A BURL ON THE LIVING TREE: FREEDOM OF CONSCIENCE IN SECTION 2(A) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

By

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science

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ABSTRACT

The Charter grants to everyone, in s.2(a), the “fundamental …freedom of conscience and religion.” Yet the interaction between the two operative terms, “religion” and “conscience” remains largely unexplored. What, for example, is meant by “conscience”? By conscience in contradistinction to religion? Does s. 2(a) make a distinction between the state’s respect for religion and that of conscience? Can freedom of conscience be elevated to a freestanding right? Can conduct motivated by conscience be exempted from general laws in the way that some religious conduct has? Should the state take action to ensure conscience is protected? After more than 25 years of Charter commentary and jurisprudence, these remain deep questions, only partially answered.

This project considers the possibility of building a case for an independent and robust “conscience” branch of s. 2(a), which will protect a broader range of freedoms, at the same time as allowing other disputes to be cast in more neutral tones (by taking them out of religious-based language, where possible) and allowing still others more room to develop in a more analytical and principled basis (as purely “religious” disputes more commonly
associated with religious norms). In my view, there is, despite some opposition, sufficient justification in history, theory and doctrine to establish a separate and independent concept of freedom of conscience. At the same time, freedom of religion will always remain relevant as an acknowledgement of the distinct communal aspects of religion. Thus, a broad approach to freedom of conscience could include individual religious claims where the religious belief is based on a matter of conscience, and those conscience-based claims that lack a communal dimension, such as the prisoner who cannot eat meat or the whistleblower who feels compelled to report a supervisor.

By exploring the origins of conscience and religious freedom, the basis behind the inclusion of conscience in many human rights documents, and the need for a theory that encompasses both as equal and complementary aspects of liberty, the dissertation sets out some possible ways in which freedom of conscience could be invoked and present a potential framework for assessing constitutional freedom of conscience claims.
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Burl (n): A dome shaped growth on the trunk of a tree; giving an attractive figure when polished and used especially for handcrafted objects and veneers

This intimate, immediate awareness I had of the worthlessness of my ideas prevailed against all the praise that might be heaped on me, as do, in a wicked man whose good deeds are universally commended, the qualms of his conscience.”

- Marcel Proust, The Way by Swann’s, translated by Lydia Davis
Chapter 1

Introduction

Compared to the mind-bending ideas of modern science, religious beliefs are notable for their lack of imagination (God is a jealous man; heaven and hell are places; souls are people who have sprouted wings). That is because religious concepts are human concepts with a few emendations that make them wondrous and a longer list of standard traits that make them sensible to our ordinary ways of knowing.

- Stephen Pinker, How the Mind Works

“There’s something you must believe in. Nobody can go on living without some belief.”

“Oh, I’m not a Berkeleian. I believe my back’s against this wall. I believe there’s a stun gun over there.”

- Graham Greene, The Quiet American

Liberal theory holds that governments should not merely respect rights and freedoms, but ensure their protection and enforce them if appropriate. Religious liberty very much depends on this concept: history shows that states have often favoured one religion while persecuting others. Modern governments must not, therefore, engage in their own form of religious persecution. But that is only part of their role. They must also provide the space to allow religious freedoms to be exercised; unless governments take steps to protect people from interference by others who disagree with their views, true religious liberty is not realized. It is inaccurate, therefore, to say that traditional liberal rights – so-called negative rights – require only government forbearance or omission, whereas modern socio-economic rights – positive rights – require government outlay: all rights, especially those more properly characterized as
liberties, are positive in some sense. Religious freedom, and its often silent twin, conscience, are particularly so.¹

Conscience and religion have always been strongly linked in Western thought, particularly since the Reformation. Nearly 500 years ago, Martin Luther seemed to treat the two synonymously by claiming that an individual’s belief or unbelief is a matter of conscience and that Catholics held only a “conscience in appearance” since their conscience was not guided by Scripture.² A few centuries later, John Stuart Mill, a philosopher normally given to careful parsing of concepts, also appears to connect the two terms (or appears indifferent to any distinction between them) when he asserts that the great writers of the past, espousing liberty, have relied on “freedom of conscience” to ensure that no one is accountable to another for a religious belief.³ In our time, Martha Nussbaum exhibits a similar tendency. She relies on Roger Williams’ concept of conscience as concerned with the search for the ultimate meaning, but then urges for an expansion of the “account of religion” so as to accommodate as many forms of belief as possible.⁴

The two terms thus become almost inseparable, without any analysis of their possible distinct relationship, especially in legal constitutional terms. This elision, however, often comes at the expense of “conscience.” Of the two, it is the concept frequently ignored or unnoticed.

This should not be the case. The main argument of this thesis is that we ought to take seriously the deliberate inclusion of “conscience” in s. 2(a) of the Canadian Charter of Rights and Freedoms; to do so, freedom of conscience must be fully recognized as an independent and


⁴ Martha Nussbaum, Liberty of Conscience, (Basic Books, 2008) at 173. It should be noted that Nussbaum is discussing the First Amendment, and is obviously restricted to the language of religion due to the text of the First Amendment. Nevertheless, there is, in my mind, a tendency to assume freedom of religion and freedom of conscience are one and the same, since in her view, an expanded definition of “religion” will achieve both.
robust freedom under the Charter.\textsuperscript{5} In my view, the previous approach to religious liberty needs to be revised in order to accommodate the burl that is freedom of conscience. In fact, conscience may be a link between religion, secular modernism, morality and liberty that relieves the burden currently placed on “freedom of religion” in s. 2(a). A fully developed freedom of conscience could bring “conscience” into the foreground as the primary freedom, subsuming some forms of religious freedom within it. This more powerful freedom of conscience might also help to bring about a better response to, and reduced incidence of, religious intolerance.

\section{Belief and Intolerance in the Ascendant}

Religious tolerance has enjoyed reasonable longevity in the West. Born mainly out of the European Reformation, and bolstered by American independence and the Enlightenment, ideas stemming from religious tolerance are largely responsible for the development of political theories of liberty and the rise of freedom and human rights.

Religion continues to remain important to a significant proportion of humanity. The number of people defining themselves as religious believers has remained fairly consistent over the last 50 years and, in some cases is on the rise. In Canada, as the highly-regarded religious sociologist Reginald Bibby reports, the most recent survey on religion shows that there was a 3\% increase in both weekly and monthly church attendance between 2000 to 2005.\textsuperscript{6} Moreover, the percentage of Canadians who, in the aggregate, do not attend church services, declare themselves as not religious and do not believe in God has, since 1975, remained extremely low at 2\%.\textsuperscript{7} It is too simplistic, therefore, to think that secularization is on the increase while

\textsuperscript{5} Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. (“Charter”).


religiosity is declining. Sociologists and religious scholars studying the place of religion in the modern world note that a major influence is religion’s contribution to “social capital” – social networks, norms of trust and mutuality, and social resources in communities – which can be employed productively to further resources, skills, wealth and attitudes such as forgiveness and mercy.  

Unfortunately, religious tolerance seems never to be entirely free of its opposite. Both in Canada and around the world, there has been a rising number of clashes between religious beliefs and other values – sometimes signaling a rising intolerance – that is difficult to ignore. Consider these events from a random sampling of recent books, news articles, activities and lawsuits: in the fall of 2005, widespread furor and violence erupted over the publication by the Danish daily newspaper Jyllands-Posten of a series of cartoons depicting the prophet Mohammad. Ensuing protests over his representation led to the deaths of more than 50 people in Asia, Africa and the Middle East. Some newspaper editors were fired after reprinting some of the cartoons, while others were arrested and charged with insulting Islam. A growing body of new “atheist” literature, penned by well-respected and well-known commentators, has also fueled the fires of intolerance – at heart, the books make claims regarding the irrationality of religious belief. In the United States, the American political scientist Samuel Huntington’s 2004 book Who Are We? argues that extensive Mexican immigration into the U.S. endangers America’s core identity as a “deeply religious and primarily Christian country” rooted in

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9 See “The Limits to free speech – Cartoon wars,” The Economist, February 9, 2006; see also “Images”, Jane Kramer, The New Yorker, February 27, 2006.

10 There are almost too many to mention. A sampling includes Daniel Dennett, Breaking the Spell (2006); Richard Dawkins, The God Delusion (2006); Christopher Hitchens, God is Not Great: How Religion Poisons Everything (New York: Hatchett Books, 2007); and Sam Harris, The End of Faith (2004). It should be noted that the ‘atheist’ literature has produced an almost equal number of replies: see James Carse, The Religious Case Against Belief (2008); Douglas Wilson, Letter from a Christian Citizen (2007); Charles Taylor, A Secular Age (2007); John Coleman, Christian Political Ethics (2007) and Chris Hedges, I Don’t Believe in Atheists (2008).
“Anglo-Protestant” values, in part because of Mexican prevailing ethnoreligious identities.\textsuperscript{11} Fresh disputes over the exhibition of religious imagery in public spaces continue to gain attention, despite the U.S. Supreme Court holding such displays to be a legitimate exercise of freedom of religion.\textsuperscript{12}

Closer to home, a number of religiously-based conflicts prompted the Quebec government in 2007 to commission Gérard Bouchard and Charles Taylor to chair the Consultation Commission on Accommodation Practices Related to Cultural Differences.\textsuperscript{13} Some of the incidents reviewed in the Report include: the removal of Christmas trees at Montreal City Hall on the basis that they represent a Christian perspective; the papering of YMCA windows to prevent young Jewish males from observing women in workout clothing; the exemption of Muslim children from music classes on the grounds that the classes infringed religious precepts; and a Code of Conduct drafted by the town council of Hérouxville which proclaimed, amongst other items, that the town frowns upon women being beaten to death or burned alive in public, and that no woman shall be stoned in public.\textsuperscript{14} The Report described a number of similar incidents that were reported as taking place over an almost twenty year period in Quebec.\textsuperscript{15}

Elsewhere, a series of news and magazine articles claiming improper use of human rights commissions have been tinged with religious intolerance.\textsuperscript{16} In Alberta, legislative changes

\textsuperscript{11} Samuel P. Huntington, \textit{Who Are We? The Challenges to America’s National Identity} (New York: Simon & Schuster, 2004) at 20; 221-256.

\textsuperscript{12} See \textit{Van Orden v. Perry} 545 US 677 (2005). An example of the continuing controversy is the 2007 protest by the American Civil Liberties Union against a portrait of Jesus hanging in a Slidell City Court in Louisiana.

\textsuperscript{13} \textit{Building the Future: A Time for Reconciliation}, Government of Quebec, 2008 (the Report).

\textsuperscript{14} Ibid. The stoning provision was subsequently removed in February, 2007 -- see also, \url{http://www.cbc.ca/canada/montreal/story/2007/02/13/qc-herouxville20070213.html} accessed July 16, 2009.

\textsuperscript{15} Ultimately, the Bouchard and Taylor concluded that the media had exaggerated some of the religious conflict claims, and that Quebec’s approach to reasonable accommodation was working – see Report at 60, 74-5.

\textsuperscript{16} One example involves a human rights complaint over an article in \textit{Maclean’s} magazine lodged by the Canadian Islamic Congress (in BC, Ontario and federally) against the publication: see Mark Steyn, “The Future Belongs to Islam”, Oct. 23, 2006 and subsequent related articles. Margaret Wente of the Globe and Mail seems to be on her own personal crusade to root out, in her view, human rights commission failures – a number of columns have been written in the last 3 years, including: “Labiaplasty denied: a landmark test of transsexuals’ access to medical
making photographs on all drivers’ licences obligatory led to Hutterite groups claiming the amendment is unconstitutional, on the ground that requiring photographic portraits is contrary to their religious freedom.\(^{17}\) Even more recently the Quebec government introduced Bill 94 which seems to require, in general, that persons reveal their face when seeking government services – thus alienating those Muslims who feel a belief or obligation to keep their faces covered.\(^{18}\)

In Canada, discrete conflicts over religious values are counterbalanced by a general societal tolerance of multiculturalism and diversity that remains a model for the world. As the Bouchard-Taylor Commission reports, despite gaps and barriers in intercultural relations, there remains substantial agreement with the idea that most Canadians are at ease with ethnocultural diversity, as evidenced in schools and in the laboratories of diverse cities such as Toronto, Vancouver and Montreal.\(^{19}\) One of Canada’s great strengths lies in allowing immigrants to choose which ethnic identity and which religion they wish to maintain, while protecting that choice through the constitution and its laws. In other words, our “easy” diversity is basically working – creating a collection of selves that is greater than the whole; not a “dissonance but a higher symphony.”\(^{20}\) “Canada’s commitment to equality and rejection of discrimination,” is, in Michael Adams’ words, “anything but spineless.” It is the qualities of democracy, freedom, equality and rights that immigrants most appreciate about Canada. We are a global expert in managing diversity, the only place on earth where three significantly different groups can be found to co-exist: a substantial immigrant population, a national minority group (the

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18 An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions”, Bill 94, 1st Session, 39th Legislature, March 24, 2010. The text of the Bill make its operation and effect very difficult to discern. The English translation is particularly unclear, s.6 stating: “The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the delivery of services is a general practice.”

19 See the Report, supra n. 13 at 241-2.

Quebecois), and an aboriginal population. For Canadians, multiculturalism is seen as an important aspect of identity.  

There does remain a sense, however, that our exceedingly tolerant society has spawned the seeds of its own intolerance. We are victims of our own success. Even if the increased perception of religious intolerance is due partly to heightened awareness and increased reporting of incidents (particularly after the events of 9/11), the granting of certain rights and freedoms will always allow, as Adams puts it, “the free[dom] to entertain certain prejudices within certain parameters.” A properly conceived vision of s. 2(a), including a strong freedom of conscience, can help promote a tolerant idea of freedom for believers and non-believers alike, in both the religious and moral planes.

### 2 Religion in the Constitution: Defining Belief in Canada

Our constitution, particularly the Charter, is well-positioned in the middle of this conversation between anti-religious sentiment, multiculturalism and diversity, and religious significance. Unlike its earlier counterpart, the Constitution Act, 1867, with its provisions dealing with separate schooling undeniably suggesting a formal quasi-establishment – the “shadow establishment” – the Charter is a late twentieth century liberal human rights document. Section 2(a) grants to everyone the “fundamental …freedom of conscience and religion.” Section 15 ensures that discrimination on the basis of “religion” is forbidden. And s. 27 preserves and enhances the multicultural rights of all Canadians. Protecting a number of aspects of religious belief is obviously important and signified as so in our most important constitutional documents.

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22 Ibid at 139.

Yet, equally important in my view, is the interaction between the two operative terms “conscience” and “religion” in s. 2(a) of the Charter. It is a connection that unfortunately remains largely unexplored. What, for example, is meant by “conscience”? By “conscience” in contradistinction to “religion”? By the “freedom of” these two? Is there a relationship with tolerance? Does s. 2(a) make a distinction between the state’s respect for religion and that of conscience? Can freedom of conscience be elevated to a freestanding right? Can conduct motivated by conscience be exempted from general laws in the way that some religious conduct has? Should the state take action to ensure conscience is protected? After more than 25 years of Charter jurisprudence and commentary, these remain deep questions, only partially answered.

The attempt to draw any distinction between conscience and religion is hampered by the fact that, the definition of the term “religion” remains highly contested. In Mick Gordon’s and Chris Wilkinson’s book, Conversations on Religion, nineteen prominent religious intellectuals (mostly British), upon being asked to provide a working definition of religion gave almost nineteen different responses, ranging from “something otherworldly and outside the natural order,” that reflects “shared values” and “that makes life bearable despite radical uncertainty and contingency,” which can express transcendence through art or architecture, painting or poetry, dance or music, to that which is “ineffable and impossible to define.” For others, religious faith must be lived, so attempting to define religion is like trying to define life. As Robert Orsi puts it, “[L]ived religion cannot be separated from other practices of everyday life, from the ways that humans do other necessary and important things, or from other cultural structures and discourses.”

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25 Julia Neuberger, ibid, 133.
26 Don Cupitt, ibid, 49.
27 Karen Armstrong, ibid, 183.
28 Giles Fraser and Alister McGrath and Abdelwahab El Affendi, ibid, 16, 99, and 112, respectively.
Chair in the Contextualization of Religion in a Diverse Canada at the University of Ottawa, explicitly acknowledges the dilemma of trying to define religion. Both functional approaches and substantive approaches end up in theoretical cul de sacs: functional definitions (what social function does religion fulfill?) are prone to limitless expansion, such that practices like hockey, soccer or ballet, that for some may be deeply linked with the sublime, become very difficult to exclude. On the other hand, substantive definitions (what characteristics identify a religion?) suffer for the opposite reason, as they may too easily be confined to majoritarian or traditional conceptions of religion, thereby possibly excluding less mainstream religions.  

In Canada, problems with the legal definition of religion have arisen in a number of situations involving government officials, such as: prison authorities who have to decide on prisoner dietary requirements; fish and wildlife authorities determining the legality of out-of-season hunting by aboriginals for religious ceremonies; zoning authorities assessing appropriate locations to situate places of worship; school officials faced with children claiming a right to be educated free of any religious indoctrination or seeking permission to wear religious objects that may be dangerous; legislatures regulating the days of work for commercial activities; and condominium board members contemplating the building of temporary structures on the premises. Each case has required a court to establish, at a minimum, whether “religious” freedom was in issue (and in the case of a prisoner’s diet, if “conscience” was the more apt freedom), which in turn necessitated some basic working definition of


religion; sometimes, however, a court will simply assume a matter to be religious. With each decision, the core of what counts as “religious” has been slightly modified.

Consequently, American and Canadian Supreme Courts have faced difficulty in capturing the essence of religion. They have ended up defining religion largely tautologically. In particular, the United States Supreme Court has had to broaden its definition of religion – almost beyond recognition – in order to accommodate beliefs and practices of conscientious objectors that look and feel like religion. Such definitional imprecision creates as many problems as it resolves. Lori Beaman’s fictitious “Church of the Holy Shoelaces” provides a good example. Should a church whose ten members believe such oddities as the requirement to wear footwear with laces only, to eat an apple a day, and to sacrifice an apple on the third Tuesday of each month by dropping it from a 3 storey balcony, be recognized as a religion? Beaman’s view is that it would not likely fit within the Supreme Court’s Amselem definition since its practices and beliefs are simply too far removed from the mainstream idea of what a religion should be.\(^{37}\) It certainly would give most judges pause.

In conjunction with these definitional and legal complexities is the fact that, certainly in the United States, church-state issues have reached a near crisis point. Religious pluralism, the decline of a Protestant hegemony, increased governmental involvement in the lives of citizens, the growth of non-traditional religions challenging orthodoxy, and the concomitant backlash of certain religious believers, have all contributed to a growing body of religious controversies seeking constitutional redress.\(^{38}\) With many similar factors present in Canada, it is reasonable to assume the rise of comparable developments occurring here. Religious subjectivity, coupled with a rights-based conception of society – which favours individual autonomy over all – is a potent mix. In my view, a truly independent and strong freedom of conscience is the best way forward to deal with many of these individualized claims.

\(^{37}\) Beaman, supra n. 29.

3 Legal Religious Freedom: Toward Individual Autonomy

Religion and its practices in the twenty-first century are very different from what they were in the 17th and 18th centuries when state protection of religious liberty became more common. One of the most telling aspects of this change is that many aspects of religious expression have become individualized. This has caused problems for constitutional freedom of religion. As Winnifred Fallers Sullivan argues, since religion for most is now “lived religion,” accounted for almost exclusively in one’s own experience, a legal definition of religion for purposes of assessing constitutional freedom of religion is impossible (or so subjective as to be incapable of legal formulation). It means, for her, that religious freedom should be discarded in favour of a strong notion of equality, an equality that includes religious equality. At its core, Sullivan’s position translates to an unsettling recognition of the failure in the U.S. to reach a liberal ideal of state secularism that began over 200 years ago through the vision of the architects of the U.S. Bill of Rights.

