sup> R. Porter, *The greatest benefit to mankind. A medical history of humanity from antiquity to the present.* (London: HarperCollins, 1997) cited in Derick T Wade, "Do biomedical models of illness make for good healthcare systems?" *BMJ* 329 (2004): 1398-1401.
- <sup>116</sup> Engel, "The Need for a New Medical Model," 130.
- <sup>117</sup> *Ibid.*
- <sup>118</sup> Wade, "Do biomedical models of illness make for good healthcare systems?"
- <sup>119</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 538.
- <sup>120</sup> George L. Engel, "From Biomedical to Biopsychosocial," *Psychosomatics*, 38 (6) (1997), 1526.
- <sup>121</sup> Wade, "Do biomedical models of illness make for good healthcare systems?" *BMJ* 329 (2004).
- <sup>122</sup> Engel, "The Need for a New Medical Model," 131.
- <sup>123</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 536, 538.
- <sup>124</sup> *Ibid.*, 538.
- <sup>125</sup> Engel, "The Need for a New Medical Model," 131.
- <sup>126</sup> *Ibid.*, 132.
- <sup>127</sup> *Ibid.*, 134.
- <sup>128</sup> George L. Engel, Letter to the editor in *Psychosomatic Medicine* 23 (5) 1961.
- <sup>129</sup> Engel, "The Need for a New Medical Model," 129-136.
- <sup>130</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 535.
- <sup>131</sup> P. Weiss, Animal behaviour as systems reaction: orientation toward light and gravity in the resting postures of butterflies (Vanessa) (1925). *General Systems: Yearbook of the Society for General Systems Research* 4 (1959): 1-44; P. Weiss, "The problem of cell individuality in development." *American Naturalist* 74 (1940): 34-46; P. Weiss, "The biological basis of adaptation", in *Adaptation*. ed. Romano J Ithaca, (N.Y, Cornell University Press, 1949); P. Weiss, "1+1=2: when one plus one does not equal two," in *Neurosciences: A Study Program*. ed. G.C.Quarton, T. Melnechuk, F.O.Schmidt (New York: Rockefeller University Press, 1967); P. Weiss, "The living system: determinism stratified," in *Beyond Reductionism*. ed A. Koestler, J.R.Smythies (New York: Macmillan Publishing Co., 1969); P. Weiss, "The system of nature and the nature of systems: empirical holism and practical reductionism harmonized", in *Toward a Man-Centred Medical Science* ed. K.E.Schaefer, H.Hensel, R. Brody. (Mt. Kisco N.Y: Futura Publishing Co. 1977); L. von Bertalanffy, *General Systems Theory* (New York: Braziller, 1968); L. von Bertalanffy, "Chance or law," in *Beyond Reductionism* ed. A Koestler, J.R.Smythies (New York: Macmillan Publishing Co. 1969) cited in Engel, "The Clinical Application of the Biopsychosocial Model," 543-544 notes 7-15.
- <sup>132</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 536.
- <sup>133</sup> *Ibid.*
- <sup>134</sup> *Ibid.*, 537.
- <sup>135</sup> *Ibid.*, 538.
- <sup>136</sup> Engel, "From Biomedical to Biopsychosocial," 525.
- <sup>137</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 543.
- <sup>138</sup> M.Balint, J.Hunt, D.Joyce, M.Marinker and J.Woodcock, *Treatment or Diagnosis: a study of repeat prescriptions in general practice* (Philadelphia P.A: JB Lippincott, 1970) cited in Moira Stewart, et al. *Patient-Centred Medicine*, 2<sup>nd</sup> ed. (Oxford: Radcliffe Medical Pr., 2003), 8.
- <sup>139</sup> J.H.Levenstein, E.C.McCracken, I.R.McWhinney, M.A.Stewart, J.B.Brown. "The patient-centred clinical method. A model for the doctor-patient interaction in family medicine". *J Fam Pract.* 3 (1986): 24-30 cited in Robert C Smith, "The Biopsychosocial Revolution", *J Gen Intern Med.* 17(4) (2002): 309-10 note 7.
- <sup>140</sup> Francis Creed, "Are the patient-centred and biopsychosocial approaches compatible?" in *Biopsychosocial Medicine*, ed. Peter White (Oxford: Oxford University Press, 2005) 187-199.
- <sup>141</sup> 1. Exploring both the disease and the illness experience. 2. Understanding the whole person. 3. Finding common ground (e.g. problems, priorities, goals of treatment). 4. Incorporating prevention and health promotion. 5. Enhancing the doctor-patient relationship (e.g. compassion, power, healing) 6. Being realistic (e.g. time and wise stewardship of resources).  
J.B.Brown, M.Stewart, W.W.Weston and T.R.Freeman, introduction to *Patient-Centred Medicine* by Moira Stewart, et al. 5, Box. 1.1.
- <sup>142</sup> *Ibid.*, 6.
- <sup>143</sup> Judith Belle Brown and W. Wayne Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62.
- <sup>144</sup> S.G. Post et al. "Physicians and patient spirituality: professional boundaries, competency and ethics". *Ann Int Med.* 132 (7) (2000): 578-83 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62.
- <sup>145</sup> M.R.Ellis et al. "Addressing spiritual concerns of patients: family physicians attitudes and practice", *J Fam Pract.* 48 (2) (1999): 105-109; D.A.Matthews et al. "Religious commitment and health status. A

review of the research and implications for family medicine". *Arch Fam. Med.* 7 (2) (1998): 118-24; J.L.McBride, et al. "The relationship between a patient's spirituality and health experiences". *Fam Med.* 30 (2) (1998): 112-6 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62

<sup>146</sup> F.C.Craigie Jr. and R.F.Hobbs III, "Spiritual perspectives and practices of family physicians with an expressed interest in spirituality", *Fam. Med.* 31 (8) (1999): 578-85; M.R.Ellis et al. "What do family physicians think about spirituality in practice?" *J Fam Pract* 51 (3) (2002): 249-54 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62.

<sup>147</sup> Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62.

<sup>148</sup> J.B.Brown, M.Stewart, W.W.Weston and W.P.Scott, "Religious faith and the illness experience," in *Challenges and Solutions in Patient-Centred Care*, ed. J.B.Brown, M.Stewart and W.W.Weston (Oxford: Radcliffe Medical Pr., 2002), 11-12.

<sup>149</sup> Arthur Kleinman, "Why Does Culture Matter in Health Care and What Can We Do About It?" November 2006.  
[http://www.healthynh.com/fhc/initiatives/access/ccdownloads/nov3\\_kleinman.ppt](http://www.healthynh.com/fhc/initiatives/access/ccdownloads/nov3_kleinman.ppt) (accessed April 3, 2008).

<sup>150</sup> Kleinman, *The Illness Narratives*, 228.

<sup>151</sup> *Ibid.*, 229.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*, 3.

<sup>154</sup> *Ibid.*, 5.

<sup>155</sup> *Ibid.*, 228.

<sup>156</sup> *Ibid.*, 5.

<sup>157</sup> *Ibid.*, 230-236.

<sup>158</sup> *Ibid.*, 233.

<sup>159</sup> *Ibid.*, 121.

<sup>160</sup> *Ibid.*, 239.

<sup>161</sup> *Ibid.*, 122.

<sup>162</sup> *Ibid.*, 240.

<sup>163</sup> Kleinman, "Why Does Culture Matter in Health Care and What Can We Do About It?"

<sup>164</sup> *Ibid.*

<sup>165</sup> K. Plummer, *Telling sexual stories: power, change and social worlds* (London: Routledge, 1995).

<sup>166</sup> Kleinman, *The Illness Narratives*, 128-9.

<sup>167</sup> At one time the Chaplaincy department would receive details of a patient's religion on the patient's admission to hospital. Due to the introduction of the Data Protection Act 1988 many Primary Care Trusts will not now sanction the release of this information because chaplains are not regarded as being part of the clinical team. Chaplains therefore have to rely on a patient, his or her family, or clergy, to contact the Chaplaincy department to inform them that a patient requires help.

<sup>168</sup> Stanley Hauerwas and David Burrell, "From System to Story: An Alternative Pattern for Rationality in Ethics," in *Why Narrative?* ed. Stanley Hauerwas and L.Gregory Jones (Grand Rapids, Michigan: W.B.Eerdmans Pub. Co., 1989), 158-190.

<sup>169</sup> *Ibid.*, 185.

<sup>170</sup> *Ibid.*, 186.

<sup>171</sup> John D Arras, "Nice Story, But so what?" in *Stories and their limits*, ed. Hilde Lindemann Nelson (New York and London: Routledge, 1997), Ch. 5, 65-88.

<sup>172</sup> *Ibid.*, 76-77.

<sup>173</sup> W.D.Ross, *The Right and the Good* (Oxford: Clarendon Pr., 1930) cited in Arras, "Nice Story, But so what?" in *Stories and their limits*, ed. Nelson, 77.

<sup>174</sup> Arras, "Nice Story, But so what?" in *Stories and their limits*, 77.

<sup>175</sup> *Ibid.*, 79-85.

<sup>176</sup> *Ibid.*, 80.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*, 81.

<sup>179</sup> *Ibid.*, 83.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*, 84.

<sup>183</sup> John Hardwig, "Autobiography, Biography, and Narrative Ethics," in *Stories and their limits*, edited by Hilde Lindemann Nelson, (New York & London: Routledge, 1997), 50-64.

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<sup>184</sup> Joanne Lynn, "End of Life Decision-making in Seriously Ill Patients," presented at "Deciding How We Die. The Use and Limits of Advance Directives," Roanoke, VA., 15 September 1995 conference sponsored by Carilion Health Systems cited in Hardwig, "Autobiography, Biography, and Narrative Ethics," in *Stories and their limits*, 54 note 4.

<sup>185</sup> Hardwig, "Autobiography, Biography, and Narrative Ethics," in *Stories and their limits*, 52-55.

<sup>186</sup> *Ibid.*, 61.

<sup>187</sup> *Ibid.*, 58-60.

<sup>188</sup> *Ibid.*, 60-61.

<sup>189</sup> *Ibid.*

<sup>190</sup> An interesting case study is of the medical story of Mrs Shalev and the counter-story of her daughter Becky Putnam provided by Hilde Lindemann Nelson, "Feminist bioethics: where we've been, where we're going." *Metaphilosophy*, 31 (2000): 492-508 cited in Brody, *Stories of Sickness*, 220-224 Nelson compares the story of the medical team treating Mrs Shalev and the counter-story of her daughter Becky Putnam. The medical staff in this case had come to a particular conclusion about the best course of action concerning treatment for Mrs Shalev and had started to talk about the 'futility' of further treatment. Becky Putnam on the other hand found talk of 'futility' offensive and wanted aggressive treatment continued. Her attitude was frustrating to the treatment team and they called on the help of the hospital ethics committee to try to change Becky Putnam's mind, or to find a way to get her out of the decision-making loop. When Becky Putnam's counter-story is placed alongside that of the medical story a different picture emerges. When allowed to tell her story in her own words Becky Putnam's voice is heard for the first time and her point of view, explanation and reasons are put forward. Putnam places her explanation and reasons for her attitude towards her mother's treatment in a historical, social, relational, and cultural context. When the stories are compared what becomes apparent is that the medical team thought they knew what Becky Putnam was *doing*. She was refusing to face the inevitability of her mother's death, refusing to discuss and weigh options, she was putting her own needs before that of her mother's need for pain relief. Nelson suggests however that in an important sense the medical team do not understand what Becky Putnam is doing until they have *heard* her counter-story. Her decisions are understandable when set within this narrative context. The ethics committee might therefore conclude that the medical story is flawed when placed alongside the counter-story of Becky Putnam on the basis that it imposes the medical team's frustration and poor quality of life on the patient and her daughter. Comparing the stories has illustrated that what the medical team should have done was to apply to the ethics committee and asked "what should we do?" rather than "how can we get this crazy woman to change her mind?"

<sup>191</sup> Brody, *Stories of Sickness*, 220-224.

<sup>192</sup> Nelson, "Feminists bioethics: where we've been where we're going," *Metaphilosophy*, 31 (2000), cited in Brody, *Stories of Sickness*, 218.

<sup>193</sup> M.U. Walker, *Moral Understandings: A Feminist Study in Ethics* (New York: Routledge, 1998) cited in Brody, *Stories of Sickness*, 218.

<sup>194</sup> Kleinman, *The Illness Narratives*.

<sup>195</sup> *Ibid.*, 230-236.

<sup>196</sup> *Ibid.*, 236-8.

<sup>197</sup> *Ibid.*, 240.

<sup>198</sup> *Ibid.*, 243.

<sup>199</sup> *Ibid.*, 240-243.

<sup>200</sup> *Ibid.*, 244.

<sup>201</sup> *Ibid.*, 243.

<sup>202</sup> Mark Cobb, *The Hospital Chaplain's Handbook* (Norwich: Canterbury Press, 2005), 23.

<sup>203</sup> Anne, Simmonds, The Rev'd "The Chaplain's Role in Bioethical Decision-Making," *Healthcare Management Forum* 7(4) (1994): 7.

<sup>204</sup> Cobb, *The Hospital Chaplain's Handbook*, 23.

<sup>205</sup> Simmonds, "The Chaplain's Role in Bioethical Decision-Making," 7.

<sup>206</sup> Stanley Hauerwas, *Suffering Presence* (Edinburgh: T & T Clark, 1988), 74-82.

<sup>207</sup> Simmonds, "The Chaplain's Role in Bioethical Decision-Making," 7.

<sup>208</sup> Charles V. Gerkin, *An Introduction To Pastoral Care*, (Nashville: Abingdon Press, 1997), 91.

<sup>209</sup> In conversation with David Walford, Chaplain at Hospicecare, Exeter, Devon, England, July 2008.

<sup>210</sup> Simmonds, "The Chaplain's Role in Bioethical Decision-Making," 7.

<sup>211</sup> 'The genogram (or family tree) at its simplest is a representation of the patient's relatives, but it can also be a means for a patient to tell the stories of what these relationships mean.' Cobb, *The Hospital Chaplain's Handbook*, 48.

<sup>212</sup> 'The ecomap is a visual representation of social information about a patient. Unlike the genogram the ecomap can include friends, neighbours, work colleagues, pets and other significant people such as the

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GP, social worker or minister. The ecomap provides a diagram of the person in their wider social environment and can also include significant organizations such as the hospital. Different lines can be used between the elements on the ecomap to indicate supportive or difficult links. Drawing either of these diagrams is an activity in which both the chaplain and the patient can participate, and it can involve any significant visitors whom the patient may want to include. Both exercises can help to illustrate the resources that support the patient as well as the people or systems that are problematic.’ Cobb, *The Hospital Chaplain’s Handbook*, 48-49.

<sup>213</sup> Ibid., 46-47. This includes: understanding the person’s spirituality in relation to their life context; identifying any practical consequences this may involve in terms of the provisions of care; establishing beliefs or practices that facilitate coping and factors that may hinder spiritual wellbeing; recognizing the significance of beliefs in the experience of injury or illness and in making healthcare decisions; and determining any support or resources needed.

<sup>214</sup> Ibid.

<sup>215</sup> Arthur Kleinman, *The Illness Narratives*, (New York: Basic Books, 1988), 121.

<sup>216</sup> John Patton, *Pastoral Care in Context* (Louisville, Kentucky: Westminster/John Knox Press, 1993), 43-45.

<sup>217</sup> Kleinman, *The Illness Narratives*, 230-233.

<sup>218</sup> John Patton, *Pastoral Care in Context*, 43.

<sup>219</sup> Ibid., 8.

<sup>220</sup> Anne Aldridge, “The Unique Role of Chaplain.” *Scottish Journal of Healthcare Chaplaincy*. 9 (1) (2006): 18-22.

[http://www.sach.org.uk/journal/0901p18\\_aldridge.pdf](http://www.sach.org.uk/journal/0901p18_aldridge.pdf) (accessed July 19 2008).

<sup>221</sup> Robert D Orr and Leigh B Genesen, “Requests for “inappropriate” treatment based on religious beliefs,” *Journal of Medical Ethics* 23 (1997): 146.

<sup>222</sup> Emily McClung, Daniel H. Grosseohme and Ann F. Jacobson, “Collaborating with Chaplains to meet spiritual needs,” *Medsurg Nursing* 15(3) (2006): 147-156.

<sup>223</sup> Iain Macritchie, “The Chaplain as Translator,” *Scottish Journal of Healthcare Chaplaincy* 2 (2) (1999).

[http://www.sach.org.uk/journal/0202p07\\_macritchie.pdf](http://www.sach.org.uk/journal/0202p07_macritchie.pdf) (accessed July 19, 2008).

<sup>224</sup> Ibid.

<sup>225</sup> Ibid., 10.

<sup>226</sup> Hazel E McHaffie, Supporting Families When Treatment Is Withdrawn From Neonates: Parental Views On The Role Of The Chaplain, *Scottish Journal of Healthcare Chaplaincy*, 3(2) (2000).

[http://www.sach.org.uk/journal/0302p02\\_mchaffie.pdf](http://www.sach.org.uk/journal/0302p02_mchaffie.pdf) (accessed July 19, 2008).

<sup>227</sup> Russell B. Connors, Jr. and Martin L. Smith “Religious Insistence on Medical Treatment: Christian Theology and Re-Imagination.” *The Hastings Center Report* 26(4) (Jul-Aug. 1996): 23-30.

<sup>228</sup> Ibid., 25.

<sup>229</sup> Ibid.

<sup>230</sup> Dr. Simon Harrison, a chaplain at the Royal Devon and Exeter Hospital Wonford Exeter, Devon England personal communication, July 2008.

<sup>231</sup> Gerkin, *An Introduction To Pastoral Care*, 111.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid., 112.

<sup>234</sup> Ibid.

<sup>235</sup> David Lyall, *The Integrity of Pastoral Care* (London: SPCK, 2001), 84.

<sup>236</sup> Walter Brueggemann, *Interpretation and Obedience: From Faithful Reading To Faithful Living*, (Philadelphia: Fortress, 1991), 178.

## Chapter 4

### Mediation – A way of making room for faith?

In the last chapter I examined how doctors such as Engel and Kleinman have journeyed from a place of not taking into account the perspective and faith of their patients, to a place where they are convinced of the need to do so. I argued that the negotiation of meaning is an example to the legal profession of a reason why room should be made for the discussion of issues of faith of individual believers. I argued that Engel and Kleinman's models could be adapted and applied in legal cases and I will return to this topic in Chapters 5 and 6. In this chapter I will examine and discuss another example that is closer to the legal profession, and that has provided a challenge to the profession's monopoly on dispute resolution, and the way in which the profession understands and addresses conflict. In Chapter 1 I argued that one of the reasons why persons of faith experience difficulties in the English law courts is because conflict is understood and addressed in narrow legal terms. In this chapter I will examine how conflict is understood and addressed through the process of mediation, and consider whether it might provide an alternative way of dealing with disputes that involve issues of faith, rather than the disputants having to go to court. Also whether in mediation the perspective and faith of disputants would not just be heard and respected, but also taken into account in the decision-making process.

Mediation, put simply, is a process where an impartial third party assists the parties in dispute to resolve their differences. It is an ancient method of communal dispute resolution that can be found in many cultures including those of the Bible.<sup>1</sup> I will briefly outline in Section I the historical and biblical roots of mediation, the reasons why it fell into disuse, and the reasons why it re-emerged in America and the UK in the 1960's and 1970's. In the UK today mediation is employed in disputes involving small claims, commercial agreements, neighbour disputes, and, since the Family Law Act 1996, in family disputes.<sup>2</sup> It is therefore not a new concept, but since its re-emergence the concept has developed and changed. In Section II I will compare and contrast four different models of mediation and outline their strengths and weaknesses. Then in Section III I will discuss the advantages and disadvantages of mediation for persons of faith. Finally, I will argue that the use of mediation could be extended and employed as

a way of addressing some disputes that involve issues of faith. Depending on the model of mediation employed, it is a process that could provide room for the faith of a disputant not only to be heard and respected, but also to be taken into account in the decision-making process. It is also a process that could provide room for representatives of faith communities to either act as co-mediators or speak in support of a person of faith. Although the concept of mediation envisaged in New Testament teaching differs in several key respects from modern models of mediation, a further advantage of mediation for Christians is that it has its roots in biblical teaching, and it provides a way for Christians who do not want to go to law to try and settle disputes. However, I concede that there may be some cases where mediation may not be available, or may not succeed, or may not be appropriate, and that these cases will end up in the English law courts. I will therefore address this situation in Chapters 5 and 6.

## Section I – Mediation – roots, use, disuse and re-emergence

In small-scale communities or kinship-based communities mediation was a way of maintaining community solidarity and ensuring collective survival.<sup>3</sup> In these communities there was a high level of shared beliefs and values and normative agreement. When there were disputes or transgressions against the norms of the community it was often perceived as a threat to the community. It was therefore crucial to resolve disputes and restore harmony. Conflict resolution took many forms, some punitive; others involving conciliatory measures, but a common theme was that a respected member of the community was invited to help those in dispute to settle their differences.<sup>4</sup> Mediation in these communities was not an alternative to law, but instead, the dominant form of dispute resolution.<sup>5</sup>

The concept of mediation can be found in the Bible. In the Hebrew Bible Joab sends a wise woman from Tekoa to mediate between king David and his son Absalom (2 Sam. 14: 1-23).<sup>6</sup> In the New Testament the term ‘mediator’ is applied to Christ, who is described as, the ‘one mediator between God and humankind’ (1Tim.2: 5). Christians believe that Jesus, through his life, death, and resurrection, has reconciled humankind and God, and provided a way for humankind to have a relationship with God. In his teachings Jesus taught that the root cause of conflict is ‘sin’, and the method of dealing with ‘sin’ is through face-to-face dialogue, repentance and forgiveness (Mt. 18: 15-17). Jesus urged Christians to settle matters with one another, rather than go to the law

courts (Mt. 5: 25-26). Likewise, the Apostle Paul urged Christians to settle disputes rather than go to court (1 Cor. 6: 1). Paul regarded Christians as already defeated if they had to resort to lawsuits and be judged by unbelievers (1 Cor. 6: 7). Paul identified the root of conflict as ‘sin’ and spiritual immaturity (1 Cor. 3: 1-4). He taught that if Christians were unable to settle their dispute, they should appoint another Christian, one who is wise, to judge the dispute (1 Cor. 6: 5). This teaching faces Christians with very specific challenges about how they deal with disputes, and it also raises a number of questions. For example, have Christians been able to live without law, or is it an impossible ethic? What about disputes with non-Christians? Why might Christians have turned to the law? Can Christians be faithful to New Testament teaching and still go to law?

Jerold Auerbach in *Justice Without Law* begins to answer some of these questions.<sup>7</sup> He writes about a number of communities in America in the seventeenth and early eighteenth centuries including, Puritans, Quakers, utopians, Dutch settlers in New Amsterdam, and merchants, who attempted to live without recourse to law, or at least only resorted to law as a last resort.<sup>8</sup> One such group were the Puritans who had left England and settled in Massachusetts.

‘Their fundamental principle of association, expressed in one typical town covenant was “everlasting love.” It required, paradoxically, exclusion of the “contrary minded”; any “differences” must be mediated by members, not consigned to lawyers. For Zion to survive in the wilderness according to Puritan design, the dispute-settlement framework, like the holy experiment itself, must be communal, not individual. Its spirit was religious, not secular; the style was consensual, not adversarial.’<sup>9</sup>

Consequently, members of the community were dissuaded from seeking legal redress.

‘To sue a fellow church member, according to the Reverend John Cotton, was “a defect of brotherly love.” By order of a Boston town meeting in 1635, no congregation members could litigate unless there had been a prior effort at arbitration.’<sup>10</sup>

Each church functioned as a court and dealt with a variety of disputes. However, there was nothing in a church hearing that we would recognize today as due process.

‘The accused might bear the burden of proof; a minister might combine the functions of judge and prosecutor; lawyers did not participate; there was no provision for appeal. Instead, the entire congregation participated in a process designed to reassert harmony and consensus.... Congregants were free to offer information, opinion, and admonition, but the purpose of individual participation was to encourage a collective congregational judgement, which would isolate offenders, restore them to congregational fellowship, and thereby strengthen

communal values. The sanctions of admonition and excommunication were sufficient for this purpose.’<sup>11</sup>

Another group who tried to live without law were the Society of Friends or Quakers who lived in Delaware. They resolved their disputes according to the procedure known as the “gospel order” which was based on the teaching of Jesus in St. Matthew’s Gospel.<sup>12</sup>

‘First, the complainant, “calmly and friendly,” spoke to the other party, trying “by gentle means, in a brotherly and loving manner to obtain his rights.” If he was unsuccessful, he reasserted his claim in the company of one or two other “discreet, judicious Friends,” who were expected to act “justly and expeditiously” to resolve all differences. That failing, they were to “admonish and persuade” the parties to accept arbitration by disinterested Quakers. Refusal to arbitrate diverted the dispute to the monthly meeting, which enforced the norms of the holy community. . . . The meeting appointed arbitrators; refusal to abide by their judgement was an intolerable affront to the entire community. . . . The penalty was disownment by the society. Only after disownment could an ex-Friend pursue a remedy at law.’<sup>13</sup>

Auerbach notes that although the Friends pursued peace and harmony they did not always succeed. When they became involved in commerce and the pursuit of profit they were inextricably drawn into the legal system.<sup>14</sup> As a result, although Quakers rarely went to law against Friends, they did often litigate as both plaintiffs and defendants in disputes with non-Friends.<sup>15</sup>

By the beginning of the eighteenth century, however, Quakers and other Christian communities were increasingly drawn into the judicial system to settle their disputes. The reasons for this involved complex changes that were taking place in society. Communities that were once close knit and which had a high level of shared beliefs and values began to change as newcomers with different beliefs and values intermingled with them.

‘Once the original bonds of unity unravelled, a cluster of values associated with individualism found ready expression: opportunity, mobility and acquisitiveness. With this transformation came the necessary context for litigation. If mediation and arbitration tended to express the needs of those who were mutually bound in continuing cooperative relationships, the legal process encouraged the clash of individual differences and constant jostling for private advantage. The shifting balance between non-legal and legal forms of dispute settlement reflected a growing tolerance for conflict. Legalized disputation served those who asserted claims and rights in a competitive struggle with their adversaries. Law also provided a new framework for order and authority. . . in this sense law was an alternative forum, serving a different set of interests than arbitration could protect. Disputing individuals wanted to resolve private claims, not restore communal cohesion.’<sup>16</sup>

By the end of the eighteenth century courts came to be the primary way in which disputes were settled because they were seen as the only institutions whose rules and decisions were acceptable in communities who were not bound by a common moral code.<sup>17</sup> However, alternative methods of resolving disputes did not disappear completely. Merchants continued to favour arbitration for its speed and low cost, and some pious Christian groups continued to employ mediation.<sup>18</sup>

In the UK today Quakers still try to live without law and resolve disputes in their meetings.<sup>19</sup> More widely mediation and other dispute resolution mechanisms, such as arbitration began to re-emerge in America and in the UK as alternatives to the court system in the 1960s. Several complex social forces contributed to this development. Frank Sander, for example, points to the struggles and conflicts in America in the 1960's relating to the civil rights movement, and the Vietnam War protests.<sup>20</sup> He argues that these led to a lessening in tolerance and a tendency to turn grievances into disputes. There was also an increase in the statutory creation of new causes of action, which resulted in increased pressure on the court system. This, in turn, led to claims that equal access to justice had been denied, and, in part, provided the environment where parties tried to settle their differences through alternative dispute mechanisms. Other contributing factors included: the decline in mediating institutions such as the family, church, and ward-healer, and the mood of anti-professionalism.<sup>21</sup>

Marian Roberts lists a number of reasons for the growth of family mediation in the UK.

‘The early growth of family mediation in Britain can be seen as the later manifestation of that revival of alternative approaches to conflict and dispute that occurred in the US, in the community justice movement, in particular, arising from the social movement of the 1960s, of the ‘new consciousness’ that challenged traditional attitudes and values in the context of dispute resolution (a process memorably observed by Reich in *The Greening of America*, 1970). The values of mediation exemplified the spirit of the time - the importance of respect, dignity, fairness, justice, reciprocity, individual participation, consensus and party control. The resurrection of these values countered a dominant, prevailing value system characterised by adversarial processes, impersonality, lawyer control and a rule-centred authoritarian command.’<sup>22</sup>

Roberts acknowledges, however, that the story of the modern growth of mediation, that incorporates family mediation, can also be described in other ways, for example:

(i) ‘As a response to the ‘evolutionary demise’ of ‘conventional forms of institutionalised searches for justice, in the form of the courts and trial .... because they are failing to satisfy modern requirements for voice, justice and conflict resolution’.<sup>23</sup>

(ii) ‘As symptomatic of the changing nature of state power in late capitalism, manifesting both in the radically transformed nature of the courts developing new strategies of dispute settlement and in the expansion of government outwards to co-opt and shape a hitherto ‘private’ sphere of negotiation.’<sup>24</sup>

(iii) ‘As the struggle for recognition of a new professional group, offering an innovative and different way of managing family conflict and disputes, one involving the re-discovery of the universal and ancient triadic process.’<sup>25</sup>

(iv) ‘As the movement of recovery on the part of lawyers, fearing competition and seeking to protect their traditional monopoly of control over dispute resolution.’<sup>26</sup>

What point (iv) reveals is that the re-emergence of mediation challenged the monopoly of the legal system and legal profession in dispute resolution, and also the assumption that the courts were the only institutions that people with different beliefs and values would accept to address their disputes. As a result some lawyers have responded by training to become mediators.

With the re-emergence and growth of mediation has come change. Whereas mediation was once embedded in a particular community it has become one of many different methods of conflict resolution. Where once a respected or wise person in a particular community was invited to act as a mediator, now there is a professional class of mediators.<sup>27</sup> Where once mediation was understood as a method of dispute that was distinct from law and the legal profession, now the boundaries have become blurred. Lawyers do not just refer clients to mediation - some lawyers have trained to become mediators, and legal thinking has infiltrated some mediation processes.<sup>28</sup> As these changes have taken place different models of mediation have emerged with different underlying ideologies, and it is these that I will examine in the next section.

## Section II – Mediation - definition, models, and characteristics

In the introduction I described mediation as a process where an impartial third party assists the parties in dispute to resolve their differences but it can be defined in a more nuanced way. For example, emphasis can be put on the process and on its voluntary nature.<sup>29</sup> Equally, different models of mediation have emerged, with different mediator styles and underlying ideologies and normative approaches.

There are four recognised models of mediation, evaluative, facilitative, transformative, and narrative. Each model has a different normative approach to mediation and has different views on conflict and the human person. An ‘evaluative’ model is the one that is closest to a “rights-based” approach which focuses on the legal rights of the disputants and attempts to achieve a resolution that meets legal criteria.<sup>30</sup> This is similar to the approach taken in court proceedings where conflict is framed in legal terms and proceedings tend to be adversarial. The human person is viewed primarily as an autonomous individual with legal rights. Evaluative mediation is like a court process, but without the formality, and is therefore sometimes referred to as non-binding arbitration.<sup>31</sup> The mediator is likely to have expertise in the subject matter of the dispute, rather than in mediation or negotiation technique.<sup>32</sup> The role of the disputants or their lawyers is to present persuasive arguments to the mediator and these arguments will often take the form of legal arguments.<sup>33</sup> The mediator will examine the facts, weigh the evidence, and advise on the merits of the arguments before coming to a decision, which is likely to reflect the legal rights of the disputants.<sup>34</sup> Evaluative mediation is non-binding because the disputants do not have to accept the mediator’s decision and can still decide to go to court.<sup>35</sup> The strength of this model is that the mediator has expertise in the subject matter of the dispute.<sup>36</sup> Evaluative mediation may therefore be appropriate in cases where the dispute is a purely legal one, and where the mediator is a solicitor or retired judge, and the disputants want to avoid the time and expense of litigation. The weaknesses of evaluative mediation are that the focus is on legal criteria, and an evaluative opinion may ironically hinder communication between the parties, and between the parties and the mediator. This is because the parties in anticipation of an evaluation may only put their best case forward, without acknowledging the weaknesses or complexities in their case. They may be more likely to approach the mediation from a positional bargaining stance, rather than be prepared to think outside the legal box and consider other solutions.<sup>37</sup> As the criteria for decision-making is legal and the mediator makes the decision then this approach will probably not provide any more room for the faith perspective of a disputant in the decision-making process than would court proceedings. Also as the mediator decides, it does not provide the disputants with skills for resolving disputes in the future, and it blurs the distinction between mediation, arbitration and litigation.<sup>38</sup> Consequently, not everyone agrees that evaluative mediation should be classed as mediation. Lela Love, for example, argues that it is the disputants who should make the decisions in mediation,

and she draws a distinction between the roles of an evaluator and a mediator.

‘Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions. In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations.’<sup>39</sup>

Some suggest, therefore, that evaluative mediation should be reclassified as ‘neutral evaluation’ or non-binding judging.<sup>40</sup>

Facilitative mediation is closer to an “interests-based” approach which focuses on the underlying needs and interests of the disputants, and considers a broad range of options to resolve those needs and interests.<sup>41</sup> The resolution achieved from this approach may therefore satisfy the disputants, but may not meet legal criteria.<sup>42</sup> The theory behind an “interest-based” approach is that if disputants are encouraged to explore their underlying interests they are in effect defining the problem. The exploration is also likely to reveal new dimensions of the problem, and help disputants who are at an impasse discover shared interests, and a range of different solutions.<sup>43</sup> It is therefore sometimes referred to as the “problem-solving” approach. In facilitative mediation the mediator’s role is to facilitate communication between the disputants, promote understanding of the issues, and encourage the disputants to explore their interests and evaluate their own situation.<sup>44</sup> The mediator may not be an expert in the subject matter of the dispute, but will often be a trained negotiator who will explore the various options with the disputants, and may even discuss the strengths and weaknesses of the disputants’ cases.<sup>45</sup> The mediator will seek creative solutions that will be acceptable to all the disputants, including solutions that may be outside of the legal normative box.<sup>46</sup> But unlike evaluative mediation, or court proceedings, it is the parties in facilitative mediation who decide if, and how, to resolve their dispute.<sup>47</sup>

The strengths of facilitative mediation are that it provides the disputants with opportunities to talk and the possibility of reaching a settlement.<sup>48</sup> It makes efficient use of negotiation opportunities,<sup>49</sup> and this can be particularly helpful when disputants have entrenched positions.<sup>50</sup> There are indications that it is more efficient and cost effective than court proceedings.<sup>51</sup> The solutions to the dispute are not restricted to strict legal rights. Consequently, a broader range of interests are considered and a broader range of possible outcomes can be created, that may well be more satisfactory to the disputants than a ‘rights-based’ or evaluative approach handed down by a third party.<sup>52</sup> It would

therefore be possible for room to be made to discuss the perspective of a person of faith and any relevant issues of faith. As it is the parties who make the decisions issues of faith could be given some weight in the decision-making process. However, whether this would happen in practice will depend on the willingness and cooperation of the mediator and both disputants. The weaknesses of facilitative mediation are that the disputants may not reach a settlement and so the dispute may end up in court anyway, and it requires a skilled mediator.<sup>53</sup>

Winslade and Monk have also drawn attention to four underlying assumptions on which the problem-solving approach is based, and a number of critiques of those assumptions.<sup>54</sup> The first assumption is that conflict is based on a psychology that focuses on the individual, rather than a psychology that begins with a social view of a human being. Consequently, even in conflicts involving groups the model makes sense of it in terms of individual psychology.<sup>55</sup> They have pointed out that this individual psychology does not sit well with cultures that emphasize collective responsibility ahead of individual autonomy.<sup>56</sup> The second assumption is that human beings are regarded as motivated by internally generated needs that have their origin in human nature. These needs are represented in mediation as interests. Implicit in this is the idea that each party in the conflict is viewed as pursuing his, or her, own path of self-interest, and the way to reach a settlement is by meeting those needs. As a result, the focus of attention is taken away from cultural, collective, or relational aspects of personhood.<sup>57</sup> The third assumption is that conflict occurs when needs are not met and that the way to resolve conflict is by meeting the needs. The fourth assumption is that the mediator is regarded as an objective, neutral third party. Consequently, if the parties have needs, the mediator is neutral, and if the parties have interests the mediator is disinterested. If the parties have substantive goals the mediator is only interested in the process and creating the opportunity for a win-win resolution. They argue that the idea of a mediator as a neutral disinterested third party is based on the model of the scientist-practitioner - a detached, neutral observer who applies knowledge generated within modernistic scientific traditions. The emphasis is on the generation and application of universal truths. Consequently, issues of culture or gender contribute to the bias and distortion that good models of practice seek to eliminate. They argue that in the light of a number of critiques this view of a mediator is difficult to sustain.<sup>58</sup>

‘The idea of the mediator as neutral facilitator of the process, who “makes no assessments, judgements, or value interventions” but is “wholly supportive of all actors, and adopts a no-fault and neutral position” is now hard to hold.’<sup>59</sup> It

makes more sense to see mediators as unlikely to be able to stand outside time and space and their own culturally and historically located values. As they respond to people's stories, mediators are likely to select for emphasis some perspectives over others, or to attune themselves to some people more than others.<sup>60</sup>

Winslade and Monk note that the idea that content and process can be separated and that the mediator is viewed as a process facilitator who is impartial about content has also been questioned.

'Linda Putnam has pointed out how particular conceptions of process (for example, thinking in terms of instrumental goals) influence the selection of subject matter to be discussed or emphasized. She suggests that instrumental goal-directed thinking leads to a privileging of "substantive issues over relational and identity management aims."<sup>61</sup> Likewise, Joseph Folger and Robert Bush have shown a "settlement orientation" to narrow the range of subject matter that a mediation conversation can address.'<sup>62</sup>

Winslade and Monk also point to feminist critiques of neutrality.