This trajectory of religion as moving ever closer to an individual practice follows the more widespread individualization of rights associated with a rights-conscious age. This is where “conscience” naturally fits in. Although some of the “Charter skeptics” might deplore the idea of creating another individual right or freedom from the aged wood of our constitutional living tree, I see a clear advantage to developing conscience as a free-standing, independent and powerful right. This is not merely because it is expressly stated in s. 2(a) of the Charter; it is

39 See Danièle Hervieu-Léger, “Individualism Religious and Modern: Continuities and Discontinuities” in Lyon and Van Die, eds., Rethinking Church, State, and Modernity: Canada Between Europe and America (Toronto: University of Toronto Press, 2001) 52. (Translated by David Lyon and Marguerite Van Die). I will discuss this in greater detail in chapter 5.


41 Sullivan, ibid, especially at chaps 4-5.

also, I believe, a more legally efficacious individual freedom in some instances than religion and it thus could be more frequently utilized. A neo-Hegelian might say that the plight of legal religious freedom has succumbed to the forces of individualization and alienation to such an extent that it is has lost some of its usefulness. As Michael Perry notes, however, it is what we do with our basket of rights that is most important. In his view, excessive individualism occurs when societies establish or valorize the *wrong* rights, such as the right to private property trumping other more social rights. The purpose of this dissertation is to assist in developing the appropriate use of freedom of conscience.

4 Envisioning an Independent Role for Conscience

Modern constitutions, like the Charter, which include aspirational rights and freedoms, are complex documents. In embedding such concepts as freedom, liberty and equality, they define a legal universe that is full of unexplored dark matter. This is perhaps more true of “conscience,” as expressed in the Charter, than it is for most other terms; so far, almost nothing has been made of its inclusion as a fundamental freedom in s. 2(a). It need not be this way, however. Accepting the difficulty of legally defining religion, and the near-complete individualization of it, without acceding to Sullivan’s somewhat dystopic vision regarding freedom of religion, requires a much more candid discussion of the role of conscience in our constitutional framework.

Why should freedom of conscience be treated separately from religious freedom? There are two interrelated lines of inquiry for developing an independent freedom of conscience. The first is descriptive, based on the distinct nature of freedom of “conscience” as compared to freedom of “religion.” What is it that “conscience” is, that “religion” is not? In my view, there is, despite some opposition, sufficient justification in history, theory and doctrine to establish a separate and independent concept of freedom of conscience.

The second line of inquiry is normative, taking the notion of freedom of conscience as independent, and exploring its purpose. What are the benefits to developing freedom of conscience? There are two main reasons for doing so: first, a fully-developed freedom of conscience could capture a broader range of matters involving moral and cultural practices that run counter to government policy. Whereas freedom of religion, by definition, requires some religious basis to a practice, freedom of conscience would include certain practices based on non-religious grounds. In such cases, a series of simple questions might be asked: “What if this practice is objected to on conscientious, as opposed to religious, grounds? Is it equivalent to religion? If so, why is a religious-based objection taken more seriously than, or given privilege over, a conscience-based one?” Second, and perhaps more important, developing “conscience” as a freedom will subsume some, if not much, of what is considered religious freedom. In other words, religious liberty can be thought of, for purposes of some forms of constitutional adjudication, as a distinct sub-category of conscience-based liberty. In this way freedom of conscience becomes an alternative tool for dealing with individual beliefs, convictions and practices. As I will discuss in chapter 2, unlike religious practice, which can be alienating to anyone who does not believe, we are all imbued with a conscience. Framed as such, it becomes easier for judges to engage in the kind of imaginative thinking that is a necessary component of the skilled resolution of disputes: to put oneself in someone else’s conscientious shoes, in short, may be easier than putting oneself in someone else’s religious shoes. At the same time, freedom of conscience cannot be so broadly defined as to allow simply any act of the conscious will to receive constitutional protection: thus, concerns over floodgates and incoherence will need to be addressed.

Alongside my desire to give freedom of conscience its due, there remains the need to retain constitutional freedom of religion as an acknowledgement of the distinctly communal aspects of religion. As such, a conceptual distinction between conscience and religion is advanced. By re-thinking religion and religious freedom as matters of communal sacrament that are important in their own right, we can keep distinct the two aspects of “conscience” and “religion” without doing damage to either. Put differently, religious faiths – even those as strange as the Church of the Holy Shoelaces – could be protected by a strong form of institutional religious freedom. The individual practices of individual adherents, however, may be better framed, in some cases, as freedoms of conscience. Thus, a broad approach to
freedom of conscience could include both individual religious claims – where the religious belief is based on a matter of conscience – and those conscience-based claims that lack a religious dimension, such as the atheist prisoner who will not eat meat or the whistleblower who feels compelled to report a supervisor.

Throughout this dissertation I will use case law and jurisprudence wherever possible to inform the analysis. However, given that a substantial part of the discussion centres on the development of freedom of conscience as independent from religion, a notion for which there is limited jurisprudence, I will also rely extensively on some historical and philosophical works related to conscience and religion. And since there has been a long history of confusion between the two terms, for purposes of analysis I have divided the types of situations or cases analyzed into categories: Category 1, or “Undifferentiated Conscience” situations, are those where conscience and religion are treated as synonymous or interchangeable (by philosophers or other thinkers, or by legislatures or courts); Category 2 or “Distinct Conscience” cases are those where explicit attention has been paid to the difference.

The methodology employed is more expansionist than technically comparative. It is a trite observation that “religion” and “conscience” appear together in almost all 20th century human rights documents, but the focus has almost always been on the role of religion at the expense, or ignorance, of a freedom based on conscience. I will establish this by examining primary sources of a number of human rights instruments, including the Charter and the UDHR and the ICCPR. In parallel with this, I examine some of the American theory and jurisprudence surrounding the First Amendment religion clauses, for the simple reason that there is an abundance of literature from the U.S. in this area that is fruitful and important. There is much debate in the U.S. about the specific political, ideological and normative angle that the framers intended by the free exercise and no establishment clauses of the First Amendment – a debate that mirrors, to some extent, issues of originalism versus progressivism in U.S. constitutional adjudication. I intend to leave that debate to others, however, as my project is in some ways much simpler. For me, the American experience only helps to highlight the distinctive nature

44 See, for example, at one end: John Witte Jr., Religion and The American Constitutional Experiment (Boulder Colorado: Westview Press, 2000) at 5. Martha Nussbaum reflects the views of the other end of the spectrum: see supra n. 4, especially at chaps. 2-3.
of our Canadian constitutional position: that including “conscience” alongside “religion” as fundamental freedoms in s. 2(a) opens the door to a broader freedom. In fact, the best use of the American experience is as a negative comparator, highlighting how conscience and religious freedom, working together, can prevent many of the pitfalls occasioned by a First Amendment clause that was intended to ensure a limited role for government solely over the place of religion in society. While it may be true that the American experience in religious liberty was remarkably advanced by 18th century Western standards, that is no longer the case. Judged by 20th and 21st century standards of human rights language, the American First Amendment is deficient. We should press freedom of belief to its theoretical, theological and political limit: which means that for many claims, “religion” should give way. Freedom of conscience deserves a much stronger place in the constitutional canon.

Seven chapters follow. My argument begins in chapter 2 by exploring an historical and theoretical background to religious freedom and tolerance. It surveys a history of religious freedom in conjunction with conscience, not with the intention to present an authoritative historical essay, but to show how conscience has been seen as both distinct and indistinct from religion. As my ultimate goal is to partially dismantle the edifice of religious freedom by supplementing and supplanting it as conscience-based freedom where applicable, I begin this in chapter 2 first by looking at the denotation and connotation of the word “conscience” to show that it is unique and then further illustrating this through theoretical and historical literature that allows conscience to be treated independently. At the same time, I acknowledge that there is a strong counter-tradition that views conscience as subsumed within religion by reviewing some of the important proponents of this view.

In chapters 3 and 4 I turn to the legal doctrinal responses to freedom of religion. Perhaps even more so than in other, non-legal ways, conscience has been treated as an aspect of religion in legal doctrine (and is therefore often found as Undifferentiated Conscience). There are, however, reasons to believe that this will not preclude an independent status for conscience. My discussion of the legal doctrinal responses is divided by jurisdiction: I begin in chapter 3 by looking at the history and development of freedom of religion and conscience in rights

45 See Witte Jr., ibid, at 38.
documents and in jurisprudence outside of Canada -- a longer history of the concept outside Canada warrants examining it first. In chapter 4 I turn to the Canadian legal approach. In each of these chapters, I follow a two-stage analysis: first I examine debates and discussions leading to the culmination of language in rights documents, and then I look at the jurisprudence following implementation.

This leads to chapter 5, which continues the process by pursuing the second line of inquiry in examining the limitations that result from concentrating on, or privileging, religious freedom. I take up the basic matter of constitutional interpretation, and note how “religion” is only one aspect of a disjunctive pair of freedoms. I then pay particular attention to the U.S. jurisprudential experience, elaborating on the myriad challenges and unsatisfactory results that have become evident in trying to implement religious freedom in a legal form. I also touch on how a conscience-based approach has been described as “inevitable.” At the same time, I do not seek to reduce freedom of religion to irrelevance, so I explore how some elements of it, including its connection to community, are still warranted.

Chapter 6 assesses new ways of formulating the legal debate by examining how some aspects of constitutional freedom of religion could be reframed as conscience claims. I take the second, normative, line of inquiry into the realm of conscience by exploring some of the arguments that show potential benefits for developing freedom of conscience as a general category of morally-based freedoms. This includes an exploration of how a more fully developed approach to freedom of conscience could have the beneficial spin-off effect of a more consistent approach to religious freedom under s. 2(a), particularly as it relates to religion’s collective dimension.

Chapter 7 continues the reframing process by taking four key elements of freedom of conscience and proposing one possible methodological approach for how it could be constitutionalized. I do this by synthesizing some common threads and factors that would be necessary for courts to consider in developing freedom of conscience. I then present a potential framework for assessing constitutional freedom of conscience based on these common threads – a framework which resembles current approaches in freedom of religion cases but is modified to reflect the more individualized and universal moral and compelled
beliefs arising from conscience. I then explore the practical application of my model by applying it to two hypothetical situations based on existing jurisprudence.

A short conclusion in chapter 8 completes the call for a rejuvenation of s. 2(a) of the *Charter* as a corrective in a world where religious intolerance and discontent is on the rise, and where a distinctly Canadian approach may provide a way forward.

This project comes with a caveat. I am not an analytical philosopher or an historian. It is not the purpose of this dissertation, therefore, to develop a comprehensive theory of religious freedom that includes conscience, nor to trace the complete development of religious freedom (and its offshoot, conscience) from the beginnings of tolerance in the Reformation to the constitutionalization of rights as set out in the First Amendment, through the Enlightenment to contemporary discussions on the philosophy on rights, religion and conscience. Nor do I intend to perform a thorough and comprehensive comparative review of all doctrine related to religious and conscientious freedoms, from obscure human rights documents such as developed by the League of Nations, through the myriad areas in Canadian law where conscience may have arisen, such as the *Canadian Bill of Rights* or in cases related to blasphemy or civil marriage, to an exhaustive search of other countries that may have developed jurisprudence on freedom of religion or conscience. Although these matters are extremely important to the study of religious freedom in general, on the one hand, I defer to the vast literature that already pervades the field of constitutional law on religious freedom, and on the other, I am limited to what is reasonable yet telling in the scope of my research.46

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46 For reasons of space, I can only give a small sample of works that are available here. For theory and philosophy of religious freedom, see, for example: Kent Greenawalt, *Religion and the Constitution*, vols. 1 and 2. (Princeton: Princeton University Press, 2009); Martha Nussbaum, supra n. 5; Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007).

My aims are thus more modest and pragmatic: I wish only to survey the landscape of religious freedom, in its theoretical and doctrinal aspects, in order to show that a strong case can be made for an independent freedom of conscience. So far, that goal has eluded us, which is a shame.

It is never too late to change. Our living constitutional tree continues to grow. It also contains a burl: a growth sometimes hidden in plain view, that can, with human ingenuity and craft, be turned into a valuable object. It is my hope that s. 2(a)’s unheralded “conscience” will become a Charter freedom of significance.

Chapter 2

Freedom of Conscience, Freedom of Religion:
The Twin Sparks of Celestial Fire

Labor to keep alive in your breast that little spark of celestial fire called conscience.
- George Washington

There is a higher law than the law of government. That’s the law of conscience.
- Stokely Carmichael, UPI Dispatch, Oct. 28, 1966

In hundreds of articles, textbooks, cases and discussions about human rights across the globe, and in the formative liberal human rights charters of the last two centuries, “conscience” and “religion” are linked. A short sampling of commentary on constitutional provisions suffices to illustrate the point:

- the European Court of Human Rights bluntly states, “[w]hile religious freedom is primarily a matter of individual conscience…”47
- Professor Charles Diamini notes that “[r]eligion forms an essential part of human life. Consequently the right to religious freedom, which includes freedom of conscience and freedom of thought…”48
- the Australian Constitutional Commission reports that s. 116 of the Commonwealth Constitution (employing language very similar to the First


Amendment) gives “protection [to an] individual’s right to freedom of belief and conscience.”

The merging of the two concepts seems to occur regardless of the language employed in the specific constitutional text. In the case of South Africa, the freedoms are often equated because the constitutional text uses inclusionary language, as alluded to in Diamini’s quote above: s. 15 of the South African constitution states that “everyone has the freedom of conscience, religion, thought, belief and opinion.” But in Australia, as in the United States, the constitutional text speaks only of the “establishment of religion” and the “free exercise of religion.” Conscience is thus absent from Australia’s text, yet as a concept it is not ignored. It appears to occupy a place at the heart of our liberal tradition of universal liberty and fairness ideals. But what is it?

1 The Meaning of Conscience: A Distinct Concept

Undoubtedly, religion and conscience have much in common both historically and theoretically. But in a legal, constitutional sense, I argue that they should remain distinct, and in fact, for purposes of legal analysis, conscience should be treated independently. One simple reason for doing so is that the etymology and usage of “conscience” is sufficiently distinct from “religion.”

The English word “conscience” comes from the Latin term conscientia, which means knowledge within oneself, or self-knowledge. It connotes a joining of knowledge of things to self-knowledge. Conscientia first appeared in the New Testament (although it will be shown that it is traceable back to the Greek word “συνειδησις”): in particular, through the writings of the apostle Paul. In his Epistle to the Romans, for example, he noted: “wherefore [ye] must needs be subject, not only for wrath but for conscience’s sake.” Originally, conscience represented a joining of an individual’s judgment to God’s knowledge of right and wrong, and


a joining of self-knowledge to God’s knowledge of our thoughts and intentions.\textsuperscript{51} Obeying one’s rulers and authority figures was thought good not just because of the fear of civil punishment associated with disobedience, but was a way to do good, through a conscience that accorded to God’s. Its English origins are thus tied strongly with Christian thought; in fact, there are no Sanskrit, Chinese or Japanese words for conscience.\textsuperscript{52}

According to the Oxford English Dictionary, the first English use of the word “conscience” occurred in 1225, where it was used in the moral sense of a “consciousness of right and wrong”, or as the “deity within us.”\textsuperscript{53} Originally, it referred to the whole moral nature of humankind, but it gradually became personified and individualized. Further refinements followed: the OED gives an example from Shakespeare’s \textit{Hamlet}, in which Hamlet laments that “conscience does make Cowards of us all”\textsuperscript{54} which, on one reading, suggests a doubting kind of conscience or the conscience that keeps us from acting as our true selves (acts, by implication, that would get us into trouble). Conscience is also used to describe an inward knowledge or consciousness, such as an internal conviction. Although both meanings derive from the self-knowledge of \textit{conscientia}, the English word implies a moral standard of action in the mind as well as a consciousness of action. Conscience is thus the application of reason, employed about questions of right and wrong, and accompanied by sentiments of approval or condemnation.\textsuperscript{55} A second, related, meaning refers to a conscientious observance or practice; the sense of a practice of, or conformity to, what is right. This meaning is commonly invoked in cases of conscientious objectors, as will be discussed. Shakespeare employs it in all these ways, sometimes meaning moral judgment, other times religious scruples and sometimes as inward reflection.

\begin{itemize}
  \item \textsuperscript{51} See William Perkins, \textit{The Whole Treatise of the Cases of Conscience, Distinguished Into Three Books} (published under \textit{The English Experience: Its Record in Early Printed Books Published in Facsimile}, Amsterdam: Thetrvm Orbis Terrarvm, 1972) 31.
  \item \textsuperscript{52} See Edward G. Andrew, \textit{Conscience and Its Critics} (Toronto: University of Toronto Press, 2001) at chap. 1.
  \item \textsuperscript{53} See Oxford English Dictionary online, (Oxford University Press, 2009). (“OED”).
  \item \textsuperscript{54} William Shakespeare, \textit{Hamlet}, Act III, 1 (~1600).
  \item \textsuperscript{55} See Webster’s Revised Unabridged Dictionary, 1996.
\end{itemize}
“Conscience” is often invoked as a negative, in the sense of “having something on one’s conscience,” or less euphemistically tied to wrongdoing, as a “guilty conscience,” having to “clear one’s conscience” or acting in a “fit of conscience” from an existing guilty thought or deed (as Kant says, “Prudence reproaches, conscience accuses”). It can also represent an institutional or individual seal of trust or authority: “the conscience of the court” or “binding on one’s conscience,” which can, at its limits, be offended or astounded, as in situations that “shock the conscience.”

Conscientia is also the present participle of the Latin word conscire which means to be mutually aware. By this, conscience takes on a moral meaning that is more than the thoughts inside one’s head. It is the “public conscience” that is reflected primarily in law: for example, the highest moral order as signified by the criminal law is said to be the “legislated conscience of the state.” Thomas Hobbes had the public view of conscience in mind in the Leviathan where he recalled that “conscience is a thousand witnesses” despite the effort of “men vehemently in love with their own opinions [giving them the] reverenced name of conscience.” In Hobbes’ state of nature, where a person is “subject to no civil law” there is every chance that one will “sin in all he does against his conscience because he has no other rule to follow.” In contrast, those who live in society have the “law [as] the public conscience by which [they have] already undertaken to be guided.” The great diversity of private consciences, which according to Hobbes are simply “private opinions,” mean that without the public conscience of society and the law there would be no need to obey the sovereign any more than one felt it necessary to do so.


58 Thanks to Bruce Ryder for alerting me to a blog by Professor Stanley Fish which argued for a more public understanding of “conscience” based on Thomas Hobbes – se Stanley Fish Blog, NY Times, April 12, 2009: “Think Again: Conscience vs. Conscience”; http://fish.blogs.nytimes.com/2009/04/12/conscience-vs-conscience/.


61 Ibid at 254.
Conscientia itself derives from the Greek word συνείδησις. In a dense, scholarly treatise on the use of conscientia in the New Testament, C.A. Pierce parses thirteen centuries of Greek literature in the period from the sixth century BC to the seventh century AD, summarizing the use of συνείδησις into six main categories (described as the syneidesis family of words, or conscience-based). All but one have their basis in a concern over the moral quality of acts or their subject: in his taxonomy, they are moral-bad (moral acts known as bad), which is further broken down into moral-bad-normal (where the bad is expressed); moral-bad-negative (where consciousness of the badness is lacking); moral-bad-absolute (badness is implied); moral-positive-good (moral acts are positively stated to be good); and philosopher-technical-indifferent (used without moral judgment). Pierce concludes that the word refers to a human nature that is integrally involved in an ordered universe, but which dwells in the soul of every person, and is traceable to God (or Gods) as the creator of the universe. More important, it is always employed in reference to a person’s own past acts and character, and is not concerned with the acts or character of others. It is used only in reference to specific acts (or failures to act) that have or should have been committed by the subject, and character attributable to them, not as a general proposition or as to future potential acts. As Pierce says of someone acting through his συνείδησις, “[n]o external authority need be consulted; he knows, and is his own witness to himself; and this knowledge and witness are private to him alone.” In its usual sense, συνείδησις refers to acts or character that are morally bad – hence Pierce’s label “normal” for the act, character or condition that offends the conscience.