'They have focused their analysis on the construction of power in gender relations and the failure of mediation to influence gendered privilege. Their accusation has been that win-win solutions frequently simply reflect the pre-existing power relations between the parties and that these relations are often constructed according to patterns of privilege that are based on patriarchal assumptions of how things should be. Thus patriarchal power, unless specifically addressed in the mediation itself, gets reproduced in the outcomes that flow from a so-called neutral mediator's stance.'<sup>63</sup>

Winslade and Monk do not argue that the assumptions on which the problem-solving approach is based are necessarily wrong, merely that the assumptions are 'formed out of an individualistic, needs-based discourse and that they constitute only one way of viewing, judging, and making sense of the world.'<sup>64</sup> They conclude that the critiques point to a need for other models of mediation practice. This has led them to develop a narrative model, which I will outline and discuss later in the chapter.

The third model of mediation is 'transformative'. This was developed by Bush and Folger who describe the theory of conflict that lies behind the model as follows:

'According to transformative theory, what people find most significant about conflict is not that it frustrates their satisfaction of some right, interest, or pursuit, no matter how important, but that it leads and even forces them to behave towards themselves and others in ways that they find uncomfortable and even repellent. More specifically, it alienates them from their sense of their own strength and their sense of connection to others, thereby disrupting and undermining the interaction between them as human beings. This crisis of deterioration in human interaction is what parties find most affecting, significant – and disturbing – about the experience of conflict.'<sup>65</sup>

Bush and Folger argue that if this negative cycle of interaction is not reversed, and if parties do not regenerate a sense of their own strength, and some measure of understanding the other, it is unlikely that a person can be at peace with themselves, let alone the other. A person can be left disabled (lacking confidence, unable to function, and with their ability to trust compromised), even if an agreement on concrete issues is reached.<sup>66</sup> They argue that the reason why people can be so affected and disturbed by disempowerment and disconnection in a negative conflict cycle can be explained by a relational view of human nature.<sup>67</sup> This states that each human being senses both that he, or she, is an autonomous agent with his, or her, own life story, and that he, or she, is also a social being, connected to others in a web of relationships.<sup>68</sup> In a negative conflict cycle both aspects of a person's core identity (autonomy and social connection) are compromised at the same time - it violates a person's identity – the sense of who they are as a human being.<sup>69</sup> What motivates a person to try to reverse the negative interaction can be explained negatively, as a person wanting to get out of the inhuman experience of negative interaction. But it can also be explained positively, as a person wanting to reassert his, or her, sense of core human identity.<sup>70</sup> This leads Bush and Folger to argue that what parties want, need and expect from a mediator is help to reverse this negative process and for constructive interaction to be restored.<sup>71</sup> They define transformative mediation as:

‘a process in which a third party works with parties in conflict to change the quality of their conflict from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.’<sup>72</sup>

The critical resource for conflict transformation is found in the parties themselves – their own basic humanity – their essential strength, decency and compassion as human beings.<sup>73</sup> This is based on a relational theory of human nature:

‘that human beings have inherent *strength* (agency or autonomy) and *responsiveness* (connection or understanding) and an inherent *social* or *moral impulse* that activates these capacities when people are challenged by negative conflict, working to counteract the tendencies to weakness and self-absorption.’<sup>74</sup>

This can be contrasted with Christian anthropology that sees human beings as deeply corrupted by sin, and only transformed by God's redeeming power.

The transformative theory asserts that when these capacities are activated then the

negative spiral of interaction can be reversed even without a mediator.<sup>75</sup> The process of changing the interaction from negative to positive involves the parties in *empowerment* and *recognition* shifts.<sup>76</sup> An *empowerment* shift involves a party moving from a sense of weakness to one of strength, and where there are positive changes in self-confidence and the ability for self-determination.<sup>77</sup> A *recognition* shift involves a party moving from being self-absorbed, to understanding and being open to the other party.<sup>78</sup> The role of the mediator is to help assist the parties in identifying opportunities for empowerment and recognition and to support the parties to make *empowerment* and *recognition* shifts as they wish.<sup>79</sup> The mediator focuses on the message-by-message interaction of the parties. The model is a face-to-face dialogic approach to conflict interaction and is communication- based, rather than a psychological approach to practice.<sup>80</sup> This is similar to the approach to conflict resolution found in the New Testament teaching of Jesus (Mt.18: 15-17), although what is regarded as the root issue of conflict, ‘sin’ is not addressed in the transformative model. Bush and Folger argue that the relational view of human nature on which the dialogic approach is based, can lead to a strikingly positive view of conflict interaction in that it offers the opportunity to strengthen human agency and connectedness.<sup>81</sup> They draw on the work of legal ethicist Robert Burns who argues that conflict interaction can be *moral conversation* or *moral discourse*. Burns quotes from the work of Hanna Pitkin:

‘The centre of gravity of authentically moral discourse is the conversation between an agent and the one who is actually or potentially adversely affected by his actions ... Moral conversation provides a way of “healing tears in the fabric of relationship and maintaining the self in opposition to itself or others ... [I]t provides a door through which someone, alienated or in danger of alienation from another through his action, can return ... The point of moral argument is not agreement on a conclusion but successful [not strategic] clarification of two people’s positions. Its function is to make the position of the various protagonists clear – to themselves and to the others. Moral discourse is about what was done, how it is to be understood and assessed, what position each is taking toward the other, and hence what each is like and what their future relations will be like. The hope, of course, is for reconciliation, but the test of validity in moral discourse will not be reconciliation but truthful revelation of self ... Moral discourse is useful, is necessary, because the truths it can reveal are by no means obvious. Our responsibilities, the extensions of our cares and commitments, and the implications of our conduct, are not obvious ... The self is not obvious to the self.”<sup>82</sup>

Bush and Folger point to the US Postal Services REDRESS programme that has employed transformative mediation with great success.<sup>83</sup> From this they make two important observations. First, that the REDRESS programme suggests that transformative mediation provides parties with a process that addresses key concerns,

regardless of whether the cases settle in a traditional way. Second, that parties' conflict frequently unfolds in ways that have little to do with the presenting issues. The conclusion that they draw from this is that if a mediator focuses merely on the presenting issues and directs the parties to reach a settlement on these issues, the underlying issues that parties really want to address will very rarely surface. They argue that in transformative mediation it is the parties, not the mediator, who resolve issues, and the issues are resolved in a wide variety of ways.<sup>84</sup>

The transformative model has a number of strengths. First, mediators who employ the transformative approach attempt to understand the underlying causes of conflict, and they also recognise that conflict can have negative effects on individuals and try to address these. However, from a Christian perspective they do not address the root of conflict, which for a Christian is sin. Secondly, the approach acknowledges the relational nature of humans, and that through face-to-face dialogue conflict can produce positive outcomes, including the healing of relationships. This is a similar approach to that found in the New Testament teaching of Jesus, although Christians would argue that the healing of relationships comes through repentance and forgiveness. Thirdly, transformative mediation enables the parties to make their own decision, and provides them with skills that may help them to resolve future conflict situations.<sup>85</sup> This model provides room for a faith perspective to be heard and taken seriously, and taken into account in the decision-making process. However, the model does not allow for what Christians regard as the root of conflict, 'sin' to be addressed and dealt with through confession, repentance and forgiveness. The weakness of the model is that it seems to blur the boundaries between the roles of mediation and counselling.<sup>86</sup> Bush and Folger, however, argue that there are clear differences between the transformative approach and most types of therapy.<sup>87</sup>

The final model of mediation is narrative, which emerged out of the tradition of Narrative Family Therapy developed by Michael White and David Epston in the mid 1980's.<sup>88</sup> John Winsdale and Gerald Monk developed in the mid 1990's the narrative model of mediation.<sup>89</sup> The model is based on the idea that people make sense of their lives and organise their experience through stories.<sup>90</sup> As I discussed in Chapter 3, the narrative perception is that people tell stories about themselves, their relationships and experiences, and they listen to the stories told by others. People act into and out of such stories, and personal identity develops within an environment of many competing

stories. When disputes arise between people they will often describe the problems that they are experiencing through stories. A mediator who employs the narrative model is not so much interested in the factual aspects of stories, but in how stories operate to create reality in a person's life.<sup>91</sup>

'Stories therefore are not viewed as either true or false accounts of an objective "out there" reality. Such a view is not possible, because events cannot be known independently of the dominant narratives held by the knower. It is therefore more useful to concentrate on viewing stories as constructing the world rather than viewing the world as independently known and then described through stories.'<sup>92</sup>

Narrative mediation begins from the idea that people construct conflict from narrative descriptions of events.<sup>93</sup> The use of the narrative metaphor is strongly influenced by post-modern philosophy.

'Post-modern philosophy emphasizes the enormous variation in how people live their lives due to the quite different discursive contexts that surround them. Post-modern thinking suggests that there is no single definable reality. Rather, there is great diversity in the ways we make meaning in our lives. It is inevitable that differences will result from the diversity of meaning, and that conflict will arise from time to time within or between people.'<sup>94</sup>

Winslade and Monk therefore describe their approach to mediation as an "outside-in" as opposed to an "inside-out" approach.

'... the outside-in perspective looks at conflict as produced in the sociocultural milieu, where meanings are contested within the social fabric of community, while the inside-out perspective looks at conflict as created within the so-called natural desires, interests, and needs emanating from the individual.'<sup>95</sup>

Narrative mediation is therefore sensitive to cultural narratives:

'A narrative approach to mediation helps mediators and their clients make sense of the complex social contexts that shape conflicts. The mediation context is riddled with strong cultural narratives that form around ethnicity, gender, class, education, and financial wealth, for example. Mediators have often failed to grapple with complex cultural stories. This has led to strong criticisms of mediation practice by indigenous peoples and some feminist groups. We think that narrative mediation offers mediators some potent linguistic tools for changing their practice in ways that address these criticisms.'<sup>96</sup>

There are three phases in the process of narrative mediation, engagement, deconstruction of the conflict-saturated story, and construction of an alternative story. In the engagement phase the mediator concentrates on establishing a relationship with the disputants. In order to facilitate this the mediator pays attention to the physical setting in which the mediation takes place, the non-verbal behaviour of all participants in the early

stages, and the relational moves made by the mediator and the disputants. Attention is also paid to the discursive positions that the mediator and the parties are called into during the discussion.<sup>97</sup>

Narrative mediation recognizes the impact that the mediator's presence and cultural history can have on the disputants. It acknowledges that this may raise issues for a disputant such as, whether the mediator will understand his, or her, experiences, and identity issues that are significant to the disputants when building a relationship, such as gender, ethnicity, religion, sexual orientation, age, class or disability. The mediator is not regarded as being a neutral third party, but as someone who is embedded within a particular social and cultural context, and who has views and opinions that can have an impact on the disputants and the process of mediation. Mediators will ascertain whether a disputant requires the support of a spokesperson, and whether it might be necessary to appoint a co-mediator with a cultural background similar to that of the disputants.<sup>98</sup> I would argue that this would provide room for a representative of a faith community to be invited to act as a spokesperson or co-mediator in cases that involve issues of faith.

Narrative mediation is regarded as a 'co-creative practice' in which the disputants are viewed as 'partners' in the mediation, and they are respected from the start because they are viewed as possessing local knowledge and expertise that can help bring a resolution to the dispute.<sup>99</sup> The mediator will invite each disputant to tell his or her conflict story. The mediator will build trust with the disputants by careful listening, taking the stories seriously, and will try to avoid making assumptions.<sup>100</sup> The mediator will be particularly interested in the perspective of the disputants, and the story from which the disputants are operating, not just the one that they are telling.<sup>101</sup> In this model there would be room for a person of faith to tell her story, explain her perspective and any issues of faith that she believes are relevant to the dispute. The mediator will be interested in her perspective and the story out of which she is operating. The mediator seeks out and promotes the relational attitudes of understanding, respect and cooperation, rather than focusing on faultfinding.<sup>102</sup> The disputants 'are invited to join the mediator in a struggle to rescue a spirit of understanding and cooperation from the jaws of conflict.... At the engagement phase this means endeavouring right from the start to develop ways of speaking that invite relationship repairing and rebuilding, or at least promote a respectful encounter.'<sup>103</sup>

The next stage of the mediation process involves deconstruction of the conflict-saturated stories. At this stage the mediator will begin to work actively to separate the parties from the conflict-saturated story by gently undermining the certainties on which the conflict feeds, and will invite the parties to view the plot of the dispute from a different vantage point. This is based on the assumption that certain elements of the plot emphasise the on-going dispute, whereas elements that contradict this pattern, such as moments of agreement and mutual respect will often be left out.<sup>104</sup>

Every story that is told offers people positions to take up in relation to each other. For example, a story may position one disputant as victim in relation to the other. Each story calls a person hearing it into a position, and a person can either enter that position or refuse to do so. The purpose of deconstruction is to make visible the relative positions that each version of the story offers. The way in which the mediator achieves this is through the technique of ‘curiosity’. The mediator will ask questions, which opens up a space for reconsideration of the conflict story. The mediator will also carefully inquire into the meaning of the elements of the stories. This ‘also conveys the idea that meanings are not fixed but instead are negotiable in conversation and are related to context.’<sup>105</sup> This questioning is carried out in a ‘a spirit of wondering and curiosity rather than opposition.’<sup>106</sup> The mediator will draw everyone’s attention to the effects of discursive positioning in order to make it possible for disputants to vary from this position if they choose to do so.<sup>107</sup>

The narrative approach acknowledges that the presence of the mediator will alter the positions of the disputants in the conflict story. They will at least have to make room for a third party. Similarly, the context of mediation can call disputants into positions. For example, relating to a professional mediator can position disputants into a professional discourse with its own background stories. A disputant might defer to a mediator’s knowledge or choose to rebel. Winslade and Monk urge mediators not to take a stance as expert, but instead suggest that they should speak in a way that invites the production of a co-authored relationship.<sup>108</sup> The relationship that the mediator established with the disputants in the engagement phase needs to be continued during the deconstruction process. The mediator will continue to convey respect and compassion to the disputants.

Another technique that the mediator will employ in deconstruction is ‘externalization’. This is ‘a device used to help separate people from a story that locates the conflict in the

nature of the other person or to the relationship.’<sup>109</sup> The effect is to move the focus away from personalities or blame, and to focus instead on the features of the problem which is spoken of as a third party to the dispute. Using the techniques of ‘curiosity’ and ‘externalization’ the mediator will help the disputants to deconstruct the assumptions from which the conflict stories are assembled.<sup>110</sup> By naming the discursive positions the mediator clarifies the exact sticking points and assumptions, and helps a disputant to understand why the other disputant holds the views that they do. Deconstruction enables the mediator to open up a space in the conflict story for an alternative conflict-diminished, or a conflict-free story to be considered by the parties.

The creation of an alternative story is the third phase of the mediation, and is based on the assumption that conflict tends to narrow a person’s focus on things that support the conflict, but there will always be experience that lies outside of the conflict.<sup>111</sup>

‘These experiences will contradict, or at least not fit into, the conflict. They are rich and fertile soil for the creation of a different account of events. Out of this soil can grow new ideas for resolving the dispute. Stories are always selections from the available information strung together in a more or less coherent form. And because they are selections, elements will always be left out of them. Among what gets left out will always be material that can be employed to construct a different story.’<sup>112</sup>

White and Epston have referred to the material that gets left out as ‘unique outcomes’.<sup>113</sup> The mediator’s task is to listen for these unique outcomes or to ask questions to elicit them, and then build on them and develop an alternative story with the parties.<sup>114</sup> It is only as an alternative story of respect develops that the parties will be ready to address outstanding challenges. Only when this stage is reached will a mediator begin to problem solve with the parties. Winslade and Monk take the view that it is only when a better relational pattern develops that a problem-solving approach will be effective.<sup>115</sup> Their approach favours trying to settle relational issues in preparation for settling the substantive issues, and they acknowledge this phase of mediation may lead to a variety of outcomes.

‘This phase may lead to a resolution that takes the form of an agreement between the parties. However, this is not assumed to be the best outcome. Sometimes the development of an attitude of cooperation and respect may be more important than any substantive agreement. On other occasions the story of what has happened may be revised in ways that dissolve the conflict altogether.’<sup>116</sup>

The three phases of engagement, deconstruction of the conflict-saturated story and construction of an alternative story are not discrete stages and do not follow in

sequence. The mediator may therefore move back and forward between the phases. They are therefore to be thought of as ‘background organizing frameworks for mediators to use to guide their thinking.’<sup>117</sup>

Narrative mediation is based on a number of principles of social constructionism. To begin with human beings are understood as being more the product of social processes, than internal essences.<sup>118</sup> This challenges the individual psychology on which facilitative mediation is based. Consequently, a person’s needs are understood as constructed in discourse. The effect of this is to shift the purpose of mediation from an attempt to fulfil a person’s needs towards transformation.<sup>119</sup> This can be contrasted with Christian anthropology that understands human beings as deeply corrupted by sin, and only transformed by God’s redeeming power, and understands human identity in the context of a human being’s relation to God. Secondly, narrative mediation questions the existence of objective facts. All knowledge is therefore understood as derived from a perspective, and is relative to a particular culture and social context. This has implications for mediators as they listen to the stories of participants.

‘... from a social constructionist perspective we are not just interested in hearing the facts and establishing the parties’ interests in a mediation. We are also interested in the cultural and historical processes by which these facts and interests came to be.’<sup>120</sup>

Drawing on the work of Ludwig Wittgenstein in this model of mediation language is understood as a precondition of thought.<sup>121</sup> The way in which we think, the concepts and categories are provided for us in language. Words are not regarded as simply neutral tools to describe an event, but construct the event.<sup>122</sup> ‘Language “speaks” us into existence and constitutes our personhood.’<sup>123</sup> Winslade and Monk argue that this idea of language has profound implications for mediation.

‘If language can be understood as a meaning-making activity rather than as a passive reporting function, meaning cannot be chosen arbitrarily. Language is then seen as having the function of permitting or constraining the options that might be available to us. The significance of these ideas for mediation practice is profound. The traditional psychological separation of talk and behaviour becomes irrelevant. Instead, we can think of the talk we create in mediation as actually constructing experience... Our language, however, is not of our own making. We inherit much of it from the cultural world into which we are born. It is therefore not so easy from a social constructionist perspective to view individuals as prime movers in their own worlds. Thus the individualistic perspective of the liberal-humanist tradition, out of which problem-solving models emerge, can no longer be viewed as a value free, culturally neutral perspective. We can then make room from models that build on different assumptions-for example, relational and communitarian or collectivist

descriptions of what it means to be a human being.’<sup>124</sup>

Winslade and Monk argue that if persons are constructed in language and discourse, then interactions between people are placed centre stage, rather than attitudes, motivations or social structures. The world, including the internal world of the individual, is understood as constructed in these interactions. Language is therefore understood as *performative* and its use a form of social action.

‘The implication of this view is that mediation is a site where social action is always taking place rather than just being talked about. It is where lives and relations are being produced and reproduced. It is where cultural stories are performed and enacted. It is also where social or institutional change can take place. Thought of in this way, mediation is more than just a place where particular interpersonal problems get resolved and some kind of social homeostasis gets restored. It is where we should take care to talk with an eye on the kind of world we are creating, because we are always in the process of creating.’<sup>125</sup>

The strength of the narrative approach lies in the use of stories. Participants are encouraged to tell their stories in their own words, as against a court process where lawyers retell the participant’s story. There is room in this model of mediation for the story of a person of faith to be told and for the perspective and issues of faith to be discussed. The mediator will be attentive to the meanings conveyed through the stories, and will work to draw out underlying dominant cultural stories that can have an important impact on the construction and continuation of the conflict. There is space and a mechanism to enable the mediator to challenge dominant cultural narratives. The mediator will also be aware that she is not a neutral observer, and that her own cultural biases can colour the mediation process. As a result the mediator will ascertain whether a party requires a spokesperson and/or a co-mediator who is sensitive to his or her culture. As the parties make their own decision there will be room for the faith perspective of a party to be heard and taken into account in the decision-making process. This model of mediation is much more sensitive and responsive to cultural issues, and therefore faith issues than either a court process, or other models of mediation.

The critiques of narrative mediation tend to be aimed at its post-modern approach. I have discussed these in more detail in Chapter 3 Section V but would just make the following points. One concern is that the inherent subjectivity represents, “a sort of “anything goes” aesthetic, relativistic chaos [and] abandonment of shared ideals”.<sup>126</sup>

Another is that if the client's unique viewpoint is "privileged" then the "truth" is no longer fixed and knowable, instead, the "truth" becomes the client's view of reality. The concern here is that it will lead to ethical anarchy, and that therapeutic interventions and their solutions will not be guided by objective criteria.<sup>127</sup> Post-modernists, on the other hand view the inherent subjectivity as strength.

‘ It deposits us on a different (if no longer solid) ground, a ground that offers new possibilities for staging resistance to the damaging effects of social, cultural, and political dominant narratives and for inviting subjects to write for themselves more empowering less subjugated narrative.’<sup>128</sup>

But can mediators combine the different normative approaches or models of mediation? Bush and Folger argue that ‘combining models is not possible, because of the incompatible objectives of the different models and the conflicting practices that flow from these diverse objectives.’<sup>129</sup> They point out, for example, that it would be impossible for a mediator to encourage the disputants to make their own decisions and at the same time substitute his or her judgement. I would argue that although some models and approaches are clearly incompatible it might not be quite as clear-cut as they would have us believe. Stitt, for example, warns that a strict demarcation between a “rights-based” and “interest-based” approach can be deceptive because mediators who focus on the disputants’ interests and needs may also take time to consider the disputants’ legal rights and the consequences of not reaching agreement. Whereas, mediators who focus on rights may also consider the parties needs and interests when evaluating the dispute.<sup>130</sup> Toreen Hansen, writing about narrative mediation likens the ‘unique outcomes’ of Winslade and Monk’s narrative model to the ‘recognition shifts’ that appear in Bush and Folger’s transformative model. Hansen also argues that the narrative model converges at one point with the “problem-solving” approach.<sup>131</sup> So while some models and approaches are clearly incompatible, some models do seem to incorporate elements of other models.

Before I turn to discuss the advantages and disadvantages of mediation I want to return to the models of mediation found in the New Testament teachings of Jesus and the Apostle Paul and compare them with modern concepts of mediation. The concept of mediation envisaged in New Testament Teaching differs in several key respects from modern models of mediation. To begin with, New Testament teaching envisaged mediation being employed in communities where there was a high level of shared beliefs and values. Mediation was part of a new way of living that embodied an ethic of

grace and forgiveness. Today mediation is one of a number of alternative methods of dispute resolution. It is employed in communities where there are a wide range of values and beliefs, and where recourse to law is widely accepted, even by Christians. The New Testament teachings indicate that the root cause of conflict is sin, and that this causes a person to become alienated from God, self and others. The way in which Christians are taught to address sin and alienation is through confession, repentance and forgiveness. Modern models of mediation understand conflict in many different ways. The transformative model is closest to the New Testament approach as it acknowledges that the negative effects of conflict involve alienation from self and others and attempts to address the causes. However, the transformative approach does not understand these negative effects of conflict as caused by sin, and it seeks to address alienation in a different way to that of Christian teaching. Bush and Folger clarify the relationship of the model to spiritual issues.

‘Although the premises underlying this model of practice are consistent with some beliefs and worldviews of religious individuals or large communities of faith, these premises do not specifically derive from religious or spiritual values.’<sup>132</sup>

In the Hebrew Bible and New Testament the human person is envisaged both as an individual who is responsible before God, and as a social being capable of relating to God, self and others. The evaluative and facilitative models focus mainly on the view of human beings as autonomous individuals with rights or needs. The narrative and transformative models view human beings as being both autonomous individuals and social beings capable of relating to self and others. The transformative model tries to understand the underlying causes of conflict and acknowledges that conflict can have a negative effect on individuals that it describes as alienation. It understands human beings as able to transform conflict through their own resources. This can be contrasted with Christian anthropology that understands human beings as deeply corrupted by sin, and only transformed through God’s redeeming power. The teaching of Jesus urges a face-to-face and dialogic approach to resolving conflict and an emphasis is placed on mending the relationship between the parties. Most modern models of mediation offer some opportunity for face-to-face discussion but not all are focused on mending the relationship between the parties. In fact, in some instances mediation is employed to end a relationship. Only the transformative and narrative models specifically focus on mending the relationship. The transformative model not only advocates a face-to-face dialogic approach, but also regards this as moral conversation and capable of healing a

relationship. This has led to the view that transformative mediation is only appropriate if there is an ongoing relationship. Bush and Folger however, argue that this is not the case because ‘the transformative approach assumes that all interactions between people carry relationship significance, for however long their interactions last.’<sup>133</sup> Finally, the Apostle Paul urged Christians who could not settle a dispute to consider appointing a wise Christian from within the community, to act as a mediator. However, in modern models of mediation it is now often either a lawyer or a professional mediator who will help to resolve disputes. Consequently, Christians and persons of other faiths cannot expect that a mediator will necessarily understand or be sympathetic to their faith. Only the narrative model specifically acknowledges that there may be a need to appoint a spokesperson or co-mediator who is sensitive to the cultural needs of the disputants. However, Roberts argues that in family mediation:

‘Mediators have a responsibility to ensure that they understand and respond appropriately to the impact of cultural difference on mediation. One approach to this emphasizes the need for mediators to share the cultural and ethical norms of the disputants, and therefore to come from the same cultural background and community, exploring and adapting indigenous forms of mediation where appropriate. Another approach argues that with training, a single group of mediators can work with a variety of cultural groups. A third approach recommends the combination of the two, recognising that further research is necessary.’<sup>134</sup>

This would seem to point to a need for representatives of faith communities to become involved in the mediation process when a dispute involves issues of faith, either as a mediator or co-mediator, or as a spokesperson for a disputant who is from his, or her, faith community.

### Section III - Advantages and disadvantages of mediation for persons of faith

#### a) Advantages

There are a number of advantages to mediation for persons of faith, although the exact extent of these will depend on the mediator and the model of mediation that is employed. First, mediation is an informal process and there are no legal rules relating to inadmissibility of evidence. What this means in practice is that disputants are able to define the dispute in their own terms. It does not have to be framed in purely legal terms and legal norms, because there is no issue about the “inadmissibility” of evidence.<sup>135</sup>

Other issues that the law deems irrelevant, whether they are emotional, ethical or faith-based can be discussed. What this means for a person of faith is that there should be room in the mediation process for her to tell her story in her own words. This may well involve explaining issues of faith that are meaningful and important to her, and that specifically relate to the conflict, and that have affected her decision. It may well be that this is the first time that a person of faith has had the opportunity to do this, and has been listened to uninterrupted. It may also be the first time that the other disputant has heard the story and been given the opportunity to understand the perspective and point of view of the person of faith. This is an important advantage for persons of faith over legal proceeding, because mediation can encompass issues relating to law, ethics and faith, as opposed to legal proceedings that tend to focus on legal issues and legal norms. The process of the disputants telling their stories opens up a space not only for beliefs, values, and perceptions to be vocalised, but also for emotions to be vented. Often, this is just what is needed to diffuse a conflict situation. The role of the mediator is not to stifle these emotions, but to allow them to come out in such a way that facilitates resolution of the dispute.<sup>136</sup> The opportunity to express emotions is also an important advantage over legal proceedings, provided it is not prolonged or excessive, and provided that it is not allowed to impede the mediation process.<sup>137</sup>

Mediation provides a way through which a mediator can facilitate communication and understanding between the disputants. What emphasis a mediator will place on the perceptions and faith of a person will vary depending on the mediator and the model of mediation. More emphasis will be placed on them in narrative mediation and less in evaluative. The perceptions of the disputants are regarded by some mediators as being crucial in defining the issues and in finding a resolution to the dispute.

‘Nor is it the object of mediation to challenge the perceptions of the parties. On the contrary, the parties are regarded as competent both to define the issues for themselves and to come to their own decisions. Their perceptions are seen as essential to an accurate understanding of their dispute and its context.’<sup>138</sup>

Similarly, the emphasis that is placed on the meanings in the disputants’ stories will vary depending on the mediator and the model of mediation. Mediators employing the evaluative model will focus more on the facts and legal criteria, while those employing facilitative mediation will focus on the disputants’ needs, whereas mediators who employ narrative mediation will focus more on the meaning in the story.

‘The mediator, on the other hand, affirms the supremacy of the parties’ meanings and decision-making authority. The parties’ control over the

definition of the issues is fundamental to their control of the decision-making process and its outcome. One of the first tasks of the mediator is to gain an understanding of the issues as they are perceived by the parties themselves. This means giving paramount worth to the perception, feelings and meanings of the parties. The mediator can have no privileged perspective on how to view and interpret experience. The skill of the mediator must lie in facilitating the crucial exchanges of accurate and constructive information that lead, through adjustments of expectations and preferences, to greater understanding, co-ordination and order, and eventually to a settlement of the dispute.<sup>139</sup>

The cultural awareness and sensitivity of the mediator will depend on the mediator and the model of mediation. Mediators who employ narrative mediation are most likely to be culturally aware, and are most likely to enquire whether a disputant wants a co-mediator or spokesperson who is sensitive to his or her cultural or faith needs. A person of faith is therefore most likely to have the opportunity to request that a representative of her faith community acts as a co-mediator in narrative mediation. Mediators in all models of mediation are likely to allow a representative of a faith community to act as a spokesperson for a person of faith. But the emphasis placed on faith issues will depend on the individual mediator and the model of mediation that is employed.

Disputants in mediation make decisions jointly, except in evaluative mediation where the mediator makes the decision. Joint-decision-making is an advantage for persons of faith as in theory, it would provide room for the perceptions and faith of a disputant not only to be heard, but also to enter and be accorded some weight in the decision-making process.

A further advantage of mediation over court proceedings for Christians is that mediation has its roots in the New Testament teaching of Jesus and the Apostle Paul. For a Christian who wants to be faithful to this teaching and does not want to go to law, mediation provides a way of settling disputes. But Christians should be aware that the process of mediation outlined in the New Testament is very different from modern concepts of mediation. The point of the New Testament teaching on mediation was that disputes between Christians should be settled within the Christian community. All too often the disputes that end up in the courts today involve believers in dispute with those who are not Christians and who may have very different perceptions, values and beliefs. Paul envisaged a wise Christian mediating between two Christians in dispute. Whereas, now Christians will find that the person who mediates in their disputes is a professional mediator, who may or may not be a Christian, or may be a person of another faith,

agnostic or atheist. If a Christian seeks mediation and wants a Christian mediator then they would probably be well advised to employ a mediator who uses narrative mediation. This way they could at least request that a co-mediator is appointed who is a Christian and who is sympathetic to their issues of faith. Paul would have expected any dispute between Christians to be settled on the basis of biblical principles whereas, disputes today between believers and non-believers will not be based on, or be restricted to biblical principles.

## b) Drawbacks and critiques of mediation

Mediation is, in most instances, a voluntary process. Consequently, one party to a dispute may not agree to participate in mediation. The only way around this stumbling block is to make mediation mandatory. English family law provides an example of a move from a voluntary to a mandatory system of mediation. From the 6 April 2011 it will be mandatory for all divorcing couples in England and Wales to be referred to mediation to resolve most disputes, before they will be allowed to use the courts.<sup>140</sup> Exceptions are cases involving domestic violence or child protection, which will still go to court. The Justice Minister Jonathan Djanogly explained that the reason for the move is that mediation is a “quicker, cheaper and more amicable alternative” to the over-worked family courts. The minister added that statistics show that more than two-thirds of couples that use mediation are satisfied with the results, and it gives parties the opportunity to take their futures in their own hands.<sup>141</sup> Family law therefore provides an example of not only mediation working in practice but also a move to a mandatory process. In theory, therefore, it would be possible for some cases that involve issues of faith to be referred to mandatory mediation before the parties are allowed to use the courts.

Another drawback is that mediation may not succeed and the parties may still end up in court. Whilst this is true the statistics point to a high success rate in mediation. Stitt quotes statistics that indicate that up to 70-80% of cases that go to voluntary mediation settle,<sup>142</sup> and that 40% of mandatory cases settle at mediation, or within 10 days of mediation.<sup>143</sup> Bush and Folger provide similar statistics. They note that of the twenty thousand cases that were mediated over a two-year period in the U.S. Postal Service REDRESS programme using transformative mediation, 80% were closed. They explain that ‘this finding has generally been interpreted to mean that parties have dealt with

their conflict satisfactorily, and therefore did not feel that they needed to bring the case to an additional forum.<sup>144</sup> But even in cases that do not settle there can still be benefits to mediation. The mediation process provides space for the disputants to tell their story and explain their perspective, and also to listen and maybe hear for the first time the other parties' stories. It provides the opportunity to gain understanding of the issues and the perspective of the other party. This process can be beneficial for all parties but particularly so for a person of faith who would have space to explain the issues of faith that are important and meaningful to him or her. The negotiation process may also enable the parties to narrow the issues that they take forward to a court hearing, and limit the damage done to the relationship.<sup>145</sup>

Mediation is held in private so the process and outcome are not open to public scrutiny - unlike court proceedings that are generally open to the public. A lack of transparency and accountability can lead to the danger of an abuse of the process of mediation in two particular areas. The first relates to the influence of mediators on the mediation process. Roberts highlights both the potential for creative opportunities, and the risks of manipulation in mediation.

‘Mediators need to face squarely the potential that they have to affect the substance of the communication by their control over the process of that communication (Silbey and Merry, 1986).<sup>146</sup> Possibilities exist at every level of intervention (from the most minimal to the strongest) for the mediator to exert influence – in reformulating or rephrasing, in editing, in the kind of information and the way in which it is elicited, in stressing some matters and ignoring or obstructing others, and especially in the making of new suggestions. While this potentially presents the most creative of opportunities for the mediator, there are also serious risks. It is because the issue of party authority is central to mediation that the dangers of manipulation need to be recognised and restricted. .... Intervention strategies can range from the most tentative, indirect and unobtrusive to the most directive and dominating. The risks of manipulation of the negotiation process by the mediator increase along the same continuum. The greater the strength and scope of intervention the greater the opportunity for manipulation by the mediator and for exceeding their proper role.’<sup>147</sup>

There are others who argue that mediation is a flawed process for dealing with disputes because it is so vulnerable to the mediator's biases, prejudices, and preconceptions, and they raise serious questions about whether mediators can be neutral and separate from their own cultural histories.<sup>148</sup> Bush and Folger express the concern that a mediator could impose his or her own views on the parties.

‘When conflicts are mediated, social justice issues can be suppressed, power imbalances can be ignored and outcomes can be determined by covertly imposed third-party values.’<sup>149</sup>

They acknowledge, however, that other dispute resolution processes can also suffer from the imposition of the viewpoints of professionals. Winslade and Monk paraphrasing their comments note that ‘a court hearing or negotiation process, are so intertwined with dominant cultural practices and implicit cultural knowledge that they too are likely to reproduce social injustice.’<sup>150</sup> I would argue that this is certainly the case for some persons of faith in the English law courts as I explained in Chapter 1.

Failures in mediation practice have been found to be the result of inadequate training.<sup>151</sup>

Roberts highlights the need for training to include cultural awareness:

‘Training needs to include anti-discriminatory practice and the study of the impact of culture on disputes, both because mediation practice should fulfil its potential to the wider community by being accessible and by meeting specific cultural needs, and because of the likelihood of increasing numbers of cross cultural mediations, either where the disputants come from different cultures or where the mediator is from a culture different from that of one or both of the parties.’<sup>152</sup>

Safeguards against poor practice begin with adequate training, and include continuing professional development, registration, codes of practice, complaints procedures and, where necessary, disciplinary procedures and sanctions.<sup>153</sup> Whilst none of these can completely rule out failures in practice, they can ensure a level of competence and awareness of good practice, which reduce the likelihood of bad practice. It is also worth noting that failures in practice can and also do happen in the legal profession.

Another criticism of the private nature of mediation relates to the issue of power imbalances. The underlying concern here is that where there are serious power imbalances there is a danger that the more powerful party in mediation will take advantage of, or apply pressure to the weaker party and thereby abuse the process. This, in turn, raises questions about how we understand and define power, and what action, if any, that a mediator should take in such cases. Whether or not a mediator intervenes depends on the exact nature of the power imbalance, and whether or not the mediator takes the view that it is her role to intervene. It will also be influenced by the model of mediation that a mediator employs, because power can be understood in a variety of ways, and this is reflected in the different models of mediation.

Power is often understood as a commodity or property that an individual possesses such as physical strength, money, knowledge, experience, position in an organisation, ability

to communicate effectively, race and gender.<sup>154</sup> This is based on a structural and hierarchical understanding of power, where those at the top have greater power and influence in a conflict than those at the bottom.<sup>155</sup> If the nature of the power imbalance is physical strength and there is a danger that there will be threats of violence mediators are generally agreed that they have an ethical responsibility to stop the mediation, or if the threats come to light prior to mediation then the mediation should not be commenced. This is because it is important that both disputants should be able to make decisions free of fear and duress.<sup>156</sup> But where other types of power imbalance exist the situation for mediators is more problematic. For example, what if the power is economic? Unequal resources may lead one disputant to employ a lawyer who can amass and analyse information and negotiate on her behalf, whereas the other disputant may have to negotiate for himself. It can lead to a disputant having to settle for less, because he has an urgent need for the monies, or because he cannot afford for the matter to go to litigation.<sup>157</sup> What can or should a mediator do? Even if the dispute ends up in court there may be an economic disparity between the disputants that favours the disputant who can afford to employ the more experienced legal team. Likewise if power is understood as knowledge or the ability to communicate effectively then is it the place of the mediator to help the disputant who is a poor advocate? In court a judge may also be faced by a similar situation, where one advocate is more experienced than another. If power relates to gender then a judge, as well as a mediator, can be affected by patriarchal narratives. At least with narrative mediation there is an awareness of the influence on cultural narrative in conflict, and a process whereby dominant narratives can be gently questioned and challenged. Another point to note is that when power is viewed as a commodity the mediator will be viewed as possessing considerable power by virtue of her role. But a potential difficulty for the mediator is that if she tries to balance power between the disputants the disputants may no longer view her as neutral or impartial.<sup>158</sup>

Another way of understanding power is found in the narrative model, which draws on a poststructuralist analysis of power.

‘From this perspective power does not so much adhere to structural positions in hierarchical arrangements as it operates in and through discourse. Discourses offer people positions of greater or lesser entitlement. Within particular discourses, some positions are rendered more legitimate or more visible and others subjugated. Some voices get heard and others are silence. But of course discourses are products of the shifting, changing, unstable conversations that take place in communities and language worlds. As discourses shift and change,

so the discursive positions of legitimacy and marginalization ebb and flow. Some people may be positioned in places of influence and privilege within a particular discourse in one context, or even into another conversation. People regularly mount challenges to these positions too. Thus power is always unstable from a structuralist perspective. It is more a relational phenomenon than a commodity or quantity possessed by and individual.<sup>159</sup>

Power is therefore understood in the narrative models as relational and as being everywhere. Consequently, social life is seen as a network of power relations. In this model ‘mediators can recognize that those who belong to apparently disadvantages groups can have access to courses of action that can significantly influence a relationship.’<sup>160</sup> No one is understood as being completely powerless or as having no ability to act. Mediators who employ narrative mediation would rather talk about how a person can resist the operation of power in his or her life. It is accepted that there may never be equality of power because this rests on the assumption of power as an individualistic commodity-based idea. Rather, power relations are viewed in terms of an ongoing product of struggles and contests.<sup>161</sup>

‘These relations are constantly being produced and reproduced, even in the middle of mediation. As people express resistance to a particular power relation, that relation starts to change, even in the tiniest ways. This process of expressing resistance develops a sense of agency in people who have felt silenced and marginalized. Viewing agency from this perspective acknowledges that there are likely to be opportunities to act in apparently powerless circumstances in a variety of settings at different times. Even the most downtrodden or defeated person can demonstrate some level of psychological resistance to an oppressive or constraining circumstance.’<sup>162</sup>

But should a mediator intervene when there is a severe imbalance of power between the parties? It will clearly depend on how power is understood, and on the particular mediator. Some mediators take the view that if there is a severe power imbalance that a weaker party may not be able to make an informed decision, or may make a decision based on fear and that the only way fair and just way to deal with such a dispute is through the legal system. Whereas others argue that the court system favours those with power and money and it is naïve to suggest that the disempowered will be protected, and parties should be allowed the freedom to choose to mediate if they wish to do so.<sup>163</sup>

There are, however, two practical courses of action that a mediator could take to deal with imbalances in power. First the mediator could make sure that those who are lacking in power are assisted to communicate effectively, and so that they can make informed decisions. This may mean that the mediator encourages a disputant to seek the

assistance of a lawyer, social worker, friend or relative.<sup>164</sup> I would also argue that it could include a mediator appointing a co-mediator who understands the faith perspective of a person of faith. Second, in order to avoid one party overpowering the other verbally the mediator could meet with the parties separately initially, and if there is a joint session the mediator could set out and enforce strict ground rules. As a last resort the mediator could prevent direct contact between the parties.<sup>165</sup>

Whilst it might be preferable to hold mediation in public because of the danger of mediator dominance, or power imbalances between the parties, there are some circumstances where a private hearing might be advisable. Chris Ham, for example, has argued that some healthcare cases, particularly those involving children, might be better dealt with outside of the glare of publicity created by the national media because it makes negotiations between healthcare teams and parents that much more difficult.<sup>166</sup> Public hearings can heap additional pressures on all parties including judges, at a time and in a way that is not helpful, and which creates an environment that is not conducive in which to make life and death decisions. It may also be the case that disputants may prefer a private hearing rather than air the details of their dispute in public. There may also be solutions that parties might be prepared to discuss in a private hearing that they would not be prepared to discuss in public in court.<sup>167</sup> A strict demarcation between private and public can, however, be misleading, because there are often private negotiations between the lawyers of the parties in dispute that effect a legal settlement that are not made public.<sup>168</sup>

Another potential drawback to mediation for persons of faith is that it is no longer a process that is completely distinct from the legal system or legal profession. For example, evaluative mediation is very similar to court proceedings. A person of faith will be able to tell her story and this may well facilitate communication and understanding with the other disputant. However, the mediator in evaluative mediation will make a decision for the disputants and if he is a solicitor or retired judge then he is likely to focus on legal issues and norms. Issues of faith will probably be regarded as 'irrelevant' in the decision-making process as is illustrated in the case of Baby MB set out in Chapter 1. It is important therefore that persons of faith are made aware of the different types of mediation, and that if the dispute involves issues of faith that they choose their mediator wisely. The most hospitable models of mediation for a person of faith are narrative and transformative mediation. In narrative mediation a person of faith

has the chance to request the appointment of a co-mediator who understands, and is sympathetic to her faith position.

## Conclusion

In this chapter I have examined how conflict is understood and addressed through the process of mediation, and I have considered whether mediation might provide an alternative way of dealing with disputes that involve issues of faith, rather than the disputants having to go to court. Also whether in mediation the perspective and faith of disputants would not just be heard and respected, but also taken into account in the decision-making process.

In Chapter 1 I argued that one of the reasons why persons of faith experience difficulties in the English law courts is because conflict is understood and addressed in narrow legal terms. In this chapter I outlined four models of mediation: evaluative, facilitative, transformative and narrative. Each model has a different normative approach to mediation and has different views on conflict. The evaluative model is the closest to a 'rights-based' approach, which is similar to court proceedings in that it tends to understand conflict in legal terms and the mediator's decision is based on legal criteria. However, what the facilitative, transformative and narrative models reveal is that conflict can be understood and addressed in much broader terms than just legal criteria and legal norms. This, in theory, provides the possibility that issues of faith could be heard and discussed, and given some weight in the decision-making process.

As mediation is an informal process and there are no legal rules relating to inadmissibility of evidence, in theory, a person of faith could have room to tell her story and explain her faith perspective in all four models of mediation. However, I have argued that in practice some mediators and some models of mediation are likely to be more accommodating than others. The evaluative model is closest to court proceedings and the focus is likely to be on legal criteria, so it is less likely to be accommodating to a person of faith. On the other hand, a mediator using a narrative model is likely to be sensitive to issues of culture and is therefore likely to be most accommodating to a person of faith. A person of faith is likely to be able to request that a representative from her faith community act as a spokesperson for her in all models of mediation. But a

representative from a faith community is most likely to be able to act as a co-mediator in a narrative model.

In mediation the disputants generally make decisions jointly, except in the evaluative model where the mediator makes the decision. Whether issues of faith will be allowed to enter and be given weight in the decision-making process will initially depend on the model of mediation. In the case of evaluative mediation if legal criteria are used in the decision-making process then it is unlikely that issues of faith will be accorded weight. In other models of mediation it will depend on the disputants and the circumstances of the dispute as to whether issues of faith are accorded weight in the decision-making process.

Finally, I concede that mediation may not, in some instances, be available, or may not succeed, or may not be appropriate. This is because if mediation remains voluntary one party may not agree to participate and so there may be no alternative to court proceedings. While there are reports of high success rates of up to 80 per cent with mediation there will inevitably be some cases that are not resolved and will end up in court. Finally, family law illustrates that mediation is not appropriate in some cases, for example, where there is a threat of violence, or where there are issues concerning child protection. In these instances an unresolved dispute may well end up in the law courts and I will explore the issues surrounding such cases in Chapters 5 and 6.

## Notes

- <sup>1</sup> Andrew Woolford and R.S.Ratner, *Informal Reckonings* (Abingdon: Routledge-Cavendish, 2008), 40; Dr. Sue Prince, *Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court*, University of Exeter, March 2004. <http://www.adr.civiljusticecouncil.gov.uk/updocs/client0/ExeterResearch.doc>. (accessed February 2010). Prince notes that ‘Historically mediation was used by the Chinese to resolve local difficulties. Parties were considered to have failed if they had to resort to court to solve their problem. A Chinese proverb states, “It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit”.’ Prince cites J.A.Cohen, ‘Chinese Mediation on the Eve of Modernisation’ 54 *Cal Law Rev* (1966), 1201.
- <sup>2</sup> Prince, *Court-based Mediation*.
- <sup>3</sup> Woolford and Ratner, *Informal Reckonings*, 40.
- <sup>4</sup> Woolford and Ratner *Informal Reckonings*, 40, cite R. Michalowski, *Law, Order and Crime* (New York: Random House, 1985).
- <sup>5</sup> Woolford and Ratner, *Informal Reckonings*, 40 cite R. Kueneman, ‘The origins and role of law in society’, in R. Linden ed. *Criminology: A Canadian Perspective, Vol.5* (Toronto, ON: Thomson-Nelson, 2004), 20-54.
- <sup>6</sup> Pauline Bell and Pauline Jordan, *Conflict in the Local Church* (London: Scripture Union, 1992), 137-138.
- <sup>7</sup> Jerold Auerbach, *Justice Without Law* (Oxford: Oxford University Press, 1984).
- <sup>8</sup> *Ibid.*, 19-46.
- <sup>9</sup> *Ibid.*, 21 note 3 Auerbach cites Kenneth A. Lockeridge, *A New England Town: The First Hundred Years* (New York, 1970), 4-7; John Demos (ed.), *Remarkable Providences: 1660-1760* (New York, 1972), 14-15; Thomas Bender, *Community and Social Change in America* (New Brunswick, 1978), 63-65; Winthrop’s sermon in *The Puritans*, 2 vols. eds. Perry Miller and Thomas Johnson (New York, 1963), I: 198.
- <sup>10</sup> Auerbach, *Justice Without Law*, 23, note 6. Auerbach cites John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York, 1970), 9; William E. Nelson, “The Larger Context of Litigation in Plymouth County, 1725-1825”, 29-31 in *Plymouth Court Records, 1689-1859*, ed. Konig: Emil Oberholzer, Jr., *Delinquent Saints* (New York, 1956), 10, 32-34, 135, 188-89.
- <sup>11</sup> Auerbach, *Justice Without Law*, 23, note 7. Auerbach cites Oberholzer, Jr., *Delinquent Saints*, 33-35; Nelson, “The Larger Context” 29-31 in *Plymouth Court Records, 1689-1825*, ed. Konig: Demos, *Remarkable Providences*, 238.
- <sup>12</sup> Auerbach, *Justice Without Law*, 28-30.
- <sup>13</sup> Auerbach, *Justice Without Law*, 30 note 15. Auerbach cites Ezra Michener, *A Retrospect of Early Quakerism*, (Philadelphia, 1860), 269-71; Tolles, *Meeting House and Counting House* (New York, 1963), 251-252. For a hostile interpretation of Quaker antilegalism Auerbach cites Daniel J. Boorstin, *The Americans: The Colonial Experience* (New York, 1958), 68. Boorstin trained as a lawyer, finds it odd that Quakers preferred arbitration to litigation.
- <sup>14</sup> Auerbach, *Justice Without Law*, 30 note 16 Auerbach cites H. Clay Reed and George J. Miller (eds.) *The Burlington Court Book: A Record of Quaker Jurisprudence in West New Jersey, 1680-1707* (Washington D.C., 1944), xi.
- <sup>15</sup> Auerbach, *Justice Without Law*, 30 note 17 Auerbach cites Tolles, *Meeting House and Counting house*, 64-65, 75-76; George S. Odiorne, “Arbitration and Mediation Among the Early Quakers,” *Arb. J* 9(1954), 164-65; Reed and Miller, *Burlington Court Book*, xii, xlvii, 2, 29, 39, 44, 46, 70, 299, 339.
- <sup>16</sup> Auerbach, *Justice Without Law*, 34-35.
- <sup>17</sup> *Ibid.*, 35.
- <sup>18</sup> *Ibid.*, 43.
- <sup>19</sup> Anthony Bradney and Fiona Cownie, *Living Without Law* (Aldershot: Dartmouth Publishing Company, 2000).
- <sup>20</sup> Frank E. A. Sander, “Alternative Methods of Dispute Resolution: An Overview.” University of Florida Law Review 37 (1985): 1, in *Alternative Dispute Resolution* ed. Michael Freeman (Aldershot: Dartmouth Publishing, 1995).
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Marian Roberts, *Mediation in Family Disputes* 3<sup>rd</sup> ed. (Aldershot: Ashgate Publishing Company, 2008), 2.
- <sup>23</sup> Roberts, *Mediation in Family Disputes*, 2 cites C.J. Menkel-Meadow, ‘Remembrance of things past? The relationship of past to future in pursuing justice in mediation,’ *Cardozo Journal of Conflict Resolution*, 5 (2004): 97, 100.

- <sup>24</sup> Marion Roberts, 'Voluntary participation in family mediation,' *Family Law* 36 (2006): 57-62.
- <sup>25</sup> *Ibid.*
- <sup>26</sup> *Ibid.*
- <sup>27</sup> Roberts, *Mediation in Family Disputes*, 236-241.
- <sup>28</sup> *Ibid.*, 98-100.
- <sup>29</sup> Prince, *Court-based Mediation*. 'It has also been defined narrowly as '... the intervention, by invitation of the parties, of an experienced, independent and trusted person [who] can be expected to help the parties settle their quarrel by negotiating in a collaborative rather than adversarial way.' Prince cites M.Noone, *Mediation* (London: Cavendish Publishing, 1996).
- <sup>30</sup> Carole J. Brown, "Facilitative Mediation: The Classic Approach Retains its Appeal." *4 Pepperdine Dispute Resolution Law Journal* (2003-2004): 279-296.
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*
- <sup>35</sup> Alan J. Stitt, *Mediation: A Practical Guide* (London: Cavendish Publishing Limited, 2004), 2.
- <sup>36</sup> Sue Prince, Exeter University *Seminar notes February 2010*.
- <sup>37</sup> Brown, "Facilitative Mediation" *4 Pepperdine Dispute Resolution Law Journal* (2003-2004): 279-296.
- <sup>38</sup> Sue Prince, Exeter University *Seminar notes February 2010*.
- <sup>39</sup> Brown, "Facilitative Mediation: The Classic Approach Retains its Appeal." cites Lela P Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate,' *FLA. St. U. Law Review* 24 (1997): 937-938
- <sup>40</sup> *ibid*; Stitt, *Mediation*, 3.
- <sup>41</sup> Woolford and Ratner, *Informal Reckonings*, 49.
- <sup>42</sup> Brown, "Facilitative Mediation" *4 Pepperdine Dispute Resolution Law Journal* (2003-2004): 279-296.
- <sup>43</sup> *Ibid.* Brown cites Roger Fisher, William Ury and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In* 2<sup>nd</sup> ed. (New York: Penguin Books, 1991) as the writers who advanced the underlying theory of the "interest-based" approach.
- <sup>44</sup> Brown, "Facilitative Mediation" *4 Pepperdine Dispute Resolution Law Journal* (2003-2004): 279-296.
- <sup>45</sup> Stitt, *Mediation*, 4.
- <sup>46</sup> Stitt, *Mediation*, 3; Brown, "Facilitative Mediation".
- <sup>47</sup> Brown, "Facilitative Mediation".
- <sup>48</sup> Stitt, *Mediation*, 4.
- <sup>49</sup> Sue Prince, Exeter University *Seminar notes February 2010*.
- <sup>50</sup> Stitt, *Mediation*, 4.
- <sup>51</sup> Woolford and Ratner, *Informal Reckonings*, 49.
- <sup>52</sup> Brown, "Facilitative Mediation".
- <sup>53</sup> Prince, *Court-based Mediation*.
- <sup>54</sup> John Winslade and Gerald Monk, *Narrative Mediation* (San Francisco: Jossey-Bass Publishers, 2000), 32.
- <sup>55</sup> *Ibid.*
- <sup>56</sup> Winslade and Monk, *Narrative Mediation*, 36 note 11 cites Relationship Services, New Zealand National Working Party on Mediation, *Guidelines for Family Mediation: Developing Services in Aotearoa* (Wellington, New Zealand: Butterworths, 1996).
- <sup>57</sup> Winslade and Monk, *Narrative Mediation*, 33.
- <sup>58</sup> *Ibid.*
- <sup>59</sup> *Ibid.*, 36; Winslade and Monk cite J.Burton, *Conflict: Resolution and Prevention* (New York: St. Martin's Press, 1990), 204.
- <sup>60</sup> Winslade and Monk, *Narrative Mediation*, 36; cite J.Rifkin, J.Millen and S.Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality," *Mediation Quarterly*, 9(2) (1991): 51.
- <sup>61</sup> Winslade and Monk, *Narrative Mediation*, 36; cite L.Putman, "Challenging the Assumptions of Traditional Approaches to Mediation," *Negotiation Journal*, 10(4) (1994): 339.
- <sup>62</sup> Winslade and Monk, *Narrative Mediation*, 36; cite J.P.Folger and R.A.Bush, "Ideology, Orientations to Conflict, and Mediation Discourse," in J.Folger and T.Jones (eds.), *New Directions in Mediation: Communication Research and Perspectives* (Thousand Oaks, California: Sage, 1994).
- <sup>63</sup> Winslade and Monk, *Narrative Mediation*, 36; cite H.Astor and C. Chinkin, *Dispute Resolution in Australia* (Sydney, Australia: Butterworths, 1992).
- <sup>64</sup> Winslade and Monk, *Narrative Mediation*, 35.
- <sup>65</sup> Robert A. Baruch Bush and Joseph P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 2005), 45-46.
- <sup>66</sup> *Ibid.*, 52.
- <sup>67</sup> *Ibid.*, 59-60.

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- <sup>68</sup> Ibid. Bush and Folger cite D.J Della Noce, "Seeing Theory in Practice: An Analysis of Empathy in Mediation," *Negotiation Journal*, 15(3) (1999): 271-301.
- <sup>69</sup> Bush and Folger, *The Promise of Mediation*, 61.
- <sup>70</sup> Ibid.
- <sup>71</sup> Ibid., 52.
- <sup>72</sup> Ibid., 65-66.
- <sup>73</sup> Ibid., 54.
- <sup>74</sup> Ibid. Bush and Folger cite Della Noce, "Seeing Theory in Practice: An Analysis of Empathy in Mediation," *Negotiation Journal*, 15(3) (1999): 271-301.
- <sup>75</sup> Bush and Folger, *The Promise of Mediation*, 54.
- <sup>76</sup> Ibid., 56, 75-78.
- <sup>77</sup> Ibid., 75.
- <sup>78</sup> Ibid., 77.
- <sup>79</sup> Ibid., 66 and 73-74.
- <sup>80</sup> Ibid., 233.
- <sup>81</sup> Ibid., 253.
- <sup>82</sup> Ibid., 254-255 Bush and Folger cite Robert P. Burns, "Some Ethical Issues Surrounding Mediation," *Fordham Law Review* (70) (2001): 709-710 who cites Hanna Pitkin, *Wittgenstein and Justice: The Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press, 1972), 151-154.
- <sup>83</sup> Bush and Folger, *The Promise of Mediation*, 218 cite L.B. Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*. (Washington, D.C: IBM Center for the Business of Government, 2003).
- <sup>84</sup> Bush and Folger, *The Promise of Mediation*, 218.
- <sup>85</sup> Prince, *Seminar notes February 2010*.
- <sup>86</sup> Ibid.
- <sup>87</sup> Bush and Folger, *The Promise of Mediation*, 225-228.
- <sup>88</sup> Toran Hansen, 'The Narrative Approach to Mediation'.  
<http://www.mediate.com/articles/hansenT.cfm> (accessed January 26, 2010). Hansen cites Gerald Monk, Guidance and Counselling. "Narrative Approaches to Therapy: 'Fourth Wave' in Family Therapy." (1996) 11: 41-47. [On-line] Abstract taken from *Wilson Web Journal Database* (1-8).
- <sup>89</sup> Winslade and Monk, *Narrative Mediation*, xii. The book *Narrative Mediation* in which their model of narrative mediation is discussed built on their earlier book - G. Monk and J. Winslade (eds.), *Narrative Therapy in Practice: The Archaeology of Hope* (San Francisco: Jossey-Bass, 1996), and the work that John Winslade and Alison Cotter presented in their chapter on narrative mediation.
- <sup>90</sup> Winslade and Monk, *Narrative Mediation*, 3.
- <sup>91</sup> Ibid.
- <sup>92</sup> Ibid.
- <sup>93</sup> Ibid., xi.
- <sup>94</sup> Ibid., 41.
- <sup>95</sup> Ibid., xi.
- <sup>96</sup> Ibid.
- <sup>97</sup> Ibid., 62.
- <sup>98</sup> Ibid., 64-68.
- <sup>99</sup> Ibid., 69.
- <sup>100</sup> Ibid., 6.
- <sup>101</sup> Ibid., 70.
- <sup>102</sup> Ibid., 69.
- <sup>103</sup> Ibid., 71.
- <sup>104</sup> Ibid., 72.
- <sup>105</sup> Ibid., 77.
- <sup>106</sup> Ibid., 74.
- <sup>107</sup> Ibid.
- <sup>108</sup> Ibid., 75.
- <sup>109</sup> Ibid., 79.
- <sup>110</sup> Winslade and Monk, *Narrative Mediation*, 79-80.
- <sup>111</sup> Ibid., 84.
- <sup>112</sup> Ibid.
- <sup>113</sup> Ibid. Winslade and Monk cite M. White, "The Externalizing of the Problem," *Dulwich Centre Newsletter*, special edition 1989, 3-21.
- <sup>114</sup> Winslade and Monk, *Narrative Mediation*, 84.
- <sup>115</sup> Ibid., 90.

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- <sup>116</sup> Ibid., 82.
- <sup>117</sup> Ibid., 91.
- <sup>118</sup> Ibid., 37.
- <sup>119</sup> Ibid., 38.
- <sup>120</sup> Ibid.
- <sup>121</sup> L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1958).
- <sup>122</sup> Ibid.
- <sup>123</sup> B. Davies, *Shards of Glass: Children Reading and Writing Beyond Gendered Identities* (St. Leonards, Australia: Allen & Unwin, 1983).
- <sup>124</sup> Winslade and Monk, *Narrative Mediation*, 40.
- <sup>125</sup> Ibid., 40-41.
- <sup>126</sup> Toran Hansen, 'The Narrative Approach to Mediation' cites Herb Wylie and David Pare, "Whose Story is it Anyway? An Interdisciplinary Approach to Postmodernism, Narrative and Therapy.", 1 (2001) 34: 153 [On line] Abstract taken from *Infotrac Journal Database* (1-14).
- <sup>127</sup> Ibid., 12.
- <sup>128</sup> Ibid.
- <sup>129</sup> Bush and Folger, *The Promise of Mediation*, 228.
- <sup>130</sup> Stitt, *Mediation*, 2.
- <sup>131</sup> Hansen, 'The Narrative Approach to Mediation'.
- <sup>132</sup> Bush and Folger, *The Promise of Mediation*, 234.
- <sup>133</sup> Ibid., 219.
- <sup>134</sup> Roberts, *Mediation in Family Disputes*, 147 and for a discussion of the subject see S. Goldstein, Cultural Issues in Mediation: A Literature Review, PCR Working Paper, (Honolulu: University of Hawaii, 1986); D.Gale, The impact of culture on the work of family mediators,' *Family Mediation* 4 (2) 1994; S.N. Shah-Kazemi, 'Family mediation and the dynamics of culture,' *Family Mediation* 6(3), 5-7 1996; S.N. Shah-Kazemi, 'Cross-cultural mediation: a critical review of the dynamics of culture in family disputes,' *International Journal of Law, Policy and the Family*, 14 (2000): 302-25.
- <sup>135</sup> Stitt, *Mediation*, 69.
- <sup>136</sup> Ibid.
- <sup>137</sup> Roberts, *Mediation in Family Disputes*, 35.
- <sup>138</sup> Ibid., 22.
- <sup>139</sup> Ibid., 23 Roberts cites P.H.Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press, 1979).
- <sup>140</sup> BBC News 23 February 2011.  
<http://www.bbc.co.uk/news/uk-12548506?print=true>
- <sup>141</sup> Ibid.
- <sup>142</sup> Stitt, *Mediation*, 7 cites M.S.Gillie, 'Voluntary mediation' 26 Trial No 10 (1990), 58.
- <sup>143</sup> Stitt, *Mediation*, 7 cites 'Ontario Mandatory Mediation Program Status Report', for the period ending 1 June 2002: Tom Altobelli, 'NSW Supreme Court makes mediation mandatory' *ADR* 3(3) (2000): 43.
- <sup>144</sup> Bush and Folger, *The Promise of Mediation*, 218.
- <sup>145</sup> Stitt, *Mediation*, 8.
- <sup>146</sup> S.S. Silbey and S.E. Merry, 'Mediator settlement strategies,' *Law and Policy* 8(1) (1986): 7-32.
- <sup>147</sup> Roberts, *Mediation in Family Disputes*, 171.
- <sup>148</sup> Winslade and Monk, *Narrative Mediation*, 48, note 28 cite J.Rifkin, J.Millen, and S.Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality," *Mediation Quarterly*, (1991) 9(2), 151.
- <sup>149</sup> Winslade and Monk, *Narrative Mediation*, 48, note 29 cite J.P.Folger and R.A.Bush, "Ideology, Orientations to Conflict, and Mediation Discourse," in J.Folger and T.Jones (eds.) *New Directions in Mediation: Communication Research and Perspectives*, (Thousand Oaks, California: Sage, 1994), 5.
- <sup>150</sup> Ibid.
- <sup>151</sup> Roberts, *Mediation in Family Disputes*, 234 Roberts cites S. Cobb and J. Rifkin, 'Rethinking neutrality: Implications for mediation practice', unpublished 1990.
- <sup>152</sup> Ibid. 234-35.
- <sup>153</sup> Roberts, *Mediation in Family Disputes*, 234-35; See also The UK Register of Mediators, Code of Practice and Complaints Procedure Mediation Services.  
[http://www.ukregisterofmediators.co.uk/attachments/003\\_UKRM%20-%20CODE%20OF%20PRACTICES%20AND%20COMPLAINTS%20PROCEDURE%20-%20Organisations.pdf](http://www.ukregisterofmediators.co.uk/attachments/003_UKRM%20-%20CODE%20OF%20PRACTICES%20AND%20COMPLAINTS%20PROCEDURE%20-%20Organisations.pdf) (accessed 21.3.2011); and Family Mediators Association, Code of Practice.  
[http://www.thefma.co.uk/about\\_the\\_fma/code\\_of\\_practice](http://www.thefma.co.uk/about_the_fma/code_of_practice) (accessed March 21, 2011).
- <sup>154</sup> Stitt, *Mediation*, 115.
- <sup>155</sup> Winslade and Monk, *Narrative Mediation*, 49.
- <sup>156</sup> Stitt, *Mediation*, 120; Roberts, *Mediation in Family Disputes*, 12; Winslade and Monk, 66-67.
- <sup>157</sup> Owen M. Fiss, 'Against Settlement,' *The Yale Law Journal*, 93 (1984): 1073-90.

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<sup>158</sup> Winslade and Monk, *Narrative Mediation*, 50.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid., 51.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid., note 32 Winslade and Monk cite T.L. Robinson and J.V. Ward, 'A Belief in Self Far Greater than Anyone's Disbelief: Cultivating Resistance Among African American Female Adolescents,' in *Women, Girls, and Psychotherapy: Reframing Resistance*, eds. C. Gilligan, A.G. Rogers and D.L. Tolman (New York: Haworth Press, 1991); T.L. Robinson and M. Hamilton, 'An Afrocentric Paradigm: Foundation for a Healthy Self-Image and Healthy Interpersonal Relationships,' *Journal of Mental Health Counselling*, 16 (1994): 327-339.

<sup>163</sup> Stitt, 121.

<sup>164</sup> Ibid., 121-122.

<sup>165</sup> Ibid.

<sup>166</sup> Christopher. Ham and Shirley McIver, *Contested Decisions* (London: King's Fund, 2000).

<sup>167</sup> Stitt, *Mediation*, 8.

<sup>168</sup> Ibid.

## Chapter 5

### Making room for faith in English legal cases

In Chapter 4 I argued that it might be possible for some disputes that involve issues of faith to be addressed through the process of mediation but I conceded that this might not be possible in all cases. In these circumstances one of the disputants might make an application to the High Court and the dispute will then be heard before a judge. Can room be made for the understandings that come from religious faith in such cases? I will begin in Section I by outlining Maleiha Malik's 'interpretive' model of law.<sup>1</sup> This is a hermeneutical approach to judicial reasoning, which, if implemented, would enable a judge to take a litigant's perspective and faith into account, on the grounds that it reveals the inner motivation and culpability of litigants. In Section II I will discuss a number of obstacles to taking faith seriously in courts of law and consider some of the ways in which these obstacles might be overcome. In Section III I will return to the medical models that I outlined in Chapter 3, and explain how these might be adapted and applied in legal cases. In Section IV I will discuss what the changes I have suggested would mean for judges and the legal system, as well as for persons of faith, and our ideas about law and justice.

#### Section I - Malik – An 'interpretive' model of law

The contexts for Malik's discussion about legal theory are two debates on the contemporary political culture of Western democracies.<sup>2</sup> The first concerns the problems of social pluralism and the challenges posed by diversity. John Rawls' *Political Liberalism* is one example.<sup>3</sup> Rawls argues that a permanent feature of the political culture of a democratic society is "reasonable pluralism" – diverse comprehensive religious, philosophical and moral doctrines that are at the same time conflicting and irreconcilable, and yet reasonable.<sup>4</sup> The diversity of reasonable comprehensive doctrines is an inevitable outcome of free human reason at work within the framework of free institutions.<sup>5</sup> What follows is that there will be reasonable disagreements between reasonable persons. Disagreements follow from the indeterminacy of concepts used in judgements, different life experiences and norms on the part of judges and they involve the assessment and evaluation of evidence, the

weight of evidence, and understandings about priorities.<sup>6</sup> Malik notes that, ‘For Rawls, “public reason” will ensure that these differences do not manifest themselves in the public sphere and that all citizens will accept the value of reaching an agreement based on his principles as the public principles of justice, thereby forming a *modus vivendi* – an “overlapping consensus” – irrespective of their notion of the comprehensive good.’<sup>7</sup>

Malik concludes that ‘this analysis is compatible with the idea that membership of groups is important for individuals but suggests that these communal attachments are relevant in the private rather than the public sphere.’<sup>8</sup> I would make two comments. First, in a later edition of *Political Liberalism* Rawls concedes that reasonable doctrines may be introduced to public reasoning at any time, with the proviso that at some point they are supported by public reasons.<sup>9</sup> Second, he has stated that it is important not to confuse his use of “public reason” and Habermas’ use of public sphere.<sup>10</sup>

The second debate concerns the “politics of identity”. Malik notes that writers such as Raz and Taylor ‘reject an atomistic picture of individual freedom as radical detachment. Their work recognises an important link between individual freedom and identity on the one hand, and social practices and community on the other.’<sup>11</sup> Malik argues that a number of consequences follow which include the recognition that well-being and self-respect springs from a person’s beliefs and attachments and the obverse that when these are attacked this undermines self-respect and well-being. Charles Taylor argues that identity is formed dialogically, and misrecognition or non-recognition shows not just a lack of respect, it can lead people to suffer real damage, harm or oppression.<sup>12</sup> Because this is the case Malik argues that respect and recognition move the “politics of identity” from the private to the public sphere. Malik then poses the question - do these debates raise questions for jurisprudence? She notes that it is often assumed that jurisprudence should be immune to contemporary fashions and political culture, but that this position is not necessarily synonymous with positivism.<sup>13</sup> It is possible to recognise a different vision, while remaining within positivism. For example, Gerald J Postema sets out a normative jurisprudence, and argues against the approach taken in analytical jurisprudence.<sup>14</sup>

‘Analytical Jurisprudence rests on a problematic philosophy of language. It mistakenly assumes that the concepts we use can be divorced from the language of everyday life in which they function. But language shapes thought, and language emerges from shared practices and patterns of meaningful human activity. .... Conceptual analysis is not sharply distinct from the enterprise of gaining an understanding of the practices and forms of life in which the concepts

have their life.’<sup>15</sup>

He also argues that conceptual analysis in jurisprudence can never limit itself to mere description.<sup>16</sup> In fact, ‘the subject matter – human belief and conduct – requires a process of characterisation and interpretation of the data by the theorist: it cannot be understood without an understanding of the point or meaning attributed to the behaviour and social practice.’<sup>17</sup> Malik notes that this vision of the relationship between theory and social practice raises a number of issues. If it is accepted that description of human conduct is insufficient and what is required is an analysis of the beliefs and meanings that underlie human conduct and social practices, then this will inevitably introduce uncertainty. Rather than yielding certain and absolute definitions, these concepts and their common meanings will invariably be the subject of controversy and debate.<sup>18</sup> Malik notes that, ‘in order to command legitimacy and agreement, characterisations of meaning and significance will need to draw on common meanings, which are not just the beliefs of individual actors, but should be understood as a constitutive set of ideas and norms which are the common property of the society.’<sup>19</sup> Postema, for example, has argued that law has an important function, not just in regulating behaviour but also in constructing and giving sense and meaning to behaviour.<sup>20</sup> Further, law has an important public role, as a repository of collective wisdom and as public “ritual”.<sup>21</sup>

Malik argues that if the metaphor of “public ritual” is apt and ‘law performs a public function in the creation and interpretation of beliefs and attitudes, then it is clear that this has important implications. The complex relationship between law and social practices (such as those based on faith) suggests that an “error” in theory can have a substantial impact on the practices themselves.’<sup>22</sup>

‘In describing a physical object, where theoretical analysis fails to “get it right”, it still leaves the subject matter unchanged. However, with more complex social practices where a theoretical concept fails there is a risk that it will distort the subject matter in a more fundamental way: it may influence the way in which the social practice is understood even by participants and those whose conduct and beliefs are being described. Where there is a failure of theory in relation to these types of beliefs, which fails to capture the full range of relevant data or uses methods of analysis which are likely to be distortive, this has serious consequences for the underlying subject matter. Theorising in this context has an important role in setting the context within which not only outsiders but also insiders come to understand the practices: “it does not leave the phenomenon unchanged”.<sup>23</sup> If it fails to accurately capture the practice, it will distort also the underlying reality which is the object of analysis. Reflecting back to agents a distorted or demeaning image of themselves will influence not only the perception of outsiders but it will also impact the self-understanding of

“insiders”<sup>24</sup>.

Malik suggests that ‘this may explain why insiders care so passionately whether their beliefs are presented accurately.’<sup>25</sup> Further, ‘given the importance of law and legal institutions in the public sphere it is not surprising that a major part of the struggle for “recognition” has focused on the reform of legal provisions and institutions, which have such a great symbolic and rhetorical significance for individuals.’<sup>26</sup>

Malik notes that ‘reflection upon the nature of law and legal institution requires attention to relevant facts about human belief and conduct.’<sup>27</sup> She then asks, ‘where this includes behaviour and conduct based on faith, how should we understand these facts accurately and without distortion?’<sup>28</sup> Malik begins by considering the usual tools of neutrality and objectivity. This involves the theorist breaking free of his own perspective and adopting a neutral point of view as a prerequisite of study. This method of studying human conduct avoids the dangers of uncertainty, evaluation and subjective interpretation. The attraction of the method is that it gives us a way of overcoming problems of “ethnocentricity” or bias and ensures that all faith-based arguments are on an equal footing with one another, and with other types of argument. However, Malik argues that this approach is inhospitable to faith. This is because the model focuses on the external conduct of the agent, and the importance of the inner motivations, beliefs and states of consciousness are ignored or marginalised.<sup>29</sup> Even when the theory gives priority to internal attitudes they are treated as “brute facts” which can be stated in neutral and objective descriptions, rather than as inherently subjective meanings which need to be understood from the perspective of the relevant subject who experiences them.<sup>30</sup> ‘The appropriate temporal unit tends to be the basic action. Instead of focusing on the history of the individual or the origins of the social practice which provides the context within which the act is performed, conduct tends to be studied as an isolated and one-off act.’<sup>31</sup> The results for faith-based practices are not good. Malik continues,

‘Its focus on external conduct and the basic action is likely to distort the full value of the practices as experienced by the participants. ... Attention to the act, without any reference to inner states and this wider temporal context, is therefore likely to miss important features of faith-based conduct. .... The “point from nowhere” neutrality .... is not – from the perspective of faith-based arguments - neutral. What seems to be a neutral starting point, and objective method, does not facilitate an undistorted understanding of faith. On this analysis, faith-based conduct which is alien and different is likely to remain inexplicable and will continue to seem irrational to the theorist.’<sup>32</sup>

Malik notes that recent post-modern scholarship indicates that the problem of “ethnocentrism” arises when we seek to understand a tradition as outsiders by applying

an evaluative criterion, which is often a universally applicable standard external to the tradition. Some scholars argue that to impose evaluative criteria from the outside is to do “violence” to the other. The alternative is to avoid evaluation, either by arguing that there are no evaluative criteria, or that all are equal. Malik argues that the first option is unlikely to be helpful to faith-based arguments. The second option seems to be more attractive, but is problematic.