In addition, the function of συνείδησις was to express pain. Pierce quotes a passage from Philo’s Decalogue in which he speaks of a bad conscience that “gives not peace, but makes war…stabs as with a goad, and inflicts wounds that know no healing,” thus attributing the giving, inflicting or feeling pain to conscience. In a similar vein, the word also functions to describe an agent delivering pain, often in the form of judge, prosecutor or accuser that drives the guilty man mad. In contrast, the word was rarely used to express pleasure, and even then it

63 Ibid at 42.
64 Ibid at 46.
was usually in the form of Pierce’s moral-bad-negative, meaning the absence of pain, as a form of pleasure. In sum, the basic connotation of the “συνειδησίας group of words,” argues Pierce, “is that man is by nature so constituted that, if he overstep the moral limits of his nature he will normally feel pain – the pain called συνειδησίας.” 65 Although it is natural to all persons, it was implanted by God to watch over us and guard us from moral (and physical) evil, but not to teach or instruct us or cultivate our minds – the “formation of morals by direct superintendence belonged to public officers.” 66

The almost secular morality implicit in συνειδησίας is clear. Unfortunately, some of this original independence between conscience and its source was subsequently lost. As the concept of conscientia took hold, and its English equivalent developed, religion (initially through its Catholic thinkers) became the key to linking conscience with morality. It is St. Thomas Aquinas who began this process by developing human reason. For him, reason, inherent in all humans, allows everyone to comprehend the natural law, created and directed by God. All people seek good; the tendency toward the good is an innate condition of being human. It is called synderesis. As Aquinas says:

[T]here must be some enduring principle which has unchangeable rightness and by reference to which all deeds are tested, such that this enduring principle resists everything evil and gives assent to everything good. This is what synderesis is, whose job is to murmur back in reply to evil and to turn us towards what is good. 67

Conscience connects to synderesis, but reflects an action – the relation of knowledge to something. One must follow one’s conscience, however, which may not guarantee a correct choice – it is human fallibility which makes synderesis the ideal, conscience the practical human side. But for Aquinas, there was no breaking a connection between synderesis, conscience, and the idea of religious belief. 68

65 Ibid at 50.
66 Ibid at 52.
The vestiges of that link remain strong today. But there is enough to suggest that conscience is not merely religion in another guise; in fact, it is much more. As Wilhelm Mensching aptly describes it, conscience is our “inner ear” for the voice which tells us what we should do and what we should leave undone, what the pattern and purpose of our lives should be. But it is more than the existence of this voice -- it is the particular human ability to hear this voice within. Conscience thus acts as a warning mechanism, telling us that certain work, thoughts, feelings or acts, are wrong-headed or evil; at other times conscience acts as a calling, urging and impelling action, words, thoughts or feelings as being right and dutiful. All adult humans have this conscience within. As Paul noted, in his letter to the Romans, even “heathens” have a conscience: they have the moral law “written in their hearts, [while] their conscience also bears witness and their thoughts the [mean] while accusing or else excusing one another.” The modern-day recognition of this fact is found in the first Article of the U.N. Declaration of Rights, which reminds us that “all human beings … are endowed with … conscience.”

The metaphor of a voice within (particularly the “voice of God”) is what brings conscience naturally inside the religious sphere. For centuries, conscience had an almost material quality, interposed between God and Man. As William Perkins described it:

Man hath two witneffes of his thoughtes, God, and his owne conscience; God is the firft and chiefeft; and Confcience is the fecund subordinate vnto God, bearing witness vnto God either with the man or againft him…The naturall condition or propertie of euery mans conscience is this; that in regard of authoritie and power, it is placed in the middle betweenee man and God,

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70 New Testament, Romans 2:15 (King James translation).

71 Universal Declaration of Human Rights, Article 1. Some might argue that there are humans without conscience – psychopaths and sociopaths, for example: see Robert Hare, Without Conscience: The Disturbing World of the Psychopaths Among Us (New York: Guilford Press, 1999). For my purposes, however, these are largely matters of psychiatry or metaphysics and not relevant to a legal constitutional analysis of conscience. In a different vein, I accept that infants do not have a developed conscience, and that conscience requires some level of maturity (at which age it begins to take root is a matter beyond the scope or relevance of this project). Like Mensching, therefore, I will assume that all adult humans have a conscience; the important question will be how or whether it is exercised.

72 Mahatma Gandhi spoke of conscience in this way: see Raghavan Iyer, The Moral and Political thought of Mahatma Gandhi (New York: Galaxy Books, 1978) at 122: “I simply want to please my own conscience, which is God.”
fo as it is vnder God and yet aboue man. And this naturall condition hath two parts: the firft is the Subiection of consfcience to God and his word.  

Socrates, Jesus, Luther and Gandhi, for example, all referred to their conscience as the voice of God.

One’s conscience is also mutable. For years, Luther maintained an attitude of respect and forbearance toward the Catholic church – his conscience brooked no opposition to it. It was only as he aged and developed his own thinking on religion that his attitude changed. Since conscience cannot perceive all truths, understand all reason – or, for religious believers, be equivalent to God – it is also prone to error. It is constantly receiving other voices, such as those from parents, religious institutions, the state, and the broader culture and society surrounding us. These often substitute for conscience, taking over its autonomy and usurping its role:

Hence, very different decisions are made about what is true, right and moral. It is the environment, and not the voice for which we each possess a conscience, that determines the decisions of such consciences.

Although these external voices may become internalized into one’s conscience (and they should, in some cases, in order to allow a conscience to evolve) they can act both constructively and destructively on our consciences. Since we adults all have a conscience, however, it is in my view proper to say that those who commit acts of barbarism or are evil are not devoid of conscience but are acting against conscience. The mutability of conscience is, however, one of its strengths. A conscience true to its humanity cannot remain satisfied with the status quo: “we have been given a conscience so that we can hear a voice which wants more than strict observance of the rules valid in our community or in any other group.”

A healthy conscience continually changes to reflect a better understanding of the world around us.

73 Perkins, supra n. 5 at page 44.

74 Mensching, supra n. 23 at 13.

75 Ibid at 14.
Different religions and individual consciences manifest themselves in a nearly limitless variety of forms, often diametrically opposed to one another. The major religions have vastly different views on what might be the ultimate purpose or divine understanding of the universe. Even more mundane religious beliefs (or social customs that often are associated with religious practices) can lead in different directions: many Jews and Muslims do not eat pork while many Hindus do not eat beef; each of them relate these practices to religious dogma.

Similar effects arise with conscience-based beliefs. One person’s conscience is not likely to be the infallible voice of truth, morals, or of one God, to all people, at all times. Our consciences can ignore things unintentionally and unknowingly, or intentionally and deliberately; errors can be made where our own conscience confuses other, external, voices with the inner voice of truth, reason, humanity, or morals, etc. Different people relying genuinely on conscience can be led to diametrically opposed – and potentially conflicting – beliefs, which may ground conflicting actions. Martin Luther’s conscience compelled him to attack the Catholic church while Thomas More’s required him to defend it. Or, in a more modern vein, followers of Martin Luther King Jr. and his non-violent resistance to segregation were led by their consciences to believe that the laws were wrong and unjust; those in the South trying to uphold the laws must have felt it in their conscience, however misplaced, that the laws protected both whites and blacks alike. Conscientious objectors feel compelled to object to military service while others may have a conscientious belief that fighting and dying for one’s country is the best path. As Mensching says, two people can arrive at opposite conclusions and yet both can be making a decision based on conscience.76

Often it is the close connection between conscience and religion that can lead to conflicts. Jesus and Luther, as examples, were considered to be blasphemers and destroyers of the faith. They were persecuted because they rejected the teachings and forms of a prevailing religion for the sake of their own conscience and God.

Although conscience is normally thought of as pertaining to individuals, it is important to recognize that some connotations of “conscience” reflect a wider constituency and call to action. Since our conscience can teach us what is right and wrong with others and society, and

76 Ibid at 10-11.
ask us to “do good” to both, it can reach beyond the individual to a social conscience. The preamble to the UDHR alludes to this wider understanding of conscience: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind…” Sometimes the awakening of a single conscience leads to the formation of a public conscience against what had not been previously recognized as an injustice or inhumanity. History is thus replete with examples where numbers of humans have been led by conscience to recognize and fight injustice, inhumanity, and evil. Witness Mahatma Gandhi’s acts of civil disobedience or Nelson Mandela’s call to dismantle apartheid -- the expansion of their fight into the public conscience eventually galvanized support for change (of course, theirs were not the only voices, but their public display of conscience was an important factor in rousing public sentiment). Public conscience reflects a healthy consideration for the future. A conscience which does not want to know, for example, what will happen to the planet as a result of climate change and the consequences it will have for future generations, is unhealthy and limiting.77

In sum, there are strong enough claims to recognize “conscience” has meanings distinct from religion, such that it could be recognized as an independent freedom with separate constitutional status. It is, in other words, more than a synonym or substitute for religion. A similar pattern emerges from reviewing the historical and philosophical literature on religion and conscience: while many writers conflate the two concepts, in most cases they do so inadvertently or with little thought given to their differences.

2 Subsumed and Distinct Conscience: An Introduction

Human rights are recognized mainly to protect values deemed fundamental to human flourishing. Protection from interference by others, whether these be states, organizations, or individuals, is a necessary component of this. Ideally, the purpose of law is to reinforce these goals; law is thus not an end in itself, but a means to an end – that of human welfare and

77 See ibid at 23. Mensching uses the example of nuclear testing and nuclear war to explore the importance of a collective conscience.
development. For over two centuries, “religion” has been identified as one of the fundamental values worth protecting – it appears in human rights documents such as the U.S. Bill of Rights, the Universal Declaration of Human Rights, and the Charter. In many of these documents, conscience is often paired with religion as a fundamental freedom, but, interestingly, without much thought or attention paid to the way in which it may differ from religion or how it might operate as a stand-alone freedom. Some of the reasons for this are traceable to the European Enlightenment and the early beginnings of religious toleration.

In Europe, intolerance and persecution went hand-in-hand with Christian behaviour for decades prior to the 17th century. This was not condemned – in fact, it was a widely accepted social and collective phenomenon. Religious persecution existed as both church and state policy. There was, in effect, a Christian theory of persecution that long antedated any concept of religious toleration or freedom, and without which the Catholic Church, Protestant state churches, Christian governments, and religious persons could not have authorized the repression of Christian heretics and dissenters. In ways similar to religion itself, religious intolerance, therefore, was a group phenomenon. Only with the development of tolerance as a philosophy came the groundbreaking idea of religious liberty. And conscience was never far from discussions centred on toleration.

Timothy Potts and Brian Tierney trace the early evolution of a Western understanding of conscience in the writings of medieval philosophers such as Peter Lombard, Philip the Chancellor, Bonaventure and St. Thomas Aquinas. Two separate developments led to a better understanding of the idea of conscience: first, that conscience could be utilized to perform a reflective assessment of oneself, by witnessing and judging one’s own actions; and second, that it was then natural to apply such self-reflection to one’s standards of behaviour. By the 13th century, Aquinas had adopted the reflective nature of conscience to make plain the

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connections between conscience and religion, philosophy and theology. He held that *conscientia* binds humans to a course of action; the duty, or imperative force that drives the conscience is obedience to God’s voice and commands.\(^81\) As the church started flexing its muscles to secure freedom from the state, the road toward religious liberty began. The combination of these forces led to a recognition that humans could be morally autonomous, endowed with conscience and reason and free will.\(^82\) Thus, obeying one’s conscience, which was the voice of God, became paramount.

As the medieval period gave way to the Reformation, the ideas of conscience and religion solidified. Martin Luther provides some of the earliest sustained discussion on religion, conscience and morality. In over 50 volumes, Luther makes a number of links between religion and conscience. He claims that belief or unbelief is a matter of conscience, that it was the individual’s conscience that could be delivered from the burden of sin; that Catholics held only a “conscience in appearance” since their conscience was not guided by Scripture.\(^83\)

Like so much about Luther, his views on conscience are decidedly schizophrenic. At many times, he seems to treat a person’s conscience as no more than the inner religious voice in one’s head. “When some physical affliction besets us, our conscience is soon at hand,” says Luther

> and the devil torments it by assembling all the circumstances. Therefore a troubled heart looks about and considers how it may have offended God most. This leads to murmuring against God and to the greatest trial, hatred of God.\(^84\)

Our conscience thus provides the direct connection to God. As Luther puts it more plainly, “[i]nwardly, however, they disquiet and embitter the conscience, *that is*, they make God out to be bitter and wrathful, so that He is blasphemed through such righteousness.”\(^85\) It is God who

\(^{81}\) Potts, ibid at 68.

\(^{82}\) Tierney, supra n. 34 at 32.


\(^{85}\) Ibid, vol. 9, Deut 29:1, at 273 (emphasis added).
can, therefore, alter human conscience at will: “They ask ‘Why has God done this?’ And this came from the terror and anguish of conscience which, with great grief and anguish of hearing, are wont to follow sin. Such an evil beast and wicked devil is conscience… Conscience feels the judgment and wrath of God.”86 But at heart, a beneficent God who informs and cares for the state of our conscience: “God wants our conscience to be certain and sure that it is pleasing to Him. This cannot be done if the conscience is led by its own feelings, but only if it relies on the Word of God.”87

Ultimately, it was Luther’s own conscience that led to his excommunication. When, in 1521 at the Diet of Worms, he was ordered in the presence of Charles V to recant his heretical opinions, he refused in the name of conscience.88 While defying the Catholic church to the end, conscience remained bound to religion, as he pleaded with his prosecutors that he could not recant against conscience, bound as it was in the “word of God.”89

Other scholars, following Luther, remained of the view that religious belief and conscience were virtually one and the same. Sebastien Castellio, a French theologian and follower of Luther, joined religion, conscience and tolerance, in noting that the difficulty of altering a person’s subjective conscience was intimately connected with a need for practicing tolerance, since people do not believe that their religion is false. Where truth is uncertain, conscientious conviction becomes a reason for religious toleration.90 He identified the need, on moral grounds, to respect conscience, claiming that the French Catholic war against the Huguenots was caused by the “forcing of consciences.”91 In 16th century Holland, Dirck Coornhert’s plea


87 Ibid, vol. 9, Deut 12:1, at 123.


90 See Zagorin, supra n. 33 at 121.

for universal tolerance was based on the notion that without the free exercise of religion, there is no freedom of conscience.92

This linkage continues into the Enlightenment, where writers such as John Locke and Pierre Bayle, espousing Newtonian rationalism, further ideas about religious tolerance, while continuing to recognize conscience’s role. For Locke, freedom of conscience is fundamentally connected to freedom of worship, both of which should be treated as distinct from freedom of thought or expression. While thought and expression are manifest in infinite variety, conscience is limited by its nature as a moral agent.93 In other words, conscience is consonant with religion. It has a moral element to it and that moral element comes from religion.

Locke views the church as the principle protector of morality. It was acceptable to Locke for a religion to attempt to provide exterior influence on the individual conscience as long as tolerance of religious diversity was maintained through state practice. Individuals are entitled to immunity from legal regulation where religious needs are granted priority, but a person’s sincere belief cannot encroach upon the interest or rights of others. Some beliefs, however, being an inherent menace to other humans (such as Catholicism and atheism) should not be tolerated.94 To be sure, Locke’s distrust (and near intolerance) of these groups is not supportable today. Though it was of its time; based on a belief that neither Catholics nor atheists were governable as they could not be relied upon to follow the bonds of civil society, his was a political concern, not one of religious tolerance. Moreover, his broader point remains valid: while thought and expression are manifest in infinite variety, conscience is, by its nature, limited as a moral agent.

There is no need to refer to all of Locke’s numerous uses of “conscience” in the *Letter*, but three examples help establish the strong connection he held between conscience and religion. In a passage concerned with the need to follow one’s own faith sincerely in order to find acceptance with God, Locke states:

92 See Zagorin, supra n. 33 at 157-60.


94 Ibid at 63-64.
In vain, therefore, do princes compel their subjects to come into their church-communion, under pretense of saving their souls. If they believe, they will come of their own accord; if they believe not, their coming will nothing avail them. ...[M]en cannot be forced to be saved whether they will or no; and therefore, when all is done, they must be left to their own consciences.\textsuperscript{95}

When comparing the purposes of civil society and contrasting these with a person’s salvation, he says:

[I]t is easy to understand to what end the legislative power ought to be directed...and that is the temporal good and outward prosperity of society...[I]t is also evident what liberty remains to men in reference to their eternal salvation, and that is, that every one should do what he in his conscience is persuaded to be acceptable to the Almighty...

But some may ask, “What if the magistrate should enjoin any thing by his authority, that appears unlawful to the conscience of a private person?” ...[I]f the law indeed be concerning things that lie not within the verge of the magistrate’s authority; as, for example, that the people, or any party amongst them, should be compelled to embrace a strange religion, and join in the worship and ceremonies of another church; men are not in these cases obliged by that law, against their consciences; for the political society is instituted for no other end, but only to secure every man’s possession of the things of this life.\textsuperscript{96}

Towards the end of the \textit{Letter} Locke makes his final case for tolerating diversity of opinion, as refusing to be tolerant has led to all the “bustles and wars” occurring in the name of religion:

The heads and leaders of the church, moved by avarice and insatiable desire of dominion...have incensed and animated [people] against those that dissent from themselves, by preaching...that schismatics and heretics are to be outed of their possessions and destroyed...Now as it is very difficult for men patiently to suffer themselves to be stripped of the goods, which they have got by their honest industry; and contrary to all the laws of equity, both human and divine, to be delivered up for a prey to other men’s violence and rapine; especially when they are otherwise altogether blameless; and that the occasion for which they are thus treated does not at all belong to the jurisdiction of the magistrate, but entirely to the conscience of every particular man, for the conduct of which he is accountable to God only...[C]ivil magistrates, growing more careful to conform their own consciences to the law of God, and less solicitous about the binding of other men’s consciences by human laws, may, like fathers of their country, direct all their counsels and endeavors to promote universally the civil welfare of all their children; except only of such as are arrogant, ungovernable, and injurious to their brethren...\textsuperscript{97}

\textsuperscript{95} Ibid at 41.

\textsuperscript{96} Ibid at 59.

\textsuperscript{97} Ibid at 71-3.
In each case it is clear that conscience means more than simply a person’s decision or choice of action, despite Locke’s somewhat elliptical statements. To take away individual agency would leave individual consciences at the mercy of the state, which in Locke’s view would be a formula for individual enslavement. This gives conscience its connection with religion – in a Lockean world view, our conscience can be seen as something bound up with religion, which is commensurate with morality. Freedom of conscience does not mean freedom for anything or to do anything simply because one believes one may do so.

Pierre Bayle, in developing ideas of tolerance comparable to Locke’s, blurred the two concepts by connecting God, sin and conscience. “Between a man and his conscience there can be no other judge but God,” he stated, continuing:

To wish to force the conscience is surely a crime against the rights of God...It is a self-evident proposition that any man who does anything which his conscience tells him is evil, or who does not do what his conscience tells him he must, is committing a sin...  

He notes further that the “empire of conscience belongs only to God” – where conscience is the voice of God and belief a matter of conscience. His entire theory regarding the “erroneous conscience” is also tied directly to religion: since there is no evidential way of determining whether one’s beliefs are divinely given or just personal views, individual conscience is all that remains to ensure the connection with the divine. Empirically, conscience and religion have to stand together.

At the same time, Bayle acknowledges that the persecutor who persecutes in good conscience is justified. One could only deal with this paradox by attempting to change the persecutor’s


99 Bayle, *Critique of Maimborg*, reprinted in *Oeuvres Diverses*, ed. By E. Labrousse, vol. 2 (Hildesheim: Georg Olms, 1965). This is subject to some modification – Bayle recognized that because atheists deny the existence of God, then their conscience must be judged without reference to God (see “Philosophical Commentary on the Words ‘Compel Them to Come In’” in *Oeuvres Diverses*, vol. 2 at 431).


mind through persuasion. Toleration, put otherwise, seems to be trumped by conscience. But in order to recognize the difference between tolerance and intolerance, Bayle characterized a desire to prevent persecution and superstition as legitimate forms of liberalism – as “nontolerance.”\(^{102}\)

This pattern of loosely conjoining religion and conscience has continued, relatively unabated, to this day, including writers as ideologically diverse as John Stuart Mill, Karl Marx, and John Randall Jr., to name only a few. Mill seems to employ the term “conscience” stylistically, as just an elegant variation of freedom of religion:

> It is accordingly on this battlefield [of religion], almost solely, that the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted. The great writers to whom the world owes what liberty it possesses, have most asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to another for his religious belief.\(^{103}\)

“Religion,” “conscience” and “religious belief” in the above paragraph seem to speak to the same concept of an indefeasible right to believe. Marx also saw them as mirrors of each other: “Among [the rights of man] are freedom of conscience, the right to exercise a chosen religion.”\(^{104}\) The statement reads almost as if the two were interchangeable: freedom of conscience is simply the right to exercise a chosen religion. John Herman Randall, Jr., in his classic work *The Making of the Modern Mind* speaks of the Reformation’s development of the idea of tolerance, which allowed “Huguenots, Catholics and ‘fanatical Puritans’” to “[wax] eloquent” on the “rights of conscience,” as the beginning of the concept of religious freedom.\(^{105}\)

Despite this, there have been some writers who have maintained a distinction between the two terms. One of the earliest to do this in western thought was the third Earl of Shaftesbury, a

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\(^{102}\) Bayle, “Philosophical Commentary on the Words ‘Compel Them to Come In,” supra n. 53.


student of John Locke’s, who saw the difference between theology and morality and began to de-Christianize the notion of conscience in his work, *An Inquiry Concerning Virtue, or Merit*. As Martin Fitzpatrick puts it, Shaftesbury “treated conscience both religiously and morally as two aspects of man’s relationship with God, but in such a way as to give priority to the moral.” Secular morality was placed at the heart of conscientious concern, and would lead to social harmony and tolerance, where “conscience would be able to take its own decisions about the public good.”

In the modern era, John Rawls, in his approach to freedom, seems to entertain the idea that conscience is a broad term, encompassing religious and moral freedoms. His famous “original position” thought experiment, which requires imagining how a society would be ordered if no one knew his or her race, creed, religion, physical or mental abilities etc., relies on an overarching conception of liberty of conscience. In the original position, people will have certain obligations or categorical demands but they will not necessarily know what form or requirement those demands will take. Rawls’ argument suggests that conscience is a broad category made up of both moral and religious beliefs or values. In most of the discussion throughout the thirty-third and thirty-fourth sections, “Equal Liberty of Conscience” and “Toleration and the Common Interest,” he carefully treats religion and morality as aspects of conscience. Thus, the denizens of the original position regard themselves as having “moral or religious obligations,” choosing principles that “secure the integrity of their religious and moral freedom” while not knowing what their “religious or moral convictions are” or the particular content of these obligations. They cannot take the chance of having a “dominant religious or moral doctrine” or persecute others who do not share this view. He solidifies this relationship most clearly when he says,


108 All quotes are at Rawls, ibid at 206-07.
Liberty of conscience is limited, everyone agrees, by the common interest in public order and security. …[A]cceptance of this limitation does not imply that public interests are in any sense superior to moral and religious interests…”

Rawls’ individuals will accept some categorical demands but these may apply as matter of conscience in a broader sense, not exclusively religious. Thus, conscience might easily be Rawl’s moral, but not necessarily religious, indicator. He leaves open the question of whether conscience can extend beyond morals and how freedom of conscience might differ from freedom of religion.

In different ways, Michael J. Perry and Jeremy Webber provide other complex and nuanced arguments for a maintaining a related, but distinct, religious-conscience connection. Perry’s claim is that certain religious values are inescapably connected to modern western notions of human rights – there is no intelligible secular version of the claim that every human being is inviolable (or has inherent dignity, is an end in himself or the like) – and therefore the idea of human rights is “ineliminably” religious. For Perry, the question of whether every human is sacred (or inviolable) is only coherent to a religious understanding of the same, for the question itself is embedded within a religious tradition and is unanswerable in a world that is meaningless or agnostic (his version of a secular world). He takes issue with Ronald Dworkin’s view that life’s sacredness can be interpreted as part of either a religious or secular philosophy because Dworkin trivializes sacred, failing to understand it in its strong/objective sense. He faults definitional strategies that assume the “moral point of view” is universal and self-regarding strategies that argue what is good for one person/family/nation etc. should be good for all. Both end up, in Perry’s view, falling short of the required objective – universal need for human rights – unless the sacred nature of every human life is factored in as part of the equation. Even though rights can be particularized and may not apply to all humans all the time (think of the so-called “Legal Rights” in the Charter, such as trial within a reasonable time under s. 11(b), which only apply to a person who is charged with an offence) all aspects.

109 Ibid at 212.


of generalized rights belong to all humans as humans. In other words, that religions
(particularly Western ones) are the foundation of morality. Whether one agrees with him or not – and his view is contestable – it supports my point that conscience is distinct from religion. Even if conscience arises out of a religious tradition, its value as a constitutional liberty is not compromised by his argument as to its derivation.

Jeremy Webber also articulates the idea of religion as singular, but his concern is not over its connection to universal human rights but of its place as entrenched constitutional law. Although he does not discount the notion of having a freedom of conscience – unlike Perry, he writes from a Canadian perspective and so is aware of the text of s. 2(a) – for him, religion, much like expression, is special. In “The Irreducibly Religious Content of Freedom of Religion”, Webber, like Perry, makes the case that a secular basis for freedom of religion is incoherent. He argues that freedom of religion

cannot be secularized so that it is entirely neutral between belief and unbelief. The interpretation and application of the right necessarily involve acknowledging, contemplating, and seeking to protect distinctively religious commitments.112

This inevitably leads, for Webber, to the need to privilege freedom of religion over other similar freedoms or rights, including conscience. While he admits that an approach to the freedom which would require neutrality between religions and between religion and irreligion (in sum, privileging freedom of conscience) has superficial appeal, he ultimately finds it wanting. Despite the fact that making conscience the primary freedom may “sidestep religious controversy,” be immune from “sectarian partiality,” deny a particular “vision of the good” and open the door to equivalency between all beliefs and non-beliefs as long as they are kept out of the public sphere, it would do an injustice to freedom of religion itself.113 As a specific freedom, Webber maintains that freedom of religion carries with it “a much richer set of

112 Jeremy Webber, “The Irreducibly Religious Content of Freedom of Religion” in Avigail Eisenberg, ed., Diversity and Equality: The Changing Framework of Freedom in Canada, (Vancouver: UBC Press, 2006) 178 at 178. At 194, Webber concludes by stating that “[f]reedom of religion does not require, then, that the state remain indifferent to religion. Two motives drive the right: (1) an acknowledgment of the importance of religion, and (2) a realization of religion’s diversity, ultimately resulting in an attempt to generalize respect for religion so that all members benefit from equivalent protection, no matter their beliefs.”

113 Ibid at 182.
normative judgments than is often recognized as religion itself is “indispensible” to understanding freedom of religion.¹¹⁴

In direct contrast to Winnifred Fallers Sullivan,¹¹⁶ Webber maintains that allowing freedom of conscience to function as the overarching freedom leads to difficulties, since it becomes impossible to define belief (and thus morality) without religion. Even if religion is not expressly in issue, it provides the template for related freedoms. Thus, claims that freedom of conscience has autonomous content will of necessity, according to Webber, require formulation in terms of the more basic religious freedom.¹¹⁷ However, he does leave some interpretive room for a separate freedom of conscience. Notably, he relies on some key passages from R v. Videoflicks,¹¹⁸ Roach v. Canada (Minister of State for Multiculturalism and Citizenship)¹¹⁹ and R. v. Morgentaler¹²⁰ (each is discussed in more detail in chapter 4), for providing a definition of conscience that does not rely on a religious analogy. These are situations

that focus on obedience to moral injunctions as the object of the guarantee. Thus, freedom of conscience protects a “set of beliefs by which the person feels bound to conduct most, if not all, of his voluntary actions” [citing Videoflicks] or it recognizes “strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles” [citing Roach and Morgentaler].¹²¹

¹¹⁴ Ibid at 178.
¹¹⁵ Ibid at 188.
¹¹⁶ Sullivan makes a strong claim that freedom of religion is impossible to maintain – see The Impossibility of Religious Freedom (Princeton: Princeton University Press, 2005), especially chaps. 5 and 6 for a full discussion of her position.
¹¹⁷ Webber, supra n. 112 at 186. Webber refers to freedom of conscience as “parasitic” on freedom of religion in all of its more difficult manifestations – ibid.
¹²¹ Webber, supra n. 112 at 188.
But he limits these mostly to the interior dimension of thought. Once taken to a dimension that involves exterior action, they are, for Webber, rarely free of a religious connection. Moreover, where there is even an inkling that a conscience-based practice might be distinct, such as conscientious objectors to military service, Webber is uncompromising:

Even here, one suspects that the religious analogy continues to play a strong role: these definitions clearly contemplate peremptory standards, not the provisional conclusions that emerge from moral debate in its philosophical sense. In any case, a definition of conscience focused on morality would not be sufficient to subsume freedom of religion, at least not without severely distorting the latter. Moral injunctions are a dimension of many religions, but religion includes elements that are not contained within morality, such as prayer, methods of worship, communal institutions, and what to a believer is knowledge of the divine.122

This approach to conscience confirms for Webber the importance of freedom of religion. Whereas Sullivan attests to its “impossibility”, Webber holds it to be “irreducible.” Freedom of conscience cannot stand in its place in many cases, particularly when one moves from inner beliefs and thoughts to protecting, via law, religion’s outer manifestations and practices.

Despite their concerns, neither Webber nor Perry call for the rejection of the idea of freedom of conscience. Nonetheless, they do see freedom of religion as having utmost importance, largely because of its long history and “ineliminable” or “irreducible” core. It is, for them, a rich freedom intimately connected to the human search for truth and the ineffable (matching Curry’s notion of freedom of religion as the “first freedom”).123 At the same time, neither are completely at ease with the current jurisprudence on freedom of religion: Webber, for one, seems to wish for an understanding of the freedom that does include some analysis of content, as opposed to the “all too frequent” resort to testing sincerity.124 Perry, in his more recent writings, calls for a broadening of religious freedom to encompass what he calls “moral freedom” – the right to freely practice one’s morality, in aid of convictions and commitments that are the “yield of one’s conscientious effort to discern what sort of person one should

122 Ibid.
124 Webber, supra n. 66 at 194.
be.”125 In sum, I believe that Perry, in this way, calls for an independent freedom of conscience while Webber wishes to ensure a continuing role for legal freedom of religion. I will return to these ideas in more detail in chapter 7.

Kent Greenawalt feels a similar inclination. In “The Significance of Conscience” he argues that religious claims may deserve preference over nonreligious conscience-based claims, on account of their link with tradition, their importance to the life of a religious individual, the relative ease by which they can show sincerity, and governments’ lack of competence in assessing religious claims. He is not totally convinced of his own position, however, stating that the position of religious superiority is “debateable.”126 He goes on to say:

I conclude that for most subjects as to which both religious and nonreligious claims of conscience about moral requirements are likely to arise, any right of conscience should include the nonreligious claims. That is both because the claims are similar enough to warrant comparable treatment and because there is some reason to accommodate deeply held convictions even when they are demonstrably mistaken. Nevertheless, the special reasons to accommodate religious conscience should be a crucial part of the discussion whether any right or privilege should be granted.

For Greenawalt – and Adam Kolber, in his favourable critique of Greenawalt127 – the fact that many theists may make claims that are rooted in non-religious belief and the difficulty of trying to assess whether such claimants might deserve additional constitutional protection is important in understanding moral claims. In my view, conscience is the more appropriate mechanism to make this assessment. It can often do the work of both religious and nonreligious claims.

Finally, some contemporary writers recognize that the two terms may have become separate in the twentieth century, but wish to bring them back together to ensure that conscience remain closely connected to a religious sensibility. For instance, Marie Failinger laments that what was once “an argument that government must ensure a free response by the individual called distinctively by the Divine within” – a traditional free exercise of religion argument – has now

come to mean “very little beyond the notion of personal existential decision-making.”

Her call for a return to a more traditional understanding of liberty of conscience (that is, tied to religious belief) is in response to what she perceives as the whittling away of any of religious freedom’s legitimacy and potency as an independent freedom. Steven Smith (who has been strongly influenced by Perry) takes up the challenge to rethink a freedom based on both conscience and religion. He ultimately concludes, in an echo of Perry’s thesis, that religious freedom is unique. Smith’s challenge will be examined in much more detail in chapter 7.

However, some of these contemporary writers see the role of conscience as at least as important, and possibly more so, than that of religion. Charles Taylor and Gérard Bouchard portray freedom of conscience as broadly as possible, as the freedom from which freedom of religion is derived, so that freedom of religion is simply an aspect of freedom of conscience.

While they recognize freedom of conscience as encompassing the narrower protection of “freedom from religion” – the ability to be free from religion, or to abstain or refuse it – they acknowledge a need for its larger role. Their reasons are not based on hierarchy, but inclusiveness. As they state, “[t]he idea here is not to assert that freedom of religion has a moral or legal status inferior to freedom of conscience but that freedom of religion belongs to a broader class or category of freedom of conscience, which includes all deep-seated convictions.” For them, the overarching objective of all belief-based freedoms, whether cast as religious or secular in nature, is that they allow individuals to shape their own moral identity, giving direction to their life. The denial of any such deep-seated convictions is detrimental to an individual’s moral integrity. The emphasis becomes one focused on the


131 Bouchard & Taylor, ibid n. 84, 144 at fn. 23.
function of the belief rather than its source. Jocelyn Maclure, in following this, also sees the essential question as one regarding what role belief plays in the moral life of an individual, rather than questioning from where a belief emanates. The distinction is therefore not between religious and secular beliefs, but between “strong evaluations” and “personal preferences”. By insisting on the moral weight rather than the origin of the belief, Maclure implicitly brings religion inside conscience. Both belong to the same normative category.

It is clear in this short survey that conscience and religion have often been connected historically, at times treated as one and the same concept, and at others, seen as intimate associates. The connection is most often through a sense of both being concerned with morality; where the two are recognized as related but distinct, what seems to provide the link is morality. Even in the latter case, however, what is not always clear is whether conscience is connected to morality via its connection to religion, or whether conscience, on its own, is a source of human morality.

The difference is important in trying to understand the need for, and scope of, an independent conscience-based constitutional freedom. A natural starting point begins with examining constitutional texts and their interpretation. In the next chapter I look more closely at these doctrinal approaches to freedom of conscience outside Canada.

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132 Jocelyn Maclure, “Convictions de conscience, responsabilité individuelle et équité: l’obligation d’accommodement est-elle équitable?” in Paul Eid, Pierre Bosset, Micheline Milot and Sébastien Lebel-Grenier, eds., Appartenances religieuses, appartenance citoyenne : un équilibre en tension (Québec: Les Presses de l’Université Laval, 2009), 327-350. As she notes, “It is important to emphasize that it is not religious belief itself that must have…a special status, but all deeply held beliefs or convictions of consciousness that allow individuals to structure their moral identity. …Indeed, one seen no good reason to rank, in terms of rights, between a person whose vegetarianism originated from a religion (Hindu) or a secular moral philosophy (animals also have rights). The relevant distinction is not between strong evaluations of a religious nature and those of a secular nature, but…between strong evaluations and preferences not closely related to the understanding I have of myself as a moral agent.” (at 342-43) (Translation by Google Translator and author).

133 Ibid, 344.

134 Maclure, like Bouchard and Taylor, treats freedom of religion as a sub-category of freedom of conscience: ibid at 342-3.
Chapter 3

Conscience in Legal Doctrine:
Unformed Burls Outside Canada

1 Introduction

As was seen in chapter 2, conscience and religion have long been closely related, if not synonymous. Famous moments in history attest to it. There is Thomas More allowing himself to be hanged rather than swearing, against his conscience, an oath that held the Roman Catholic Pope subservient to secular rulers.\(^1\) Philosophers, such as Pierre Bayle, limited the “empire of conscience” to that of God alone, since for him conscience was the human manifestation of the voice of God.\(^2\) Theologians like Roger Williams, signaled the very phrase, “liberty of conscience” as freedom pertaining to matters spiritual and religious. The first operative paragraph of Article IV of the proposed constitutional manifesto “Agreement of the People” drafted by the Levellers in 1647 states that “matters of religion, and the ways of God’s worship, are not at all entrusted by us to any human power, because therein we cannot remit or exceed a tittle of what our consciences dictate to be the mind of God, without willful sin.”\(^3\) Likewise, the constitution of Pennsylvania, first passed in 1790, declared that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; … no human authority can in any case whatever control or interfere

\(^1\) Captured perfectly in Robert Bolt’s play, *A Man for all Seasons*: “More: I believe, when statesmen forsake their own private conscience for the sake of their public duties . . . they lead their country by a short route to chaos…. “ And later: “Thomas More (Moved): And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship?” – Act I, Scene **, Act II, Scene **.

\(^2\) Pierre Bayle, *Critique of Maimborg*, reprinted in *Oeuvres Diverses*, ed. By E. Labrousse, vol. 2 (Hildesheim: Georg Olms, 1965). As noted in chapter 2, Bayle recognized that an atheist’s conscience is judged without reference to God, since atheists deny His very existence (see, supra, chapter 2 at note 53 and accompanying text).

with the rights of conscience…”⁴ For centuries, at least in the Christian west, a man’s conscience was almost automatically assumed to reflect his religion; no more and no less.

Despite this close relationship, conscience was not expressly protected in the first national entrenched constitutional bill of rights. The U.S. Bill of Rights, comprised of the first ten amendments to the United States Constitution, was a singular achievement. The first of these amendments – eponymously known as the First Amendment – was far ahead of its time in protecting religious freedom, free speech, freedom of the press, the right to peaceful assembly and to seek government redress of grievances. It heralded the very idea of entrenching human rights and freedoms. The provision remains a template for the constitutionalization of fundamental freedoms around the globe.

It does not, however, expressly protect freedom of conscience, an omission that has proven controversial. As will be shown in chapter 6, writers such as Philip Hammond have argued that the First Amendment’s wording of “free exercise of religion” will inexorably become a kind of “free exercise of conscience.”⁵ Others, including Martha Nussbaum, have argued that the founders expected non-religious moral commitments to be protected by the Free Speech and Press Clauses.⁶ The United States Supreme Court has not fully endorsed these views, but has been enterprising in its freedom of religion jurisprudence. Some small, careful steps towards finding conscience-based decisions analogous to religious decisions have been made. The Court has worked around the limitations in the First Amendment language by occasionally reading conscience into the free exercise of religion clause – an interpretive technique that has been the subject of much criticism and dispute. At the same time, American courts have been hesitant to find the existence of a generalized freedom of conscience. In contrast, in Canada conscience is expressly protected in s. 2(a) of the Charter. Yet, as will be shown in chapter 4, there exists a similar hesitancy on the part of Canadian courts to expand on freedom of conscience and grant it full-blown independent status.