‘If all positions are granted “equal respect” without any enquiry into what they are or why they are valued, then – arguably – this is a “hollow” version of recognition. The respect and recognition sought – and the argument that there should be a better understanding of faith-based arguments – require some attention to the claim of insiders that these have value. An endorsement on demand, without any investigation or appreciation of the true value of the faith for “insiders” does little to advance understanding in this context. In any event, rather than being an act of respect and recognition, an automatic grant of approval on demand could be construed as an act of condescension.’<sup>33</sup>

Malik argues that a different approach is needed, which involves a different view of human agency and which involves three modifications.<sup>34</sup>

‘First, motivation, belief and the “meaning” of practices take on a central rather than a peripheral role in this enquiry. Secondly, the conduct needs to be placed within the wider context of the experiences of the agent. This shift in focus means that the methods of neutrality and observation need to give way to techniques which focus on the data from the perspective of the agent. Objectivity will need to be supplemented by some attention to the viewpoint of the subject, as the theorist attempts to understand belief and conduct from this perspective. Thirdly, the nature of these types of commitments set important constraints on the degree of certainty and the type of understanding which the theorist should seek. It is often assumed that understanding in these contexts requires reaching an agreement on shared values which can be endorsed by both – or all- relevant parties. However, this is not a helpful way of setting up the goal of analysis in these types of cases.... Rather than seeking agreement on absolute and neutral criteria, this alternative method suggests that “understanding the other” is about making that person and his or her self-understanding more intelligible.’<sup>35</sup>

Malik draws on philosophical hermeneutics to provide the resources for this new approach, which she refers to as an ‘interpretive’ model.

‘This approach seeks to ‘mediate the tension between attention to the perspective of the subject relying on faith on one hand, and the needs of the theorist who is seeking greater understanding and clarity on the other.’<sup>36</sup>

Malik notes that Hans-Georg Gadamer’s work is useful because of his insight that ‘knowledge of the other – who is different and alien – is only possible if we use rather than suspend our pre-existing insights into the human condition’.

‘Only the support of familiar and common understanding makes possible the venture into the alien, the lifting up of something out of the alien, and thus the broadening and enrichment of our own experience of the world.’<sup>37</sup>

Then Malik turns to the work of Emilio Betti who has discussed hermeneutics in the context of legal theory.<sup>38</sup> Betti asks the question, what is the cognitive activity that we may designate “interpretation?”

‘In every form of practical, goal-oriented activity, there is an implicit representative value, from which, as from a symptom, one may indirectly discern some trace of the personality of the actor, some characteristic trait of his thought and understanding. Through the interpreter reflecting upon it, this implicit value gains explicit representation. Such representative values are marks of personality, found throughout the whole range of overt behaviour, from the pinnacle of the hero or of the saint who makes his faith his life’s ultimate concern to the misery of the hypocrite and even the illegal acts and deviance of the criminal. As a cognitive act, the process of interpretation answers to the epistemological problem of understanding. Taking up a distinction familiar to jurists between action and outcome, we may characterize interpretation as action whose useful outcome is understanding.’<sup>39</sup>

Malik notes that the ‘method of interpretation involves a special relationship between subject and object, which recognizes the unique phenomenon which is being studied.

“At one head of the process is the living thinking spirit of the given interpreter. At another is some spark of the human spirit, objectivised in representative form...”<sup>40</sup> Jean

Grondin notes that in Betti’s method,

‘We come into contact with another mind not immediately but only by taking a detour through the objectivizations or meaning-bearing forms whereby it makes itself cognizable. ... The objectivizations to be interpreted (language, but also gestures, monuments, traces, tones of voice and so on) represent or stand for the inner spirit or mind that one is trying to understand.’<sup>41</sup>

Malik argues that this method seeks to accommodate the greater need for subjectivity and understanding of the other, which may be important in the context of faith-based arguments. Betti explains the method as follows:

‘On the one hand, the interpreter must respond to the requirement of objectivity; his rethinking of the object, his reproduction of it, must be faithful and as close as possible to the expressive or characteristic value possessed by the representative form he seeks to understand... Two things are thus held in opposition: one, the subjectivity that is inseparable from the spontaneity of understanding; the second, the objectivity, or otherness so to speak, of the sense which interpretation seeks to elicit in the object. Upon it, one may construct a general theory of interpretation, which in allowing critical reflection upon the process, can serve as the basis of an account of its ends and methods. This theory is hermeneutics.’<sup>42</sup>

Malik notes that at first sight such a strategy seems to raise insurmountable problems when it comes to understanding faith in the context of social pluralism. How can a diverse range of perspectives – many of which will be very different, and often incompatible with the theorist’s own “home” beliefs - be studied? Surely if priority is given to “home” beliefs then divergent beliefs will be deemed wrong and erroneous, thereby breaching the requirements of the “politics of recognition”? Malik argues that this underestimates the potential shift in understanding that can result from the alternative approach. Understanding the other with radically different beliefs and practices requires placing these against analogous “home” beliefs and practices, and involves a contrast. Initially there will be a clear attribution of error to the beliefs and practices of the other. Bias and the application of an external criterion will be explicit using this approach.<sup>43</sup> However, the analysis does not end there. The practice of comparison takes a special form.

‘By placing the practices against a home understanding, and most importantly using a method which looks beyond merely external acts, the theorist is forced to notice a range of factors which often remain obscure when the “neutrality” model is used. The theorist is forced to notice that the other person is acting out of inner beliefs, motivations and states of consciousness to advance what – from his perspective – is a social practice with value. The theorist uses rather than neutralizes his own home understanding of his motivation, belief and conduct. This pre-existing knowledge acts as a modular frame within which faith-based practices are placed, contrasted and made more intelligible.’<sup>44</sup>

Malik acknowledges that there are limits to the extent of agreement concerning values that we can expect from this approach. But once it is recognized that the task is to make the other more intelligible it becomes meaningful to claim that the act of comparison has led to a shift in understanding.

‘Rather than merely noticing that the action is different and alien, the theorist can attempt to comprehend the meaning of the action from the perspective of the subject. It is only from this perspective – trying to grasp the significance of the external conduct for the agent – that the action can be made more intelligible. This does not mean that the action is now accepted as being valid or as meeting some objectively agreed criteria of what is rational. The action may still remain puzzling but it is now seen as one of a range of possibilities for human agents who wish to realise meaning, point and value in their lives. The action is now characterized as part of a stream of behaviour of an agent who will reflect upon it in order to make sense of his personal history.’<sup>45</sup>

One possible outcome of this approach is a judgement that the faith-based conduct is wrong. Should this be seen as a fatal flaw and the approach dismissed? Malik argues against a hasty dismissal by drawing attention to the other models on offer. Both the analytical- neutral-description (positivism and empirical approach) and difference-

sensitive (post-modern theories approach) are inhospitable to faith-based arguments.

‘Moreover, under conditions of reasonable pluralism, reasonable comprehensive doctrines which rely on faith may be forced to conclude that they cannot insist on the truth of their conception of the good as the basis for organizing political co-operation in the public sphere. Faced with a choice between insisting that the absolute truth of their doctrine is acknowledged, and the prospect of communicating the value that their faith has for them to others, “insiders” have good reason to prefer the latter.’<sup>46</sup>

Malik notes that there are limits to an approach that is dependent on the “home” understanding.

‘This approach is dependent on the theorist reviewing and re-examining his own perspective. Success in this enterprise will be dependent on the ability of the theorist to remain open to the possibility of a change and shift in his perspective. Self-understanding and the ability to analyse his or her own “home understanding” will be as important as the ability to describe and observe. The subjectivity of this approach, with the resulting lack of certainty, clarity and predictability, sits uneasily with methods of verifiable description and observation which are usually applied in these contexts.’<sup>47</sup>

The obvious criticism is that the approach will lead to a “hermeneutical circle”, which we cannot enter if we do not share the home understanding of the theorist, and out of which we cannot break if we lack objective criteria that we have discarded because of their “ethnocentricity”. Malik concedes that the accusation that the model is flawed because of its subjectivity, uncertainty and arbitrariness has some force and validity. She also acknowledges that if the faith-based conduct is so different when placed against the theorist’s “home” understanding, the “home” understanding may act as an absolute barrier to understanding. In this case Malik asks whether a sterner response is preferable, one that acknowledges that it is not possible to do justice to the ideal of reason, which underpins liberal politics, and the claims of those who rely on faith. On this view, faith-based arguments fail to meet the prerequisite conditions of rationality, which are the basis of organizing public life and institutions. Although relevant in private life they should have nothing to do with the public sphere. Malik resists taking this route. Instead, she begins by pointing to the “politics of recognition” and argues that dismissal would be interpreted as ‘a dismissal of those individuals for whom these beliefs are of great significance and value.’ Secondly, she notes that the characteristic of faith-based reasons is that they have significant status for the individual. They act as a theoretical authority and the implications go beyond the private. There is potential for divergence and conflict between faith-based sources of authority and the law’s claim to act as an authority. When individuals are faced with conflicting demands – between

faith-based authority and compliance with law, this may lead to a refusal to act according to the requirements of the law. Menski has also highlighted this problem.<sup>48</sup> Malik sees two options: either, a legislator or judge decides, or disputes are minimised so that there is a greater convergence between institutions that provide the sources of normative guidance.<sup>49</sup>

‘A vision of law which sees it as not only a system for regulating conduct, but also as a source of creating and sustaining common meanings in a community, makes it especially important to take seriously the sincere feelings of those who rely on faith-based arguments. The self-perception of these individuals that their views have been considered and given some weight by legal institutions become important in order to ensure their identification with the legal system.’<sup>50</sup>

Implicit in what Malik is saying is that if room is made to discuss the issues that are meaningful to a person of faith and that he or she believes are relevant to a dispute, then there is less likelihood that a person of faith will feel alienated from the English legal system.

I agree with Malik that in order to make room for the perspective and faith of individuals to be accommodated within the English legal system it would be necessary to adapt judicial reasoning, and that one way in which this might be achieved is through a hermeneutical approach, but I also want to argue that the medical models that I outlined in Chapter 3 illustrate that there are also other ways in which judicial reasoning could be adapted and I will return to this in Section III.

Malik assumes, like Bradney and Menski, that judges should spend time coming to an understanding of issues of faith in a particular case, but as Bradney has pointed out in connection with *Re ST* (a legal case that I outlined in Chapter 1), this can take an inordinate amount of time and effort on the part of the judge.<sup>51</sup> This, in turn, has a knock-on effect on the whole legal system. Time-constraints and cost are therefore two issues that need to be taken into account when the accommodation of faith is being considered within the present system. One way in which these issues might be addressed is by more education for judges about different faiths, and about the important role that faith can play in a litigant’s life, and how faith can shape a litigant’s understanding of a dispute and the decisions that he or she makes. Another way of reducing the potential additional burden on judges might be for them to accept that they need more help from representatives of faith communities when dealing with legal cases

that involve issues of faith.

Thirdly, just because there is a model or system in place that, in theory, makes room for a person's perspective and faith to be accommodated, does not mean that this will actually happen in practice. In Chapter 3 I outlined the patient-centred model in healthcare, which in theory makes room for a doctor to discuss and take into account a patient's perspective and faith. But what has been found is that in practice doctors do not always discuss spiritual issues with patients. There are a number of reasons that doctors have given to explain why and these include fear of offending the patient, because it is outside of their expertise,<sup>52</sup> or because of lack of time or training.<sup>53</sup> Others have expressed an interest in discussing spirituality with patients, while recognizing the need to approach this with 'sensitivity and integrity'.<sup>54</sup> What the healthcare experience seems to indicate is that making room for faith is not as simple as having a model or procedure that accommodates faith, because models on their own are not enough. They must be supported by education and training, and there must be time set aside for dialogue to take place. Accommodation is also dependent on the willingness of practitioners, whether they are doctors or judges, to apply the model. It must also be borne in mind that there will inevitably be some doctors and judges who will be more at ease in discussing spiritual matters, and there will also be others who will prefer not to discuss spiritual matters at all. Another potential problem that I discussed in Chapter 3 is that of conflicting narratives, and that the conceptual world of some narratives may be difficult, if not impossible, for some to enter and understand. These potential problems associated with the application of models that seek to accommodate faith, also points to the need for a greater role for representatives of faith communities.

Finally, Malik's hermeneutical approach to judicial reasoning appears to facilitate understanding and a level of accommodation for a faith perspective. However, the 'interpretive' model illustrates yet another view of law, this time as 'a source of creating and sustaining common meanings in a community', which Malik locates within legal positivism. The advantage of this view of law from the lawyers' perspective is that it maintains a legal positivist outlook on law, as well as the legal structures and procedures that go with it. But the question that I would pose is - would this work to make room for faith? I will argue in the next section that on its own it will not because a change in judicial reasoning is only one part of a much bigger picture.

## Section II – A bigger picture – conflict, law and religion

In Chapter 1 I argued that a legal positivist standpoint causes difficulty for persons of faith in English legal cases. Judges understand conflict and address disputes in legal terms and settle them in accordance with legal criteria. However, what the re-emergence of mediation and the development of facilitative, transformative, and narrative models of mediation have revealed is that conflict does not necessarily have to be understood and addressed in narrow legal terms. Indeed, there are those who argue that addressing disputes in such narrow terms can have wider adverse affects. Brown, for example, has argued in relation to evaluative mediation, that if the focus is on legal criteria and an evaluative opinion, this may hinder communication between the parties, and between the parties and the mediator, because the parties in anticipation of an evaluation may only put their best case forward, without acknowledging the weaknesses or complexities in their case. They may also be more likely to approach the mediation from a positional bargaining stance, rather than be prepared to think outside the legal box and consider other solutions.<sup>55</sup> This argument could equally be applied to legal cases. It also illustrates another important point, namely that if a dispute is framed in purely legal terms it restricts the possible options for resolving the dispute to legal ones. This can then lead to another potential problem. Bush and Folger have argued that if the focus of a dispute is too narrow the underlying issues that parties really want to address will very rarely surface.<sup>56</sup> In Chapter 2 I drew a distinction between obtaining a legal settlement and resolving a dispute. If a dispute is framed and addressed in legal terms a disputant may well obtain a legal settlement. However, if other matters that are meaningful to the disputants, such as issues of faith, are not discussed or addressed then the disputants may well not resolve the underlying issues that led to the dispute.

While I accept that the legal aspects of a dispute are important and should be addressed I would also argue that they are just one element to consider when trying to understand and address a dispute. For many persons of faith their faith will also be meaningful and important. The problem for persons of faith is that when cases reach the law courts it is the legal aspects of the dispute that become all consuming, and other elements such as faith are not discussed or addressed. It is this situation that I would argue needs to change.

But if room is to be made for faith judges need to be persuaded that conflict can be

understood and addressed successfully in broader terms than just legal criteria. The re-emergence of mediation has done just that. This, in turn, has challenged the legal profession's monopoly on dispute resolution, and it has paved the way for a dispute resolution process that is more sympathetic and open to issues of faith being discussed. The challenge, now, is to find ways in which to introduce and apply the insights from mediation into legal cases. I will return to this in Sections III and IV.

In Chapter 1 I argued that the second reason why persons of faith experience difficulties in the English law courts is because of the way in which law is understood. In the legal case studies in Chapter 1 I illustrated how some judges understand law as strictly separated from ethics/morals and religion, and how they understand their role as the interpretation and application of legal rules. Consequently, judges regard aspects of a case such as complex ethical issues or issues of faith as 'irrelevant' and not justiciable. I have argued that the reason why the judges understand law in this way is because of the influence of legal positivism, which, as I have shown in Chapter 2, is a highly contested way of understanding law. Legal pluralists, for example, do not differentiate between legal, ethical and religious norms because they prefer to understand all these different types of norms as ways in which human behaviour is regulated and choose to label them all as law. Clearly strict positivists and legal pluralists are at two different ends of a wide spectrum of views on what constitutes 'law'. This is also illustrated by Malik's work in this chapter and that of Dworkin and Finnis outlined in Chapter 2. Although legal positivism and the work of Hart have been hugely influential, it is only one model of law amongst many others.

What modern debates about the law illustrate is that there is no agreement on the nature of law, or on the relationship between law, morals, and religion. But I would argue that this does not alter the fact that there are cases that come before the courts that involve not just legal, but also complex ethical issues and issues of faith. This situation raises the question of how cases that involve issues of faith should be understood and addressed. I have argued that the contributions that Hebrew law can make to modern debates about law provide important insights that can help address this problem. Yoder, as we saw, draws a distinction between 'procedural' justice and 'substantive' or 'shalom' justice.<sup>57</sup> Yoder explains 'procedural' justice as the application of rules, whereas, 'substantive' or 'shalom' justice is where an okay state of affairs is the result. I

argued in Chapter 1 that this is still relevant today. The persons of faith in the legal cases in Chapter 1 clearly received ‘procedural’ justice but did they receive ‘substantive’ justice? I argued that they did not, because the issues of faith that were central to their identities and were meaningful to them were not discussed or understood. Interestingly, even English Law Lords who sit as part of the English Supreme Court understand and accept the difference between these two types of justice. In a recent BBC 4 programme Lord Phillips, Lord Kerr, Lord Hope and Lady Hale discussed the issue of justice.<sup>58</sup> Lord Phillips acknowledged that there had been cases where he personally would have preferred to give a different judgement, but he was constrained from doing so by the law. One illustration that he gave was the recent case about bank charges: on a personal level he thought that it would have been good if the Office of Fair Trading (OFT) could have been sanctioned to review bank charges but he explained that was not the question that the Court had to consider. Instead, the Court had to decide whether the OFT’s statutory remit extended to that of being able to investigate bank charges. The Court found that it did not. Lord Kerr then explained that judges administer justice ‘according to the law’. This means that judges interpret and apply legal rules to a particular case. This would be equated to Yoder’s ‘procedural’ justice. There is therefore a structural problem because the legal system is set up to deliver ‘procedural’ justice, not ‘substantive’ or ‘shalom’ justice. This encompasses all cases, not just those involving issues of faith. Added to which the English adversarial system pits lawyer against lawyer and tends to encourage an attitude of ‘winner takes all’.<sup>59</sup> Consequently, law, can and is used by some as a weapon against others. This can be contrasted with the aim of ‘shalom’ justice, which was a sense of ‘all-rightness’ between parties to a dispute, and involved restitution and restoration of godly relationships.

Hebrew law, I argued, also gives a model of how ‘difficult’ cases, which involved both civil and religious issues, and civil and religious authorities, were resolved, in that judges and priests worked together. What the healthcare experience has revealed is that if faith is to be accommodated then we are expecting a great deal of professionals such as doctors and judges. They spend a great deal of time and effort learning about their respective professions. Do we therefore want them to also become experts in religions? I would argue that we do not but this is not to say that they should not receive some education in this area. In particular, I would argue that they need to be aware in general terms of the religious factors that might suggest that a faith position was important to a

given individual litigant, and that the litigant's faith may well shape the way in which the litigant understands the dispute and may affect the litigant's decisions and responses to the dispute. In other words both doctors and judges need to be made aware that they are involved in a continual negotiation of meaning, because, as I explained in Chapter 3, Medicine, Law, and faith, are like cultural systems with their own language and practices that need to be interpreted, translated and negotiated. There are two specific reasons why doctors and judges need to be prepared to work with representatives of faith communities in order to resolve 'difficult' cases that involve complex ethical issues and issues of faith. First, because doctors and judges often lack the detailed knowledge and expertise, as well as the time to devote to come to an understanding of the aspects of a case that relate to faith. Secondly, as Menski and Malik have noted, in cases that involve issues of faith there are two authorities operating - civil and religious, and a litigant may well feel torn between whether to follow civil/legal or religious authorities. I would argue that it is important to try to accommodate faith, and involve faith communities in trying to resolve 'difficult' cases not only, because it is a matter of justice, but also to avoid persons of faith feeling alienated from the legal system. Sadly, as I noted in Chapter 2, Menski has already found evidence that some persons of faith (i.e. some Muslims) are choosing not to follow British law.

In the Introduction I argued that the third reason why persons from faith traditions experience difficulties in the English law courts is because of the way in which religion has come to be understood. Carter, for example, notes that religion is often treated as a 'hobby' and some secularists argue that religion is a private matter and should not be used to support arguments in public debates or in public forums such as the law courts. I argued in the Introduction that many persons of faith would not agree with these arguments, and would want the freedom to explain the issues of faith that motivate them and determine their decisions and actions. However, I acknowledge that this is a sensitive and emotive issue. Some secularists are concerned that religion might be imposed on them, whereas, some persons of faith interpret the secularists' arguments as an attempt to silence religious voices in the public sphere. Unfortunately, these two concerns collide in legal cases that involve issues of faith. Some secularists are concerned that religious tenets will become law and will then be imposed on them, whereas, persons of faith are concerned that they lack the space and the voice in legal cases to explain that which is meaningful to them. There are no easy answers to such concerns. On the face of it, what is required is a continuing dialogue between secularists

and faith communities. This is not easy with often diametrically opposing views but I would argue if persons of faith are not to be alienated from the legal system, and if they are to receive 'substantive' justice then ways need to be found to make room for faith. In the next section I will revisit the medical models that I outlined in Chapter 3 to explore what these models might have to say to the legal profession, and how three of the models might be adapted to make room for the faith of individual litigants in legal cases.

### Section III – Medical models revisited

In Chapter 3 I outlined four medical models, the biomedical, bio-psychosocial, patient-centred and meaning-centred models. The biomedical model has been the dominant model in Western medicine over the last century.<sup>60</sup> It is a scientific model that was devised by medical scientists for the study of disease,<sup>61</sup> and it understands disease narrowly in biological terms as 'alteration in biological structure or functioning'.<sup>62</sup> As the model's underlying principles are reductionism and physicalism the focus is on objective and verifiable data. Any social, psychological, cultural or religious data are ignored as 'overlay' or 'irrelevant'.<sup>63</sup> According to Engel this distorts perspectives, interferes with patient care,<sup>64</sup> and encourages the bypassing of the patient's verbal account, thereby placing greater reliance on technical procedures and laboratory measurements.<sup>65</sup> I explained how some doctors have developed other models, because, in their opinion, the bio-medical model is too narrow, and focuses on disease, and not the patient as a person. It is these developments that I argued are an example to the legal profession, partly because of the gradual movement that has taken place in medicine from 1960 onwards towards understanding the importance of accommodating a patient's cultural beliefs and values, including faith, and her perspective of illness. I drew a parallel between the biomedical model and the model of law encapsulated by legal positivism. Both have a narrow focus on their respective disciplines of medicine and law. Both seek to exclude the perspective and faith of the patient and litigant respectively. In Chapter 2 I argued that the legal positivist's concept of law is too narrow in a similar way that Engel and Kleinman have argued that the bio-medical model is too narrow. For example, Menski has devised a model of law that is sympathetic to culture and faith. Menski is acutely aware of the pressing need for the legal profession and the legal system to become more culturally sensitive and accommodating. Although there has been a theoretical move to accommodate culture and faith in law through the work of Menski, this has not succeeded in making room for

culture and faith in legal cases. I have argued that there are a number of complex reasons for this. One is the influence of legal positivism. Another is that lawyers are used to understanding and addressing conflict in narrow legal terms but, as I explained in Chapter 4, the re-emergence of mediation has challenged the legal profession's monopoly on dispute resolution, and shown that conflict does not have to be understood and addressed in narrow legal terms. Consequently, some lawyers have trained to become mediators. However, lawyers in the mainstream English court system have yet to respond to calls that they and the English legal system need to become more culturally sensitive. I suspect that this is because many lawyers do not see or understand that there is such a need, while those that do, do not know how such an accommodation could be accomplished.

Secondly, in Chapter 3 I showed that the reason why the perspective, culture and faith of individual patients is accommodated by some in the medical profession is because they have come to understand that there is a continual negotiation of meaning that takes place between doctor and patient. Medicine, like religion, is a cultural system with its own language and practices that have to be interpreted translated and negotiated. I argued that this is relevant to the legal profession because law is also like a cultural system with its own language and practices that have to be interpreted, translated and negotiated. Consequently, the faith of individual litigants should be given space to be expressed and discussed in legal cases because there is a negotiation of meaning that takes place between disputants, and between disputants and the judge. I also argued that doctors such as Engel and Kleinman who have journeyed from a place of not taking into account a patient's perspective and faith, to a place where they are convinced of the need to do so, provide an example to the legal profession of the journey that they too need to make if room is to be made for the perspective and faith of litigants in legal cases. Thirdly, I argued that the bio-psychosocial, patient-centred and meaning centred models could be adapted and applied in legal cases in order that the perspective and faith of an individual litigant could be accommodated. It is to this that I will now turn. First, by briefly outlining each model, then by suggesting ways in which each model could be adapted, and finally, by explaining what changes that this would involve in the legal system.

The bio-psychosocial model is based on a systems approach. Systems include: cell,

organ, person, family, community, culture and society. Each system implies qualities and relationships distinctive for that level of organization, and each requires criteria for study and explanation unique for that level. This is a model that eschews reductionism and understands that nothing exists in isolation. The model incorporates the biomechanical model, but widens it to include social, psychological, and cultural data. The doctor's role in this model is the relief of the patient's distress, and the collection, assessment, and analysis of data, in the light of systems theory. The patient is 'a larger social system,' and data given by the patient identifies other 'systems' (e.g. family, work, church) of which the patient is a part. The patient's religious community would be regarded in this model as one of those systems, and data relating to the patient's religious beliefs and practices could be included in the data collected. The doctor assesses the relevance and usefulness of the data from each level for the patient's care.<sup>66</sup>

How could this model be adapted for legal cases? I would suggest that following a systems model would act as a reminder for disputants, lawyers and judges that a dispute cannot be understood and addressed in purely legal terms. A litigant does not exist in isolation - she lives within a particular society, culture, and faith community. Evidence would not be restricted to legal evidence but would include other relevant evidence, which could include details of a litigant's faith perspective, beliefs and practices. Whether this additional evidence would be deemed 'relevant' would depend on the judge. For this model to be effective judges would need to accept that law could be understood in wider terms than that proscribed by legal positivism. Judges would be required to receive more education on cultural awareness, faith communities and the negotiation of meaning. It would also necessitate a shift in the relationship between litigant and judge. The judge would be required to engage in dialogue with a litigant about her faith. This model could also provide room for representatives of faith communities to assist judges in helping to resolve 'difficult' cases.

The second model is the patient-centred approach, which has six interactive components.<sup>67</sup> It incorporates and expands the biomedical model by aiming to understand and treat illness, as well as disease. Disease is diagnosed by objective observation under the biomedical model, but also the doctor 'actively seeks to enter the patient's world to understand his or her experience of illness.'<sup>68</sup> The approach requires a balance between the collection of objective and subjective data, and brings body and mind together in order to understand and treat the 'whole' person. In seeking to

understand and treat the whole person it is recognized that spirituality may play a role in a patient's life, and in his or her response to illness.<sup>69</sup> Unlike the biomedical model in which the doctor was encouraged to maintain a professional distance from the patient, in the patient-centred model the doctor is encouraged to engage with the patient. The doctor-patient relationship could be described as a partnership, and the aim is to share decision-making.

I would suggest that a patient-centred approach (renamed a litigant-centred approach for application in legal cases) would be a reminder to the legal profession that a legal perspective is only one part of the equation when understanding and addressing disputes. The other part of the equation is the perspective of the litigant. Evidence would therefore include data from both types of perspective. This approach acknowledges that spirituality may play a role in a litigant's life and may shape the way in which a litigant understands and responds to a dispute, and may affect the litigant's decisions. This approach would necessitate a shift in the relationship between judge and litigant. Judges would be required to engage in dialogue with a litigant to ascertain the litigant's perspective on the dispute, and to hear about issues of faith that are relevant to the dispute. This approach would also provide room for representatives of faith communities to assist a judge to help resolve 'difficult' cases.

The third model is the meaning-centred model in which the objective is that the doctor treats the illness, not just the disease. This involves empathetic listening, translation, and interpretation.<sup>70</sup> In this the illness experience is understood as 'culturally shaped.' The doctor's role is likened to that of an ethnographer, historian and biographer.<sup>71</sup> Traditionally an ethnographer visited a foreign culture, learned the language, and attempted to see things in the way that the natives did. This began by observation and the establishment of relationships of trust and collaboration. Likewise the doctor conducts a mini-ethnography in order to place himself in the lived experience of the patient's illness. The doctor also records a brief life history of the patient, and elicits from the patient and, when feasible, the family's explanatory model of the illness experience. Explanatory models are, 'the notions that patients, families and medical practitioners have about a specific illness episode'.<sup>72</sup> To elicit the explanatory model of patient and family the doctor asks a series of questions.<sup>73</sup> The purpose of the questions is to stimulate a dialogue between doctor and patient. A patient or family member who held an explanatory model that was informed by the biblical narratives would at the

very least have their account heard and respected. The doctor then has the task of explaining to the patient and family his own explanatory model.<sup>74</sup> The doctor is then ready to engage the patient and family in negotiation over treatment.

The meaning-centred model is based on a narrative approach which would act as a reminder to judges that disputes are culturally constructed, and for the need to be sensitive to issues of culture and faith, and to pay particular attention to the meaning of the disputants' narratives. Consequently, a judge using this approach would want to take time to discuss a litigant's perspective, and try to understand how cultural beliefs or issues of faith shape how a litigant understands and responds to a dispute. This approach would also remind judges that there is a continual negotiation of meaning between disputants, and between disputants and the judge, and of the need to check that they have correctly interpreted the disputants' meaning. A judge using this model would also be aware of the need to outline and explain the legal perspective to the disputants. This approach would necessitate a shift in the relationship between judge and disputants towards dialogue and collaboration. A judge employing this approach is likely to be aware of the need to involve representatives of faith communities when a dispute involves faith issues.

But what would the changes that I have suggested mean for the legal profession, the legal system, persons of faith and our ideas about law and justice?

#### Section IV – A new vision of law and procedure

The changes I have outlined would represent a paradigm shift for judges and the wider legal profession and legal system. At present judges are heavily influenced by legal positivism and they understand law as legal 'rules' separate from ethics and religion. Ethical matters and issues of faith are regarded as 'irrelevant' and not justiciable. Consequently, judges do not have to engage with a litigant and talk to her about her faith. What I have argued is that the focus of law should be moved from 'rules' to people and relationships. This idea is not new – it is found in Hebrew law and in the field of mediation. Winslade and Monk, for example, take the view that it is only when a better relational pattern develops that a problem-solving approach will be effective.<sup>75</sup> Their approach favours trying to settle relational issues in preparation for settling the substantive issues.<sup>76</sup> If the focus of law is moved to people and relationships then a

more holistic approach can be taken to resolving disputes, and a litigant's perspective, culture and faith will be relevant and could be taken into consideration.

Malik's interpretive model and the three adapted medical models provide a variety of ways in which judicial reasoning could be adapted to make room for an individual litigant's perspective and faith. Each would require a judge to engage in dialogue with a litigant about issues of faith. This would require space and time and a willingness on the part of the judge to try to come to an understanding of the litigant's perspective and faith. I acknowledged that time and cost are factors to consider when considering how to accommodate faith. I also acknowledged that some judges might prefer not to discuss spiritual issues with litigants. I have therefore argued for a greater role for representatives of faith communities in assisting judges to resolve 'difficult' cases.

At present judges understand their role narrowly as the interpretation and application of legal rules. Judges therefore administer justice 'according to law', which means that they interpret and apply the rules to a particular case. Yoder has described this as 'procedural' justice. This affects all cases, not just those involving issues of faith. Added to which the English legal system is 'adversarial' and pits lawyer against lawyer and tends to encourage an attitude of 'winner takes all'.<sup>77</sup> Consequently, law can, and often is, used by some litigants as a weapon against others. This can be contrasted with the aim of Hebrew law, which was 'shalom' justice. This was a sense of 'all-rightness' between parties to a dispute, and involved restitution and restoration of godly relationships. I have therefore drawn a distinction between a legal settlement and resolving a dispute, and Yoder has drawn a distinction between 'procedural' and 'substantive' justice. Under the current system a litigant will obtain a legal settlement and 'procedural' justice. However, they may not resolve the dispute because underlying issues, including issues of faith, are not discussed and resolved, and they will not receive 'substantive' justice. I have therefore argued that the focus of the judges needs to change from 'rules' to people and relationships, and that there should be an opportunity to discuss and address underlying issues. This would provide litigants with the opportunity to resolve the underlying issues that led to the dispute. It would also provide the judges with the freedom and opportunity to administer 'substantive' or 'shalom' justice, which has the potential to benefit everyone, not just persons of faith.

At present persons of faith are faced with considerable difficulties when they are

involved in legal cases in the English legal system. I have outlined the extent of the difficulties in Chapter 1. The changes that I have suggested would mean that persons of faith would be provided with space and time to enable their voices to be heard, and provided with the opportunity to explain their perspective and have the opportunity of being understood. They would therefore be less likely to feel alienated from the legal system and the legal process. They could also be reassured that a judge would have a way in which to take the perspective and faith of an individual litigant into account when trying to resolve a dispute, and if constrained by time or lack of expertise, that a judge could call on the assistance of representatives of faith communities to help him resolve a 'difficult' case. They would also have the opportunity to obtain a resolution of the dispute and receive 'substantive' justice, rather than just a legal settlement and 'procedural' justice.

In the final chapter of this thesis I will revisit six of the legal cases that I outlined in Chapter 1, and examine what differences it might have made to the participants and outcome, if the changes that I have suggested had been implemented in the cases.

## Notes

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<sup>1</sup> Maleiha Malik, "Faith and the State of Jurisprudence," in *Faith in Law: Essays in Legal Theory*, ed. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 129-149.

<sup>2</sup> Ibid.

<sup>3</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) cited in Malik, "Faith and the State of Jurisprudence," 130.

<sup>4</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 36.

<sup>5</sup> Ibid., 37.

<sup>6</sup> Ibid., 56-57.

'a) The evidence- empirical and scientific – bearing on the case is conflicting and complex, and thus hard to assess and evaluate. b) Even where we agree about the kinds of considerations that are relevant we may disagree about their weight and people may come to different judgements. c) To some extent, all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and on judgment about interpretation) within some range (not sharply specifiable) where reasonable persons may differ. d) To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole life course up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to divert, at least to some degree, on many if not most cases of any significant complexity. e) Often there are different kinds of normative considerations of different force on both sides of an issue, and it is difficult to make an overall assessment. f) Finally, as we know in referring to Berlin's view (V:6.2) any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realised. This is because any system of institutions has, as it were, limited social space. In being forced to select among cherished values, or when we hold to several and must restrict each in view of the requirements of the others, we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer.'

<sup>7</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 132.

<sup>8</sup> Ibid.

<sup>9</sup> Rawls, *Political Liberalism*, (2005), xlix.

<sup>10</sup> Ibid., 382 note 13. Rawls makes this clear in a reply to Habermas in *Political Liberalism* 'The public reason of political liberalism may be confused with Habermas' public sphere but they are not the same. Public reason in this text is the reasoning of legislators, executives (presidents, for example) and judges, (especially those of his supreme court, if there is one). It includes also the reasoning of candidates in political elections and party leaders and others who work in their campaigns, as well as the reasoning of citizens when they vote on constitutional essentials and matters of basic justice. The ideal of public reason does not have the same requirements in all these cases. As for Habermas' public sphere, since it is much the same as what I call in 1: 2.3 the background culture, public reason with its duty of civility does not apply. We agree on this. I'm not clear whether he accepts this ideal.'

<sup>11</sup> J.Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994); Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton, New Jersey: Princeton University Press, 1992) cited in Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 132.

<sup>12</sup> Taylor, *Multiculturalism and "The Politics of Recognition,"* 25-26, 33-35.

<sup>13</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 133.

'Analytic jurisprudence, it is argued, should concern itself with factual and descriptive accounts of the concept of law and our legal practices. The argument is that an analysis of law should proceed solely on morally neutral and non-evaluative criteria. On this account the social fact of multiculturalism and pluralism does not raise questions for jurisprudence, ... What is important is the search for stipulative definitions which will assist in theorising. Lyons, for example, argues that before we can enter into a discussion concerning the merits or demerits of law we must first reach some agreement concerning the relevant concept.<sup>13</sup> ... Relying on this starting point ... Reflection on the nature of law must proceed without any concern for the social and practical context within which the law operates. This line of argument assumes a sharp distinction between analysis and evaluation, often discussed in the context of the positivism and natural law debate.'

<sup>14</sup> Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1996), 328-39.

<sup>15</sup> Ibid., 332-3.

<sup>16</sup> Ibid., 334.

'Jurisprudential theory, then, even when it appears to be engaged in conceptual analysis, is focused on the task of giving an account of legal institutions, and the practice and 'sensitivity' that breathe life into

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them. This accounting can never limit itself to simple description. It is essentially a matter of *characterisation* or interpretation. For these practices are not mere and mindless habits, or behavioural routines with no intrinsic significance to those who execute them. They are intelligible social enterprises with a certain, perhaps very complex, *meaning* or *point*.<sup>17</sup>

<sup>17</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 135.

<sup>18</sup> Postema, *Bentham and the Common Law Tradition*, 335.

‘As Charles Taylor has pointed out, simple descriptions can be accurate or inaccurate, and their inaccuracy can be shown by pointing to new or overlooked facts or evidence, but when characterisations fail they *distort* the reality they seek to interpret. And, after a point, no mere showing, or marshalling of more evidence, will settle a dispute regarding the truth of the characterisation. That question will turn on the strength and plausibility of the sense, point, or meaning attributed to those facts. Thus, because they do not merely ascribe properties to objects, but instruct us about how to think about them, characterisations do not leave the phenomena, unchanged. In consequence characterizations are always open to challenge.’

<sup>19</sup> C. Taylor, "Interpretation and the Sciences of Man" in his *Philosophy and the Human Sciences, Philosophical Papers, Vol II* (Cambridge: Cambridge University Press, 1985), 32-34; Ronald Dworkin *Law's Empire* (London: Fontana, 1986) suggests that law has an important role to play in creating and maintaining common meanings and community; R. Cotterell, *Law's Community* (Oxford: Clarendon Press, 1994), 222-34 cited in Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 136 note 19

<sup>20</sup> 'In fact, the law is not merely a device regulating behaviour; it is a complex structure of discourse within which behaviour is *construed* (and on this construal action is taken and evaluations of it are formed). The context of law gives behaviour meaning; a sense is made of it. And this constructive, interpretive power is rooted in the collective resources of the practice.' Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, (New York, 1983), 175 cited in Postema, *Bentham and the Common Law Tradition*, 334.