⁴ See Article 1, s. 3, Constitution of the Commonwealth of Pennsylvania,


This chapter explores, in detail, the development of freedom of conscience in legal doctrine in a number of jurisdictions outside Canada in order to sharpen the focus on Canada that I develop in later chapters. I concentrate on the First Amendment in the U.S. Bill of Rights, but also, since the Charter is not the first important rights document to provide express protection of conscience, some other constitutional and human rights documents that refer specifically to both “conscience” and “religion.” Thus, I pay particular attention to debates and the resulting jurisprudence surrounding three prominent international rights documents – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention – as well as the German constitution because of its strong connection to conscience. The idea is to see if other jurisdictions can provide insight into the development of a Canadian approach to freedom of conscience.

As in chapter 2, the doctrinal examination of conscience in law breaks down into two main categories: Category 1 are those instances where religion and conscience are treated similarly or as meaning the same, and Category 2 are those where their independence is recognized. Further analysis shows that the following situations give rise to Category 1: where conscience is left out of a statutory or quasi-constitutional text; where constitutional or statutory debates show little or no intention to include conscience as an independent right deserving separate protection; and where freedom of religion, as determined jurisprudentially, is assumed to cover the entire field. Conversely, conscience as an independent value – Category 2 – may arise as follows: in constitutional or statutory debates acknowledging a difference; as a result of applying the ordinary rules of statutory interpretation over the implication of words; and where conscience is expressly adverted to as a form of moral compulsion separate and apart from religion.

Since my concern is ultimately with developing an approach to conscience-based freedom in Canada under s. 2(a) of the Charter, I have sampled jurisdictions to ensure broad coverage of where conscience as a separate freedom may exist. My intention is not to engage in a fully realized comparative approach to freedom of religion and conscience, but rather to survey the field for situations where conscience and religion are treated both synonymously and differently. In this vein, I compare and contrast approaches taken in other jurisdictions,
looking at the how conscience is treated in relation to religion. The purpose of these outside examples is to aid in informing a made-in-Canada approach to conscience-based freedom that will be developed later in chapter 6.

It is in the area of conscientious objectors that one finds the most development. Although technically outside the scope of this project, it is instructive to note the broad spectrum of approaches to conscientious objection taken around the world (well summarized in Kevin Boyle and Juliet Sheen, eds., *Freedom of Religion and Belief: A World Report*, (New York: Routledge, 1997)). In alphabetical order, the basic practices of 27 countries they examined are: Albania: the Ministry of Defence upholds conscientious objection based on religion only (at 264); Armenia: government allows for a mutually agreeable arrangement for alternative service where religious conviction conflicts, although there is no specific law on this point (at 271); Australia: exemption from military service allowed for legitimate and sincere beliefs that can be religious or non-religious (at 171); Azerbaijan: the state is allowed to offer alternatives to war duties on arrangement with religious groups and other believers, but subsequent laws have muddied the picture by removing these earlier express provisions (at 278); Bulgaria: the 1991 constitution states that no one is entitled to be relieved of constitutional and legal obligations on the basis of religion or belief (at 286); Canada: alternative service permitted during world wars, but “any new occasion for conscription would require the issues to be reconsidered under Charter principles” (at 109-10); Chile: not recognized under religious or other grounds (at 115); Cuba: persecution seems to exist where groups use religion for political purposes that are thought to undermine the revolution (at 126); Egypt: conscientious objection not recognized (at 35); France: conscientious objectors are accommodated by performing civil service in lieu of military service (at 302-03); Germany: the constitution guarantees the right to conscientious objection to military service (at 314); Greece: conscientious objection is not allowed, and is an offence under Greece’s compulsory military service (at 338); Hungary: conscientious objection on any basis of conscience is permitted (at 344); Iraq: conscientious objection not permitted (at 345); Israel: conscientious objection is not permitted but a 1996 case held that objection based on religious or philosophical convictions will be recognized by courts (at 442); Japan: freedom of thought and conscience are guaranteed by the constitution as separate from religion. As a result of WWII, Japan’s constitution prohibits raising an army, so conscientious objection to war is irrelevant (at 212); Mauritania: right to conscientious objection not protected expressly, other than through formal freedoms of opinion, thought and expression set out in the 1991 constitution (at 44); Mexico: certain groups, particularly Jehovah’s Witnesses, have been subject to persecution for failing to follow legal strictures or accept national symbols – no protection of conscience on these grounds (at 136-7); Northern Ireland: no legal provision for recognizing conscientious objection (at 329); Norway: conscientious objection recognized in law both on religious grounds and general ethical convictions (at 356); Senegal: issue has not arisen (at 62); Singapore: no provision is made to be exempt from military service on grounds of conscience, religion or belief (at 244); Spain: the constitution recognizes a right to conscientious objection for reasons of conscience related to religious, ethic, moral, humanitarian, philosophical or other convictions of a similar nature (at 385); Sudan: does not recognize conscientious objection (at 77); Trinidad and Tobago: military service is not compulsory so no issues have arisen (at 153); Turkey: no provision is made for conscientious objectors (at 397); United States: conscientious objectors need not have personal God but the objection can be based on belief even where a person does not consider themselves religious, as long as belief is sincere and deeply held (at 160).
2 Category 1: Undifferentiated Conscience

2.1. Debates Over the First Amendment

“Conscience” was not an unfamiliar term to the individual architects of the First Amendment nor was it foreign to state constitutional texts. James Madison, one of the main drafters of the U.S. Bill of Rights, began his political career in the state legislature of Virginia. He helped draft the Statute for Religious Freedom, which led to Virginia’s 1776 Declaration of Rights, an Act which referred to the “free exercise of religion” according to the dictates of “conscience.” Similarly, Pennsylvania established a Declaration of Rights thirteen years prior to the U.S. Bill of Rights. It included freedom of religion in the language of conscience. Section 3 of the Declaration stated that “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; …no human authority can, in any case whatever, control or interfere with the rights of conscience.”8 In fact, in the thirteen states that had constitutions in place prior to the adoption of the U.S. Bill of Rights, nine used “conscience” coequally or in conjunction with religion.9 The most common formulation tied religious practice to one’s conscience, relying on the phrase that religion was free to be practiced “according to the dictates of conscience.” Of the states that joined the Union between 1789 and 1912, only seven out of thirty-five did not use the word “conscience.”10

It therefore made sense that the initial drafts of the First Amendment referred to both conscience and religion. In the original ten amendments of June 1789, which formed the draft Bill of Rights, Madison tabled two proposals in the Drafts of the First Congress related to the “religion clauses.” In both, conscience played a distinct role. His draft called for the following language:


10 See Hammond, supra n. 5 at 38.
The civil rights of none shall be abridged on account of religious belief or worship…nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.\(^{11}\)

Remarkably, in his First Congress speech made on June 8, 1789, Madison never mentioned “religion,” but only “conscience.” He referred to “liberty of conscience” as one of the “great rights” equivalent to trial by jury and freedom of the press; later, he considered the rights of conscience, alongside freedom of the press, as “the choicest privileges of the people.”\(^{12}\) This draft language was retained at the House through a committee of the whole; a slightly modified version—“Congress shall make no law establishing religion … nor shall the rights of conscience be infringed” – was proposed by Fisher Ames (representative from Massachusetts) in committee and considered by the House in August of 1789.\(^{13}\)

Neither Madison’s nor Ames’ versions lasted. By the eighth draft of the First Amendment (in late September of 1789), the word “conscience” had been dropped in favour of the “free exercise of religion.” The joint House-Senate Committee returned with the final language: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The removal of conscience was met with little opposition.

Whether this decision is significant or not, in terms of legal constitutional doctrine, is a matter of some debate amongst U.S. scholars. Two camps have emerged – one that holds to a view of religious exceptionalism, the other downplaying the difference occasioned by conscience’s removal. In the first group, Stanley Ingber, for example, claims that the deletion was deliberate, intending to privilege religion.\(^{14}\) Michael McConnell goes one step further, stating

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\(^{11}\) Congressional Register, June 8, 1789, vol. 1, p. 427. See also Cogan, supra n.9.

\(^{12}\) Thomas Lloyd, ed., *The Congressional Register*, 2 vols., (New York, 1789); June 8, 1789, vol. 1, pp. 429-36 quoted from Cogan, supra n.9 at 53-57. Individual state submissions to the Bill of Rights draft texts are also enlightening: Massachusetts, New Hampshire and Pennsylvania suggested wording along the lines of “the rights of conscience” as a stand alone right (New Hampshire, for example, proposed that “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience”); Pennsylvania went even further by opening its proposed wording with: “The rights of conscience shall be held inviolable”; whereas New York, North Carolina, Rhode Island, and Virginia, although adverting to “conscience” in their formulation, tied it much more closely to religion, relying on wording such as “the right to free exercise of religion according to the dictates of conscience” – ibid at 11-12.

\(^{13}\) Cogan, supra n.9 at 3.

that the presence of both “religion” and “conscience” in different drafts suggests that the two terms are not synonymous; thus, by settling on the lone term “religion” and dropping “conscience,” the Framers considered, but rejected, extending protection all the way from religious belief to conscience-based beliefs.\textsuperscript{15} In contrast, the second camp sees the difference between religion and conscience as largely insignificant. For example, Martha Nussbaum points out that the only significance was grammatical: once “exercise” became the word of choice, “religion” on its own made the most sense. Conscience did not fit syntactically. It would have been difficult or inelegant, she posits, to fit conscience within a sentence structure based on “free exercise” – no documents of that period refer to a “free exercise of conscience.”\textsuperscript{16} Moreover, it was felt that “rights of conscience” in context might not provide adequate protection to physical acts, being seen as more closely associated with belief and speech. The original language was seen as too limiting. The proposed “free exercise” formulation referred clearly to the practice of worship but was also an unequivocal way of ensuring the protection applied to acts, as well as belief and speech. According to Nussbaum, the need to protect those without religious beliefs, such as agnostics or atheists, would have been unimaginable to the founders.\textsuperscript{17} On that basis, and since the term “conscience” had a distinct historical meaning tied to religion, its removal is not felt to be material.\textsuperscript{18}

The end result is that many judgments involving religious freedom have conflated religion and conscience, although without the deep historical scholarship shown by Nussbaum. In fact, where courts employ both terms near each other, it is most often as a rhetorical or stylistic device to avoid the appearance of dull prose, or less charitably, in the belief that they are one and the same. Justice Frankfurter’s opinion in \textit{Minersville School District v. Gobitis} is an excellent example of the former; Justice Stone’s dissent in the same case, the latter.\textsuperscript{19} In his majority opinion, Frankfurter J. wrote

\begin{footnotes}
\footnotetext{16}{Nussbaum, supra n. 6 at 102.}
\footnotetext{17}{Ibid at 102.}
\footnotetext{18}{Ibid at 102.}
\footnotetext{19}{310 U.S. 586 (1940).}
\end{footnotes}
[T]o affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration…But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.\(^{20}\)

In dissent, Justice Stone simply writes that “it is a long step…to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.”\(^{21}\) It is evident that neither passage intends conscience to be treated as an independent freedom in its own right.

At best, however, closely parsing draft texts of the First Amendment produces mixed results. Even adopting Nussbaum’s generous reading of the rationale behind dropping conscience from the original draft ignores the reality that “religion” ended up being singled out in the text of the First Amendment. Yet, as shown below in part B.2, in certain cases courts have treated the First Amendment as including a version of “free exercise” that is more closely aligned with conscience than the founders would have recognized. In such situations, the restricted words of the First Amendment have not acted as a brake on expanding the limits of the freedom.\(^{22}\) The effect of this broader interpretation means that the United States does not always lag behind other countries, such as Canada, where constitutional freedoms, such as religion, are more simply stated and where “conscience” is also included. Nevertheless, the absence of express mention of conscience still sets the First Amendment apart from most modern international human rights documents.\(^{23}\)

\(^{20}\) Ibid at 594.

\(^{21}\) Ibid at 602.

\(^{22}\) See Hammond, supra n. 5.

\(^{23}\) In this context, it is worth briefly mentioning Australia. Its 1901 constitution follows the U.S. prototype. Section 116 of the Commonwealth Constitution provides that the “Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.” (Commonwealth Constitution, 63 & 64 Vict., chap 12). Despite its similarities to the First Amendment, the slight change in wording in s. 116 (“make any law for establishing any religion”) has proven significant. The Australian experience reveals a strongly developed sense of religion, but little about conscience; compared to the U.S., Australian courts have tread very carefully within the fairly narrow confines of religious freedom. Section 116 has been interpreted to include four distinct restrictions on legislative power based on its four distinct clauses (for a good overview of the religious clauses in Australian constitutional jurisprudence, see Gabriel A. Moens and John Trone, eds., *Lumb and Moens' The Constitution of the Commonwealth of Australia*, 6th ed. (Chatswood, NSW: Butterworths, 2001) at 371-77)). Although the High Court has defined “religion” under s. 116 broadly, it has not gone as far as including conscience-based practices – see *Church of the New Faith v. Commissioner for
2.2 International Rights Documents

The idea for an international bill of rights arose during the Second World War. The failure of the League of Nations, and the devastating consequences of the Holocaust wrought by Nazi Germany provided twin catalysts for states to come together and forge a new global institutional structure. At the same time there arose, amongst many of the allied world leaders and public intellectuals, a renewed belief in universal values.24 The resulting body, the United Nations, represents one of humankind’s major accomplishments; one of its foundational documents, the Universal Declaration of Human Rights (UDHR), adopted in 1948, reflects a “common standard of achievement” for all societies to aspire to.25 Although the UDHR acquired some legal character – states have been subject to a “duty” to “fully and faithfully observe” its provisions26 -- most UN signatories realized that some of its broad concepts would eventually require translating into legally binding obligations. As a result, in the late 1940s two international covenants were contemplated: one on civil and political rights, and the other on economic, cultural and social rights. Both were a long time in development; almost thirty years of discussion and debate preceded the coming into force of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR) in 1976. Because freedom of conscience figures in both

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25 Henkin, ibid.

26 See, for example, GA Res. 1904, 18 GAOR Supp. 15, UN Doc A/5515 at 35 (1963.).
the UDHR and the ICCPR, it is fruitful to review their background debates and histories. If either provide a strong signal for treating conscience independently of religion, they will help our purpose, since the language of s. 2(a) of the Charter owes a debt to these international human rights documents.

(a) Universal Declaration of Human Rights. “Conscience” appears three times in the UDHR:

Preamble (second paragraph):

“…Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,…”

Article 1

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 18

“Everyone has the right to freedom of thought, conscience and religion; …”

After recognizing that human equality and dignity are the source of freedom, justice and peace in the world, the second paragraph of the Preamble reminds us that there have been atrocities so terrible that they engage our collective conscience. The first Article then brings conscience down to a more individual level, acknowledging that all humans have reason and conscience.

Article 18 is the main operative provision on this point. It grants to everyone the “right to freedom of thought, conscience and religion” and the freedom to “manifest his religion or belief in teaching, practice, worship and observance.”

27 A very good summary of the drafting process is chapter one “The Drafting Process Explained” in Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent (Philadelphia: University of Pennsylvania Press, 1999) at 1-35. A short note is warranted on the process by which the UDHR and the ICCPR were created. The actual drafting stages and committee work was very complex and detailed, and has been subject to much scrutiny and detailed writing. Since I am concerned only with matters that are directly relevant to the inclusion of both freedom of conscience and religion, I will refrain from providing detailed background description, unless necessary.


29 UDHR, ibid, Art. 18.
debates and discussions over the text of Article 18, it is apparent that the main concern for virtually all the committee members was to allow for a ‘‘thin’’ version of religious freedom; that is, that a state should allow a plurality of religious and secular ideologies to live peacefully within its boundaries. The state should refrain from engaging in thick forms of moral (and therefore, potentially religious) indoctrination.\(^{30}\) The Article provides a framework by which each individual is free to pursue his or her own conception of a religious or non-religious conception of the good.

From the outset, the word ‘‘conscience’’ was included but received little separate attention. In the first, short, draft of the provision, John P. Humphrey, the Director of the Secretariat’s Division on Human Rights, proposed that there shall be ‘‘freedom of conscience and belief of private and public worship.’’ The United Kingdom’s response to this, which by elaborating on the basic freedom paved the way to the final wording, simply retained the idea of ‘‘conscience’’ as part of worship: ‘‘‘conscience and religion’ are to replace the need for forms of worship.’’\(^{31}\)

The main participants in the debates over Article 18 were Geoffrey Wilson from the U.K., Dr. Charles Habib Malik from Lebanon and René Cassin of France. None paid much heed to the inclusion of the word ‘‘conscience.’’ Sometimes it was overlooked, as in Malik’s urging of the Committee to ‘‘recognize the fundamental right of differing fundamental human convictions, as in religion, to exist in the same national entity.’’\(^{32}\) But most of the time, the participants discussed religion, religious beliefs, religious persecution and institutional forms of religion as if ‘‘conscience’’ were invisible.

(b) International Convention on Civil and Political Rights.\(^{33}\) The ICCPR’s relevant text is strikingly similar to the UDHR (and is also found at Article 18):

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\(^{30}\) See Morsink, supra n. 27 at 259.

\(^{31}\) See AC.1/3; AC.1/3/Add.3.

\(^{32}\) Ibid.

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching practice and observance.

...

(3) Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The debates over this text were also not much different from those surrounding Article 18 of the UDHR. Although in general terms discussions were more thorough, the specific discussions about freedom of conscience, and what the legal differences may be between freedom of conscience and freedom of religion, were sparse. Where they did occur, many of the debates about religion tread over familiar ground already covered by the framers of the UDHR.

Drafting of both International Covenants (ICCPR and the ICESCR) began with the first session of the Drafting Committee (a sub-organ of the Commission on Human Rights) in June of 1947. The Committee consisted of representatives from eight member states – Australia, Chile, China, France, Lebanon, the Union of Soviet Socialist Republics, the United Kingdom, and the United States. The second session of the Commission on Human Rights (December 1947) then took up the drafts prepared in June, and continued until May of 1948. Drafting proceeded through eight more sessions until the tenth session of the Commission on Human Rights, which ended in April of 1954. Final drafts of both covenants were tendered to the Third Committee of the General Assembly of the United Nations. Twelve years later, on December 16, 1966, both International Covenants were adopted by the General Assembly.

Paragraph 1 of Article 18 of the ICCPR follows closely the text of the UDHR. Its first sentence seems to provide for an open-ended freedom of conscience. In the first draft version

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prepared by Great Britain for the 1st session of the Drafting Committee in 1947, however, freedom of conscience was not differentiated. Instead, conscience was presented in its Category 1 form, tied closely to religion, as a separate, but quasi belief-based set of traits. It originally read: “Every person shall be free to hold any religious or other belief dictated by his conscience and to change his belief.”\(^{35}\) This draft was not adopted for discussion, however, as the 2nd session Commission on Human Rights agreed to proceed with the draft tendered by the United States, which opening sentence began “Everyone shall have the right to freedom of religion, conscience and belief…”.\(^{36}\) One year later, in 1948, the 2nd session of the Drafting Committee proposed another alternative, adopting a text that read, “No one shall be denied the freedom of thought, belief, conscience and religion…”\(^{37}\) After these few early iterations settled on the concepts, the main issue over this part of Article 18 became whether to phrase the initial right in a negative assertive form (“no one is denied”), positive in a declarative sense (“everyone has”) or, as became the final version, a positive assertive (“everyone shall have”).\(^{38}\) The final text of paragraph 1 of Article 18 was adopted at the Third Committee, 15th session, in 1960.

Very little discussion regarding Article 18 focused specifically on the scope of the basic freedom contained in the first sentence. As with the UDHR, most of the debate centred around the drafting of the second sentence (“This right shall include freedom to have or adopt a religion or belief of his choice…”). Although many members stressed that the paramount issue was the protection of an individual’s freedom of choice in all matters related to thought, conscience and religion, the aspect of the right to maintain or change one’s religion was most controversial and defined the legal content of the freedom.\(^{39}\)

\(^{35}\) Ibid at 351; emphasis added.

\(^{36}\) Ibid at 351-2.

\(^{37}\) Ibid at 352-3.

\(^{38}\) Ibid at 357-359.

\(^{39}\) See A/C.3/SR.1022, §4-5 (GB), §22, 25 (CL); A/C.3/SR. 1024, §1 (CDN); A/C.3/SR.1026, §14 (YV); A/C.3/SR.1027, §19 (USA).
One of the most extended discussions over the wording of Article 18 took place during the fifth session of the Commission on Human Rights, on the 116th and 117th meetings. At those meetings, a number of Commission members spoke of the need to protect religious freedom and felt that the proposed wording represented a minimum safeguard for that. Conscience, as a distinct concept, received much less attention. When it was mentioned, however, it was treated as something equivalent to religious belief. In many hundreds of pages of testimony, only two references, both coming from external invitees, reflect on conscience as something different. Mr. Lewin (from Agudas Israel) and Mr. Nolde (Commission of Churches on International Affairs) alluded to conscience indirectly by referring to “beliefs which could not be termed religion in the traditional sense” or the need to hold and manifest any religious “or other belief.” But neither of these submissions engendered further discussion.

The other point of contention that occupied much discussion was the issue over what extent parents could control the “religious and moral” education of their children. Some concern was shown over whether the right more properly belonged with rights related to education covered in the ICESCR. Karl Josef Partsch notes that it may have been included in the ICCPR partly as a built-in redundancy, to cover the possibility of one Covenant not being ratified by all states. At the same time, its inclusion in Article 18 shows that it is a distinct right related to religious freedom, separate and apart from rights related to education in general. Yet again, in discussions over this clause, little was made regarding the specific choice of words “religious and moral” and whether these would have a different meaning from “religion and conscience” or “religion and belief.” No one commented on these potential discrepancies.

As is the case with many international agreements, Article 18 reflects the compromises inherent in multinational cooperation. Put simply, it is not a model of skilled legislative drafting. To point out some of the more obvious questions that come to mind: What, for example, is the difference, if any, between “thought, conscience and religion” as contained in the first sentence of paragraph 1, and “religion or belief,” as found in the second? Are “thought and conscience” equivalent to “belief?” A basic rule of legislative drafting – avoid

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41 Ibid /116 at 3, 5.
elegant variation and assume that different words have different meaning – seems to be ignored here. Is it simply careless wording? Or are the phrases meant to capture different concepts? At the very least, the two phrases are potentially ambiguous. A less charitable reading finds them deliberately confusing. The confusion carries over to other clauses in Article 18, where, for example, “manifest” is connected to “religion or beliefs” but “thought” and “conscience” are not mentioned (paragraph 3), or in paragraph 4, where “religious and moral” are conjoined. As a result of some of these difficulties, the U.S.S.R., Romania and Barbados, have consistently treated Article 18(3) as permitting restrictions on the very ideas of freedom of thought, conscience, and religion or the right to have and adopt a choice of religion, despite wording that most others argue was intended to permit restrictions only on the right to manifest one’s religious and other beliefs.

In sum, from the hundreds of pages of testimony devoted to the text of the ICCPR, there is little that can be concluded about the intended idea or scope of freedom of conscience. As Karl Joseph Partsch puts it, the apparent ease with which a consensus was reached on the first sentence is likely due to the fact that all interested groups had their own understanding of what the basic freedom meant. For atheists and non-believers, “thought” and “conscience” preceding religion gave comfort. For liberals, giving all three freedoms seemingly equal weight and authority was important. And for those who were strongly religious, they likely took the view that thought and conscience corresponded not only to religion generally (or was synonymous with it) but could be subsumed within the one true religion to which they adhered. In any event, as evidenced by the limited debate over the wording of the first sentence of Article 18, there was little or no discussion on the basic elements of the freedom, and certainly little disagreement amongst the Committee members over the need to include the basic concepts of thought, conscience and religion. As mentioned, the bulk of debate focused


on the right of parents to choose the form of their children’s education.\textsuperscript{45} In the final analysis, it is safe to say that the majority of the debates surrounding the two major U.N. documents do little to aid the approach to take in assessing the role and scope of freedom of conscience in Canada.

\textbf{(c) European Convention.} This same lack of an in-depth conversation on conscience-based freedom holds true for the final international document under review, the European Convention on Human Rights. Human rights became a major priority for those promoting a particular form of European unity at the end of World War II. The successful development of the United Nations and the public spectacle of the Nuremberg trials in 1945-6 had special meaning for those living in Europe. In May 1948, a number of delegates from around Europe, as well as from Canada and the United States, met at The Hague at the Conference of the International Committee of the Movements for European Unity. At the conclusion of the Conference, the Committee proclaimed a desire for European nations to develop a Charter of Human Rights and a Court of Justice, the one guaranteeing liberty of thought, assembly and expression, and the other having the ability to implement these guarantees.\textsuperscript{46} Shortly after, the Council of Europe was established with a mandate to develop the Charter.

The first draft of the Charter was tabled in July 1949 and, despite initial obstacles (some countries, such as Norway, France and Sweden opposed the idea of a European charter of human rights because the United Nations was already covering the field), the project began in earnest in August 1949.\textsuperscript{47} It took less than two years to complete. The resulting European Convention on Human Rights (“European Convention”) remains the oldest and most developed international rights Protecting document.

\textsuperscript{45} According to Partsch, this debate also engaged the European Convention – “no other guarantee… met with so many reservations.” – ibid at 213.


\textsuperscript{47} Janis and Kay, ibid.
The relevant text of the European Convention mirrors closely the language of the UDHR and the ICPR:

9. **Freedom of thought, conscience and religion**

(1) Everyone has the right to freedom of thought, conscience and religion…

Section 1 goes on to protect the ability to manifest religion or belief in various ways such as worship, teaching, practice and observance.

In the eight volumes of the *Collected Edition of the “Travaux Préparatoires”* that detail the Convention discussions, there are only 25 references to freedom of thought, conscience and religion set out in Article 9. Twenty of those references are simple references to the bare wording of the text itself – that is, to the words “freedom of thought, conscience and religion.” Only five speeches devote any time to the actual language of the freedom.

It was not until the eighth sitting of the first session of the Consultative Assembly that the importance of the fundamental freedom of religion was mentioned. After a series of speeches stressing the importance of universal and fundamental human rights, and the need to be ever-vigilant against future horrors of the kind seen in World War II, M. Fayat of Belgium described the importance of so-called fundamental freedoms: “from the legal point of view, freedom may be divided into what is commonly called the fundamental freedoms, that is to say: first, the freedom of the individual, which is essentially characterized by freedom from arbitrary arrest and prosecution; freedom of opinion and religion; freedom of association and assembly, etc…” Mr. Everett of Ireland added that if civil and religious freedoms were the only two rights that were guaranteed in Europe, the Council will have justified its existence. All other rights are simply “subdivisions” of those two rights. That was the extent of debate in the first session: no further mention of Article 9 occurred.

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49 Ibid, vol. 1 at 86.

50 Ibid at 103-4.
Following the first session, the Committee on Legal and Administrative Questions was formed in order to help focus discussion. A selected list of guaranteed freedoms was tabled and the Committee was asked to determine whether each of them should be included (subject to the internal laws of each country), and, if so, what was their nature and scope. Fifth on the list was “freedom of religious belief, practice and teaching”. A few days later the rapporteur, Mr. P. H. Teitgen, proposed that this freedom be defined as “[f]reedom of religious practice and teaching, in accordance with Article 18 of the United Nations Declaration.”\(^{51}\) The Committee made no further mention of it.

The first draft report tendered to the Consultative Assembly of the Council of Europe on September 5, 1949 relied on a text for religious freedom that read virtually word for word the same as the ultimate version adopted for Article 9. Five months later, at meetings of the Committee of Experts, nothing changed. Without further discussion, the language of “thought, religion and conscience” remained intact. (The only changes suggested were to the location and numbering of the articles, not the content of the freedom.)

In the end, the original draft containing “thought, conscience and religion” was left untouched through at least twenty drafts, seven different committees, ten sessions of the Committee of Ministers, three sessions of the Consultative Assembly, a conference of senior officials, working papers, Reports of Experts and the Committee of Ministers.\(^{52}\) Other than the quotations from Favat and Everett above, no debate ever occurred on the meaning or importance of the words “thought”, “conscience” or “religion.” By way of comparison, there were numerous debates over what was originally termed the right to petition, (the right to apply to the European Court of Justice where an individual was the victim of a rights violation) -- on whether such a right should be granted, who should receive the petition, how it should be administered and organized, etc. These discussions took more than 10 days of deliberation and involved over 15 different delegates or representatives.\(^{53}\) All told, it seems that all participants involved in the development and drafting of the religious freedom clauses

\(^{51}\) Ibid at 168.

\(^{52}\) Determined through a complete review of the discussions set out in the *Collected Edition*, ibid.

\(^{53}\) See, for example, ibid at vol. V, pp. 8, 36, 62, 64; vol. VI at pp. 50, 56, 64, 78-80, 126-128.
of the European Convention relied heavily on models already in place in international documents such as the UDHR and the proposed ICCPR. And, as with those documents, the debate over freedom of conscience was extremely limited.

All told, the deliberation given to conscience in three major international rights documents was meagre. In most of the discussions, conscience, if it is mentioned at all, is either referred to as if it were a mere appendage of religion without independent content, or treated as fundamentally the same as religion. In the many hours of debate over the religious freedom clauses of all three of these important human rights texts, delegates dealt largely with matters related to religious freedom per se, and not with the difference or importance of conscience as compared to religion. Even the debates over religious matters were largely confined to narrow aspects of religious freedom, such as whether the freedom included the ability to change one’s religion, or educate one’s child in a specific religion. The underlying idea – that of providing protection for religion – was, like that of conscience, mentioned hardly at all. At the same time, no one objected to including “conscience” as part of a fundamental freedom somehow connected with morality or belief. In the main, therefore, little can be gleaned from the formal discussions over the wording of each of the UDHR, ICCPR and European Convention provisions to aid an analysis of the nature and scope of the concept of conscience in these human rights documents. As will be seen in chapter 4, this echoes closely what occurred in Canadian provinces that adopted bills of rights protecting “conscience” and in debates over the language of s. 2(a) of the Charter itself.

The lack of serious debate about the word “conscience” in these human rights documents, therefore, leaves virtually all the difficult and detailed interpretation of its nature and scope, and its comparison with religious freedom, to the judiciary. Evidence of this is presented in the next section, where I begin to show an alternative account of legal doctrine: that of conscience contrasted with religion. Although I acknowledge the few instances where discussions about “conscience” took place in international human rights instruments, the bulk of authority comes from judicial decisions – and as will be shown in the case of the U.S., without an express constitutional recognition of conscience. This makes the case for an independent freedom of conscience in Canada that much stronger.
3 Category 2: Religion and Conscience As Distinct

3.1 Conscience in Debate: U.S. and International Documents

As previously noted, Stanley Ingber and Michael McConnell, among others, have argued that the choice to drop “conscience” from the First Amendment text, in the eighth draft, was deliberate. Their point is based largely on the mere fact of its removal, not on any reported discussion over its removal. Retaining religion as a constitutionally protected freedom, with conscience removed, was intended, Ingber argues, to prevent philosophical and personal beliefs from having the same legitimacy as religiously-based arguments. Claims of exemption from laws of general application based on anything other than religious beliefs, “would have been totally inconsistent with the liberal democratic theory popular at the time.”

Or as McConnell bluntly notes, “religion has a special and unique place in our constitutional order” that arose after the Framers “seriously considered enacting constitutional protection for ‘conscience,’ presumably a broader term, and deliberately adopted the term ‘religion’ instead.”

Perhaps inadvertently, Ingber and McConnell both make a case that “conscience” must be treated differently from religion where it is expressly and separately protected in a constitutional text or other statutory document. In fact, Ingber and McConnell go much further in differentiating conscience than those, for example, who debated the language of s. 2(a) of the Charter. As will be shown in chapter 4, the drafters of the Charter seemed to limit the scope of freedom of conscience to protecting against the persecution of non-believers or atheists. Ingber and McConnell see freedom of conscience (if it were constitutionalized in the U.S.) as providing protection to a wide spectrum of beliefs that mirror beliefs coming out of a religious tradition but are not tied to a religious foundation.

54 Ingber, supra n. 14 at 252.

55 McConnell, supra n. 15 at 15, 12.
Apart from a few explorations into the history of early drafts of the First Amendment, such as Nussbaum’s, McConnell’s and Ingber’s, there has been little analysis of conscience in the context of the First Amendment. That is not surprising, since “conscience” does not appear in the final text. But in those documents where conscience is included as a freedom, such as the UDHR, the ICCPR, Germany’s Basic Law and the European Convention, there were some, though limited, discussions exploring its dimensions.

One aspect of protecting conscience – as a right available to non-believers – seems to have been understood and adverted to on a few occasions in debates surrounding international rights-based documents. The earliest documented discussions come out of those involving Article 18 of the UDHR, which protects the right to “freedom of thought, conscience and religion.” For example, Alexandre Bogomolov, the USSR delegate, pointed out in the Working Group of the Second Session of the UDHR: “[A]rticle [18] should grant freedom of conscience not only for the practice of religion, but also for anti-religious propaganda.”

Eleanor Roosevelt, the Chairman, responded that the inclusion of conscience meant that “believers as well as atheists” were protected. But other than these very limited quotes, little attention was paid to the meaning of conscience in this context. Nevertheless, there is at least some indication in the discussions over the UDHR text that the morality of human rights does not require a religious foundation.

Likewise, in the ICCPR debates, there were only a few passing references to differences between religion, conscience and belief. Recall the text of Article 18:

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching practice and observance.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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57 Ibid at 13.
(3) Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

On the issue of a right to change religion under paragraph two, for example, some members felt that the right of a person to change his religion or belief was fundamental.\(^{58}\) While it could be taken as an off-hand comment, it is revealing. Adding “or belief” shows two things: first, that there are principles that may well be equivalent to religion; and second, that these are deserving of protection just the same. Belief in this context has to mean more than a person’s mere thoughts: it is nonsensical to think that changing one’s thoughts need protecting as a human right, since thoughts can change at will, from one moment to the next. Put otherwise, beliefs that require protecting, and that should be changeable without consequence, must be different from mere thoughts. Consequently, “belief” under this paragraph more likely functions as a proxy for “conscience.” Further evidence of this position is found by comparing the limitation clause in paragraph 3 of Article 18 to the absence of a limitation clause in paragraph 1. The limitation clause in paragraph 3 permits limits on the ability to manifest one’s “religion or beliefs” for public health and safety reasons. Since the limitation applies exclusively to the freedom to manifest – no limits are permitted on the basic freedoms of thought, conscience and religion in paragraph 1 – and since, as argued, thought is not something that can be limited by law, “beliefs” must stand in for “conscience.” Grammatically, this also makes sense, as the verb “manifest” does not fit as readily with “conscience,” it being more awkward and inelegant to refer to someone being able to “manifest his conscience.”

A similar situation arose over the issue whether parents could control the “religious and moral” education of their children as delineated in paragraph 4 of Article 18 (whereby states undertake to have “respect for the liberty of parents to ensure the religious and moral education of their children…”). Although little was made regarding the specific choice of words “religious and moral,” and what, in particular, “moral” meant in this context, a few members made note of the specific language. The Soviet delegate, Mr. Pavlov, regarded the phrase as contemplating the possibility of “free thinkers” giving their children a purely secular

\(^{58}\) See, for example, ibid /116, Phillipines, France and UK, pp. 8, 9.
education unaccompanied by any form of religious teaching. Without that additional protection, he stated, the freedom is incompatible with the concept of freedom of conscience.\(^{59}\)

Pavlov was one of the few delegates to make any attempt to define the nature and scope of conscience-based freedom. For him, Article 18 dealt with two separate freedoms: (i) freedom of thought or conviction and (ii) freedom of conscience or religion.\(^{60}\) This framework was also adopted by the Indian delegate, [NTD: need name***], who spoke of true freedom of conscience as something concerning “man’s inner life.”\(^{61}\) Again, however, other than these sparse references, little discussion occurred over the specific use of “conscience” or its comparison to the more commonly used “religion.”

In his summary of the ICCPR proceedings, Karl Josef Partsch interprets the scope of the clause as guaranteeing a far-reaching right, despite the lack of specific definitions of either “thought” or “conscience:”

_Taken together with religion, [“thought” and “conscience”] include all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance. “Thought” includes political and social thought, “conscience” includes all morality._\(^{62}\)

As will be discussed in more detail in chapter 4, rules of statutory interpretation favour granting conscience independent status wherever it appears alongside religion in a legal instrument. Given that the UDHR, ICCPR and the European Convention all use a similar form, granting freedom to both “religion” and “conscience,” the argument for giving distinct legal force to each word is applicable to all. Inasmuch as one of the General Comments states that “the obligation to use lethal force may seriously conflict with the freedom of conscience...

\(^{59}\) Ibid.

\(^{60}\) Ibid at 13.

\(^{61}\) Ibid, /117 at 7. Note the similarity to Sue Rodriguez’s statement during testimony in the *Rodriguez* trial, infra, chapter 4 at text to n. 55 and following.

\(^{62}\) Karl Josef Partsch, supra n. 44 at 214.
and the right to manifest one’s religion or belief,” the Human Rights Committee of the ICCPR seems to have recognized this difference.63

Because the ICCPR also protects “thought”, in addition to freedom of conscience and religion, an alternate approach might be to give more weight to freedom of thought. Instead of making conscience the fundamental non-religious belief-based freedom, thought, in this version, is given primacy. In his summary of the UDHR debates, for example, Johannes Morsink reasons that it is the inclusion of “thought” as the first operative word in Article 18 that provides for the right to be an atheist. It is also, for him, significant that “thought” appears first in the word order; by this placement, it is intended to show that thought is a concept embracing both conscience and religion, whereas the reverse is not necessarily true.64 In my view this is both too narrow and too broad. While freedom of thought may protect non-religious views and beliefs, by its nature it seems limited to ideas (or possibly their expression) and is not intended to cover actions. In contrast, freedom of conscience could be used to protect non-religious actions grounded in some moral or other compelling individual interest, as introduced in chapter 2 and developed in chapters 6 and 7. In short, conscientious objectors require more than the freedom to think war is wrong; they wish to avoid taking up arms as a form of active resistance to war.

The simultaneous sense of connectedness and distinctiveness that exists between thought, conscience and religion might have taken a different course in the 20th century if rights and freedoms were not singled out for protection without concomitant duties. In early discussions on the text of the UDHR, some delegates questioned why duties were not considered. Guy Pérez Cisneros, representing Cuba, believed that the American Declaration of the Rights and Duties of Man (sometimes referred to as the Bogota Declaration, or now the OAS Declaration) represented a model international document expressing the highest ideals of state and personhood which the UDHR should strive to replicate.65 In a separate chapter, the Bogota  

63 General Comment No. 22 (48) (art. 18) (1993), General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev. 1/Add.4., para. 11.

64 See Morsink, supra n. 27 at 261.

65 Ibid at 239-40.
Declaration provided a list of duties required of all persons, including the duty to vote, obey the law and care for one’s children and parents, among many others. The bases for setting out such duties are described in the preamble:

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources. And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

Understanding one’s duties thus enables moral standards and conduct – some of our highest aspirations – to be reached. In this way, conscience is one of the lynchpins connecting rights with duties. Through conscience comes an understanding that the rights of others limit the exercise of one’s own rights.