<sup>21</sup> Postema, *Bentham and the Common Law Tradition*, 72 'One might say that the processes and practices of Common Law... define a kind of secular ritual. ... The Common Law, then, not only defines a framework for social interaction, a set of rules and arrangements facilitating the orderly pursuit of private aims and purposes, but it also publicly articulates the social context within which the pursuit of those aims takes on meaning. It is the reservoir of traditional ways and common experience, and it provides an arena in which the shared structures of public experience unfold.'

<sup>22</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 137.

<sup>23</sup> Simmonds notes that this causal connection between theory and the social reality which it seeks to describe in the following terms: "The wide separation between theory and reality rests above all on a failure to appreciate the extent to which 'a man's social relations with his fellows are permeated with his ideas about reality.' For changes in theory and belief are not sources of truth or error about reality: by transforming the significance of human practices, they may work a transformation in the nature of social reality itself." N.E. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984), 12 cited in Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 137 note 22 Malik also notes that an alternative view, one which views the social reality as "brute facts", would suggest that any error at the level of theory and in formulating definitions will not impact on the substance of the underlying phenomenon, and that the choice of definitions does not have any practical consequences.

<sup>24</sup> Malik, "Faith and the State of Jurisprudence," in *Faith in Law*, 137.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, 138.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, 139 note 26.

Malik notes that 'Traditionally, John Austin's attempt to develop a "science of jurisprudence" sought to develop the subject along the lines of the natural sciences. The fact that reflection on the nature of the law is concerned with human conduct was not seen to be a significant barrier to the application of description and observation as the appropriate tools for understanding these facts. Contemporary jurisprudence has of course broken free of the naive assumptions of Austin's model, although the methods and assumptions concerning human agency which underlie this approach continue to present themselves as an attractive option. Arguably, the attraction of Economic Analysis of Law is explained (in part) by the way in which its assumptions concerning human agency (focusing on Man as a rational maximiser of desires) successfully avoids questions of motivation. All questions concerning value are either avoided or equated with what people want using a criterion of efficiency which is amenable to calculation. This type of analysis emphasises weighing between values rather than any investigation of a qualitative contrast between them.' For a discussion of these features of Economic Analysis of Law see A.A. Leff, "Economic Analysis of Law: Some Realism about Nominalism" (1974) 60 *Virginia Law Review*. 451.

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<sup>30</sup> Malik notes that ‘Hart’s work breaks from the naïve techniques which focus on outward phenomenon, toward a method which attends to the inner states of subjects. He states, in relation to understanding law as a rational and empirical science: “My main objection to this reduction of propositions of law which suppress their normative aspect is that it fails to mark and explain the crucial distinction that there is between mere regularities of human behaviour and rule-governed behaviour. It thus jettisons something vital to the understanding not only of law but of any form of normative social structure. For the understanding of this the methodology of the empirical sciences is useless; what is needed is a “hermeneutic method” which involves portraying rule governed behaviour as it appears to its participants, who see it as conforming or failing to conform to certain shared standards.” H.L.A.Hart, *Essays in Jurisprudence and Legal Philosophy* (Oxford: Clarendon Press, 1993) 15. Malik notes, however, that despite giving priority to the internal attitude, Hart’s account remains within a tradition which treats motivations and meanings as facts to be described rather than inter-subjective meanings to be interpreted by attending to the experience of the subject. Therefore, it is argued by Simmonds that Hart’s theory remains within the empirical paradigm rather than adopting a genuinely alternative “hermeneutic approach”. Simmonds, *The Decline of Juridical Reason*, 104-5 cited in Malik, “Faith and the State of Jurisprudence,” 139 note 27.

<sup>31</sup> A.MacIntyre, *After Virtue*, 3<sup>rd</sup> ed. (London: Duckworth, 2007), Ch. 15.

<sup>32</sup> Malik, “Faith and the State of Jurisprudence,” in *Faith in Law*, 140.

<sup>33</sup> Taylor, *Multiculturalism and the Politics of Recognition*, 70.

<sup>34</sup> Malik, “Faith and the State of Jurisprudence,” in *Faith in Law*, 142.

‘to gain a better grasp of faith, what is required is an approach which explicitly shifts the focus from external conduct to the inner motivations and beliefs which underlie the conduct. Those theorists who insist that it is an essential rather than a contingent fact about human beings that they not only desire and act, but also undergo a process of reflection about their conduct, provide some of the resources for such a move.<sup>34</sup> This alternative method forces us to notice that not only do human agents have first-order desires (brute desires), they also have second-order desires (where they rank these desires according to evaluative criteria). In this way, some desires and actions of the agent are ranked by him according to his conception of value as being higher, noble and an aspect of an integrated way of living, whereas others are deemed to be unworthy, base and associated with a fragmentary life. These second order desires necessarily entail not only a quantitative assessment of what and how much is desired, but they also require a qualitative assessment of whether these desires fit in with the agent’s sense of what makes his life valuable. This method presents a more attractive way of capturing all the data relevant for an understanding of faith-base arguments which give particular weight to these features of human agency. Once this different view of human agency is accepted, it becomes clear that a full understanding of conduct cannot rely solely on observation and description. Reflection – motivations, beliefs and intentions – cannot be communicated in certain, absolute and objective terms. This emphasis necessarily introduces subjectivity, as we are required to understand these features by referring them to the experience of the agent.’

<sup>35</sup> *Ibid.*, 142-3.

<sup>36</sup> *Ibid.*, 143.

<sup>37</sup> Hans-Georg Gadamer, *Philosophical Hermeneutics*, edited and translated by David E. Linge ed. (Berkeley and Los Angeles California: University of California Pr., 1976).

<sup>38</sup> E.Betti, “On a General Theory of Interpretation: The Raison D’Etre of Hermeneutics” 32 *The American Journal of Jurisprudence* (1987): 245-269.

<sup>39</sup> *Ibid.*, 247.

<sup>40</sup> *Ibid.*, 248.

<sup>41</sup> Jean Grondin, *Introduction to Philosophical Hermeneutics*, trans. Joel Weinsheimer (New Haven and London: Yale University Press, 1994), 126.

<sup>42</sup> Betti, “On a General Theory of Interpretation, 248-249.

<sup>43</sup> C.Taylor, “Comparison, Truth and History” in his *Philosophical Arguments* (Cambridge, Mass., Harvard University Press, 1995), 146.

<sup>44</sup> Malik, “Faith and the State of Jurisprudence”, in *Faith in Law*, 145.

<sup>45</sup> *Ibid.*, 145-146.

<sup>46</sup> *Ibid.*, 146.

<sup>47</sup> *Ibid.*

<sup>48</sup> Werner Menski, “Law, Religion and Culture in Multicultural Britain,” in *Law and Religion in Multicultural Societies*, ed. Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman (Copenhagen: DJOF Publishing, 2008), 48, 60.

<sup>49</sup> Malik, “Faith and the State of Jurisprudence”, in *Faith in Law*, 148.

This will be especially important if the link between individual well-being, identity and recognition is accepted. In this context minimising such conflicts becomes an important part of the conditions necessary to allow individuals to flourish and lead fully autonomous lives.’

<sup>50</sup> *Ibid.*

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<sup>51</sup> *Re ST(A Minor)* The case was unreported and there is no record of it on the LEXIS database. There was a news report of it in the Guardian, 25 Nov. 1995. But Bradney's comments on the case are based on a transcript of it that he received from The Family. Cited by Anthony Bradney, "Faced by Faith," in *Faith in Law: Essays in Legal Theory*, eds. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 89-105.

<sup>52</sup> S.G. Post et al. "Physicians and patient spirituality: professional boundaries, competency and ethics". *Ann Int Med.* 132 (7) (2000): 578-83 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, Moira Stewart, et al. 2<sup>nd</sup> ed. (Oxford: Radcliffe Medical Pr., 2003), 60-62.

<sup>53</sup> M.R.Ellis et al. "Addressing spiritual concerns of patients: family physicians attitudes and practice", *J Fam Pract.* 48 (2) (1999): 105-109; D.A.Matthews et al. "Religious commitment and health status. A review of the research and implications for family medicine". *Arch Fam. Med.* 7 (2) (1998): 118-24; J.L.McBride, et al. "The relationship between a patient's spirituality and health experiences". *Fam Med.* 30 (2) (1998): 112-6 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, Moira Stewart, et al., 60-62.

<sup>54</sup> F.C.Craigie Jr. and R.F.Hobbs III, "Spiritual perspectives and practices of family physicians with an expressed interest in spirituality", *Fam. Med.* 31 (8) (1999): 578-85; M.R.Ellis et al. "What do family physicians think about spirituality in practice?" *J Fam Pract* 51 (3) (2002): 249-54 cited by Brown and Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, Moira Stewart, et al., 60-62.

<sup>55</sup> Carole J. Brown, "Facilitative Mediation: The Classic Approach Retains its Appeal." *4 Pepperdine Dispute Resolution Law Journal* (2003-2004): 279-296.

<sup>56</sup> Robert A. Baruch Bush and Joseph P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 2005), 218.

<sup>57</sup> Perry Yoder, *Shalom* (London: Spire imprint of Hodder & Stoughton, 1989), 82-83.

'The laws, of course, do not apply themselves; people need to be willing and able to implement them. In this regard, we know that the structure of a society and its institutions governed day-to-day operation more than do abstract rules. Indeed, law can be seen as a reflection of these institutions, and a guide to their operation. As a result, justice tends to become understood as procedure - justice results when the applicable law has been carried out. In this view of justice laws become norms which in themselves determine whether justice is done. From this view of the law can arise the belief that following the law is a litmus test of justice. In this framework of thinking, the question of legality (is it legal? is it according to the law?) replaces the question of justice, (is it right or just?). In contrast to this procedural understanding of justice, shalom depends on justice understood substantively: justice is done when a just okay state of affairs is the result. On this view, legality is not the test of justice, because laws themselves are unjust if they do not bring about a just result. Instead, the litmus test of justice is whether the powerless and oppressed received aid and liberation so that there might be shalom..... These two different views of justice have significant consequences for the role of law in society. When we understand justice procedurally, the law becomes a conservative force - it operates to maintain the status quo because it is primarily concerned with carrying out rules. When we understand justice as substantive, then law operates to transform society by instituting an equitable set of social relationships within the society. This latter function was, of course, the concern of biblical law. The implication of this seems to be that only as justice passes this test, will it be shalom justice and lead to shalom. Shalom will not result from procedural justice alone.'

<sup>58</sup> 'The Highest Court in the Land: Justice makers: The work of the Supreme Court' BBC programme screened on BBC Four on the 25<sup>th</sup> May 2011.

<sup>59</sup> While I make this statement I do acknowledge that mediation is now often employed in the English legal system, particularly in relation to small claims and in family law to try to reach settlements.

<sup>60</sup> Derick T Wade, "Do biomedical models of illness make for good healthcare systems?" *BMJ* 329 (2004).

<http://www.bmj.com/cgi/content/full/329/7479/1398> (accessed November 25, 2007).

<sup>61</sup> George L. Engel, "The Need for a New Medical Model: A Challenge for Biomedicine," *Science* 196 (1977): 129-136.

<sup>62</sup> Arthur Kleinman, *The Illness Narratives* (New York: Basic Books, 1988), 5-6.

<sup>63</sup> George L Engel, "The Clinical Application of the Biopsychosocial Model," *Am J Psychiatry* 137 (5) (1980), 538.

<sup>64</sup> Engel, "The Need for a New Medical Model," 131.

<sup>65</sup> *Ibid.*, 132.

<sup>66</sup> Engel, "The Clinical Application of the Biopsychosocial Model," 538.

<sup>67</sup> J.B.Brown, M.Stewart, W.W.Weston and T.R.Freeman, introduction to *Patient-Centred Medicine* in *Patient-Centred Medicine*, Moira Stewart, et al., 2<sup>nd</sup> ed. (Oxford: Radcliffe Medical Pr., 2003) 5, Box. 1.1 - 1. Exploring both the disease and the illness experience. 2. Understanding the whole person. 3. Finding

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common ground (e.g. problems, priorities, goals of treatment). 4. Incorporating prevention and health promotion. 5. Enhancing the doctor-patient relationship (e.g. compassion, power, healing) 6. Being realistic (e.g. time and wise stewardship of resources).

<sup>68</sup> Ibid. 6.

<sup>69</sup> Judith Belle Brown and W. Wayne Weston, "The second component: understanding the whole person, Section 1: individual and family," in *Patient-Centred Medicine*, ed. Moira Stewart et al., 60-62.

<sup>70</sup> Kleinman, *The Illness Narratives*, 228.

<sup>71</sup> Ibid., 230-236.

<sup>72</sup> Ibid., 121.

<sup>73</sup> Ibid., 239.

<sup>74</sup> Ibid., 240.

<sup>75</sup> Ibid., 90.

<sup>76</sup> Ibid., 82.

<sup>77</sup> While I make this statement I do acknowledge that mediation is now often employed in the English legal system, particularly in relation to small claims and in family law to try to reach settlements.

## Chapter 6

### Narrative and meaning: a challenge to legal positivism

In the light of my argument in the past two chapters I will revisit six of the legal cases outlined in the first chapter and consider whether my proposals would have made a difference.

The first case that I looked at was *Baby MB (An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem))* [2006] EWHC 507 (Fam) [2006] 2FLR 319.

#### Case Study 1 - Baby MB

This case involved a child known as M aged 18 months who was found to be suffering from a severe form of spinal muscular atrophy, a degenerative and progressive condition. With treatment M might live for a few years or die soon. The doctors considered that M's quality of life was so low and the burdens of medical intervention so great that the endo-tracheal tube should be removed. M would be sedated to prevent pain and distress and he would die immediately because he was unable to breathe. M's parents who visited him for long periods every day would not agree to this. They argued that although M did show signs of pain and distress, he also showed signs of pleasure, recognised members of his family and responded to music or television. The NHS Trust therefore applied to the High Court for a declaration to the effect that it would be lawful and in M's "best interests" to withdraw ventilation. M's parents sought a declaration that it would be lawful and in M's "best interests" for a tracheostomy to be performed to enable long-term ventilation to be carried out. The court dismissed both applications and made a declaration concerning the lawful withholding of further treatment.<sup>1</sup>

Both parents gave written and oral evidence. The court report included the following statement about the child's father.

'The father is a practising Muslim. He said in his written statement: 'One of my beliefs is that it is not right for people to choose whether another person should live or die'. During the course of his oral evidence he said that he believes no one knows what time someone is born to die. No one knows exactly when the God who gives life takes it. We all have a certain time to die and should leave the decision to God.'<sup>2</sup>

The response of Mr Justice Holman was as follows:

“This case concerns a child who must himself be incapable, by reason of his age, of any religious belief. An objective balancing of his own best interests cannot be affected by whether a parent happens to adhere to one particular belief, or another, or none. I have the utmost respect for the father’s religious faith and belief, and for the faith of Islam, which he practises and professes. But I regard it as irrelevant to the decision, which I have to take, and I do not take it into account at all.”<sup>3</sup>

The problem is the judge and father do not engage in a meaningful dialogue about issues of faith, they are talking past one another. This is a similar situation to what we found in Chapter 3, in the medical setting, when the romantic genre of narrative and the biomedical model come into contact. The second difficulty relates to the legal decision-making process where conflicting rights and principles, or in this case benefits and burdens of treatment, are balanced. As I have explained in Chapter 1 Bradney has argued that this is problematic for the ‘obdurate’ believer as his faith is his priority. The third difficulty relates to concepts such as ‘benefits’ ‘burdens’ ‘harm’, ‘futility’ and ‘quality of life’. Ann Sommerville, from the BMA, argues:

‘Although they can be slippery, notions of “harm” and “benefit” continue to feature strongly in the BMA’s problem-solving methodology and increasingly preoccupy the courts, even though there is no clear and universalisable definition. As with the four principles approach interpretation of the terms depends, in different contexts on a number of varieties, including individuals’ perceptions as well as legal and professional benchmarks.’<sup>4</sup>

Sommerville acknowledges that the concepts are evaluative and can be understood either subjectively or objectively. For example, doctors now accept that some Jehovah’s Witnesses are likely to view blood products as “harm” rather than a “benefit”.<sup>5</sup>

Likewise, there are some in the medical profession who acknowledge that both lay and medical professionals are susceptible to several cognitive biases when they make health-related decisions.<sup>6</sup>

‘We often assume that, when faced with any decision involving a range of possible outcomes, we should subjectively estimate how nice or nasty each outcome will be, weigh these by the probability that each outcome will occur, and intuitively choose the option with the highest weighted score. This line of reasoning (known as subjective expected utility theory) implicitly underpins much research into health-related decision-making. But in reality, neither patients nor the members of regulatory bodies make choices in this fundamentally rational way. Limits to our capacity to process information, for example, prevent us from considering all options, outcomes, and the likelihoods at once. Those that we focus on will inevitably influence us more.’<sup>7</sup>

Similarly, it has been argued that cultural and religious beliefs can affect the way in which such terms as 'futility' and 'quality of life' are interpreted.<sup>8</sup> I would argue that it is therefore not just a simple and straightforward case of drawing up a list of benefits and burdens/harms as the judge suggested. What might be a benefit to one person might be a burden/harm to another, depending on interpretation. In Chapter 3 I argued that there is a continual negotiation of meaning that takes place in the doctor-patient relationship, and also in disputes between disputants, and when a case ends up in court between the disputants and the judge, a negotiation which arises from different cultures. Both medicine and law are like cultural systems with their own language, which has to be interpreted and translated, and the meanings negotiated.

Could the dispute about Baby MB have been referred to mediation? If so, what benefit might there have been for M's parents? I would argue that this dispute could, as a first step, have been referred to mediation. Had this happened M.'s parents would have had the benefit of being able to tell their story in all of the models of mediation that I outlined and discussed in Chapter 4, and all, except the evaluative approach, would have provided some room for issues of faith to be discussed and given some weight in the decision-making process. In my view the most beneficial approach for M's parents would have been a narrative approach to mediation, because a mediator who employs this approach would have understood the importance of culture, and is likely to have been sensitive to issues of faith. Such a mediator would have also been more likely to have enquired whether the parents of M wanted the support of a representative of their faith community as a spokesperson or co-mediator and this would have certainly facilitated dialogue and understanding between the disputants. As we saw in the third chapter, in the story of James Hopewell, arriving at a mutual understanding may still be difficult but at the very least consideration of the meaning in stories could be a useful tool for pinpointing areas of misunderstanding and conflict between disputants. Mediation might not have resolved the dispute but it would have provided space for dialogue and understanding to be facilitated between the disputants, and to clarify points of agreement and disagreement.

If the dispute was heard at Court what difference would it have made to the parents of M had the judge approached the case in the ways that I suggested in Chapter 5? Would a different approach have led to a different outcome? If the judge had approached the case by employing a Malik 'interpretive' model he would not have dismissed the

father's religious beliefs as 'irrelevant'. Instead, he would have had to spend time reflecting on the father's beliefs, and tried to understand them. The three adapted medical models would have had a similar effect. If the judge had employed a systems approach it would have reminded him that the dispute could not be understood and addressed in purely legal terms, and that a litigant does not live in isolation but within a particular society, culture and faith community. The judge would have therefore had to be prepared to hear not just legal evidence but also details of the Muslim father's faith perspective, beliefs and practices that were relevant to the case. If the judge had employed a litigant-centred approach it would have reminded him that a legal perspective was only one part of the equation, and so he would have also sought the Muslim parent's perspective on the dispute. The judge would also have been aware that the spirituality of a litigant may play a role in shaping how a litigant understands and responds to a dispute, and that it may also affect the litigant's decisions. The judge could have therefore engaged in dialogue with the patient's father about his beliefs. However, in my view the most beneficial approach for M's parents would have been if the judge had employed a meaning-centred approach because it would have reminded him that disputes are culturally constructed. The judge would have therefore been aware that a continual negotiation of meaning takes place between disputants, and between a disputant and a judge. The judge would have understood the importance of listening to the father's story and of paying attention to the meaning in that story. The judge would have therefore engaged in dialogue with the patient's father about his beliefs. I have argued that if judges do not have the time or expertise, or do not feel able to discuss spiritual matters with a litigant, then they should be able to seek the assistance of a representative of the litigant's faith community. In this case if the judge had employed any of the adapted medical models he could have enquired whether the patient's father required support from a representative of his faith community, and if needed sought assistance himself to help resolve the dispute.

I suspect that, in the light of the facts of this particular case, this would still not have changed the outcome. Two facts seem to support my contention. The first appears in the judgement of Judge Holman and relates to the Court's power when it comes to positive medical intervention. 'The court had no power to require doctors to carry out a positive medical intervention against their own judgement and will.'<sup>9</sup> This explains why the judge dismissed the parents' application for a tracheostomy to be carried out on M. The second relates to the fact that baby M was neither in a persistent vegetative state nor

severely brain damaged. This is probably a key reason why the judge refused to support the Trust's application to withdraw ventilation.

'There have been legal cases and decisions in which approval has been given for the withdrawal of life support from, followed by immediate death of, brain dead or severely brain damaged children or patients. And there have been legal cases and legal decisions (of which Charlotte Wyatt is an example) in which advance approval has been given not to embark upon (i.e. to withhold) forms of treatment or life support, if later needed, if the condition of a child is very poor. So far as I am aware, no court has yet been asked to approve that, against the will of the child's parents, life support may be withdrawn or discontinued, with the predictable, inevitable and immediate death of a conscious child with sensory awareness and assumed normal cognition and no reliable evidence of any significant brain damage.'<sup>10</sup>

Despite this I do not consider this a good enough reason to keep the system as it is.

Malik and Taylor provide reasons why dismissal should not be an option. Malik argues that in the light of the debates about the "politics of recognition" dismissal may well be interpreted as 'dismissal of those individuals for whom these beliefs are of great significance and value.'<sup>11</sup> Taylor argues that identity is shaped partly through recognition and dialogue.<sup>12</sup> Misrecognition or non-recognition shows not just a lack of respect, it can lead people to suffer real damage, harm or oppression. Further, 'recognition is not just a courtesy we owe to others - it is a real need'.<sup>13</sup> If faith (which for all believers are part of their identity, and for 'obdurate' believers are a key to their identity) is not recognised then this can lead to harm. Malik also argues that with dismissal there is also a risk of alienating those who present faith-based arguments from the legal system, whereas, taking faith-based arguments seriously ensures 'identification with the legal system'.<sup>14</sup>

## Case Study 2 - The Conjoined Twins Jody and Mary

This is the case of *Re A (children) (conjoined twins: surgical separation)*.<sup>15</sup> Jodie and Mary were conjoined twins who were joined at the lower abdomen. Jodie was capable of independent existence, but an operation to separate the twins would inevitably result in the death of Mary who was alive only because a common artery enabled her sister to circulate oxygenated blood for both of them. If there were no operation they would both probably die within three to six months because Jodie's heart would fail. The doctors who were caring for the twins wanted to operate to separate them but the parents of the twins refused to give consent. The hospital therefore applied to the High Court for a declaration that the proposed operation would be lawful and in the best

interests of both twins. The High Court judge decided that the operation would enable Jodie to lead a relatively normal life; that the remaining months of Mary's life would not only be worth nothing to her, but also hurtful; that to prolong her life for those few months would be seriously to her disadvantage; that the operation would therefore be in the interests of both children, that it was not to be regarded as a positive act, but as the withdrawal of Mary's blood supply; that the position was therefore analogous to the court authorising the withholding of food and hydration; and accordingly the operation would be lawful. The parents therefore appealed on the grounds that the judge erred in holding that the operation was (i) in Mary's best interest, (ii) that it was in Jodie's best interest, and (iii) that in any event it would be legal. These were the three points that the Court of Appeal considered.<sup>16</sup>

The Court of Appeal's decision included the following statements:

1. 'In the High Court case the judge was wrong to conclude that Mary's life was not worth living. The operation was not in Mary's best interests.'<sup>17</sup>

2. 'Given the conflict of interests between Jodie and Mary, and the conflict in the Court's duty to give paramount considerations to the welfare of each twin, it had to choose the lesser of two evils and so find the least detrimental alternative. It therefore carried out a balancing exercise, with the right of the twins to life going into the balance, alongside the worthwhileness of the treatment.... The operation was in Jodie's best interests. The least detrimental choice ... was to permit the operation to be performed.'<sup>18</sup>

3. 'The doctors were under a duty to Mary not to operate because it would kill her, but they were under a duty to Jodie to operate, as not to do so would kill her. In those circumstances the law had to allow an escape route through choosing the lesser of two evils. ... In any event, the reality was that Mary was killing Jodie, and the doctors would be justified in coming to Jodie's defence by removing the threat of fatal harm presented by Mary draining her lifeblood. The availability of such a plea of quasi self-defence, modified to meet the quite exceptional circumstances that nature had inflicted on the twins, made intervention by the doctors lawful. ... the circumstances satisfied the three necessary requirements for the application of the defence of necessity, namely that the act was needed to avoid inevitable and irreparable evil, that no more should be done than was reasonably necessary for the purpose to be achieved and that the evil inflicted was not disproportionate to the evil avoided. Further, the doctrine of the sanctity of life respected the integrity of the human body, and the proposed operation would give the children's bodies the integrity which nature had denied them. Finally, Mary's death, though the inevitable consequence of the operation, would not be its purpose or intention. Accordingly, it would be lawful to perform the operation.'<sup>19</sup>

The parents who are both Roman Catholics were faced with an agonising choice and

this is part of the parents' statement that explains why they were not prepared to consent to the operation:

“We have of course had to give serious consideration to the various options as given to us by our daughters' treating doctors. We cannot begin to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive. That is not what we want, and that is what we have told the doctors treating Jodie and Mary. In addition, we are also told that if Jodie survives and that is not known at all, then she is going to be left with a serious disability. The life we have .... is remote... with very few, if any facilities would make it extremely difficult not only for us to cope with a disabled child but for that disabled child to have any sort of life at all ... We have very strong feelings that neither of our children should receive any medical treatment. We certainly do not want separation surgery to go ahead as we know and have been told very clearly that it will result in the death of our daughter, Mary. We cannot possibly agree to any surgery being undertaken that will kill one of our daughters. We have faith in God and are quite happy for God's will to decide what happens to our two young daughters. ... .”<sup>20</sup>

The root of the parents' objection to separation was that the twins were equal in their eyes and they could not agree to kill one even to save the other. The parents interpreted the proposed medical intervention as an act by the doctors and indeed themselves that involved killing Mary.

The Archbishop of Westminster, Archbishop Cormac Murphy-O'Connor, was allowed to make written submissions to the Court. The full text of the submissions gives a clear account of why the Archbishop intervened and what he hoped to achieve by that intervention.<sup>21</sup> The submissions can be divided into two parts, 1 - 3 are based on tenets of the Christian faith and principles of Catholic moral teaching,<sup>22</sup> and 4-21 included arguments based on legal advice that the Archbishop had received, although they are also very much coloured by the Christian faith.

Could this dispute have been referred to mediation? If so, what benefit would there have been for the parents? Would the outcome have been different? I would suggest that as the parents interpreted the medical intervention as an act of killing by the doctors and themselves, two courses of action might have been possible. First, a member of the medical team could have enlisted the help of a healthcare chaplain. I have outlined the role of the healthcare chaplain in Chapter 3. In this instance the healthcare chaplain would have been helpful in being able to take time and space to listen to the parents' story. If the chaplain had been a Roman Catholic priest who did not interpret the

medical intervention in exactly the same way as the parents, then it might have been possible for the priest to have sensitively attempted to resolve the matter by the process of reframing. Secondly, mediation might also have been helpful. The parents would have had the benefit of being able to tell their story in all four models of mediation that I outlined in Chapter 4, and all, except the evaluative model would have provided time for issues of faith to be discussed and granted some weight in the decision-making process. In my view the most beneficial model for the parents would have been a narrative approach as mediators adopting this approach are aware that disputes are culturally constructed and are likely to be sensitive to issues of faith. The parents would have been asked whether they wanted a representative of their faith community to act as a spokesperson and/or co-mediator. A mediator using this approach would have also been attentive to the meaning that the parents attached to the medical intervention. The parents thought that the doctors would be killing Mary, and that by agreeing to the operation that they would be complicit in killing their daughter. In my opinion this was the key to resolving this dispute. How could narrative mediation have helped? As I explained in Chapter 4 one of the steps in narrative mediation is the construction of a new narrative, which is a similar process to reframing. From the parents' statement it is also clear that economic factors and very practical considerations about how Jodie would receive ongoing medical treatment figured prominently. I would suggest that had these matters been addressed in mediation at an early stage then the parents might conceivably have been prepared to agree to the operation, and the case would not have ended up in the courts.

If the dispute was heard at Court what difference would it have made to the parents of the twins had the judge approached the case in the ways that I suggested in Chapter 5? Would a different approach have led to a different outcome? The parents would have benefited in varying degrees from having their faith considered if the judge had approach the case by employing any of the adapted medical models or the Malik 'interpretive' model. If the judge was unwilling or felt unable to talk to the parents about their faith he could have sought assistance from a representative of their faith community. In my view the most beneficial approach for the parents would have been if the judge had used a meaning-centred approach. A judge employing this approach would have been aware that disputes are culturally constructed and been attentive to the meanings in the parents' narratives. The key in this case was the meaning that the parents attached to the medical intervention. However, I think it unlikely that a judge

would have been able to resolve this matter through dialogue alone. The judge would have needed the assistance of a representative of the parents' faith community to help resolve this dispute.

Again it is unlikely that the outcome of the case would have been different because Section 1 (1) Children Act 1989 states that the welfare of the child is to be regarded as paramount. What this means is that parental rights are subordinate to the welfare of a child. The parents' views are therefore to be respected and their decision given due weight but in the end it is the Court's decision to make on the basis of the welfare and best interests of the children. This provided a dilemma for the Court because they were faced with deciding the welfare of two children. They dealt with this dilemma by carrying out a balancing exercise which involved weighing the right to life of each twin, together with the worthwhileness of the treatment and the quality of life. Many, including the parents of the twins, may well have found this process abhorrent. However, if the Court had not made the decision to separate the children both would have died. Medical evidence confirmed that no one could save Mary, as she would have died with or without the operation. The medical evidence also suggested that with an elective separation the risk of Jodie dying was between 2-6 per cent. In other words Jodie had a 94 to 98 per cent chance of survival. With such overwhelming medical evidence pointing to a successful outcome for Jodie the Court decided to try save her as she had an excellent chance of survival. While the Court's decision was controversial and some commentators have disagreed with the judicial reasoning,<sup>23</sup> and others with the decision to override the parents' rights,<sup>24</sup> in the end the Court acted to save the life that they could save.

Does this support the view that the faith of the parents, or that of a representative of their faith community, should not be heard and discussed in legal cases? I have argued that it does not because that would deny the parents and the representative of their faith community substantive justice, and risk causing harm and alienating them from the legal system. But I also want to consider another reason why the voice of faith communities should be heard in legal cases, and that is to challenge a particular legal judgement.

The Archbishop's submissions numbers 4-21 included specific arguments based on legal advice that he had received, but that were coloured by the Archbishop's Christian

faith. It was these submissions that Ward LJ dealt with in his legal reasoning. I do not intend to go through these in detail but what they reveal is that the Archbishop is deeply troubled by the language, reasoning and decision of the judge, Mr Justice Johnson concerning Mary, the weaker of the twins, when the case was heard in the High Court. The purpose of the Archbishop's submissions is to correct certain statements made by Mr Justice Johnson about Mary, and to invite the Court of Appeal to reverse his judgement. Which begs the question, what was it that Mr Johnson said, and what was it about his reasoning and decision that troubled the Archbishop? A summary of Mr Justice Johnson's judgement was reported as follows:

'The judge concluded that the operation would enable Jodie to lead a relatively normal life; that the remaining months of Mary's life would not only be worth nothing to her, but also hurtful; that to prolong her life for those few months would be seriously to her disadvantage; that the operation would therefore be in the interests of both children; that it was not to be regarded as a positive act, but as the withdrawal of Mary's blood supply; that the position was therefore analogous to the court authorising the withdrawal of food and hydration; and accordingly the operation would be lawful.'<sup>25</sup>

The Archbishop raises a number of criticisms of Mr. Justice Johnson's reasoning. The first concerned his comment that Mary's life would be worth nothing to her.

'It is seriously unreasonable to seek to justify the ending of someone's life on the grounds that that human being's life lacks value or worth, so that he or she would be better off dead. Judgements of that kind should not be admitted as justifications of intentional killing since they are both arbitrary and admit of no principled way of containing their extension to a variety of other conditions, and so are incompatible with the justice which the law should uphold. The indispensable foundation of justice is the basic equality in worth of every human being.'<sup>26</sup>

The second, concerned the fact that Mr Justice Johnson employed reasoning from the case of *Airedale NHS Trust v Bland*<sup>27</sup> to argue that the surgical separation of the twins was not a positive act of the withdrawal of Mary's blood supply, but an omission like the withdrawal of food and hydration.

“the analogy between the proposed operation and ceasing tube-feeding is strained and unpersuasive. While it is reasonable to classify the latter as an omission, the former is clearly a major surgical intervention.”<sup>28</sup>

The Archbishop also argued that the operation would be of no benefit to Mary and would only act to accelerate her death.

It is in these particular criticisms that the Archbishop is more successful with the judges. To begin with Ward LJ dealt with the issue of the worth of Mary's life.

“Given the international conventions protecting ‘the right to life’ . . . I conclude that it is impermissible to deny that every life has an equal inherent value. Life is worthwhile in itself whatever the diminution in one’s capacity to enjoy it and however gravely impaired some of one’s vital functions of speech, deliberation and choice may be. I agree with the Archbishop that: The indispensable foundation of justice is the basic equality in worth of every human being. . . In my judgement Johnson J was wrong to find that Mary’s life would be worth nothing to her. I am satisfied that Mary’s life, desperate as it is, still has its own ineliminable value and dignity.”<sup>29</sup>

Ward LJ then dealt with Mr Justice Johnson’s reasoning that separation would be an act of omission:

“It seems to me to be utterly fanciful to classify this invasive treatment as an omission in contra-distinction to an act. Johnson J’s valiant, and wholly understandable attempt to do so cannot be supported. . . The operation has, therefore, to be seen as an act of invasion of Mary’s bodily integrity and unless consent or approval is given for it, it constitutes an unlawful assault upon her.”<sup>30</sup>

Then Ward LJ dealt with the issue of whether the separation would be in Mary’s best interests.

“It clearly cannot be. It will bring her life to an end before it has run its natural span. It denies her inherent right to life.”<sup>31</sup>

A summary of the first part of the final judicial decision brings all these comments together:

‘In view of the international conventions protecting ‘the right to life’, it is impermissible to deny that every life had an equal inherent value. Life was worthwhile in itself whatever the diminution in a person’s capacity to enjoy it, and however gravely some of his vital functions of speech, deliberation and choice were impaired. Moreover, the indispensable foundation of justice was the basic equality in worth of every human being. It followed that in the instant case the judge had been wrong to conclude that Mary’s life would be worth nothing to her. Further, it was utterly fanciful to classify the proposed operation as an omission in contra-distinction to an act. The operation was an invasion of Mary’s bodily integrity, which constituted an unlawful assault upon her unless consent or approval was given. Nor could the operation be categorised as the non-continuation of treatment prolonging the patient’s life. Thus the question was not whether it was in Mary’s best interests that the hospital should continue to provide her with treatment which would prolong her life. Rather, it was whether it was in her best interests that an operation be performed to separate her from Jodie when it was certain that she would die as a result. That question could only be answered by concluding (Robert Walker LJ disagreeing) that it was not in her best interests. Accordingly, although the judge had plainly been correct to conclude that the operation was in Jodie’s best interests, his approach was flawed, and his assessment of Mary’s best interests fell with it.’<sup>32</sup>

What we can see from this is that the Archbishop was successful in arguing against part of Mr Justice Johnson's judgement concerning Mary. I would argue that the reason why it was so important that the Archbishop challenged this judgement is that left unchallenged Mr. Justice Johnson's judgement would have become legal precedent, capable of being followed in other cases, quoted and relied upon by law students, solicitors, barristers and judges. As a legal precedent it could have been used in other cases and been capable of affecting the lives of other vulnerable persons.