Ultimately, the concept of duties was largely left out of the UDHR text. Expressing regret at this, Morsink says: “the correlation of rights and duties is a fundamental principle and should have been kept with the other two basic announcements” contained in Article 1 and 2. The only sign that remains of the debate is the implicit understanding of a notion of duty set out in Article 29 of the UDHR (which speaks of one’s duties to the community). It is difficult to predict what might have happened if the delegates had felt differently; however, a more explicit formulation of duties may have elevated conscience’s bridging role and thus increased its likelihood of becoming a truly independent freedom. Fortunately, as will be seen next, a number of judges have used the inherent flexibility of judicial reasoning to get there.

[Sources cited]


67 Morsink, supra n. 27 at 246.

68 The text of Art. 29(1) of the UDHR is the extent of any explicit reference to duties: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”
3.2 Conscience in Cases: U.S. and European Judicial Decisions

As alluded to earlier, the absence of a conscience clause in the U.S. Bill of Rights has created some difficulties for claimants who, unable to base their claims on religious grounds, nevertheless believe that certain laws infringe their morality. The problems are most marked where a so-called “traditional” religion is entitled to the benefit of a law that a non-religious, but “devout” person cannot access. So far, the most common, although not exclusive, situation has involved conscientious objectors. For example, what if an Orthodox Jew could resist the draft on religious grounds, but a pacifist who follows the ethical ideas of Henry David Thoreau cannot?69 American courts have found ways around some of the most egregious situations, but have done so largely by subverting, rather than upholding, the principles of the constitutional text. In contrast, a wide range of activities, including hunting, corporal punishment and divorce, have been the subject of direct freedom of conscience claims in Europe, where bills of rights, like the Charter in Canada, expressly protect freedom of conscience. These include cases where conscience is employed defensively to seek exemptions from laws specifically prohibiting activities, and also cases where freedom of conscience is used to attack the legitimacy of laws permitting certain activities.

(a) Conscience in the United States – First Amendment Jurisprudence. The wording of the First Amendment seems clear: only religious exercise is protected and religious establishment prevented.70 So far, it is safe to say, traditional religious doctrines have been the main beneficiaries of this privilege.71 There are many examples of cases where a “respected” religious belief has received protection, while an “esoteric” or non-religious belief has not.

69 Nussbaum, supra n. 6 at 102.

70 The text of the First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” – see U.S. Const., am. 5.

Some counter examples, however, do exist. A small but salient body of American jurisprudence has, in the last half century, held that non-traditional beliefs (at least those that might be said to resemble religious ones) can be constitutionally protected. The cases often employ language that treads much closer to upholding pure conscience than it does to religious belief. At the forefront of this development is the right to object to military service.

Although most conscientious objectors rely on religious convictions to backstop their claims, some pacifists have claimed the right to be exempt from military service on non-religious grounds. The only plausible methodology by which these objectors can achieve this is on the basis of an implied freedom of conscience.

Factually, the problem is straightforward. The U.S. government has, in the past, required its citizens to perform military duty. Yet some individuals maintain that government should not wage war. They feel deeply enough about it that they do not wish to participate, and in consequence, seek exemption from service. Not all of these are pacifists; they are more accurately described as “non-combatants.” Although the problem is most acute with mandatory conscription, it does arise in situations where volunteers resign without completing their term, or where reservists decline to accept a call-up. In each case, objectors are left with two equally unsatisfactory and unpalatable options: either they refuse to serve and risk punishment (sometimes jail), or they agree to serve, thereby subverting their own deep convictions.

As a result of this lack of a genuine option, legislative exemptions protecting so-called conscientious objectors were developed. Almost without exception, however, the exemptions granted protection only to those whose religious beliefs forbade military duty, not recognizing objections based purely on moral or ethical grounds. It has long been this way -- starting

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72 See Greenawalt, ibid. Much of the following discussion is based on chapter 4, “Conscientious Objection to Military Service”.

73 Other options could include fleeing the country (a position taken by many U.S. “draft-dodgers” who came to Canada during the Vietnam War, or submit to a draft but attempt to avoid actual combat through assignment options.

74 In a somewhat ironic footnote, it has never been the position that conscientious objectors would be considered “good Christians” yet it was recognized by Pierre Bayle over 300 years ago that Christianity was not a good religion for soldiers since at its heart it requires moderation, forgiveness and the abatement of pride: see Pierre
with James Madison’s original proposal for a Bill of Rights (with the proviso that “no person religiously scrupulous of bearing arms shall be compelled to render military service in person”\(^{75}\)) a religious basis has been a necessary condition to exemption in virtually all U.S. military statutes. For example, the 1917 Draft Act exempted anyone who belonged to “any well-recognized sect or organization.” The 1940 Selective Service Act applied to “anyone who, by reason of religious training and belief, is conscientiously opposed” to war.\(^{76}\) Amendments to the Selective Service Act in 1948 continued the practice by allowing objectors who held a “belief in relation to a Supreme Being” but excluding beliefs related to “essentially political, sociological, or philosophical views or a merely personal moral code.”\(^{77}\) For much of the more than 200 year history of the U.S., this relationship between pacifism and religion was understandable, as pacifist movements have always been strongly influenced by, and connected to, various religions.\(^{78}\)

Even in 21\(^{st}\) century legal terms, the language of the First Amendment looms large. Constitutionally, conscientious objectors in America are prompted towards raising a claim based on free exercise of religion. This puts a religious tinge on virtually any discussion associated with conscientious objection. Kent Greenawalt unwittingly displays this form of thinking when he ties pacifism to religion:

> Conscientious objection is not a corporate religious activity; it is an individual moral choice. If the government is to exempt pacifist Quakers, it should also exempt pacifists who happen to be Roman Catholics. Moreover, a law exempting only members of pacifist groups would push pacifists toward membership in those groups, an effect at odds with the principle that government should avoid influencing people to belong to one religion rather than another.\(^{79}\)

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\(^{76}\) Greenawalt, supra n. 71 at 50.

\(^{77}\) 40 Stat. 76, 78 (1917) and 54 Stat. 889 (1940).

\(^{77}\) Section 6(j) of the Selective Service Act of 1948, 62 Stat. 613.


\(^{79}\) Greenawalt, supra n. 71 at 54-55; emphasis added.
He then withdraws from the statement’s narrow implications by asking whether it is appropriate to limit exemptions from service only to religious objectors because of some intrinsic value given religion, or because of long-standing relations between the state and religious organizations that are worth preserving. In searching for a solution, he canvasses a number of aspects related to military service and exemptions. These include: (i) the reasons for military service; (ii) the difficulties administering and distinguishing various reasons for exemption; (iii) the existence of both religious and non-religious convictions; and (iv) the need for fairness. Greenawalt ultimately concludes that the unfairness of treating nonreligious objectors differently from religious ones outweighs any reason for having restricted exemptions.

The United States Supreme Court has, for the most part, followed Greenawalt’s reasoning despite language limitations inherent in the First Amendment. In Girouard v. United States the Court adopted a line of dissenting argument that had reached its apogee in Justice Oliver Wendell Holmes’ decision in United States v. Macintosh where, in the context of an oath of citizenship, Holmes J. recognized conscience as distinct from (albeit leading to) freedom of religious belief. In the context of a refusal to swear an oath to take up arms, Justice Douglas in Girouard said:

The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

The die was thus cast for a freedom broader than one of traditional free exercise of religion. It became reality in United States v. Seeger. Seeger claimed that he was conscientiously

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80 Ibid at 57.
81 Ibid at 58.
82 328 U.S. 61 (1946) (“Girouard”).
83 283 U.S. 605 (1930).
84 Girouard, supra n. 82 at 68.
85 380 U.S. 163 (1965) (“Seeger”). The case was a consolidated action, and included claims made by Arno Sascha Jakobsen and Forest Britt Peter, who had similar, although not identical, issues with religious beliefs.
opposed to participation in any form of warfare by reason of his belief. On his Selective Service form, he left blank the question whether he believed in a Supreme Being (the form expected all applicants to indicate with a ‘yes’ or ‘no.’) In his testimony at trial, he displayed skepticism about the existence of God, but it was also evident that he lacked faith only in the traditional sense. He claimed a belief in “goodness and virtue” and a religious faith in a purely ethical creed, citing Plato, Aristotle and Spinoza for support of his belief in intellectual and moral integrity “without belief in God, except in the remotest sense.”\(^{86}\) Faced with this obviously genuine and thoughtful pacifism, the Court interpreted the term “Supreme Being” widely, so as to include any sincere and meaningful belief that “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”\(^{87}\) As a result of Seeger, Congress revised the language of the 1958 Service Act and removed any reference to belief in relation to a Supreme Being.\(^{88}\)

This line of reasoning was developed even further in Welsh v. United States,\(^{89}\) a claim based purely on conscience, without any connection to religion whatsoever. In his application for the draft, Elliot Welsh had struck out the word “religious,” objecting to service on moral and political grounds. He therefore challenged the validity of the Universal Military Training and Service Act (UMTS) exemptions. In a five-person majority decision, the U.S.S.C. determined he was entitled to conscientious objector status. Justice Black, on behalf of a four-judge plurality, reframed Welsh’s claim as one that existed within a valid belief system. He found the language in the UMTS included quasi-religious beliefs:

If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by …God” in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a “religious” conscientious objector exemption under § 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions. …[Section 6(j)] exempts from military

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\(^{86}\) Ibid at 166.

\(^{87}\) Ibid at 165.


service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs would give them no rest or peace if they allowed themselves to become a part of an instrument of war.  

Justice Harlan, representing the swing vote, went even further in seeing the need to protect non-religious beliefs. He found the legislation unconstitutional because it exempted only those with theistic beliefs, not those with analogous secular convictions. The Act was discriminatory and contrary to both the establishment and equal protection clauses. For Harlan J. it was simply unjust to ignore those whose beliefs did not fit within neat religious categories.

Seeger and Welsh represent the leading edge of American jurisprudence on conscience as an independent freedom. Because conscientious objection has an historical connection with religious practices and belief, particularly those such as Seventh Day Adventists and Quakers, it has been possible for the judiciary to rely on this link to forge a fairly wide protection for objectors of many stripes.

Freedom of conscience claims in other areas have not met with the same level of success. In fact, outside of the conscientious objection context, there is a dearth of U.S. constitutional law on freedom of conscience. There are two main reasons for this: firstly, pacifist movements tend to connect with religious beliefs, whereas other situations where conscience could plausibly be used may not have such a strong religious foundation. Secondly, attempts to advocate for broader approaches have run up against the Bill of Right’s silence on the matter of conscience. Neither reason carries much weight in Canada, of course, because of the different formulation of the freedom. Nevertheless, the U.S. experience continues to have an impact on our jurisprudence. Thus, other American cases where conscience has been invoked – including the provision of oaths of office and euthanasia – are relevant. It turns out that most of these cases succeed by re-characterizing a free exercise claim.

In Torcaso v. Watkins, at issue was the Maryland requirement that all public office holders declare a belief in God. The Maryland Court of Appeals upheld the requirement, accepting that there is a need to control religious persecution on the basis of tolerance, but holding that

90 Ibid at 340, 344 (emphasis added).
toleration does not extend to include the ungodly. In a strongly worded rebuff, the U.S. Supreme Court made it clear that no person can be forced constitutionally to profess a belief or disbelief in any religion, nor can states pass laws or impose requirements which aid all religions as against nonbelievers, or aid theistic religions over non-theistic ones.\textsuperscript{92} The Court, in so doing, protected a broad definition of First Amendment religious freedom that extended beyond religious belief to include conscience-based beliefs, by re-characterizing a free exercise claim into an anti-establishment one. Arguably, however, they were prevented from going further by the religious confines of the First Amendment: rather than dwelling on the conscience-based nature of the atheist Torcaso’s lack of religious beliefs, the Court rested its decision on an interpretation that “categorically forbids government from regulating, prohibiting or rewarding religious beliefs as such.”\textsuperscript{93} It thus turned Torcaso’s argument on its head by finding that the Maryland statute favoured certain religious beliefs, instead of finding that one’s non-religious beliefs are also protected as a form of the exercise of conscience. Non-establishment became the principle protecting atheist beliefs.

Institutional re-characterization has also led to a broader approach to First Amendment claims that incorporates ideas of conscience. The Washington Ethical Society, the Church of Scientology, and the Science of Creative Intelligence – Transcendental Meditation have all been characterized as religious organizations for purposes of First Amendment analysis, despite few, if any, characteristics traditionally associated with religious organizations.\textsuperscript{94} In the case of Malnak v. Yogi, for example, Judge Adams at the 3rd Circuit Court of Appeals, in a concurring opinion, held that a theistic formulation of religious freedom is no longer valid at the frontiers of religion. In its place one should determine, by analogy, a set of principles based on the purpose behind all religions. Thus, he generated the idea that religious or similar purposes are any that are concerned with fundamental problems of human existence that lay claim to a comprehensive truth. In seeking this out, an organization may adopt formal signs or

\textsuperscript{92} Ibid at 495.


symbols similar to those of accepted religions, such as ceremonies and formal services, and establish a common clergy.\textsuperscript{95}

The analogical approach works reasonably well; however, the restrictive language of the First Amendment (and the conservative nature of common law judges) tends to fix limits as one approaches the outer edges of potential conscience-based acts. A good example of this self-limiting feature is found in another 3\textsuperscript{rd} Circuit appellate decision, \textit{Africa v. Pennsylvania},\textsuperscript{96} where an organization named MOVE (no apparent acronym, at least not as described in the case report) was held not to be religious. Its founder, John Africa, sought provision of a raw food diet from prison authorities where he was housed. MOVE’s goals were said to include bringing about “absolute peace, … to stop violence altogether, to put a stop to all that is corrupt.”\textsuperscript{97} MOVE believed in the “first education, the first government, the first law.” It endorsed no “existing regime or lifestyle” condemning a society that it viewed as “impure, unoriginal, and blemished.”\textsuperscript{98} These tenets are no doubt unconventional. Are they religious? The Court, applying the same analogical approach it adopted in \textit{Malnak}, drew the line. It held that MOVE lacked the character of religion. According to Judge Adams,

\begin{quote}
the MOVE organization…does not satisfy the ‘ultimate’ ideas criterion. Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern…Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism’s Veda, or Transcendental Meditation’s Science of Creative Intelligence. Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more ‘traditional’ theologies.\textsuperscript{99}
\end{quote}

\textsuperscript{95} \textit{Malnak v. Yogi}, ibid at 208-210.

\textsuperscript{96} 662 F.2d 1025 (3d Cir. 1981).

\textsuperscript{97} Ibid at 1026.

\textsuperscript{98} Ibid at 1027.

\textsuperscript{99} Ibid at 1033.
As a result, John Africa was unable to compel the prison authorities to provide him with his “religious” diet of raw food.

It may be that the right result was reached here, but at the expense of some clarity. Judge Adams’ concern in *Malnuk* with fundamental problems of existence seem to be, at least tenably, at the heart of MOVE’s attempt to provide for a peaceful world free of violence. Religious analogues such as morality, mortality, and life’s purpose or meaning, which Adams J. referred to in *Africa*, were not mentioned in *Malnuk* as necessary conditions for an institutional religious order. In my view, in *Africa* he moved beyond analogy to a more substantive approach by attempting to formulate a set of characteristics that identify a religion. This is ultimately misguided. It would be difficult, for example, to imagine Buddhists agreeing on the need for a founding document or credo, the existence of a single morally necessary path, or the commitment to a set of fundamental principles. Much more tricky to assess would be cases such as the Thugees in India, the Sons of Freedom Doukhobours in Saskatchewan and British Columbia, Waco’s Branch Davidians or Japan’s Aum Supreme Truth, whose basic tenets reflect on matters of morality, mortality and end meanings, but which also engage in destructive and even criminal practices.

100 In an even more bizarre case, a defendant who claimed that wearing a “chicken suit” to court constituted “spiritual attire” forming part of his religious belief, and would not wear anything else to court – see *State of Tennessee v. Hodges*, 695 S.W.2d 171 (Sup Ct Tenn., 1985). He was found in contempt of court and ordered to be committed to jail. The court found that the attempts were so clearly not religious that they could not receive protection under the Free Exercise Clause (at 172-173) (quoting from *Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707 (1981)).

101 The Thugees were a group of “believers” in mass murder in India and South East Asia (see Mike Dash, *Thug: The True Story of India’s Murderous Cult* (London: Granta, 2005); the Sons of Freedom were known for nude marching and acts of violence (arson and bombings) against authority (see Spokesman-Review, Spokane, Dec. 11, 1961, pg. 6); David Koresh, the leader of the Branch Davidians in Waco believed in sexual relations with married women and minors and stockpiled a number of illegal weapons; the group became infamous during the 50 day siege in 1993 (see David Thibodeau, *A Place Called Waco: A Survivor’s Story* (Toronto: Harper-Collins Canada, 1999); and the Aum Supreme Truth, believing in hallucinogenic drugs, extortion, and assassination of its critics, and which, ultimately, was responsible for dispersing sarin gas through the Tokyo subway system in 1995 (see Haruki Murakami, *Underground: The Tokyo Gas Attack and the Japanese Psyche* (New York: Vintage, 2001). As Rex Ahdar notes, the only predictable thing about sects and cults in the 21st century is that there will be a proliferation and intensification of apocalyptic and like-minded groups – “The Inevitability of Law and Religion: An Introduction” in Rex Ahdar, ed. *Law and Religion* (Aldershot, U.K.: Ashgate Publishing Company, 2000) at 5.
Finally, in two separate judgments involving euthanasia, we see another form of re-characterization. In *Cruzan v. Director, Missouri Department of Health*, a majority of the U.S. Supreme Court found that there was no constitutional basis to allow a terminally ill person to have life-sustaining treatment withdrawn. In a vigorous dissent, however, Justice Stevens reflected on the nature of euthanasia within the terms of the First Amendment:

[Not] much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience...It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life....The failure of Missouri's policy to heed the interests of a dying individual with respect to matters so private is ample evidence of the policy's illegitimacy.

Six years later, the 9th Circuit Court of Appeals took the same position in *Compassion in Dying v. State of Washington* (a case eventually overturned by the Supreme Court). The words of the eight-person majority signal a strong affirmation of conscience:

Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter [like euthanasia] so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force *their views, their religious convictions, or their philosophies* on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.

Put differently, legislation prohibiting withdrawal of treatment intimates the state’s assertion of one conscience-based position that ignores, or outlaws, other conscience-based positions. These actions are available to all because of an extreme version of non-establishment, whereby a state’s views and philosophies on death cannot be forced on anyone.

The somewhat ambiguous wording could be taken to mean that a state’s views and philosophies cannot be forced on anyone, but this surely would be too broad a reading. Otherwise, the enactment of all criminal laws might be subject to scrutiny as representing a

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103 Ibid at 344, 350.

104 79 F.3d 790 (9th Cir., 1996).

105 Ibid at 839 (Reinhardt J.); emphasis added; citations omitted.
forced philosophical position. The Court must have intended the passage to be modified by limiting it to circumstances involving death. In both cases it is the state’s connection with religion – in the sense that the legislation favours a position that exposes the state to establishment arguments – that enabled the First Amendment clause to be invoked. In *Compassion in Dying* the 9th Circuit suggests a freedom of human agency on a grand scale – beyond religious requirements to little known, little understood actions that can only make sense in the context of being guided by conscience.