### Case Study 3 - Re E

In the case of *Re E (A Minor) (Wardship: Medical Treatment)*<sup>33</sup> a hospital authority sought leave of the court to treat A, a young man aged 15 years and 9 months, who was suffering from leukaemia. The hospital wished to treat A with the conventional treatment of four drugs. The first two drugs directly attack the leukaemia cells, whereas the other two are non-specific and attack everything they meet including the bone marrow. The attack on the bone marrow reduces the body's ability to produce the necessary blood cells. As a result, there is a requirement for blood transfusions to be administered as part of the treatment. There is an alternative, but less effective treatment, which only involves the administration of the first two drugs. A, and his parents were devout Jehovah's Witnesses and A refused to consent to that part of the treatment that involved blood transfusions. The hospital suggested that if the four-drug treatment and blood transfusions was administered there was between an 80% and 90% chance of full remission. If the hospital only administered two drugs the chance of full remission was reduced to 60%. In view of the fact that A refused that part of the treatment that involved blood transfusions the hospital administered the first two drugs. There was some response to the two-drug treatment and a percentage of the cancerous cells had been killed, but A's haemoglobin levels had fallen. The medical evidence suggested that it was a matter of a day at best, or a few hours at worst, before the haemoglobin and platelets in his blood would fall to dangerously low levels. This would mean that A's blood would not be able to clot and spontaneous bleeding would then take place anywhere in the body, such as in the brain which would cause a stroke, or in the eyes causing blindness, or causing blood loss that would exacerbate his condition. The hospital were concerned that A might die from a stroke or heart attack, rather than from the leukaemia.<sup>34</sup>

On an ex parte application 2 days earlier A had been made a ward of court and the Official Solicitor was appointed to act as A's guardian ad litem. In response A's parents argued that as A was so close to his 16<sup>th</sup> birthday, an age where A's consent to treatment would be required under section 8 of the Family Law Reform Act, and following the judgement in the Gillick<sup>35</sup> case (that a child under 16 years can make a decision regarding medical treatment when he achieves a sufficient level of understanding and intelligence and fully understands what is proposed), that the court should not intervene in wardship proceedings.<sup>36</sup>

The decision of the High Court included the following statements:<sup>37</sup>

1. 'The judge found that A was intelligent enough to make decisions about his own well-being, but he did not have a full understanding of the whole implications of what refusal to accept blood transfusions would involve. As he was not yet 16 years section 8 of the Family Law Reform Act 1969 did not apply and wardship proceedings were not an abuse of the process of the Court.'
2. 'In deciding whether to give leave to the hospital authority, the welfare of the ward was the first and paramount consideration, which had to be decided objectively by the standard of the ordinary mother and father.'
3. 'The Court should be slow to interfere in a decision the ward had taken, as the freedom of choice of medical treatment was a fundamental human right in adults, and he was so close to that age. Nevertheless, having given great weight to the religious principles which underlay the family's decision, when viewed objectively the welfare of A led to only one conclusion, namely that the hospital should be at liberty to treat him with blood transfusions.'<sup>38</sup>

The position of A and his parents regarding the conventional medicine was set out by Mr Justice Ward as follows:

“The hospital have been unable to follow the conventional treatments because A and his family are devoted and strongly devout members of the Jehovah's Witness belief, and it is contrary to the tenets of their faith to permit transfusions of blood. A indicated his refusal to that blood transfusion and was then supported and continues to be supported by his parents who likewise refuse to give that consent, although in all other respects they consent to the treatment of the hospital.”<sup>39</sup>

“The parents oppose this application with a quiet but powerful reliance upon their religious beliefs.”<sup>40</sup>

The judge acknowledged that A's religious convictions were 'deeply held and genuine' but he had three concerns. The first was a legal concern – undue influence.<sup>41</sup>

The second concern was simply that the views that A held as a teenager might change, as he got older.<sup>42</sup> The third concern related to the fact that he interpreted the parents' support and A's decision in terms of martyrdom and was baffled by it.<sup>43</sup> But as Bradney has commented, 'it seems unlikely that A would have seen his death as martyrdom.'<sup>44</sup> Mr Justice Ward then went on to explain that his jurisdiction in wardship proceedings was a protective one.<sup>45</sup>

Could this dispute have been referred to mediation? If so, what benefit might there have been for A and his parents? I would argue that this dispute could only have been referred to mediation in the early stages of A's treatment. In the later stages time was of the essence and mediation would have been inappropriate. If mediation had been employed in the early stages A and his parents would have had the benefit of being able to tell their respective stories in all of the models of mediation that I outlined and discussed in Chapter 4, and all, except the evaluative approach, would have provided some room for issues of faith to be discussed and given some weight in the decision-making process. In my view the most beneficial approach for A and his parents would have been a narrative approach to mediation because a mediator who employs this approach would understand the importance of culture and would be more likely to be sensitive to issues of faith. The mediator using this approach would have also been likely to have asked A and his parents whether they wanted a representative from their faith community to support them either as a spokesperson or as a co-mediator. Would the disputants have reached a resolution? I think that this is unlikely as A and his parents held strong views about blood transfusions. However, mediation would have provided the disputants with space for each to tell their respective story, and the medical staff would have had the opportunity to explain the medical position. The mediator would have facilitated dialogue and understanding between the parties, and helped to clarify points of agreement and those where the parties continued to disagree.

What difference would it have made to A and his parents had the Court approached the case in the ways that I suggested in Chapter 5? Would a different approach have led to a different outcome? Whether the judge had employed a Malik 'interpretive' approach or any of the three adapted medical models A and his parents would have had the benefit of having their faith perspective considered. In my view the most beneficial approach for A and his parents would probably have been a meaning centred approach. A judge using this approach would have understood that disputes are culturally constructed and

would have also been attentive to the meaning in the narratives of A and his parents. The judge using a meaning-centred approach is likely to be sensitive to issues of faith and would have asked A or his parents whether they wanted support from a representative of their faith community. But there are two specific barriers to all four approaches being effective. First, as I noted in Chapter 4 Bradney argues that for a judge to come to understand unfamiliar religious beliefs requires time and reflection. In this case time for reflection was not available as A's condition had deteriorated and a decision had to be made that day. Secondly, Malik acknowledges that if the faith-based conduct is very different from the theorist's home beliefs and practices, then the theorist's home understanding may operate as an absolute barrier to understanding, and the 'interpretive' method will not be able to assist in helping the theorist understand the faith.<sup>46</sup> This is a similar position to that noted in Chapter 3 in the story of James Hopewell who found that the polar opposite narrative genres found it difficult to understand one another. So while a narrative presents a window onto the conceptual world of another, it is not always easy to enter and understand that world. In this case this seems to have been what happened with Mr Justice Ward who admitted that he was 'baffled' by A's decision. Added to which the judge was aware that the medical team had tried to accommodate the religious beliefs by using the two-drug approach, which had not proved successful. As a result, A's life was in danger. 'A' and his parents also came up against the law. Faced with the choice of being able to save a child's life or doing nothing and allowing the child to die, the Court will inevitably, under its wardship jurisdiction, err on the side of caution and try to save a child's life.

#### Case Study 4 - Re P

In the case of *Re P (Medical Treatment: Best Interests)*<sup>47</sup> a Jehovah's Witness aged 16 years and 10 months had an inherited condition called hypermobility syndrome, the symptoms of which included a tendency to bleed because of the fragility of blood vessels. The patient had suffered a ruptured aorta and he and his parents independently expressed to the treating doctors their objection to the use of blood or blood products. The doctors did not treat with blood products in part because they thought that the treatment would be futile. Although the crisis passed and there was no evidence of serious ongoing bleeding the underlying problem that caused the crisis had not been resolved. The hospital therefore sought leave to administer blood if the patient's condition became 'life-threatening.'

The High Court's decision included the following statements:

1. 'There were cases when the refusal of medical treatment by a child approaching the age of 18 years would be determinative. A court would have to consider whether to override the wishes of a child approaching the age of majority, when the likelihood was that all that would have been achieved was the deferment of an inevitable death and for only a matter of months.'<sup>48</sup>

2. 'Treatment imposed against the will of the patient was to be avoided wherever possible. In seeking to achieve what was best for the patient, his wishes had to be put at the forefront of the court's consideration. As a young man, nearly 17 years with established convictions, his religious faith must demand the respect of all about him. There were weighty and compelling reasons why the order should not be made, and the court was reluctant to overrule the wishes of the patient.'<sup>49</sup>

3. 'Nonetheless, looking at the patient's interests in the widest possible sense, his best interests would be met by an order permitting the hospital to administer blood or blood treatments subject to there being no other form of treatment available.'<sup>50</sup>

Mr Justice Johnson reported the patient's views as follows:

"I will call him 'John' although that is not his real name. He was born on 18 October 1986, so he is 16 years and 10 months old. He is ill. It seems possible that in the course of their treatment the doctors will need to administer blood or blood products. John steadfastly objects. He is, and as I understand it throughout his life has been, a staunch and committed Jehovah's Witness."<sup>51</sup>

"In the words of Mr Stevens, a solicitor who has come to act for John ..... John said to him: 'I am my own person. I have a separate mind. It makes no difference what my parents think. I make my own decisions.' John's instructions to Mr Stevens are that he does not consent to receiving a blood transfusion in any circumstances."<sup>52</sup>

What then was Mr Justice Johnson's response to John's religious beliefs and that of his parents?

"He is a young man whose religious faith must surely demand the respect of all about him. In a world in which religious or indeed any other convictions are not commonly held, John is a young man to be respected. So too the wishes of his loving and committed parents. They do not want him to die. They want what is best for him and their assessment of what is best for him is that he should be spared the administration of blood and blood products."<sup>53</sup>

Could this dispute have been referred to mediation? If so, what benefit might there have been for John and his parents? I would argue that this dispute could have been referred to mediation. John and his parents would have had the benefit of being able to tell their respective stories in all of the models of mediation that I outlined and discussed in

Chapter 4, and all, except the evaluative approach, would have provided some room for issues of faith to be discussed, and granted some weight in the decision-making process. However, in my view the most beneficial approach for John and his parents would probably have been a narrative approach. The mediator would have been sensitive to the faith issues involved in the dispute, and asked John and his parents whether they wanted support from a representative of their faith community either as a spokesperson, or as a co-mediator. If a representative of John's faith community had been present he would have had the opportunity to explain John's faith position in more detail. John and his parents would have therefore had the benefit of support from their faith community. The mediator would have facilitated dialogue and understanding between the disputants. However, this is not to say that the medical staff would have necessarily fully understood or agreed with John's faith position. As I explained in Chapter 3 there can be situations where a person finds it difficult to understand and enter the conceptual reality of a particular narrative. However, a healthcare chaplain can some times help to resolve such disputes that arise in a hospital setting. But, could this dispute have been resolved in mediation? I think that this is unlikely, as the faith position of John and his parents was strictly held, and the NHS trust applied to the high Court because they were motivated to preserve John's life. However, mediation would have enabled John and his parents to explain their faith perspective and given the medical staff the opportunity to explain the medical story. The mediator would have used mediation to facilitate dialogue and understanding between the disputants, and to clarify issues on which they agreed and disagreed.

What difference would it have made to John and his parents had the Court approached the case in the ways that I suggested in Chapter 5? Would a different approach have led to a different outcome? In this case there was no immediate crisis so time was not as crucial as in *Re E (A Minor) (Wardship Medical Treatment)*<sup>54</sup>. If the judge had employed a Malik 'interpretive' approach or any of the three adapted medical models there would have been varying degrees of benefit for John and his parents. But in each case their faith perspective would have been heard. The judge could have discussed faith issues with John and his parents, or sought the assistance of a representative of their faith community to help resolve the dispute. In my opinion the most beneficial approach for John and his parents would have been a meaning-centred approach. A judge using this approach would be aware that disputes are culturally constructed and would be sensitive to faith issues. But regardless of the approach that the judge had

taken it would not necessarily mean that the judge would have understood their faith position, particularly as he seemed to hold a very secular view of the world. This points to a need for a panel of judges, and for judges to receive help to resolve such disputes from a representative of the disputant's faith community.

But would any of these four approaches have led to a different outcome? As the law stands at present I think that it is unlikely because if the Court can act to save the life of a minor it will do so.

But there is another side to the story of Jehovah's Witnesses (JWs) and refusal of blood products. Osamu Muramoto has argued that the blood doctrine of the JWs is being criticised by current and former JWs who have expressed conscientious dissent from the organization.<sup>55</sup> Further, Muramoto alleges that pressure has at times been applied by way of disfellowshipping and shunning so that JWs would comply with the blood doctrine. A former JW elder has supported these arguments and allegations.<sup>56</sup>

Understandably, representatives of the JWs and the Watchtower Association have denied the allegations.<sup>57</sup> However, Muramoto reports that in June 2000 the Watchtower Society issued a directive, which stated that the organisation would no longer disfellowship members who did not comply with the policy of refusal of blood.<sup>58</sup>

Muramoto therefore argues for an approach that he calls 'rational non-interventional paternalism.'<sup>59</sup> He emphasises that this approach can only be used in non-emergency cases where there is no reasonable alternative to blood-based treatment, or when so-called "no-blood" treatment would incur significantly higher risk and cost.<sup>60</sup> The approach involves checking that the patient is a JW and having a confidential meeting with the patient about informed refusal of blood products on his or her own away from the influence of church officials. This discussion should include not just the possibility of death, but information about prolonged disability and suffering along with the burden on family and friends. It would also involve asking the patient a series of questions. Are they aware of what blood products that JWs are allowed to receive? Are they aware of what blood products that JWs are allowed to receive? Are they aware that some JWs have different views on the blood doctrine?<sup>61</sup> Muramoto's article does raise the question of whether doctors should engage in discussion with a patient on interpretation of biblical texts. Raanan Gillon notes that a raft of other objections could also be raised such as: it is paternalistic; bearing in mind the power differential between doctor and patient it could be coercive and disrespectful of the patient's autonomy; it may cause offence and increase the patient's distress; and it is morally and legally unjust by

threatening to override the patient's human and legal rights.<sup>62</sup> Having raised these objections Gillon then argues that provided the approach is sensitive and respectful of the patient's beliefs doctors would be professionally justified in asking a JW patient why they are refusing blood products, and asking them if they would be prepared to read a leaflet setting out arguments from members of their own religion justifying the acceptance of blood products.<sup>63</sup>

What Muramoto's work also suggests is that the concern expressed by Mr Justice Ward in *Re E (A Minor) (Wardship Medical Treatment)*<sup>64</sup> about the possibility of undue influence may have some foundation. Secondly, both doctors and judges face a delicate and sensitive task of trying to gauge whether a teenage JW is aware that there are differences in belief, and whether he or she has freely made a decision to refuse life-saving treatment. In these circumstances I would argue that it is perhaps understandable when a doctor who is trained to save life, and a judge, who under the law, is there to protect the welfare of minors, err on the side of caution and act in what they see as the overall welfare of the teenage JW patient.

## Case study 5 - Chauhan

The Employment Appeal Tribunal heard the case of *Chauhan v Ford Motor Company* in 1984.<sup>65</sup>

'Chauhan claimed exemption, under section 58(4) of the Employment Protection (Consolidation) Act 1978, from a union maintenance agreement providing for compulsory trade union membership for Ford employees, on grounds of his religious beliefs. Chauhan had at one time been a union member but that membership had lapsed. He had never previously referred to his religious beliefs during the course of his employment. It was only when the matter of his lapsed membership was raised with him that he revealed his religious beliefs. In evidence in support of his claim Chauhan cited Lecture IV in the *Laws of Manu*, which describes the need for male Hindus to retire to the forest after they have discharged their family responsibilities as part of the process of spiritual growth, which should occur during each individual's life. He had, he asserted, reached a stage in his life when trade union membership was no longer appropriate because he should withdraw from worldly pursuits. He offered to pay a sum to charity which was the equivalent of the trade union membership dues.'<sup>66</sup>

The Tribunal rejected Chauhan's application and he lost his claim for unfair dismissal. In their judgement the Tribunal (in a passage approved by the Employment Appeal Tribunal) argued that:

““In order to make a judgement on a man’s beliefs and motivations it is necessary to take account of his actions as well as his words. For our own part, we find it extremely difficult to reconcile the applicant’s three-year silence with his protestations of conscience.””<sup>67</sup>

The difficulty for Chauhan was that the Tribunal failed to take into account the cultural context and they did not understand his worldview. Consequently, they did not think that Chauhan was genuine in his religious motivation.

In my view this dispute could have been referred to mediation in which case Chauhan could have had space to tell his story, and his faith could have been discussed and granted some weight in the decision-making process. Again the most beneficial approach for Chauhan would have been a narrative approach because a mediator who employs this approach would understand that disputes are culturally constructed and would have been attentive to meanings in Chauhan’s story. The mediator would have also been sensitive to faith issues, and would have asked Chauhan whether he wanted support from a representative of his faith community either as a spokesperson, or as a co-mediator. If a representative of Chauhan’s faith community had been present he would have had the opportunity to explain that in order to be accommodated some Hindu practices are adapted to geographical and social circumstances. This information would have helped to facilitate understanding between the disputants. There was a good chance that this matter could have been settled quite easily in mediation had the Ford Motor Company been helped to understand the cultural significance of Chauhan’s position. Consequently, Chauhan would have probably retained his job, and the matter would not have been escalated to an Employment Tribunal.

What difference would it have made to Chauhan had the Employment Tribunal approached the case in the ways that I suggested in Chapter 5? Would a different approach have led to a different outcome? If the Tribunal had adopted a Malik ‘interpretive’ model or any of the three adapted medical models Chauhan would have had the benefit of having his faith perspective considered. However, in my view the most beneficial approach for Chauhan would have been if the Tribunal had adopted a meaning-centred approach because this approach accepts that disputes are culturally constructed. However, whether the Tribunal used the narrative approach or one of the other three approaches they might still not have understood Chauhan’s worldview. As I explained in Chapter 3 some people find that some narratives are conceptually difficult to understand. Consequently, it would have been crucial in this case that Chauhan had

the assistance of a representative from his faith community to explain that in order to be accommodated some Hindu practices are adapted in a particular geographical and social context. Had a representative of his faith community who could explain this supported Chauhan then I think that there might have been a different outcome to the case, and Chauhan might well have retained his job.

## Case study 6 - Janaway

This case study relates to Barbara Janaway who in June 1985 sought an order of certiorari to quash a decision by Salford Area Health Authority to uphold her dismissal as a medical receptionist. The High Court, the Court of Appeal and finally, the House of Lords heard the case.<sup>68</sup>

‘Janaway was a medical receptionist and had been asked to type a letter which she understood to be a letter of referral to make an appointment for a patient to undergo an abortion. Before taking up her job she had not been told that she would have to type correspondence which related to abortions. Janaway was a Catholic and held to the traditional Catholic position that abortions were morally wrong. She therefore refused to type the letter. Janaway argued that she was entitled to the protection of section 4(1) of the Abortion Act 1967 which allows anybody who would otherwise be required “to participate” in abortions to refuse that participation on grounds of conscience. In a series of judgments all three courts rejected the claim. Janaway was wrong, the court said, in claiming that she was participating in abortion if she typed the letter as requested. The nine judges who gave judgment in this case were divided about why Janaway was wrong. Some judges turned to the criminal law’s concept of participation for assistance; others sought, a “plain English” interpretation of the idea. All nine judges agreed that, whatever “participate” meant it did not mean what Janaway thought it meant.’<sup>69</sup>

The result was that Janaway had no protection under section 4. In Janaway’s case, unlike Chauhan’s the judges did not refuse to accept that her religious beliefs were genuine. However, the majority of the judgments turned on an ordinary language construction, rather than a technical interpretation of the law.

Again in my view this dispute could have been referred to mediation. Janaway would have had the benefit of being able to tell her story in all of the models of mediation that I outlined and discussed in Chapter 4, and all, except the evaluative approach, would have provided some room for issues of faith to be discussed and granted some weight in the decision-making process. However, in my view the most beneficial approach for Janaway would have been a narrative approach to mediation because a mediator who

employs this approach would understand the importance of meaning in a disputant's narrative. The key to Janaway's case was the meaning that Janaway attached to the typing of the referral letters. A mediator who employs a narrative approach would have also enquired whether Janaway wanted the support of a representative of her faith community as a spokesperson or co-mediator. Janaway could therefore have had the benefit of support from her faith community. The mediator would have certainly facilitated dialogue and understanding between the disputants, and the disputants may have reached a resolution. However, this might not necessarily have led to Janaway retaining her job. What could have been considered was the proportion of the job that involved typing referral letters, and whether other staff could type such letters instead of Janaway. If it was an occasional letter then Janaway might have been able to obtain an agreement that another secretary typed them. However, after going through the mediation process Janaway might equally have come to the conclusion that she did not feel comfortable working in an organisation, or part of an organisation that referred women for abortion.

Would a different approach have led to a different outcome? If a judge had adopted a Malik 'interpretive' model or any of the three adapted medical models Janaway's faith perspective would have been considered. However, in my view the most beneficial approach for Janaway would have been if the Court had adopted a meaning-centred approach. This approach accepts the importance of narrative in the construction of reality and the importance of meaning. Janaway would have been given space to tell her story, and the Court would have been attentive to the meaning that Janaway attached to the referral letters. But whether the Court would have accepted that meaning is a moot point that depends in part on the understanding of law held by the judge. With a legal positivist understanding of law as legal 'rules' a judge is likely to understand his role as the interpretation and application of legal rules. Consequently, it would be a legal interpretation that would be accepted. Although in Janaway's case the majority of the judgments turned on an ordinary language construction, rather than a technical interpretation of the law. Bradney has suggested that the judges could have approached the situation by asking what mischief the provisions of section 4(1) Abortion Act 1967 was trying to prevent. If they had done so it could have led to a different outcome. But if a judge accepted that the focus of law is relationships, rather than rules, and the aim of law is 'shalom' then Janaway's interpretation could have been accepted, which would also have led to a different outcome.

## Conclusion

I have argued that mediation could have been employed in all six disputes, even in *Re E*, provided that it had been employed early in A's treatment. All mediators try to facilitate dialogue and understanding between disputants, which is a benefit for persons of faith. In all the models of mediation that I outlined in Chapter 4, the persons of faith could have had the space to tell their respective stories, and in all, except the evaluative model, faith issues could have been discussed and granted some weight in the decision-making process. In my view the most beneficial approach for the persons of faith in all six disputes would have been the narrative approach to mediation. However, whatever approach a mediator had adopted would not have guaranteed that a particular faith perspective would have been fully understood by the other disputant or the mediator. This is why it can be crucial that a representative from the disputant's faith community is involved in the mediation process, either as a spokesperson and/or as a co-mediator. I have argued that the cases of Chauhan and Janaway might have been resolved had they been addressed in mediation. However, even if a dispute is not resolved there can still be benefits for persons of faith in mediation. To begin with they will have the space to tell their stories, and have the opportunity of being heard and understood by the other disputant. They will, in most cases be able to have the support of a representative of their faith community as a spokesperson and /or co-mediator. There will also be the opportunity to clarify issues of agreement and those where the parties continue to disagree.

I have argued that had a court or Tribunal heard the disputes there would have been varying degrees of benefit for the persons of faith had a judge or Tribunal approached the case by adopting a Malik 'interpretive' model or any of the adapted medical models. But in each case they would have had their perspective and faith considered. If a judge did not have the time or expertise or was unwilling to discuss faith issues the judge could have called upon a representative of the litigant's faith community to explain the litigant's faith perspective, and sought assistance from the representative to resolve the dispute. However, this would not have necessarily meant that the judge would have fully understood the faith perspective. Malik has noted that if the faith-based conduct is very different from the theorist's home beliefs and practices, then the theorist's home understanding may operate as an absolute barrier to understanding, and the 'interpretive' method will not be able to assist in helping the theorist understand the

faith.<sup>70</sup> This is a similar position to that noted in Chapter 3 in the story of James Hopewell who found that the polar opposite narrative genres found it difficult to understand one another. So while a narrative presents a window onto the conceptual world of another, it is not always easy to enter and understand that world. This seems to have been what happened in the case of *Re E* when Mr Justice Ward admitted that he was ‘baffled’ by A’s decision. This perhaps points to the need for judges to have assistance from representatives of the disputant’s faith community, and for a panel of judges, rather than a judge sitting alone.

What can also be seen from case studies 1, 2, 3, and 4 is that judges tend to act as far as possible to protect the welfare and preserve the lives of minors. While judges often say that they ‘respect’ a person’s faith, when the case relates to a minor this will not necessarily translate into any weight being placed on either the parents’ or a young person’s faith or beliefs. The case of *Re P (Medical Treatment: Best Interests)*<sup>71</sup> illustrates that even when a judge is sympathetic to a competent teenager and is prepared to grant weight to his or her religious beliefs in the decision-making process, this is generally not sufficient for the beliefs to be determinative. In *Re E (A Minor) (Wardship Medical Treatment)*<sup>72</sup> and *Re P (Medical Treatment: Best Interests)*<sup>73</sup> this was because the Court judged that to do so would have meant that the lives of the two teenagers would have been put at risk. The bottom line is that the Court is under a duty to protect the welfare and lives of minors and will invariably take steps to do so when it can. But does this support the view that the faith of the parents, or that of a representative of their faith community, should not be heard and discussed in legal cases? I have argued that it does not because that would deny the parents and the representative of their faith community ‘substantive’ justice, and risk causing harm and alienating them from the legal system. I have also argued that it is important that faith voices, such as that of the Archbishop of Westminster in the case of the conjoined twins, should be heard by the courts because of the crucial role that they can play in challenging particular legal judgements, which if left unchallenged could become legal precedents and used in other legal cases, and affect other vulnerable lives.

In the final chapter of this thesis I will briefly reprise the argument and conclusion of each of the six chapters, in order to provide an overview and evaluation of the research.

## Notes

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<sup>1</sup> An NHS Trust v MB (A child represented by the CAFCASS as Guardian ad Litem), [2006] EWHC 507 (Fam) [2006] 2FLR 319.

The High Court's decision included the following statements:

(1) It was not in the best interests of the child to discontinue ventilation with the inevitable result that he would immediately die; further it was positively in his best interests to continue with continuous pressure ventilation, with the nursing and medical care that properly went with it, although no declaration to that effect could or would be made. Notwithstanding the burdens of discomfort, distress and pain, the child had benefits of age appropriate cognition and continued to have a relationship of value to him and his family, and to gain other precious and real pleasures from touch, sight and sound.

(2) The possibility of a tracheostomy did not fall for direct consideration by the court. Either the doctors would agree to perform one, in consultation with the parents, or they would not. The court had no power to require doctors to carry out a positive medical intervention against their own judgement and will. (3) An option which involved continuing with invasive ventilation but withholding the forms of treatment and care that necessarily went with such ventilation had little to commend it from the point of view of the child's best interests and bordered on being unethical. (4) It would be in the child's best interests to withhold those procedures which went beyond maintaining ventilation, which required the positive infliction of pain, the need for such procedures itself, being an indicator that the child had moved toward death despite ventilation.

<sup>2</sup> Ibid., 334.

<sup>3</sup> Ibid.

<sup>4</sup> Ann Sommerville, "Juggling law, ethics, and intuition: practical answers to awkward questions," *Journal of Medical Ethics* 29 (2003): 281-286.

<sup>5</sup> Ibid.

<sup>6</sup> Trisha Greenhalgh, Olga Kostopoulou, and Claire Harries, "Making decisions about benefits and harms of medicines," *British Medical Journal* 329 (7456) (2004): 47-50.

<http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pmcentrez&artid=443458>

<sup>7</sup> Ibid.

<sup>8</sup> Mary F. Morrison and Sarah Gelbach DeMichele, "How culture and religion affect attitudes toward medical futility," in *Medical Futility*, ed. Marjorie B. Zucker and Howard D. Zucker (Cambridge: Cambridge University Press, 1997), 71ff.

<sup>9</sup> Ibid., 319.

<sup>10</sup> Ibid., 323.

<sup>11</sup> Malik, Faith and the State of Jurisprudence, in *Faith in Law: Essays in Legal Theory*, ed. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 147.

<sup>12</sup> Charles Taylor, *Multiculturalism and "The Politics of Recognition,"* (Princeton, New Jersey: Princeton University Press, 1992), 32-33.

<sup>13</sup> Ibid., 25-26.

<sup>14</sup> Malik, Faith and the State of Jurisprudence, in *Faith in Law*, 148.

<sup>15</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. 985-6.

<sup>21</sup> The Roman Catholic Diocese of Westminster, *A Submission by Archbishop Cormac Murphy O'Connor, Archbishop of Westminster, to the Court of Appeal in the case of Central Manchester Healthcare Trust v Mr and Mrs A and Re A Child (By her Guardian Ad Litem, The Official Solicitor)*.

[http://www.rcdow.org.uk/textonly/cardinal/default.asp?content\\_ref=45](http://www.rcdow.org.uk/textonly/cardinal/default.asp?content_ref=45). (accessed September 7, 2009).

<sup>22</sup> Ibid.

1. 'I am grateful to the Court for this opportunity to make a submission. My reason for doing so is to offer some reflections based on principles of morality, which the Catholic Church holds in common with countless others who value the Judeo-Christian tradition. It is my hope that these reflections may be of some assistance to the Court of Appeal judges in deciding this tragic and heartrending case in which everyone involved is clearly trying to discern, and to do, what is for the best.' 2. 'The arguments presented in this submission stem from the belief that God has given to human kind the gift of life, and as such it is to be revered and cherished. Christian beliefs about the special nature and value of human life lie at the root of the western humanistic tradition which continues to influence the values held by many in our society and historically underpins our legal system.' 3. There are five overarching moral considerations, which govern this submission:

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- (i) Human life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission.
- (ii) A person's bodily integrity should not be invaded when the consequences of doing so are of no benefit to that person; this is most particularly the case if the consequences are foreseeably lethal.
- (iii) Though the duty to preserve life is a serious duty, no such duty this when the only available means of preserving life involves a grave injustice. In this case, if what is envisaged is the killing of, or a deliberate lethal assault on, one of the twins 'Mary', in order to save the other, 'Jodie', there is a grave injustice involved. The good end would not justify the means. It would set a very dangerous precedent to enshrine in English case law that it was ever lawful to kill, or to commit a deliberate lethal assault on, an innocent person that good may come of it, even to preserve the life of another.
- (iv) There is no duty to adopt particular therapeutic measures to preserve life when these are likely to impose excessive burdens on the patient and the patient's carers. Would the operation that is involved in the separation involve such 'extraordinary' means? If so, then quite apart from its effect on Mary, there can be no moral obligation on doctors to carry out the operation to save Jodie, or on the parents to consent to it.
- (v) Respect for the natural authority of parents requires that the courts override the rights of parents only when there is clear evidence that they are acting contrary to what is strictly owing to their children. In this case, the parents have simply adopted the only position they felt was consistent with their consciences and with their love for both children.

<sup>23</sup> John Harris, "Human Beings, Person and Conjoined Twins: An Ethical Analysis of the Judgement in *Re A*," *Medical Law Review* 9 (2001): 221-236; Helen Watt, "Conjoined Twins: Separation As Mutilation," *Medical Law Review* 9 (2001): 237-245.

<sup>24</sup> Raanan Gillon, "Imposed separation of conjoined twins – moral hubris by the English courts?" *Journal of Medical Ethics* 27 (2001): 3-4; For an opposing view see Bainham, "Resolving the unresolvable: The case of the conjoined twins," 49-53.

<sup>25</sup> *Re A (children) (conjoined twins: surgical separation)*, 961.

<sup>26</sup> The Roman Catholic Diocese of Westminster, *A Submission by Archbishop Cormac Murphy O'Connor, Archbishop of Westminster, to the Court of Appeal in the case of Central Manchester Healthcare Trust v Mr and Mrs A and Re A Child (By her Guardian Ad Litem, The Official Solicitor)*. [http://www.rcdow.org.uk/textonly/cardinal/default.asp?content\\_ref=45](http://www.rcdow.org.uk/textonly/cardinal/default.asp?content_ref=45). (accessed September 7, 2009).

<sup>27</sup> *Airedale NHS Trust v Bland* [1993] 1 All ER 821.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Re A (children) (conjoined twins: surgical separation)*, 1001-2.

<sup>30</sup> *Ibid.*, 1003.

<sup>31</sup> *Ibid.*, 1004.

<sup>32</sup> *Ibid.*, 961-962.

<sup>33</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.

<sup>34</sup> *Ibid.*, 386-389.

<sup>35</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112, [1986] 1 FLR 224.

<sup>36</sup> *Re E (A Minor) (Wardship: Medical Treatment)*, 386.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 386.

<sup>39</sup> *Ibid.*, 388.

<sup>40</sup> *Ibid.*, 389.

<sup>41</sup> *Ibid.* 'Without wishing to introduce into the case notions of undue influence, I find that the influence of the teachings of the Jehovah's Witnesses is strong and powerful. The very fact that this family can contemplate the death of one of its members is the most eloquent testimony of the power of that faith. He is a boy who seeks and needs the love and respect of his parents whom he would wish to honour as the Bible exhorts him to honour them. I am far from satisfied that at the age of 15 his will is free. He may assert it, but his volition has been conditioned by the very powerful expressions of faith to which all members of the creed adhere.'

<sup>42</sup> *Re E (A Minor) (Wardship: Medical Treatment)*, 394 'I respect this boy's profession of faith, but I cannot discount at least the possibility that he may in later years suffer some diminution in his convictions.'

<sup>43</sup> *Re E (A Minor) (Wardship: Medical Treatment)*, 394; He began by quoting the American judge Justice Holmes in the case of *Prince v Massachusetts* (1944) 321 US Reports 158:

'Parents may be free to become martyrs themselves, but it does not follow that they are free in identical circumstances to make martyrs of their children before they have reached the age of full and legal discretion when they can make choices for themselves.' In the same vein Mr Justice Ward then hammers the point home with his own comments. 'There is compelling and overwhelming force in the submission of the Official Solicitor that this court, exercising its prerogative of protection should be slow to allow an

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infant to martyr himself. In my judgement, A has by the stand he has taken thus far already been and become a martyr for his faith. One has to admire – indeed one is almost baffled by – the courage of the conviction that he expresses. He is, he says, prepared to die for his faith. That makes him a martyr by itself.’

<sup>44</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Abingdon: Routledge-Cavendish, 2009), 119.

<sup>45</sup> *Re E (A Minor) (Wardship: Medical Treatment)*, 394 ‘But I regret that I find it essential for his well-being to protect him from himself and his parents, and so override his and his parents’ decision. In this judgement – which has been truly anxious – I have endeavoured to pay every respect and give great weight to the religious principles which underlie the family’s decision and also to the fundamental human right to decide things for oneself. That notwithstanding, the welfare of A, when viewed objectively, compels me to only one conclusion, and that is that the hospital should be at liberty to treat him with the administration of those further drugs and consequently with the administration of blood and blood products.’

<sup>46</sup> Malik, Faith and the State of Jurisprudence, in *Faith in Law*, 144.

<sup>47</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam), 1117.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 1118.

<sup>52</sup> *Ibid.*, 1120.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.

<sup>55</sup> Osamu Muramoto, “Bioethics of the refusal of blood by Jehovah’s Witnesses: Part 1. Should bioethical deliberation consider dissidents’ views?” *Journal of Medical Ethics* 24 (1998): 223-230.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/24/4/223maxtoshow=&HITS=10&hits=104RESULTFORMAT=&fulltext=Jehovah%27s+witnesses&researchid> (accessed September 16, 2009).

<sup>56</sup> Lee Elder, “Why some Jehovah’s Witnesses accept blood and conscientiously reject official Watchtower Society blood policy,” *Journal of Medical Ethics* 26 (2000): 375-380.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/26/5/375> (accessed September 16, 2009).

<sup>57</sup> Donald T. Ridley, “Jehovah’s Witnesses’ refusal of blood: obedience to scripture and religious conscience,” *Journal of Medical Ethics* 25 (1999): 469-472.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/25/6/469> (accessed September 16, 2009).

David Malyon, “Transfusion-free treatment of Jehovah’s Witnesses: respecting the autonomous patient’s motives,” *Journal of Medical Ethics* 24 (1998): 376-381.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/content/reprint/24/6/376> (accessed September 16, 2009).

<sup>58</sup> Osamu Muramoto, “Bioethical aspects of the recent changes in the policy of refusal by Jehovah’s Witnesses,” *British Medical Journal* 322 (2001): 37-39.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/322/7277/37> (accessed September 16, 2009).

<sup>59</sup> Osamu Muramoto, “Bioethics of the refusal of blood by Jehovah’s Witnesses: Part 2. A novel approach based on rational non-interventional paternalism,” *Journal of Medical Ethics* 24 (1998): 295-301.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/24/5/295?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=Jehovah%27s&witnesses&researchid> (accessed September 16, 2009).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Raanan Gillon, “Refusal of potentially life-saving blood transfusions by Jehovah’s Witnesses: should doctors explain that not all JWs think it’s religiously required?” *Journal of Medical Ethics* 26 (2000): 299-301.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/26/5/299> (accessed September 16, 2009).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Re E (A Minor) (Wardship Medical Treatment)* [1993] 1FLR 386.

<sup>65</sup> The full transcript of the judgement can be found on the LEXIS database - *Chauhan v Ford Motor Company*.

<http://www.lexisnexis.com/uk/legal/search/casessubmitform.do>. (accessed September 21, 2009).

<sup>66</sup> Bradney, “Faced by Faith,” in *Faith in Law*, 92.

<sup>67</sup> *Ibid.*, 92.

<sup>68</sup> *R v Salford Area Health Authority*, (The Times, 13 Feb. 1987); *R v Salford Area Health Authority, Janaway v Salford Area Health Authority* [1989] AC 537.

<sup>69</sup> Bradney, “Faced by Faith,” in *Faith in Law*, 94-95.

<sup>70</sup> Malik, “Faith and the State of Jurisprudence,” in *Faith in Law* 144.

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<sup>71</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) 1117.  
<sup>72</sup> *Re E (A Minor) (Wardship Medical Treatment)* [1993] 1FLR 386.  
<sup>73</sup> *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) 1117.

## Chapter 7

### Argument, conclusion and recommendations

#### Summary of argument

In Chapter one I illustrated some of the difficulties faced by persons of faith when they are involved in legal proceedings in the English law courts. The case of Baby MB<sup>1</sup> raises the question of whether faith is relevant when decisions are taken in court, and if so how it is relevant. What high profile healthcare cases like Baby MB and the conjoined twins Jody and Mary<sup>2</sup> also illustrate, is that there are legal cases that involve not just legal issues, but also ethical and faith issues. However, when the cases come to court the judges frame the cases as though they are primarily legal disputes that require a purely legal solution. While the judges address the legal issues, they are reluctant to address the ethical and faith issues, and if they do address them they do so in strictly legal terms. However, this is not the only type of difficulty faced by persons of faith. The faith of the parents of the conjoined twins was subjected to a sliding scale of acceptability.<sup>3</sup> In *Re E* the judge accused the Jehovah's Witness parents of A of subjecting their son to martyrdom, and he was baffled by their decision.<sup>4</sup> Whereas, an Employment Tribunal was not convinced that Chauhan's faith was genuine,<sup>5</sup> and the court in the case of Janaway did not accept her interpretation of 'participating in an abortion'.<sup>6</sup> This range of difficulties are not restricted to persons of one faith, but instead encompass all faiths, and they are not restricted to litigants but extend to representatives of Christian churches who make submissions to court. As we have seen, such problems arise not only in relation to healthcare cases but also to other types of legal case and to employment tribunals. I have suggested that there are three reasons for this happening: first, because conflict has come to be understood in narrow legal terms and the legal process tends to proceed adversarially and eschews mediation; second, because the reigning paradigm of law in England and Wales emerged at the Enlightenment and self consciously sought to distance itself from religious and metaphysical questions; thirdly, and relatedly, because of the privatisation of belief. Together these developments have provided the environment where issues of faith have come to be regarded as 'irrelevant' when disputes are heard in the English law courts. I argued that the influence of these assumptions seriously distorts legal judgements where faith commitment plays a part. If judges dismiss issues of faith as "irrelevant", or

deal with them in only legal terms, then persons of faith do not receive “substantive” justice.<sup>7</sup> This is a serious issue in a multicultural society where disputes arise between persons of faith and those who do not share their faith or values. In addressing such disputes a normative approach is needed that views conflict and the resolution of disputes in a way that is culturally sensitive, that makes room for faith, and seeks a broader range of solutions, either instead of, or in addition to, the legal interests. This could be achieved in two ways. The first is outside of the formal legal system through the process of mediation. The second is through changes to the legal system and the legal profession. I explored the first in the fourth chapter, and I addressed the second in chapters two, five and six.

## Conclusion

In Chapter four I examined how conflict is understood and addressed through the process of mediation, and I considered whether mediation could provide an alternative way of dealing with disputes that involve issues of faith, providing a process where perspectives would properly be taken into account. I outlined four models of mediation, three of which (facilitative, transformative and narrative) show that conflict can be understood and addressed in much broader terms than just legal criteria and legal norms. This, in theory, provides the possibility that issues of faith could be heard and discussed, and given some weight in the decision-making process. Whether issues of faith will be allowed to enter and be granted weight in the decision-making process will initially depend on the model of mediation. In the case of evaluative mediation if legal criteria are used in the decision-making process then it is unlikely that issues of faith will be accorded weight, whereas, in the other three models it will depend on the disputants and the circumstances of the dispute as to how much weight is granted to faith in the decision-making process.

In Chapter six I revisited six of the legal cases studies that I outlined and discussed in Chapter one. I argued that mediation could have been employed in all six disputes, even in *Re E*,<sup>8</sup> provided that it had been employed early in A’s treatment. In my view the most beneficial approach for the persons of faith in all six disputes would have been the narrative approach to mediation. However, whatever approach a mediator had adopted would not have guaranteed that a particular faith perspective would have been fully understood by the other disputant or the mediator. That is why it can be crucial that a

representative from the disputant's faith community is involved in the mediation process, either as a spokesperson and/or as a co-mediator. I argued that if Chauhan's case had been referred to mediation, and he had the support from a representative of his faith community who could have explained how Hindu practices have to be adapted to the particular social and geographical location, Chauhan might have retained his job. Similarly, if Janaway's case had been referred to mediation it might have been settled, and she would have avoided court proceedings. However, even if a dispute is not resolved there can still be benefits for persons of faith in mediation. To begin with they will have the space to tell their stories, and have the opportunity of being heard and understood by the other disputant. They will, in most cases, be able to have the support of a representative of their faith community as a spokesperson and /or co-mediator. There will also be the opportunity to clarify points of agreement and those where the parties continue to disagree, though I conceded that mediation may not, in some instances, be available, or may not succeed, or may not be appropriate. In these instances an unresolved dispute may end up in the English law courts.

In Chapters two, five and six I considered what obstacles exist to the accommodation of faith in the legal system, and what changes would have to be made to make room for the faith of individual litigants to be accommodated. In Chapter two I outlined and discussed the debates between the proponents of legal positivism, natural law, and legal pluralism, about the nature of law, and the relationship between law, morals, and religion. The significance of the different approaches is revealed in the judicial reasoning in the case studies in Chapter one. Judges who have been influenced by legal positivism understand law as being separate from ethics and religion. They therefore treat ethics and religion as 'irrelevant' to their decision and not justiciable. I showed that although legal positivism has been hugely influential it is also a highly contested view of law, and it is only one among many ways of understanding the nature of law, and its relationship to morals and religion.

I considered what the Hebrew Bible and the New Testament might have to contribute to modern debates about the nature of law. I argued that Hebrew law could make three important contributions to modern debates about law. First, the focus in Hebrew law is on people and relationships, rather than on the interpretation and application of abstract rules, as in legal positivism.<sup>9</sup> The importance of this for judicial reasoning is that it places the person together with her culture and beliefs centre stage. Faith can no longer

be ignored and labelled 'irrelevant'. Second, the aim of Hebrew law is 'shalom, which is often translated as 'peace', but has a much richer meaning than mere absence of conflict. It is God's vision for humankind living in harmony with one another, and envisages an 'all rightness' in relationships.<sup>10</sup> The importance of this for legal cases and judicial reasoning is in the way in which cases are addressed in court and the type of justice that is administered. The way in which cases are presented in English legal cases is often described as 'adversarial' and this tends to produce 'winners' and 'losers'. If 'shalom' were the aim of law then the way in which cases are presented would have to change. The aim would be a just settlement as well as a sense of all rightness between the parties. The focus would therefore be on the disputants and their relationship and the approach would be more dialogical. Justice would no longer be 'procedural' and merely based on the interpretation and application of abstract rules as is illustrated in the Chapter one case studies. Instead, it would be 'substantive' and would go beyond the letter to the spirit of the law, so that 'justice is done when a just okay state of affairs is the result.'<sup>11</sup> Third, Hebrew law illustrates that there are legal cases that involve both civil and religious issues, and these 'difficult' cases required civil and religious authorities to work together to resolve the disputes.<sup>12</sup> The relevance of this for legal cases today is that it points to a specific role for representatives of faith communities in helping judges to resolve disputes that involve issues of faith.

What the New Testament contributes to the modern debates about law is the importance of an ethic of grace and forgiveness, and the way in which disputes were understood and settled. Again what is seen is a focus on the person and relationships and a face-to-face dialogical approach to resolving disputes. The outworking of this contribution can be seen in the process of mediation. However, I would argue that it is also an approach that could be employed in legal cases.

I briefly outlined the different ways in which the concept of toleration has been understood, and the way in which it has been used as a reason for the ad hoc accommodation of religious beliefs and practices into English law. But the question arises as to whether the faith of an individual litigant should be accommodated in legal cases. I argued that it should be in order to avoid harm, and the risk of alienation of persons of faith from the English legal system.

In Chapter three I considered a further reason why the faith of an individual litigant should be discussed and accommodated where possible. This concerns the argument

from culture and the negotiation of meaning. I illustrated this argument by an example from the medical profession. I discussed how the medical profession have become increasingly aware of the role of culture, and the importance of taking into account a patient's culture, beliefs and values, as well as a patient's perspective on her illness. This follows from an understanding of how culture shapes the way in which a patient understands a wide-range of health-care issues. Faith can also act like cultural beliefs in that it can shape how a patient understands concepts such as health, sickness, suffering, the human person and death, and it can also affect a patient's decisions about treatment. Medicine is like a cultural system in that it has its own language and practice that needs to be translated, interpreted and negotiated with patients. There is therefore a continual process of negotiation of meaning that takes place between doctor and patient.

The significance of culture in legal cases is that Law, like Medicine, is like a cultural system in that it has its own language and practice that needs to be translated, interpreted and negotiated with disputants. Also, culture and faith can shape the way a disputant understands and responds to a particular dispute. Consequently, a continual process of negotiation of meaning takes place between disputants, and between disputants and the judge in cases that involve issues of faith.

Narrative plays an important role in the process of negotiation of meaning. Narrative is a way in which human beings order and make sense of experience. In the doctor-patient relationship both doctor and patient draw on narratives to make sense of the patient's illness. Narratives provide a window onto the conceptual world of another, but as the story of James Hopewell illustrates it may not be easy to enter or understand that world. However, I have argued that the analysis of narratives provides a way in which sticking points in disputes could be identified. I have also argued that narrative plays a role in the negotiation of meaning in legal cases in that each disputant will inevitably begin by describing a dispute by telling their story. Also, disputants will make sense of the dispute through drawing on personal, cultural and sometimes spiritual narratives. Just as patients draw on narratives to make sense of illness, the medical profession draw on narratives to make sense of disease. Doctors, such as Engel and Kleinman have devised models that enable the perspective and faith of their patients to be taken into account in the doctor-patient relationship, and in decisions about a patient's healthcare.<sup>13</sup> I have argued that these models could be adapted and applied in legal cases.

What the story of James Hopewell and my discussion of the interaction of doctor-patient narratives reveals is that some narratives are more likely to cause misunderstandings and dispute than others. The role of the Christian healthcare chaplain illustrates that representative of faith communities could play a significant role in helping to resolve misunderstandings and disputes that involve issues of faith in healthcare. I have also argued that this also points to a wider role that representatives of faith communities could play in helping to resolve other types of disputes through, for example, the process of mediation, or by assisting judges in helping to resolve disputes that end up in the law courts.

In Chapter five I outlined and considered Malik's 'interpretive' model of law.<sup>14</sup> This is a hermeneutical approach to judicial reasoning, which if implemented would enable a judge to take a litigant's perspective and faith into account, on the grounds that it reveals the inner motivation and culpability of litigants. I agreed with Malik that if room is to be made in legal cases for the perspective and faith of a litigant that changes would have to be made to judicial reasoning, and that one way in which this might be achieved is through a hermeneutical approach, but I argued that the medical models that I outlined in Chapter three illustrate that there are also other ways in which judicial reasoning could be adapted. I therefore outlined how these models could be adapted and applied in legal cases. However, I argued that time-constraints and cost are matters that would need to be considered if changes were made to judicial reasoning. One way in which the burden could be reduced on judges is if representatives of faith communities assisted judges in helping to resolve disputes involving issues of faith. I also argued that what the healthcare experience seems to indicate is that making room for faith is not as simple as having a model or procedure to accommodate faith, because models on their own are not enough. They must be supported by education and training, and there must be time set aside for dialogue to take place. Accommodation is also dependent on the willingness of practitioners, whether they are doctors or judges, to apply the model. It must also be borne in mind that there will inevitably be some doctors and judges who will be more at ease in discussing spiritual matters, and there will also be others who will prefer not to discuss spiritual matters at all. Another potential problem is that of conflicting narratives, and that the conceptual world of some narratives may be difficult, if not impossible, for some to enter. These potential problems associated with models points to the need for a greater role for representatives of faith communities.

Finally, I argued that Malik's 'interpretive' model illustrates yet another view of law, this time as 'a source of creating and sustaining common meanings in a community', which Malik locates within legal positivism.<sup>15</sup> The advantage of this view of law from the lawyers' perspective is that it maintains a legal positivist outlook on law, as well as the legal structures and procedures that go with it. But the question that I posed was - would this work to make room for faith? I argued that on its own it would not because a change in judicial reasoning is only one part of a much bigger picture.

To begin with judges would need to be persuaded that conflict could be understood in broader normative terms than just legal criteria. The re-emergence of mediation and the development of the facilitative, transformative and narrative models of mediation have done just that. Mediation has challenged the legal profession's monopoly on dispute resolution. But I would argue that it also challenges the way in which the legal profession understand and address disputes. Secondly, judges would need to understand law in a different way than that espoused by legal positivism. The contributions from Hebrew law and the New Testament provide alternative ways of understanding law and justice. They also provide alternative ways in which disputes could be addressed, rather than the present adversarial system. Thirdly, judges would need to understand the important role that faith can play in the way that litigants understand and respond to disputes, and that faith can affect a litigant's decisions. This in turn necessitates a greater understanding of the role of culture, and the negotiation of meaning. There is therefore a need for more education and training for judges in these areas. The changes that I have suggested would represent a paradigm shift for judges and the wider legal profession and the legal system.

In Chapter six I revisited six of the case studies from Chapter one to consider whether the changes that I have suggested would have made a difference. I argued that had a court or Tribunal heard the disputes there would have been varying degrees of benefit for the persons of faith had a judge or Tribunal approached the case by adopting a Malik 'interpretive' model or any of the adapted medical models. If a judge did not have the time or expertise or was unwilling to discuss faith issues the judge could have called upon a representative of the litigant's faith community to explain the litigant's faith perspective, and sought assistance from the representative to resolve the dispute. However, this would not have necessarily meant that the judge would have fully understood the faith perspective. Malik has noted that if the faith-based conduct is very

different from the theorist's home beliefs and practices, then the theorist's home understanding may operate as an absolute barrier to understanding, and the 'interpretive' method will not be able to assist in helping the theorist understand the faith.<sup>16</sup> This is a similar position to that noted in Chapter 3 in the story of James Hopewell who found that the polar opposite narrative genres found it difficult to understand one another. So while a narrative presents a window onto the conceptual world of another, it is not always easy to enter and understand that world. This seems to have been what happened in the case of *Re E* when Mr Justice Ward admitted that he was 'baffled' by A's decision. This points to the need for judges to have assistance from representatives of the disputant's faith community, and for a panel of judges, rather than a judge sitting alone.

What can also be seen from the case studies is that judges tend to act as far as possible to protect the welfare and preserve the lives of minors. While judges often say that they 'respect' a person's faith, when the case relates to a minor this will not necessarily translate into any weight being placed on either the parents' or a young person's faith or beliefs. The bottom line is that the Court is under a duty to protect the welfare and lives of minors and will invariably take steps to do so when it can. But I have argued that it is important that the faith perspective of litigants should be considered and accommodated when possible, because if it were not it would deny them 'substantive' justice, and risk causing them harm and alienating them from the legal system. I have also argued that it is important that faith voices, such as that of the Archbishop of Westminster in the case of the conjoined twins, should be heard by the courts because of the crucial role that they can play in challenging particular legal judgements, which if left unchallenged could become legal precedents and used in other legal cases, and affect other vulnerable lives.

## Recommendations

Most disputes that involve issues of faith could, as a first step, be dealt with through narrative mediation. This would provide persons of faith with time and space to tell their respective stories, and the opportunity to be understood by the other disputants. It would also enable persons of faith to be supported by a representative of their faith community either as a spokesperson and/or as a co-mediator. It would also provide the

opportunity for faith to be discussed and allowed to enter and be granted some weight in the decision-making process.

Where cases that involve issues of faith end up in the English law courts or an Employment Tribunal extensive changes would need to take place in order to accommodate the faith of individual disputants. To begin with, although Malik has suggested an 'interpretive' approach to judicial reasoning, and I have suggested that three medical models could be adapted and applied in legal cases, in my view the most beneficial approach to judicial reasoning would be a meaning-centred approach. However, a new model of judicial reasoning would not be enough on its own. It would need to be supported by more education and training for judges. There would also need to be a move away from an adversarial approach to dealing with disputes, towards a more relational focus, where the aim is akin to 'shalom', and where there is a dialogical approach. Time and space would therefore need to be set aside for dialogue to take place between judge and disputants. Where a judge does not have the expertise, or is unwilling to discuss issues of faith, he should be able to call on another judge to hear the case and/or call on a representative of the disputant's faith community to help resolve the dispute.

## Notes

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<sup>1</sup> *Baby MB (An NHS Trust v MB (A child represented by the CAF/CASS as Guardian ad Litem))* [2006] EWHC 507 (Fam) [2006] 2FLR 319.

<sup>2</sup> *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961.

<sup>3</sup> *Ibid.* cited *Re T (a minor) (wardship: medical treatment)* [1997] 1 All ER 906, [1997] 1 WLR 242; [1997] 1 All ER 906 at 917-918, [1997] 1 WLR 242 at 254.

<sup>4</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.

<sup>5</sup> *Chauhan v Ford Motor Company*.

<http://www.lexisnexis.com/uk/legal/search/casesubmitform.do>. (accessed September 21, 2009).

<sup>6</sup> *R v Salford Area Health Authority*, (The Times, 13 Feb. 1987); *R v Salford Area Health Authority, Janaway v Salford Area Health Authority* [1989] AC 537.

<sup>7</sup> Perry Yoder, *Shalom* (London: Spire imprint of Hodder & Stoughton, 1989), 82-83.

<sup>8</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1FLR 386.

<sup>9</sup> Yoder, *Shalom*, 82-83.

<sup>10</sup> *Ibid.*, 12-16.

<sup>11</sup> *Ibid.*, 82-83.

<sup>12</sup> Deut. 17: 8-11 and 2 Chron. 19: 8-11.

<sup>13</sup> George L. Engel, "The Need for a New Medical Model," *Science* 196 (1977): 129-136; George L. Engel, "The Clinical Application of the Biopsychosocial Model," *Am J Psychiatry* 137 (5) (1980): 535-544; Arthur Kleinman, *The Illness Narratives* (New York: Basic Books, 1988).

<sup>14</sup> Maleiha Malik, "Faith and the State of Jurisprudence," in *Faith in Law: Essays in Legal Theory*, ed. Oliver Peter, Sionaidh Douglas Scott and Victor Tadros (Oxford: Hart Publishing 2000), 129-149.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 144.

## Appendix A

### ‘The integration model’

In the ‘integration’ model health and illness are understood in the context of the relationship between human beings and God. Health is viewed in the light of salvation as ‘restoration and wholeness’, and is not limited to the physical body but extends to the restoration of relationships with God and others. Likewise, illness is not merely a biological phenomenon, but has social, cultural and spiritual significance. Human beings are understood as body-soul unities that have the capacity for relationship with God and others. Human beings are therefore both spiritual beings that are created in the image of God, and physical beings that are embedded in a particular historical, social and cultural context. Human beings do not exist in isolation but live within a web of relationships and communities and are therefore interdependent. Serious illness however is a reminder that human beings are dependent on others and on God.

God is viewed as the ultimate healer who has provided medicine and doctors for the benefit of humankind. Whether miraculous healings still occur will depend in the first instance on how miracle is defined. <sup>1</sup>A possible theological definition of miracle might be, ‘an extremely unusual event, unfamiliar in terms of naturalistic explanation, which a worshipping community takes to be specially revelatory, by dint of the blessing or healing it conveys, of the divine grace.’<sup>2</sup> Instances of miracle might therefore translate into an unexpected remission in a patient’s illness, or where a patient with a terminal illness lives for much longer than doctors have predicted, in a way that his/her community finds revelatory of the workings of God. The point being is that medicine is not an exact science, and doctors are fallible. In the second instance miracle might also be understood in terms of ‘healing’. Robin Gill illustrates this in *Healthcare and Christian Ethics* by drawing on the work of John Pilch.<sup>3</sup> In *Healing in the New Testament* Pilch draws a distinction between ‘healing’ and ‘cure’.<sup>4</sup> Pilch notes that in modern Western scientific medicine the focus tends to be on disease and its cause, and the ultimate aim is a ‘cure’. Whereas, in cultures that are not scientifically orientated the focus tends to be on symptoms, and their alleviation or management, which involves creating a new meaning for the sufferer.

‘The name given for this type of therapy is healing, namely ‘a process by which (a) disease and certain other worrisome circumstances are made into illness (a

cultural construction and therefore meaningful), and (b) the sufferer gains a degree of satisfaction through the reduction, or even the elimination of psychological, sensory, and experiential oppressiveness engendered by his medical circumstances.’<sup>5</sup>

Pilch suggests that we should not compare modern Western scientific medicine and the New Testament accounts of the miraculous healings of Jesus as though we are comparing like with like. He holds that the sickness presented to Jesus in the New Testament was concerned with a state of being, rather than an inability to function. So where in the case of lameness a modern reader would interpret a loss of function, an ancient reader would see a disvalued state of being. Gill points out that Pilch is not seeking to make the healing stories redundant, but rather to understand them better and to help ‘an interpreter to be a respectful reader of biblical material.’<sup>6</sup> Whether or not one agrees with Pilch his work leads to an important conclusion - healing may occur without a patient necessarily being cured. Pilch recounts exactly what this meant for himself and for his wife who was diagnosed with ovarian cancer.

‘My wife was healed even before she went into remission and continued in her healed state until she died. She and I discovered new meaning in life, meaning specific to this shared experience of battling the disease, and ultimately – in our case – recognising that the disease had won.’<sup>7</sup>

The role of medicine in the ‘integration’ model is viewed as limited in that it provides care for patients, relieves physical pain, and cures disease where it can, but it is also understood that despite all the scientific and technological advances it is unable to cure all diseases. Medicine is also limited in that it is unable to ‘cure’ the human condition by working on the physical body, either by trying to perfect it, or by trying to eliminate all suffering. It is accepted that while suffering may be redemptive in some cases this is not always the case. Further, there are different types of suffering, some like physical pain can and should be alleviated by medicine, but many others, such as grieving for losses, are part of life. We therefore need skills and resources to negotiate suffering, death and dying. Participating in the Christian story and the Christian community can help to provide these skills and provide practical support in the tough times. Biblical narratives, images and symbols also provide resources that can fund the imagination of a patient and his or her family and help them to negotiate illness, suffering, death and dying.

In the ‘integration’ model the nature of God is understood as paradoxical because the biblical writers used a plethora of images and metaphors of God in order to avoid

idolatry. However, some images of Christ such as the ‘shepherd’ and ‘suffering servant’ can be particularly helpful to Christian patients, or the families of patients, who are seriously ill. The image of the shepherd reminds a Christian patient and his or her family that they belong to God and are in his loving care (Ps. 100: 3; Ezk. 34); that God is their Creator, who knows them personally by name; and that God will provide for all of their needs (Ps. 100: 3; Jn. 10: 3; Ps. 23: 1-3). Therefore, they can rest secure knowing that in God’s care they will lack nothing, either materially or spiritually.<sup>8</sup> As part of that care God will lead and guide them when difficult decisions have to be made (Ps. 23: 3). Even at the darkest moments, when they ‘walk in the shadow of the valley of death’ they will not be alone, because God will be in the darkness and in the midst of their suffering with them. Therefore, they have nothing to fear because God himself will be their comfort (Ps. 23: 4). When a patient faces death and is at the end of his or her earthly life, this is not the end of the patient’s story. Instead, the patient has hope of resurrection, and a life with God in his heavenly home (Ps.23: 6).<sup>9</sup> The Christian patient can therefore feel secure knowing that they are known personally by God and are safe in the care of a loving God who is present with them through all their suffering. The theme of ‘presence’ is continued in the New Testament through the Incarnation, and Jesus who is Emmanuel (Mt. 1: 23), the Good Shepherd (Jn. 10: 11) and with the coming of the Holy Spirit (Jn. 14: 25-26).

While the image of Christ as shepherd is enduring, the employment of shepherd imagery in pastoral care has been criticised. Stephen Pattison, for example, writes, ‘The metaphor of wise shepherds leading or guiding silly sheep has been challenged as dangerously one-sided, misleading and unhelpful in the egalitarian atmosphere of the twentieth century.’<sup>10</sup> Similarly, Wesley Carr writing about pastoral care as deriving from the image of the shepherd and the way he cares for the flock notes that ‘Today this picture is sometimes resisted on the grounds that it diminishes the autonomy of believers. Who, it is asked, are the sheep? But the theme of the shepherd is not chiefly about how care (or, as we shall see, authority) is exercised. It prevails because of the way it permeates so much Jewish and Christian imagery of God.’<sup>11</sup> However, Thomas C Oden argues that the view that “modern man” is estranged from such pre-modern images and cannot understand its force sells short the capacity of the modern imagination.<sup>12</sup> He therefore suggests that rather than prematurely ruling out pastoral images we do better to listen carefully to them so as to ask how they resonate vitally with contemporary aspirations.<sup>13</sup>

The image of the suffering servant found in Isaiah depicts ‘a man of suffering and acquainted with infirmity (53: 3), and it is this image that has been applied to Jesus (Acts 8: 34-35). Many of these words used to describe the Servant’s suffering will strike a chord with many patients. Although I accept that Christ’s suffering was vicarious, I suggest that some of the words that describe that suffering can be particularly meaningful for some patients. For example, the words ‘pierced’ and ‘bruised’ will resonate with a patient who is having needles inserted into her arms for frequent blood tests. ‘Wounded’ will have a special meaning for a patient who is sore and incapacitated from invasive surgery. ‘Cut-off from the land of the living’ will echo the feelings of a patient who is isolated from friends and family who through work, distance, or illness, are unable to visit her in hospital. The patient whose illness or accident has led to physical disfigurement may well feel ‘afflicted’ or ‘even rejected by others.’ Whereas, a patient who expects to receive news that her treatment is working, only to find that it is not, and that there is nothing further that the doctors can do, will almost certainly feel ‘crushed’.

Gregory the Great has developed a detailed analogy between Christ’s suffering and that of human beings.<sup>14</sup> However, a number of objections and criticisms have been made to this linking of human suffering with the sacrificial suffering of Christ.<sup>15</sup> Stanley Hauerwas argues that Christians are under no obligation to interpret all their suffering by identifying them with Christ’s cross. This is because by doing so it can encourage Christians to accept avoidable suffering, and tempt Christians into a masochistic account of Christian life. Further, if Christians think that all their suffering is akin to Christ’s then it vacates ‘the cross of its significance because we fail to remember that what is important about the cross is who was crucified there.’<sup>16</sup> After writing this he received a letter from a friend who objected to his argument. She admitted that at first she was persuaded by the argument because as a Catholic she had been taught to accept suffering, to offer it up as sins, and to consider it a share in the cross of Christ. Reading his account she came to see the abuses in the approach, but when she became ill she felt cheated by the argument. She asked herself this question. What does it mean to be a Christian when one is sick or suffering in some other way that one is unable to participate in Christ’s ministry? She went back to the idea that being a Christian is essentially to be an imitator of Christ. Even when one is unable to preach, teach or do

anything else because of illness it is still possible to imitate Christ by bearing one's sufferings patiently and by not cursing God or neighbour.<sup>17</sup>

'Thus, simply having suffering is not part of being a Christian, but bearing it patiently ("absorbing evil"), especially for the sake of others, is an important part of being a Christian. So long as this difference is kept in mind, sick people ought to be encouraged to interpret their suffering in terms of Christ's cross. If Jesus' patient suffering is the only part of his life available for them to identify with, that possibility should not be taken away from them due to the differences in the causes of their suffering.'<sup>18</sup>

Hauerwas agrees, but responds by drawing a distinction between accepting one's own suffering in illness as having a telos in service to one another in faith, which he views as appropriate, and forcing that meaning onto another, which he believes is not because it can be destructive and make God out to be a tyrant or cosmic torturer. In the face of the pointless suffering of children he argues that the only humane course is to show patience but without discerning a purpose behind the suffering.<sup>19</sup>

In the New Testament the image of the shepherd and the suffering servant are brought together and held together in the person of Jesus Christ. They illustrate God's response to suffering. The shepherd image reminds the patient of God's presence and loving care, even through the darkest moments of suffering. Jesus is recorded as claiming the title 'Good Shepherd' (Jn. 10: 11). The image of the suffering servant reminds the patient that God identifies with human suffering through Jesus who becomes a fellow sufferer. However, suffering is not just a physical phenomenon. Through the suffering and death of Jesus, God provides a cure for the sin and alienation at the root of all suffering. The resurrection of Christ reveals that death is not the end of the story. The ultimate meaning of the patient's life is found in God's story and the hope of resurrection.

I will now test the 'integration' model against the criteria of Hauerwas and Burrell that I have set out in Chapter 3 Section V. They start by linking criteria (1) and (2) because, 'stories which offer ways to see through current distortions can also empower us to free ourselves from destructive alternatives, for we can learn how to see a current ideology as a distortion by watching what it can do to people who let it shape their lives.'<sup>20</sup>

The last two criteria are also linked together: (3) providing room to keep us from having to resort to violence and (4) offering a sense of the tragic: how meaning transcends power. One way that these criteria might be understood to operate relate to how

medicine can sometimes increase suffering. Firstly, Brody argues that,

‘Relief of suffering comes most often by changing the meaning of the experience for the sufferer and restoring the disrupted connectedness of the sufferer with herself and those around her. Indeed, modern medical practice, by focussing on bodily pain and ignoring the multiple aspects of personhood and personal meaning, may inadvertently increase suffering while seeking to relieve it.’<sup>21</sup>

Secondly, the rapid advances in science and technology can lead to an expectation that medicine can ‘fix’ everything and prolong life indefinitely. The suffering of a patient may therefore be increased by subjecting the patient to more and more medical procedures with no hope of recovery.

The ‘integration’ model provides room to keep us from having to resort to violence understood as increasing the patient’s suffering. First, by taking into account aspects of personhood other than the biological. Secondly, it offers a sense of the tragic by acknowledging that medicine has its limits. It also provides the patient and her family with resources to enable them to negotiate suffering, death and dying. The images of Christ as ‘shepherd’ and ‘suffering servant’ encapsulate God’s twin responses to suffering, those of care and cure. Death is therefore not a failure for the doctors, or the end of the patient’s story. Rather, the patient’s life has its ultimate meaning in God’s story and the hope of resurrection.

## Notes

<sup>1</sup> The 18<sup>th</sup> century philosopher David Hume defined miracle as a violation of the laws of nature. He argued that as we have uniform experience that the laws of nature are never violated, then miracles cannot occur. Recent science has thrown doubt on the premise on which this is based. 'It is very clear from the science of unpredictability in non-linear dynamic systems (including the human brain) that it is inconceivable that the behaviour of a real life system involving human beings could be the subject of a total comprehensive scientific explanation. If we do not know what the laws of nature prescribe in a particular situation we cannot be sure what would constitute a 'violation'. We therefore have to define miracle in theological terms rather than in terms of scientific regularities.' Christopher Southgate et al. *God, Humanity and the Cosmos*, (Edinburgh: T&T Clark, 1999), 263-4.

<sup>2</sup> *ibid.*

<sup>3</sup> Robin Gill, *Health Care and Christian Ethics* (Cambridge: Cambridge University Press, 2006), 71ff.

<sup>4</sup> John Pilch, *Healing in the New Testament: Insights from Medical and Mediterranean Anthropology*, (Minneapolis: Fortress, Press, 2000), 13-14 cited in Gill, *Health Care and Christian Ethics*, 72.

<sup>5</sup> Pilch, *Healing in the New Testament*, 13-14 (Pilch is quoting from Arthur Kleinman, *Patients and Healers in the context of Culture* (Berkeley: University of California Press, 1980), 265.

<sup>6</sup> Pilch, *Healing in the New Testament*, 116 cited by Gill, *Health Care and Christian Ethics*, 73.

<sup>7</sup> Pilch, *Healing in the New Testament*, 141 cited by Gill, *Health Care and Christian Ethics*, 74.

<sup>8</sup> 'Israel refuses to split things into spiritual and material. It affirms that Yahweh is the satisfaction of all wants and needs. Thus in Ps.73:26, Yahweh is one's portion.' Walter Brueggemann *The Message of the Psalms*, (Augsburg, Minneapolis: Augsburg Publishing Company, 1984), 155.

<sup>9</sup> Opinions vary on whether the metaphor of shepherd is sustained throughout Ps. 23. Some exegetes (e.g. L. Koehler, Psalm 23, ZAW, LXVIII (1956), 229f.) argue that the metaphor is sustained. Others point to the use of two metaphors, shepherd 1-4, and host 5-6. Others, to three metaphors, shepherd 1-2, guide 3-4, host, 5-6. Likewise, opinions vary on the meaning of 'I shall dwell in the house of the Lord for ever.' It has been interpreted as the Temple or continual communion with God. A.A.Anderson, *The Book of Psalms*, Vol. I (London: Oliphants, 1972), 195-199. Dahood however, argues that 'house of Yahweh' is like "palace" which in a number of places refers to God's celestial habitation. Ps. 29: 10; ,27:4; 31:3; 36:9; Is.4: 4 signifies the heavenly dwelling of Yahweh. After a peaceful life under the guidance and protection of Yahweh the psalmist looks forward to eternal happiness in God's celestial abode. Mitchell Dahood, S.J., trans. *Psalms I 1-50*, (Garden City, New York: Doubleday & Company, Inc., 1966), 148-9.

<sup>10</sup> Stephen Pattison, *A Critique of Pastoral Care* (London: SCM Press, 1993), 8.

<sup>11</sup> Wesley Carr, *Handbook of Pastoral Studies* (London: SPCK, 1997), 9-10.

<sup>12</sup> Thomas C Oden cites the following who have criticised the shepherd imagery - A. Harnack, *A History of Dogma* (London: Williams and Norgate, 1896-1899), 7 vols; R.Bultmann, "The New Testament and Mythology," (1941) in *Kerygma and Myth*, ed. H.Bartsch (New York: Harper and Row, 1969); Carroll A. Wise, *A Pastoral Counselling*, (New York: Harper & Bros., 1951) cited in Thomas C. Oden, *Pastoral Theology* (New York: HarperSanFrancisco, 1983), 51.

<sup>13</sup> Oden, *Pastoral Theology*, 51ff.

<sup>14</sup> Gregory the Great, *Pastoral Care* (591) Translated by Henry Davis. ACW vol. 11 (Westminster, Md: Newman, 1950), 126ff cited by Oden, *Pastoral Theology*, 254.

<sup>15</sup> Kathleen Corley points to feminists writers who object to a sacrificial Christology and its corresponding ethic, the way that it glorifies suffering, and holds up the victim as a model for women. Writing about 1Peter in the context of domestic violence she argues that 'its particular message of the suffering Christ as a model for Christian living leads to precisely the kinds of abuses that feminists fear.' Women are encouraged to view their suffering as a means to imitate Christ in submission and obedience. Kathleen E. Corley, 1 Peter, in *Searching the Scriptures*, Vol. Two, ed. Elisabeth Schussler Fiorenza, (London: SCM Press Ltd., 1995), 349-360.

<sup>16</sup> Stanley Hauerwas, *Suffering Presence* (Notre Dame, Indiana: University of Notre Dame Press, 2003), 31ff.

<sup>17</sup> Hauerwas, *God, Medicine, and Suffering*, 86ff.

<sup>18</sup> *ibid.* 88.

<sup>19</sup> *ibid.* 88-89.

<sup>20</sup> *ibid.*

<sup>21</sup> Howard Brody, *Stories of Sickness*, 2<sup>nd</sup> ed. (Oxford: O.U.P., 2003), 49-50.

## Bibliography

- Aldridge, Anne. "The Unique Role of Chaplain." *Scottish Journal of Healthcare Chaplaincy*. 9 (1) (2006): 18-22.  
[http://www.sach.org.uk/journal/0901p18\\_aldrige.pdf](http://www.sach.org.uk/journal/0901p18_aldrige.pdf). Accessed July 19, 2008.
- Alexander, Philip S. "Jewish Law in the time of Jesus: towards a clarification of the problem," In *Law and Religion*, edited by Barnabas Lindars SSF, 44-58. Cambridge: James Clarke & Co., 1988.
- Anderson, Bernard W. *The Living World of the Old Testament*. Harlow, Essex: Longman Group UK Ltd., 1993.
- Anderson, Ray S. *Theology, Death and Dying*. Oxford: Basil Blackwell, 1986.
- Aquinas, St. Thomas. *Summa Theologiae*: Latin text and English translation, introductions, notes, appendices, and glossaries. London: Blackfriars in conjunction with Eyre & Spottiswoode, 1963.
- Arras, John D. "Nice Story, But so what?" in *Stories and their limits*. edited and with Introduction by Hilde Lindemann Nelson, Chapter 5. New York and London: Routledge, 1997.
- Audi, Robert and Nicholas Wolterstorff, *Religion in the Public Square*. Lanham, Maryland: Rowman & Littlefield Publishers Inc., 1997.
- Auerbach, Jerold. *Justice Without Law*. Oxford: Oxford University Press, 1984.
- Austin, John, *The Province of Jurisprudence Determined*. Weidenfeld and Nicolson, 1954.
- Bainham, Andrew. "Resolving the unresolvable: The case of the conjoined twins." *Cambridge Law Review* 60(1) (2001): 49-53.
- Balboni, Tracy A. et al. "Religiousness and Spiritual Support Among Advanced Cancer Patients and Associations with End-of-life Treatment Preferences and Quality of Life." *Journal of Clinical Oncology* 25(5) (2007) 555-560.
- Banks, Robert. *Jesus and the Law in the Synoptic Tradition*. Cambridge: Cambridge University Press, 1975.
- Barbour, Ian G. *Religion and Science*. London: SCM Press Limited, 1998.
- Barbour, Ian, *Myths, Models and Paradigms*. London: SCM Press Limited, 1974.
- Bell, Pauline and Pauline Jordan, *Conflict: Handling Conflict in the Local Church*. London: Scripture Union, 1992.
- Berger, Peter L., "The Desecularization of the World: A Global Overview," In *The Desecularization of the World*, edited by Peter L. Berger, 1-18. Grand Rapids, Michigan: William B. Eerdmans, 1999.

Berger, Peter L., *The Desecularization of the World*. Grand Rapids, Michigan: William B. Eerdmans, 1999.

Betti, Emilio. "On A General Theory of Interpretation: The Raison D'Etre of Hermeneutics." *The American Journal of Jurisprudence* 32(1987): 245-268.

Bevan, Alexander H. *Alternative Dispute Resolution*. London: Sweet & Maxwell, 1992.

Borrell-Carrio, Francese and A.L.Suchman and R.M.Epstein. "The Biopsychosocial Model 25 Years Later: Principles, Practice and Scientific Enquiry." *Annals of Family Medicine*. 2 (2004): 576-582.

<http://www.annfammed.org/cgi/content/full/2/6/576>. Accessed December 8, 2007.

Bowlby, Ronald. "Chaplains are different." *British Medical Journal* 281, 20-27 Dec. (1980): 1689.

<http://www.pubmedcentral.nih.gov/picrender.fcgi?arhd=171512&blobtype=pdf>.

Accessed July 11, 2008.

Bradney, Anthony and Fiona Cownie. *Living Without Law*. Aldershot: Dartmouth Publishing Company, 2000.

Bradney, Anthony. *Law and Faith in a Sceptical Age*. Abingdon: Routledge-Cavendish, 2009.

Bradney, Anthony. *Religions, Rights and Laws*. Leicester: Leicester University Press, 1993.

Brett, Allan S. and Paul Jersild, " "Inappropriate" Treatment Near the End of Life." *Archives of Internal Medicine* 163: 14 (2003): 1645-1649.

Bridge, Caroline. "Religion, Culture and the Body of a Child," In *Body Lore and Laws*, edited by Andrew Bainham, Shelley Day Sclater and Martin Richards, 265-288. Oxford and Portland Oregon: Hart Publishing, 2002.

Bridge, Caroline. "Religious Beliefs and Teenage Refusal of Medical Treatment." *The Modern Law Review* 62 (1999): 585-94.

Brierley, Peter(ed) UK Christian Handbook Religious Trends No. 5: The Future of the Church, London: Christian Research, 2005, table 2: 2 cited in

[http://www.tomorrowproject.net/pub/1\\_GLIMPSES/Individuals\\_identity\\_and\\_value](http://www.tomorrowproject.net/pub/1_GLIMPSES/Individuals_identity_and_value).

Accessed May 3, 2007.

Brody, Howard. *Stories of Sickness*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2003.

Brown, Carole J. "Facilitative Mediation: The Classic Approach Retains its Appeal." In *Pepperdine Dispute Resolution Law Journal* 4 (2003-2004): 279-295.

Brown, Judith Belle, and Moira Stewart and W Wayne Weston, eds., *Challenges and Solutions in Patient-Centred Care*. Abingdon: Radcliffe Medical Press, 2002.

Brueggemann, Walter. *Interpretation and Obedience*. Minneapolis, Fortress Press, 1991.

Brueggemann, Walter. *Living Toward A Vision*. New York: United Church Press, 1990.

Brueggemann, Walter. *The Message of the Psalms*. Augsburg, Minneapolis: Augsburg Publishing Company, 1984.

Bruner, Jerome. "The Narrative Construction of Reality." *Critical Inquiry* 18: 1 (Autumn 1991): 1-21.

<http://linksjstor.org/sici?sici=0093-1896%28199123%2198%3A1%3C1%3ATNCOR%3E2.0.CO%3B2-J>.

Accessed March 19, 2007.

Bruner, Jerome. *Actual Minds, Possible Worlds*. Cambridge Mass: Harvard University Press, 1986.

Bruner, Jerome. *Making Stories Law, Literature, Life*. Cambridge Mass: Harvard University Press, 2002.

Bush, Robert A. Baruch and Joseph P. Folger. *The Promise of Mediation: The Transformative Approach to Conflict*. Revised ed. San Francisco: Jossey-Bass, 2005.

Cairns, Ian. *Word and Presence: A Commentary on the Book of Deuteronomy*. Grand Rapids, Michigan: Wm. B. Eerdmans Publishing Co., 1992.

Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven and London: Yale University Press, reprint 1971.

Carr, Wesley. *Handbook of Pastoral Studies*. London: S.P.C.K., 1997

Carter, Stephen L. *The Culture of Disbelief*. New York: Anchor Books, 1994

"Catholic adoption agencies adjust to gay rights legislation," BBC News Channel, Tuesday January 23, 2007.

<http://www.communitycare.co.uk/Articles/2009/01/110466/how-catholic-adoption>.

Accessed July 19, 2009.

Charon, R. et al., 'Literature and Medicine: Contributions to Clinical Practice' in *Ann Intern Med*. 122 1995: 599-606.

Charon, R., *Narrative Medicine*

<http://litsite.alaska.edu/healing/medicine.html>. Accessed February 9, 2007.

Charon, Rita. and M. Montello. *Stories Matter*. New York: Routledge, 2002.

Charon, Rita. *Narrative Medicine*. Oxford: Oxford University Press, 2006.

Childs, Brevard S. *Isaiah*. Louisville, Kentucky: Westminster John Knox Press, 2001.

Chinhengo, Austin. *Essential Jurisprudence* 2<sup>nd</sup> ed. London: Cavendish Publishing Limited, 2000.

Clebsch, William A and Charles R Jaekle. *Pastoral Care in Historical Perspective*. Northvale, New Jersey: Jason Aronson Inc., 1994.

- Coakley, Sarah, ed. *Religion and the Body*. Cambridge: Cambridge University Press, 1997.
- Cobb, Mark. *The Hospital Chaplain's Handbook*. Norwich: Canterbury Press, 2005.
- Cohen, Deborah et al. 'Medicine in a multicultural society.' *StudentBMJ* 9 (2001): 357-398.  
[http://student.bmj.com/back\\_issues/1001/editorials/359.html](http://student.bmj.com/back_issues/1001/editorials/359.html). Accessed July 10, 2006.
- Cole, Ethan. "Catholic adoption agencies to comply with equality laws." *ChristianToday*, January 12 2009.  
[http://www.christiantoday.com/article/catholic\\_adoption\\_agencies\\_to\\_comply\\_with\\_equa](http://www.christiantoday.com/article/catholic_adoption_agencies_to_comply_with_equa). Accessed July 19, 2009.
- Collins English Dictionary and Thesaurus*. London: HarperCollins & Times Books, 2000.
- Connors, Russell B. Junior and Martin L. Smith. "Religious Insistence on Medical Treatment: Christian Theology and Re-Imagination." *The Hastings Center Report*, 26: 4 (1996): 23-30,  
<http://links.jstor.org/sici?sici=0093-0334%28199607%2F08%2926%3A4%3C23%2ARIOMTC%3E2.0.CO%3B2-3>. Accessed April 1, 2008.
- Corley, Kathleen E. "1 Peter." In *Searching the Scriptures*, Vol. Two, edited by Elisabeth Schussler Fiorenza, 349-360. London: SCM Press Ltd., 1995.
- Cotterell, Roger. *Law's Community*. Oxford: Clarendon Press, 1993.
- Cotterell, Roger. *The Sociology of Law*. London: Butterworths, 1992.
- Craigie, Peter, C. *The Book of Deuteronomy*. London: Hodder and Stoughton, 1976.
- Cranston, Maurice. "John Locke and the Case for Toleration." In *On Toleration*, edited by Susan Mendus and David Edwards, 101-121. Oxford: Clarendon Press, 1987.
- Crawley, L.M., P.A Marshall, B.Lo, B.A.Koenig,"Strategies for culturally effective end-of-life care" *Ann Intern Med*. 136(9) (2002): 673-9.
- Creed, Francis. "Are the patient-centred and biosychosocial approaches compatible?" In *Biosychosocial Medicine*, edited by Peter White, 187-199 Oxford: Oxford University Press, 2005.
- Cunningham, David S. *Christian Ethics: the End of the Law*. London & New York: Routledge, 2008.
- Curlin, Farr A. et al. "When Patients Choose Faith Over Medicine," *Archives of Internal Medicine* 165 (2005): 88-91.  
<http://www.archinternmed.com>. Accessed August 22, 2006.
- Dahood, Mitchell. S.J., trans. Psalms I 1-50, Garden City, New York: Doubleday & Company, Inc., 1966.

Davie, Grace. "Europe: The Exception That Proves the Rule?" In *The Desecularization of the World*, edited by Peter L. Berger, 65-83. Grand Rapids, Michigan: William B. Eerdmans, 1999.

Davies, Howard and David Holdcroft, *Jurisprudence: Texts and Commentary*. London, Dublin, Edinburgh: Butterworths, 1991.

Donald, Anna. "The Words we Live in." In *Narrative Based Medicine*, edited by Trisha Greenhalgh and Brian Hurwitz, 17-26, London: BMJ, 2002.

Dworkin, Ronald. *Taking Rights Seriously*. 8<sup>th</sup> impression. London: Gerald Duckworth & Co. Ltd., 1996.

Ehman John W. et al. "Do Patients Want Physicians to Inquire About Their Spiritual or Religious Beliefs If They Become Gravely Ill?" *Archives of Internal Medicine*. 159 (1999): 1803-1806.  
<http://www.archinternmed.com>. Accessed January 8, 2008.

Elder, Lee. "Why some Jehovah's Witnesses accept blood and conscientiously reject official Watchtower Society blood policy." *Journal of Medical Ethics* 26 (2000): 375-380.  
<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/26/5/375>.  
Accessed September 1, 2009.

Engel, George L. "From Biomedical to Biopsychosocial" *Psychosomatics* 38 (4) (1997): 521-528.

Engel, George L. "The Clinical application of the Biopsychosocial Model" *Am J Psychiatry* 137 (5) (1980): 535-544.

Engel, George L. "The Need for a New Medical Model: A Challenge for Biomedicine." *Science* 196 (1977): 129 -136.

Erhlich, Eugen. *Fundamental Principles of the Sociology of Law*. New York: Arno Press, 1975.

Essex, Ben. *Doctors, Dilemmas, Decisions*. London: British Medical Journal Publishing Group, 1994.

Farrell, Christine, compiler. *Patient and Public Involvement in Health: The Evidence for Policy Implementation*. London: Department of Health Publications, May 2004.  
<http://www.dh.gov.uk/assetroot/04/08/23/34/04082334.pdf>.  
Accessed December 12, 2005

Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1992.

Frank, W.A., *The Wounded Storyteller*. Chicago: Chicago University Press, 1995.

Freeman, M.D.A. *Lloyd's Introduction to Jurisprudence*. 7<sup>th</sup> ed. London: Sweet & Maxwell Ltd., 2001.

- Freeman, Michael. ed. *Alternative Dispute Resolution*. Aldershot: Dartmouth, 1995.
- Frye, Northrop *Anatomy of Criticism*. Princeton: Princeton University Pr., 1971.
- Fuller, Lon L. "Mediation – Its Forms and Functions." In *Alternative Dispute Resolution*, edited by Michael Freeman 115-150. Aldershot: Dartmouth Publishing Company Limited, 1995.
- Gabriel, Yiannis. "The voice of experience and the voice of the expert – can they speak to each other?" In *Narrative Research in Health and Illness*, edited by B. Hurwitz, T. Greenhalgh and V. Skultans, 168-185. Oxford: Blackwell Publishing Ltd., 2004.
- Gadamer, Hans-Georg, *Philosophical Hermeneutics*. Translated by David E. Linge, Berkeley and Los Angeles, California: University of California Press, 1977.
- Geertz, Clifford, *The Interpretation of Cultures*. London: Hutchinson & Co., 1975.
- Gerkin, Charles V. *An Introduction to Pastoral Care*. Nashville: Abingdon Press, 1997.
- Gill, Robin. *Health Care and Christian Ethics*. Cambridge: Cambridge University Press, 2006.
- Gillett, G & Nicholas, B., 'Doctors' stories, patients' stories: a narrative approach to teaching medical ethics' *Journal of Medical Ethics* 23 (1997): 295-299.
- Gillon, Raanan. "Imposed separation of conjoined twins – moral hubris by the English courts?" *Journal of Medical Ethics* 27 (2001): 3-4.
- Gillon, Raanan. "Refusal of potentially life-saving blood transfusions by Jehovah's Witnesses: should doctors explain that not all JW's think it's religiously required?" *Journal of Medical Ethics* 26 (2000): 299-301.
- Goldacre, Ben. *Bad Science*. London: Fourth Estate, 2008.
- Gorringer, T.J. *Furthering Humanity*. Aldershot: Ashgate Publishing Limited, 2004.
- Greenawalt, Kent. *Religious Convictions and Political Choice*. Oxford: Oxford University Press, 1988.
- Greenhalgh, Trisha and A. Collard, *Narrative Based Health Care: Sharing Stories A multiprofessional workbook*. London: BMJ Books, 2003.
- Greenhalgh, Trisha and Brian Hurwitz. "Why study narrative?" In *Narrative Based Medicine*, edited by Trisha Greenhalgh and Brian Hurwitz, 3-16. London: BMJ, 2002.
- Greenhalgh, Trisha and Olga Kostopoulou, and Claire Harries, "Making decisions about benefits and harms of medicines." *British Medical Journal* 329 (7456) (2004): 47-50.  
<http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pmcentrez&artid=443458>.  
 Accessed July 11, 2008

- Greenhalgh, Trisha, Brian Hurwitz. eds. *Narrative Based Medicine*. London: BMJ Books, 1998.
- Griffiths, John. "What is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986): 1-55.
- Grodin, Michael A. "Religious Advance Directives: The Convergence of Law, Religion, Medicine and Public Health." *American Journal of Public Health* 83(6) (1993): 899-903.  
<http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1694725&blobtype=pdf>.  
 Accessed July 11, 2008.
- Grondin, Jean. *Introduction to Philosophical Hermeneutics*. Translated by Joel Weinsheimer New Haven: Yale University Press, 1994.
- Habermas, Jürgen. *Religion in the Public Sphere*.  
[http://www.sandiego.edu/pdf\\_library/habermaslecture03115\\_c939cceb2ab087bdfc6df291ec0fc3fa.pdf](http://www.sandiego.edu/pdf_library/habermaslecture03115_c939cceb2ab087bdfc6df291ec0fc3fa.pdf).  
 Accessed June 3, 2008.
- Ham, Chris and Shirley McIver. *Contested Decisions*. London: King's Fund Publishing, 2000.
- Hansen, Toran. 'The Narrative Approach to Mediation.' September 2003  
<http://www.mediate.com/articles/hansenT.cfm>. Accessed January 27, 2010.
- Hardwig, John, "Autobiography, Biography, and Narrative Ethics," In *Stories and Their Limits*, edited by Hilde Lindemann, Nelson, 50-64. New York and London: Routledge, 1997.
- Harris, John. "Human Beings, Person and Conjoined Twins: An Ethical Analysis of the Judgement in Re A." *Medical Law Review* 9 (2001): 221-236.
- Hart, H.L.A. *The Concept of Law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 1997.
- Hauerwas, Stanley and David Burrell, "From System to Story: An Alternative Pattern for Rationality in Ethics." In *Why Narrative?* edited by Stanley Hauerwas and L. Gregory Jones, 158-190. Grand Rapids, Michigan: W.B.Eerdmans Pub. Co., 1989.
- Hauerwas, Stanley and Gregory L. Jones, eds. *Why Narrative?* Grand Rapids, Michigan: W.B.Eerdmans Publishing Company, 1989.
- Hauerwas, Stanley, with Richard Bondi and David B. Burrell, *Truthfulness and Tragedy*. Notre Dame Indiana: University of Notre Dame Press, 1985.
- Hauerwas, Stanley. *A Community of Character*. London: University of Notre Dame Press, 1986.
- Hauerwas, Stanley. *God, Medicine, and Suffering*. Grand Rapids, Michigan: William B Eerdmans Publishing Company, 1990.
- Hauerwas, Stanley. *Suffering Presence*. Edinburgh: T & T Clark, 1988.

- Hauerwas, Stanley. *The Hauerwas Reader*, edited by John Berkman and Michael Cartwright. Durham, N.C; London: Duke University Press, 2001.
- Hauerwas, Stanley. *The Peaceable Kingdom*. 2<sup>nd</sup> ed. London: SCM Pr., 2003.
- Hawkins, Anne Huntsaker, *Reconstructing Illness*. 2<sup>nd</sup> ed. West Lafayette, Indiana: Purdue University Pr., 1999.
- Hay David and Kay Hunt, 'Is Britain's soul waking up?' *The Tablet*, 27 June 2000.
- Herbert, David *Religion and Civil Society*. Aldershot: Ashgate Publishing Limited, 2003.
- Hill, Mark and Russell Sandberg. "Is Nothing Sacred? Clashing Symbols in a Secular World." *Public Law* Autumn (2007): 488-506.
- Holy Bible*. New Revised Standard Version, Anglicized Edition. London: Collins, HarperCollins Publishers, 2007.
- Hopewell, J.F. *Congregation*. Edited by Barbara G. Wheeler. Philadelphia: Fortress Press, 1987.
- Hunter, K.M., *Doctors' Stories*, Princeton, N.J.: Princeton University Press, 1991.
- Hurwitz, B., Greenhalgh, T., Skultans, V., eds. *Narrative Research in Health and Illness*, Oxford: Blackwell Publishing Limited, 2004.
- Jones, Anne Hudson. "Narratives in medical ethics." In *Narrative Based Medicine*, edited by Trisha Greenhalgh and Brian Hurwitz, 217-224. London: BMJ, 2002.
- Kelly, J.M. *A Short History of Western Legal Theory*. Oxford: Clarendon Press, 1994.
- Kleinman, A *The Illness Narratives*, New York: Basic Books, 1988.
- Kleinman, Arthur, Leon Eisenberg, and Byron Good, "Clinical Lessons from Anthropological and Cross-Cultural Research." *Annals of Internal Medicine* 88 (1978): 251-258.
- Kleinman, Arthur. Why Does Culture Matter in Health Care and What Can We Do About It? November 2006.  
[http://www.healthynh.com/fhc/initiatives/access/ccdownloads/nov3\\_kleinman.ppt](http://www.healthynh.com/fhc/initiatives/access/ccdownloads/nov3_kleinman.ppt).  
 Accessed April 3, 2008.
- Koenig Barbara A. and Jan Gates-Williams, 'Understanding Cultural Difference in Caring for Dying Patients. ' *West J Med*. 163 (3) (1995): 244-9.
- Koenig, Harold G. "An 83-year-old woman with chronic illness and strong religious beliefs." *JAMA* 288 (2002): 487-493.
- Koenig, Harold G. Religion, Spirituality, and Medicine: Research Findings and Implications for Clinical Practice, *Southern Medical Journal*, 97 (12) (2004): 1194-1200.

- Koenig, Harold G., Michael E. McCullough, and David B. Larson *Handbook of Religion and Health*, Oxford: Oxford University Press, 2001.
- Lo Bernard. et al “Discussing Religious and Spiritual Issues at the End of Life.” *JAMA* 287: 6 (2002): 749-754.
- Louw, Daniel J. “Diagnostic Criteria for an Assessment of God-Images in Pastoral Counselling,” In *Metaphor, Canon and Community: Jewish, Christian and Islamic approaches*, edited by Ralph Bisschops and James Francis, 132-161. Bern: Peter Lang, 1999.
- Lyall, David. *The Integrity of Pastoral Care*. London: SPCK, 2001.
- MacIntyre, Alasdair. *A Short History of Ethics*. London: Routledge & Kegan Paul, 2004.
- MacIntyre, Alasdair. *After Virtue*. 3<sup>rd</sup> ed. London: Gerald Duckworth & Co., 2007.
- Macritchie, Iain. “The Chaplain as Translator.” *Scottish Journal of Healthcare Chaplaincy* 2 (2) (1999): 7-10.  
[http://www.sach.org.uk/journal/0202p07\\_macritchie.pdf](http://www.sach.org.uk/journal/0202p07_macritchie.pdf). Accessed July 19,2008.
- Mahowald, Briody. *Bioethics and Women*. Oxford: Oxford University Press, 2006.
- Malik, Maleiha. “Faith and the State of Jurisprudence.” In *Faith in Law: Essays in Legal Theory*, edited by Oliver Peter, Sionaidh Douglas Scott and Victor Tadros, 129-149. Oxford: Hart Publishing 2000.
- Malyon, David. “Transfusion-free treatment of Jehovah’s Witnesses: respecting the autonomous patient’s motives.” *Journal of Medical Ethics* 24 (1998): 376-381.  
<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/content/reprint/24/6/376>. Accessed September 1, 2009.
- Mandziuk, Paul A. “The Doctor-Chaplain Relationship.” *West Journal of Medicine* 160 (1994): 376-377.  
<http://www.pubmedcentral.nih.gov/picrender.fcgi?arhd=1022440&blobtype=pdf>. Accessed July 11,2008.
- Marshall, Christopher D. *Beyond Retribution*. Grand Rapids, Michigan and Cambridge U.K.: William B. Eerdmans Publishing Company, 2001.
- Mason, J.K., McCall Smith, R.A., and Laurie, G.T. *Law and Medical Ethics*. 6<sup>th</sup> ed. London: LexisNexis UK, 2003.
- Mattingly, Cheryl and Linda C Garro, eds. *Narrative and the Cultural Construction of Illness and Healing*. Berkeley, Los Angeles, London: University of California Press, 2000.

Maynard, Elizabeth A., Richard L. Gorsuch and Jeffrey P. Bjorck, Religious Coping Style, Concept of God, and Personal Religious Variables in Threat, Loss, and Challenge Situations. *Journal for the Scientific Study of Religion* 40(1) (Mar. 2001): 65-74.

<http://links.jstor.org/sici=0021-8294%28200103%2940%3A1%3C65%3ARCSCOG%3E2.0.CO%3B2-5>.

Accessed February 15, 2008.

McClung, Emily, Daniel H. Grosseohme and Ann F. Jacobson. "Collaborating with Chaplains to meet spiritual needs." *Medsurg Nursing* 15(3) (2006): 147-156.

McFague, Sallie. *Metaphorical Theology*, Philadelphia: Fortress Pr., 1982.

McHaffie, Hazel E. Supporting Families When Treatment Is Withdrawn From Neonates: Parental Views On The Role Of The Chaplain, *Scottish Journal of Healthcare Chaplaincy*, 3(2) (2000).

[http://www.sach.uk/journal/0302p02\\_mchaffie.pdf](http://www.sach.uk/journal/0302p02_mchaffie.pdf). Accessed July 19, 2008.

McLeod, Ian. *Legal Theory*. 2<sup>nd</sup> ed. Basingstoke: Palgrave Macmillan, 2003.

Mendus, Susan and David Edwards, eds. *On Toleration*. Oxford: Clarendon Press, 1987.

Mendus, Susan, Introduction to *On Toleration*, edited by Susan Mendus and David Edwards, 1-16. Oxford: Clarendon Press, 1987.

Mendus, Susan. ed. *Justifying Toleration*. Cambridge: Cambridge University Press, 1988.

Menski, Werner. "Law, Religion and Culture in Multicultural Britain." In *Law and Religion in Multicultural Societies*, edited by Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman, 43-62. Copenhagen: DJOF Publishing, 2008.

Menski, Werner. *Comparative Law in a Global Context*. 2<sup>nd</sup> ed. Cambridge: Cambridge University Press, 2006.

Moore, Sally Falk. *Law as Process*. London, Henley and Boston: Routledge & Kegan Paul, 1978.

Morris, Herbert. 'John Austin' in *The Encyclopaedia of Philosophy* vol 1 New York: Macmillan 1967.

Morrison, Mary F and Sarah Gelbach Demichele. "How culture and religion affect attitudes toward medical futility." In *Medical Futility*, edited by Marjorie B. Zucker and Howard D. Zucker, 71-84. Cambridge: Cambridge University Press, 1997.

Muramoto, Osamu. "Bioethical aspects of the recent changes in the policy of refusal by Jehovah's Witnesses." *British Medical Journal* 322 (2001): 37-39.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/322/7277/37>.

Accessed September 1, 2009.

Muramoto, Osamu. "Bioethics of the refusal of blood by Jehovah's Witnesses: Part 1. Should bioethical deliberation consider dissidents' views?" *Journal of Medical Ethics* 24 (1998): 223-230.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/24/4/233maxtoshow=&HITS=10&RESULTFORMAT=&fulltext=Jehovah%27s+witnesses&researchid=>.

Accessed September 1, 2009.

Muramoto, Osamu. "Bioethics of the refusal of blood by Jehovah's Witnesses: Part 2. A novel approach based on rational non-interventional paternalism." *Journal of Medical Ethics* 24 (1998): 295-301.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/24/5/295?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=Jehovah%27s&witnesses&researchid=>.

Accessed September 1, 2009.

Nelson, Hilde Lindemann, ed., *Stories and Their Limits*. New York and London: Routledge, 1997.

Nicholas Barbara and Grant Gillett. "Doctors' stories, patients' stories: s narrative approach to teaching medical ethics." *Journal of Medical Ethics* 23 (1997): 295-299.

Oden, Thomas C., *Pastoral Theology*. New York: HarperCollins Publishers, 1983.

Oliver, Peter, Sionaidh Douglas Scott and Victor Tadros, eds. *Faith in Law: Essays in Legal Theory*. Oxford: Hart Publishing 2000.

Orr, Robert D and Leigh B Genesen. "Requests for "inappropriate" treatment based on religious beliefs." *Journal of Medical Ethics* 23 (1997): 142-147.

Paquin, Gary and Linda Harvey. "Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection." In *Florida Coastal Law Journal* Vol. III (2001-2002): 167-186.

Parekh, Bhikhu. *Rethinking Multiculturalism*. 2<sup>nd</sup> ed. Basingstoke: Palgrave Macmillan, 2006.

Pargament, Kenneth I and Joseph Kennell, William Hathaway, Nancy Grevengoed, Jon Newman and Wendy Jones, "Religion and the Problem-Solving Process: Three Styles of Coping." *Journal for the Scientific Study of Religion*, 27 (1)(1988): 90-104.

<http://links.jstor.org/sici?sici=0021-8294%28198803%2927%3A1%3C90%3ARRATPPT%3E2.0.CO%3B2-1>.

Accessed February 2, 2008.

Paris, John J and Mark Poorman. "When religious beliefs and medical judgements conflict: civic polity and the social good" In *Medical Futility*, edited by Marjorie B. Zucker and Howard D. Zucker, 85-97. Cambridge: Cambridge University Press, 1997.

Pattison, Stephen. *A Critique of Pastoral Care*. 2nd ed.. London: SCM Press Ltd., 1993.

Patton, John. *Pastoral Care in Context*. Louisville, Kentucky: Westminster/John Knox Press, 1993.

Pearsall, Judy, ed, *The New Oxford Dictionary of English*. Oxford: O.U.P., 1998.

Perry, Michael J. *Love and Power*. Oxford: Oxford University Press, 1991.

Philpot, Terry, "Catholic adoption agencies adjust to gay rights legislation." January 21, 2009.

<http://www.communitycare.co.uk/Articles/2009/01/110466/how-catholic-adoption>.

Accessed July 19, 2009.

Plummer, K. *Telling sexual stories: power, change and social worlds*. London: Routledge, 1995.

Polkinghorne, Donald E. *Narrative Knowing and the Human Sciences*. Albany, New York: State University of New York Press, 1988.

Popper, Karl, Sir. "Toleration and Intellectual Responsibility." In *On Toleration*, edited by Susan Mendus and David Edwards, 17-34. Oxford: Clarendon Press, 1987.

Postema, Gerald J. *Bentham and the Common Law Tradition*. Oxford: Clarendon Press, 1986.

Rawls, John. *Political Liberalism*. 2<sup>nd</sup> ed. New York: Columbia University Press, 2005.

Raz, Joseph. *Ethics in the Public Domain*. Oxford: Clarendon Press, 1994.

Ridley, Donald T. "Jehovah's Witnesses' refusal of blood: obedience to scripture and religious conscience." *Journal of Medical Ethics* 25 (1999): 469-472.

<http://0-jme.bmj.com.lib.exeter.ac.uk/cgi/reprint/25/6/469>.

Accessed September 1, 2009.

Roberts, Marian, *Mediation in Family Disputes*. 3<sup>rd</sup> ed. Aldershot: Ashgate Publishing Company, 2008.

Ryken, Leland, James C. Wilhoit, and Tremper Longman III eds. *Dictionary of Biblical Imagery*. Downers Grove, Illinois, USA, Leicester, England: InterVarsity Press, 1998.

Sackett, D.L and W.S.Richardson, W.Rosenberg, R.B.Haynes. "Evidence-based medicine: how to practice and teach EBM." *BMJ* 312 (1996): 71-72.

Sander, Frank E.A., "Alternative Methods of Dispute Resolution: An Overview." *University of Florida Law Review* 37 (1985): 1. In *Alternative Dispute Resolution*. edited by Michael Freeman. Aldershot: Dartmouth, 1995.

Sanders, E.P. *Jesus and Judaism*. London: SCM Press Ltd., 1985.

Sarot, Marcel. Pastoral Counselling and the Compassionate God. *Pastoral Psychology* 43: 3 (1995): 185-190.

Scarman, Lord. "Toleration and the Law." In *On Toleration*, edited by Susan Mendus and David Edwards, 49-62. Oxford: Clarendon Press, 1987.

Seibert, P.S, and P Stridh-Igo and C.G.Zimmerman, 'A checklist to facilitate cultural awareness and sensitivity.' *J Med Ethics* 28 (2002): 143-146.

Silvestri, Gerard A., Sommer Knittig, James S.Zoller and Paul J.Nietert, "Importance of Faith on Medical Decisions Regarding Cancer Care." *Journal of Clinical Oncology* 21(7) (2003): 1379-1382.

Simmonds, N.E. *Central Issues in Jurisprudence* 2<sup>nd</sup> ed. London: Sweet & Maxwell, 2002.

Simmonds, The Rev'd Anne. "The Chaplain's Role in Bioethical Decision-Making." *Healthcare Management Forum* 7(4) (1994): 5-10.

Smith, C. Robert, "The Biopsychosocial Revolution" *Journal of General Intern Medicine*, 17(4) (2002): 309-310.

<http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1495036>.

Accessed December 7, 2007.

Sommerville, A. "Juggling law, ethics, and intuition: practical answers to awkward questions." *Journal of Medical Ethics* 29 (2003): 281-286.

<http://jme.bmj.com/cgi/content/full/29/5/281>. Accessed July 10, 2008.

South Yorkshire NHS Workforce Development Confederation (SYWDC), *Report of a foundation exercise of Public and Patient Involvement in chaplaincy undertaken as part of the preparation of a strategy for the chaplaincy and spiritual healthcare workforce. Final Report 30.6.03*.

[http://www.sywdc.nhs.uk/sys\\_upl/templates/StdLeft/StdLeft\\_disp.asp?pgid=2275&tid=50](http://www.sywdc.nhs.uk/sys_upl/templates/StdLeft/StdLeft_disp.asp?pgid=2275&tid=50).

Accessed January 11, 2006.

South Yorkshire NHS Workforce Development Confederation, *Caring For the Spirit: A strategy for the chaplaincy and spiritual healthcare workforce*, November 2003.

<http://www.nhs-chaplaincy-collaboratives.com/resources/caringforthspirit0311.pdf>.

Accessed January 11, 2006.

Southgate, Christopher et al. *God, Humanity and the Cosmos*. Edinburgh: T&T Clark, 1999.

Stewart, Moira, Judith BelleBrown, W.Wayne Weston, Ian R.McWhinney, Carol.L.McWilliam and Thomas R.Freeman. *Patient-Centred Medicine: Transforming the Clinical Method*. 2<sup>nd</sup> ed. Abingdon: Radcliffe Medical Pr., 2003.

Stitt, Alan J, *Mediation: A Practical Guide*. London: Cavendish Publishing Limited, 2004.

Stout, Jeffrey, *Democracy and Tradition*. Princeton New Jersey: Princeton University Press, 2004.

- Sulmasy, Daniel P. "Spiritual Issues in the Care of Dying Patients "... It's Okay Between Me and God." *JAMA* 296: 11 (2006): 1385-1392.
- Swift, Rev. John K. "The chaplain's role in care for the dying: toward a new understanding." *CMA Journal* Vol. 115 July 17 (1976): 181-183.  
<http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=187857blobtype=pdf>.  
 Accessed July 11, 2008.
- Sykes, J.B. ed., *The Concise Oxford Dictionary of Current English*. Oxford: Clarendon Press, 1985.
- Tamanaha, B.Z. "The folly of the 'social scientific' concept of legal pluralism." *Journal of Law & Society* 20 (1993): 192-217.
- Taylor, Charles. *Multiculturalism and "The Politics of Recognition"*. Princeton, New Jersey: Princeton University Press, 1992.
- The Roman Catholic Diocese of Westminster, *A Submission by Archbishop Cormac Murphy O'Connor, Archbishop of Westminster, to the Court of Appeal in the case of Central Manchester Healthcare Trust v Mr and Mrs A and Re A Child (By her Guardian Ad Litem, The Official Solicitor)*.  
[http://www.rcdow.org.uk/textonly/cardinal/default.asp?content\\_ref=45](http://www.rcdow.org.uk/textonly/cardinal/default.asp?content_ref=45).  
 Accessed September 7, 2009.
- Tsai, Daniel Fu-Chang, "How should doctors approach patients? A Confucian reflection on personhood," *Journal of Medical Ethics* 27 (2001): 44-50.
- Twining, William. *Globalisation & Legal Theory*. London, Edinburgh and Dublin: Butterworths, 2000.
- Vaux, Roland de. *Ancient Israel: Its Life and Institutions*. Translated by John McHugh. London: Darton, Longman & Todd, 1962.
- Wade, Derick T., "Do biomedical models of illness make for good healthcare systems?" *BMJ* 329 (11 December 2004): 1398-1401.  
<http://www.bmj.com/cgi/content/full/329/7479/1398>. Accessed November 25, 2007.
- Walzer, Michael, *On Toleration*. New Haven and London: Yale University Press, 1997.
- Warnock, Mary, Baroness. "The Limits of Toleration." In *On Toleration*, edited by Susan Mendus and David Edwards, 123-139. Oxford: Clarendon Press, 1987.
- Watson, David, *Fear No Evil*. Wheaton, Illinois: Harold Shaw Publishers, 1992.
- Watt, Helen. "Conjoined Twins: Separation As Mutilation." *Medical Law Review* 9 (2001): 237-245.
- Weaver Andrew J and Kevin J Flannelly, "The Role of Religion/Spirituality for Cancer Patients and Their Caregivers." *Southern Medical Journal* 97(12) (2004) 1210-1214.

- White, Peter ed. *Biopsychosocial medicine*. Oxford: Oxford University Press, 2005.
- Williams, Rowan. *Archbishop's Lecture – Civil and Religious Law in England: a Religious Perspective*. February 2008.  
<http://www.archbishopofcanterbury.org/1575>. Accessed February 9,2008.
- Winslade, John and Gerald Monk, *Narrative Mediation*. San Francisco: Jossey-Bass Publishers, 2000.
- Winslade, John and Gerald Monk, *Practicing Narrative Mediation*. San Francisco: Jossey-Bass Publishers, 2008.
- Woodman, Gordon R. "The Possibilities of Co-Existence of Religious Laws with Other Laws." In *Law and Religion in Multicultural Societies*, edited by Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman, 23-42. Copenhagen: DJOF Publishing, 2008.
- Woodman, Gordon R. Book Review of *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, by Werner Menski. *Journal of Legal Pluralism* 52 (2006): 207-14.
- Woolf, The Right Honourable Lord 'Are the Courts Excessively Deferential To The Medical Profession' *Medical Law Review* (Spring) 9(1) (2001): 1-16.
- Woolford, Andrew and R.S.Ratner, *Informal Reckonings*. Abingdon: Routledge, 2008.
- Wright, Martin. 'Justice without lawyers: enabling people to resolve their conflicts.' In *A Restorative Justice Reader*, edited by Gerry Johnstone, Cullompton: Willan Publishing, 2003.
- Yoder, Perry. *Shalom*. London: Spire imprint of Hodder & Stoughton Publishers, 1989.
- Zehr, Howard. *Changing Lenses*. Scottsdale, Pennsylvania: Herald Press, 1995.

## Legal cases

- Ahmad v Inner London Education Authority* [1978] Q.B. 36.
- An NHS Trust v MB (A child represented by the CAF/CASS as Guardian ad Litem)* [2006] EWHC 507 (Fam) [2006] 2FLR 319.
- Chauhan v Ford Motor Company*.  
<http://www.lexisnexis.com/uk/legal/search/casessubmitform.do>. Accessed September 21, 2009.
- Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112, [1986] 1 FLR 224, [1985] 3 WLR 830, [1985] 3 All ER 402, HL.

*R v Salford Area Health Authority*, (The Times, 13 Feb. 1987); *R v Salford Area Health Authority*, *Janaway v Salford Area Health Authority* [1989] AC 537.

*Re A (children) (conjoined twins: surgical separation)*[2000] 4All ER 961.

*Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.

*Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810.

*Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam) [2004] 2 FLR 1117.

*Re T (adult refusal of medical treatment)* [1992] 4 All ER 449.

*Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, [1993] 1 FLR 1.

## Legislation

Civil Partnership Act 2004.

[http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040033\\_en2#pt1-11g1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en2#pt1-11g1).

Accessed August 3, 2009.

Criminal Justice and Public Order Act 1994.

[http://www.opsi.gov.uk/acts/acts1994/ukpga\\_19940033\\_en\\_16#pt11-pb4-11g145](http://www.opsi.gov.uk/acts/acts1994/ukpga_19940033_en_16#pt11-pb4-11g145).

Accessed August 3, 2009.

Sexual Offences Act 1967.

[http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1967/cukpga\\_19670060\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1967/cukpga_19670060_en_1).

Accessed August 3, 2009.

Statutory Instrument 2003 No. 1660, The Employment Equality (Religion or Belief) Regulations 2003.

<http://www.opsi.gov.uk/si/si2003/20031660.htm>.

Accessed August 18, 2009.

The Equality Act (Sexual Orientation) Regulations 2007 No. 1263.

[http://www.opsi.gov.uk/si/si2007/uksi\\_20071263\\_en\\_1](http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1).

Accessed August 3, 2009.

The Sexual Offences (Amendment) Act 2000.

[http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen\\_20000044\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000044_en_1.htm).

Accessed August 3, 2009.