What is apparent in most of the U.S. cases that establish any form of conscience-based freedom is that the endorsement of conscience arises out of an inherent conflict between free exercise and non-establishment of religion and not necessarily as an independent freedom on its own. Without the specific protection of conscience in an entrenched bill of rights, United States courts tend to engage in varying levels of sophistry to protect or deny claims that occur at the very limits of what may be considered “religious”. Even in those cases where courts have been sympathetic to unconventional practices or beliefs, the analysis proceeds out of a conventional religious understanding. And yet, with only “religion” expressly protected, it is surprising how far some U.S. courts have pushed the discussion in the direction of conscience.

Regardless, the difficulty of defining religious belief or characterizing religious institutions to accommodate individual conscience provides a good argument for having a separate and distinct freedom of conscience, as found in the Canadian *Charter*. Germany’s Basic Law and Article 9 of the European Convention use such simple formulations. It is to jurisprudence under these that I turn next.

**(b) Conscience in Europe – Germany and Pan-European Jurisprudence**

In Germany, Article 4 of the Basic Law (*Grundgesetz*) sets out a number of freedoms:

1. Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy [*Weltanschauung*] are inviolable.
2. The undisturbed practice of religion is guaranteed.
3. No one may be compelled against his conscience to render military service involving the use of arms.\textsuperscript{106} Conscience is inviolable. The language is intended to ensure the protection of all belief systems, beginning with religious ones, but including as well those described as ideological.\textsuperscript{107} The complex interaction of constitutional provisions in Germany has meant an extremely broad reading of the basic freedom, so as to include, at its heart, three overlapping elements: (i) free religious exercise, (ii) freedom of conscience and the ability to profess a particular philosophy, and (iii) protection of ceremonies of non-established religions and atheists as well as other expressions of religious and ideological life.\textsuperscript{108}

In keeping with this broad reading of the basic freedom, “religion” itself has been defined extremely widely, covering practices that extend the boundary of what many would consider religious. In the Tobacco Atheist Case,\textsuperscript{109} decided in 1960, a convict attempted to bribe fellow inmates to give up their religion by offering them tobacco. As a result of his improper behaviour, he was denied parole. Although the Federal Constitutional Court (FCC) held that his denial of parole was not a breach of religious freedom, it did so on the basis that his behaviour was morally reprehensible. A religiously neutral state “cannot and should not define in detail the content of [religious] freedom because it is not allowed to evaluate its citizens’ beliefs or nonbeliefs.”\textsuperscript{110} His act, of seeking others to abandon their religious beliefs, was defined as an exercise of religious freedom. It was only because he abused the dignity of others that his attempts were not protected since they violated the Basic Law’s general order of values.\textsuperscript{111} In the Jehovah’s Witnesses Case\textsuperscript{112} the FCC was asked to pronounce on whether

\textsuperscript{106} Basic Law for the Federal Republic of Germany (\textit{Grundgesetz für die Bundesrepublik Deutschland}).


\textsuperscript{109} 12 BVerfGE 1 (1960). Cited in Kommer, ibid at 452.

\textsuperscript{110} Kommers, ibid.

\textsuperscript{111} Kommers, ibid.

Jehovah’s Witnesses could qualify for public status (a privilege granted certain religious groups). Because Witnesses in Germany refused to vote in elections, and were therefore considered, by some, to be disloyal to the state, their status was opposed. The FCC held that a religious association is not required to order its behavior such that it conforms to some degree of loyalty towards the state. The concept of “loyalty” was too vague, and too easily turned into a normative requirement demanding specific types of behaviors or even specific doctrinal perspectives. As a result, rules establishing a duty on the part of a religious association to cooperate with the state were unconstitutional. Religious freedom, if it was to have any real content, cannot be constrained by an obligation to obey, or by state imposed sanctions, even though a citizen’s consent to state order is one of the foundations of a liberal democracy. The decision thus allowed, to some extent, the development of illiberal religious orders. The Court’s conclusion was aided by adopting a benign characterization of the Witnesses’ philosophy: as it noted, they did not intend to replace democracy by another state form, or to pursue some radical political manifesto; rather, they were committed to an apolitical concept of life.

This is not to say that the German high court’s lenient view of religious freedom is completely open-ended. In the Muslim Headscarf Case, for example, the FCC held that although the extent to which the rules of Islam require women to be veiled is not relevant, a “common understanding” of the relevant religious community must be taken into account in assessing the scope of religious freedom. What this may mean at the margins is not entirely clear, but at a minimum it would not allow every individual caprice to be treated as an exercise of freedom of religious belief deserving protection.

Despite its expansive interpretation of “religion,” the Federal Constitutional Court has also left room for separate conscience-based freedoms that are not synonymous with religion. It has interpreted Article 2 so that it consists of a “single comprehensive fundamental right which includes…the freedom privately to believe or not believe … [and] the right of individual[s] to

113 Ibid at V.2.

114 Muslim Headscarf Case 2 BVerGE 1436/02 (2003); 108 BVerFGE 282, 284–85 (2003) at para 40 (cited in Kommers and Miller, ibid).
tailor [their] conduct to the tenets of [their] creed and to act in accordance with [their] inner beliefs.”115 By allowing non-belief, and conduct that accords with a widely drawn “inner belief” (which may or may not derive from a religious understanding) the German approach allows for strong forms of both religious and conscience-based freedoms. This is further developed through the interaction of Article 2 with Article 4(3) which, virtually alone among modern state constitutions, expressly protects conscientious objectors by exempting compulsory service where it is against conscience. In the Conscientious Objector I Case, the Court relied on Article 4(3) to examine conscience, but ended up defining it in a way that covers more than just objection to military service: conscience is an “inner moral command” or commitment that is not religious but an “experiential and spiritual phenomenon that absolutely compels a person, in demonstrating his concern for fellow human beings, to commit himself unreservedly to an ideal.”116 The source of the moral command is not relevant to a conscience claim, and may arise from philosophical, ethical, social or emotional considerations (as well as religious ones).

Given the interaction of the various constitutional provisions and the FCC’s interpretation of them, most commentators regard the specific freedom of conscientious objection as just a concrete manifestation of the more general freedom of conscience set out in Article 4(1).117 In any event, conscience stands alongside religion as a distinct and independent freedom in Germany.

As with religious freedom, the limits to conscience-based freedom are constantly being tested. In a very recent series of cases, a small number of German families have sought asylum in Canada and the United States on the basis that they fear persecution, in Germany, for home schooling their children (which is prohibited by law). They cite as reasons for home schooling the need to provide their children with a more religiously centred education. Yet, their argument is couched in conscience-based terms – the matter is all about freedom of conscience. According to them, they would be jailed and lose custody of their children if they

115 Ibid at para 37.
117 See Kommers, supra n. 107 at 458; Von Münch & Kunig, supra n. 107 at 1:335–37.
were required to return to Germany. If the parents’ claims are correct, it raises questions of how far freedom of conscience in Germany can be taken.

Similar questions have arisen in other European countries under the ECHR. Interestingly, in these cases, a relatively sophisticated understanding of freedom of conscience has developed under Art. 9 without reference to conscientious objectors. In its very first case under this provision, the European Court of Human Rights signaled the need to keep the three freedoms of thought, conscience and religion separate:

…freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism


119 Although conscientious objectors have been the most vocal proponents for an independent freedom of conscience in the U.S., and have been used as a basis for creating a comprehensive freedom of conscience in Germany, other European countries have relied less on conscientious objector cases for assessing the nature and scope of a generalized conscience-based freedom. Four main reasons have been posited as to why most of the conscientious objector cases, outside of those from the U.S. and Germany, are of limited value for assessing conscience-based freedoms. First, there is a growing movement amongst international law scholars that conscientious objection has become an independent human right of its own, no longer tethered to that of freedom of conscience simpliciter – see James Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1996). Second, conscientious objection is often singled out in human rights documents for specific protection (as in Article 4(3) of the German Basic Law). As an example, art. 10(1) of the Charter of Fundamental Rights of the European Union protects freedom of “thought, conscience and religion;” art. 10(2) specifically recognizes the “right to conscientious objection.” Thus, unless specific acknowledgment is made of a conscientious objector’s relationship to a more generalized freedom of conscience, as in the Conscientious Objector I case in Germany, these provisions may actually be a detriment to allowing a flourishing of conscience-based freedoms in other areas. Third, and in contradiction to the first two points, is a pervasive ambiguity about conscientious objection: some countries recognize it, others do not; some approach it in a piecemeal fashion, not recognizing it in all situations or the same conditions, or employing varying or inconsistent parameters to assess it. The ICCPR and the ECHR both expressly acknowledge this fact, noting that countries may not recognize conscientious objection (art. 8(3)(ii) of the ICCPR; art. 4(3)(b) of the ECHR). As a result, there is an almost unanimous view that art. 18 of the ICCPR and art. 9 of the ECHR (freedom of thought, conscience and religion) do not include a separate right to conscientious objection, as Lord Hoffmann concluded in Sepet and Bulbul v. Secretary of State for the Home Department [2003] U.K.H.L. 15. At a minimum, the resulting confusion means that the importance of conscientious objector cases to, and their relationship with, general freedom of conscience cases creates uncertainty. Fourth, many of the conscientious objector cases arise in the context of refugee claims, thereby involving issues of persecution or discrimination, which place the exercise of freedom as a secondary matter. Wider concerns regarding the nature and scope of a generalized freedom of conscience are, understandably, often ignored or downplayed.
indissociable from a democratic society, which has been dearly won over the centuries, depends on it.\textsuperscript{120}

Not just added glosses on religious freedom, thought and conscience were recognized as “precious” assets for those whose identity is not bound up with a religious belief. Each of the Article 9 terms were treated as independent freedoms.

Other cases in the courts have affirmed this approach and developed an analytical framework for claims based on conscience. In \textit{R. (Williamson) v. Secretary of State for Education and Skills},\textsuperscript{121} the House of Lords considered the question of whether corporal punishment was protected under art. 9 of the ECHR.\textsuperscript{122} Following a discussion of religious freedom that approved of Iacobucci J.’s approach in \textit{Syndicat Northcrest v. Amselem} (to be discussed in more detail in chapter 4)\textsuperscript{123}, Lord Nicholls moved on to the matter of freedom of conscience. He recognized conscience as separate and independent from religion:

> In the present case it does not matter whether the claimants’ beliefs regarding the corporal punishment of children are categorised as religious. Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom.\textsuperscript{124}

To limit its scope in a manner similar to that carved out for religious freedom, Lord Nicholls held that the freedom must satisfy the same threshold requirements of sincerity of belief from the \textit{Amselem} test, modified due to the language of manifestation contained in art. 9(2) of the ECHR. Thus, to be protected under art. 9, a non-religious belief must “relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs.”\textsuperscript{125} Once this threshold is met, the analysis proceeds by determining the nature and


\textsuperscript{121} [2005] U.K.H.L. 15; 2 AC 246; 2 All ER 1 (“Williamson”).

\textsuperscript{122} [2005] 2 AC 246; 2 All ER 1 (H.L.). The provision mirrors closely the language of the Charter, stating that “Everyone has the right to freedom of thought, conscience and religion…”

\textsuperscript{123} [2004] 2 S.C.R. 551.

\textsuperscript{124} Williamson, supra n. 121 at para. 24.

\textsuperscript{125} Ibid.
scope of a particular claimant’s belief in order to establish whether his or her conduct constitutes manifesting a belief in practice. Where a belief takes the form of a “perceived obligation to act in a specific way,” Lord Nicholls held, “then doing that act pursuant to that belief is itself a manifestation of that belief in practice” which creates the requisite linkage of the act to the belief. In addition, as befits the nature of conscience, he restricted its reach as a freedom claimable only by an individual, unlike religious freedom which can be a group claim. The methodology is thus simple and straightforward. A two-step approach is applied for all freedom claims under art. 9, regardless of whether the perceived obligation is religious or conscience-based. Thus, unburdened of its associations with religious freedoms from other human rights contexts, a contemporary version of “conscientious objection” has arisen outside of the military realm as a result of broadly interpreting art. 9 of the ECHR.

The availability of an independent freedom of conscience has opened the door to interesting claims, notwithstanding that some have not been successful. In Chassagnou and others v. France, a group of landowners sought to prohibit hunting on common land. Under the French system of Loi Verdeille, registered hunting associations can create approved hunting areas by pooling privately held land. Since the areas can be created even over the objections of individual landowners, the system in effect allows some normally exclusive rights of ownership to be transferred to hunters. In this instance, the claimant landowners, attempting to prohibit hunting in a regulated area, raised arguments familiar to conscientious objectors. They claimed that the Loi Verdeille system, which ordinarily estops landowners from preventing hunting on their land, even where they are ethically opposed to it, was incompatible with their freedom of conscience under art. 9 of the ECHR. While the majority of the 17-member panel chose not to address the conscience argument, preferring to find for the claimants on other grounds, Justice Fichbach, in a concurring opinion, addressed the issue of conscience. In his view, conscience is a broad concept, linked to a person’s individual personality, that aids

126 Ibid at para. 32. See also Application 10295/82 v United Kingdom (1983) 6 EHRR 558.


decisions about the type of life a person wishes to lead. He reasoned that, although an individual could not rely on anti-militarist convictions to refuse to pay taxes, one’s “most deeply-held beliefs” could not be ignored where governmental activity is serving primarily a private interest.

In another example, Johnston v. Ireland, Irish laws prohibiting divorce were challenged. Roy Johnston, following the breakdown of his first marriage, began cohabiting with Janice Williams. Due to a provision in Irish law, Johnston was unable to divorce his first wife, and a daughter that was born of the second relationship was therefore deemed illegitimate. Johnston challenged the law, claiming among other grounds that it was a breach of his freedom of conscience. His conscience claim was novel: he maintained that his inability to live with Janice other than in an extra-marital relationship (presumably, therefore, in appearance if not in actuality, less legitimate than a marital relationship) placed him in a position that was contrary to his conscience. A majority of the European Court of Human Rights dismissed that part of the claim in a single paragraph, finding that Johnston’s “freedom to have and manifest his convictions is not in issue” (i.e., he is perfectly entitled to think as he wishes) but that the unavailability of divorce under Irish law cannot be contemplated as a matter of liberty of conscience. The absence of a positive law allowing divorce, in other words, was insufficient to engage a liberty interest. In a dissenting judgment, however, Judge de Meyer held otherwise, noting that “the complete exclusion of any possibility of seeking the civil dissolution of a marriage is not compatible with … the right to freedom of conscience and religion.”

Both judgments are overly simplistic, although Judge de Meyer surely gets it right. It must be cold comfort to Mr. Johnston that he is able to have his convictions, but he must keep them to himself, or at least check them at the door if he resides in Ireland. The absence of a law can just as easily have a negative effect on liberty as the presence of a law. If

\[\text{129} \text{ Ibid at 170.}\]
\[\text{130} \text{ Ibid.}\]
\[\text{131} (1986) 9 EHRR 203.\]
\[\text{132} \text{ Ibid at 222 (para. 63).}\]
\[\text{133} \text{ Ibid at 232 (para. 6).}\]
the law had allowed only atheists to divorce, for example, would that not have infringed on the religious liberty of believers? What if some religions allowed remarriage without state divorce? What if the state forced him to remarry if he wished to cohabit with a new person, but his conscience was against remarriage? The effect on a person whose religious or conscientious beliefs forbid cohabitation is to deny them the benefit of an obvious social good – to allow people to forge relationships of mutual trust and love in a sanctioned union. Of course, the state may have a legitimate interest in ensuring the durability and longevity of marriage vows, but this would need to be asserted under the justification provisions of arts. 15 or 18 of the ECHR.\footnote{Which allow for derogation from rights in certain instances.}

In \textit{Whaley v. Lord Advocate}\footnote{[2004] SC 78 (Outer House).} the claimants sought a declaration that provisions of the newly-enacted Scottish Protection of Wild Mammals Act, criminalizing the use of dogs to hunt wild animals, was outside the legislative competence of Parliament. The Act was aimed squarely at the age-old practice of employing dogs for foxhunting. Jeremy Whaley’s claim was framed on a number of grounds, including that the provision breached his freedom of conscience under art. 9 of the ECHR. He argued that using dogs to hunt and kill foxes was more humane than other methods (such as discharging firearms) since dogs eliminated the likelihood of wounding but not killing foxes (which possibility was reasonably high with firearms). He testified that in 22 years of foxhunting with dogs, he had never witnessed any maiming or wounding; in the two month period since the Act was passed he had seen some foxes wounded or maimed. For Whaley, and his co-petitioner Brian Friend, the morality of killing was linked to their freedom of conscience – the excessive wounding occasioned by the absence of dogs was deeply unsettling to their consciences. Whaley posited his “freedom” as lost to a newly prescribed form of hunting – his conscience could not accept a method of hunting that was immoral. Following the reasoning in \textit{Chassagnou}, Lord Brodie agreed that freedom of conscience is a “developing concept” which may well include matters outside of traditional religious freedom.\footnote{Ibid at para. 73.} He also found the petitioners to be sincere in their beliefs. Nevertheless,
he determined that the petitioners’ claim could be distilled into a freedom “to act in the way that they wish” which was too broad to be guaranteed by art. 9. In fact, given that a person could abstain entirely from hunting, nothing in the Act compelled the petitioners to act contrary to their consciences. On an appeal by Friend alone, the Court of Session agreed with Lord Brodie’s finding on the grounds of conscience, noting only that the belief held is not a “sufficient belief in the Art. 9 sense.”

Brian Friend also joined a lawsuit lodged against provisions of England’s Hunting Act 2004, which, like the Scottish Act, banned the use of dogs for hunting. Most of the claimants framed their arguments on other grounds, but Friend again relied partially on a freedom of conscience claim. May L.J., in a short section devoted to art. 9 of the ECHR, noted Friend’s strong and seemingly genuine convictions. He found, however, that not all opinions or convictions, even if sincerely or deeply held, constitute beliefs for purposes of art. 9. Referring to Lord Nicholls’ assertion in Williamson that a non-religious belief, in order to be protected as a conscience-based right, must be comparable in importance to beliefs normally associated with religion, Judge May characterized fox hunting as a mere recreational pursuit, not on the same level of importance as religion. Friend once again appealed, revising his argument one last time. He stressed how hunting was a pursuit that goes to the core of the human psyche, and that those who do so are exercising their conscience in a way of life that is of similar importance to those following religious beliefs. The court dismissed the argument — although commenting on its ingenuity — by again relying on the Strasbourg court’s finding in Chassagnou that hunting is, at most, a pleasurable and relaxing activity.

137 Ibid at para. 74.
139 Countryside Alliance and others v. HM Attorney General and others [2005] EWHC 1677 (QBD (Divisional Court)).
140 Ibid at para. 250.
141 Ibid at para. 249.
142 [2006] EWCA Civ 817 at para. 177.
These cases all point to situations where the realms of conscience and religion collide, but allow for conscience to be treated differently from religion. They indirectly illustrate how religious practices are often given legitimacy simply because they belong to a known religious tradition. Imagine, for example, if Whaley and Friend had been able to show that it was a valid aspect of their religion to hunt foxes with dogs. Would the activity be received differently? What if the non-land owners in Judge Zupancic’s scenario in Chassagnou held religious objections to hunting? Or, to invert Roy Johnston’s situation, what if his religion allowed divorce and remarriage but Irish law did not? The difficulty of creating a principled approach to the nature of religion and conscience, of assessing the scope of both religious and conscience-based freedoms and ensuring spurious claims are limited, and of crafting an analytical approach in conscience cases that reflects its particularities, are common concerns.

The specific provisions of s. 2(a) of the Charter reveal some similarities to the European experience; Canadian courts have, so far, relied on an admixture of U.S. and European judgments to explore the parameters of freedom of conscience. As in these jurisdictions, a constitutional freedom of conscience for Canada is only just beginning. I turn now to that emerging jurisprudence.
Chapter 4

Conscience in Canadian Law:
The Burl on the Living Tree

Over two hundred years of constitutionalized rights history did not go to waste when the fundamental freedoms were added to the *Canadian Charter of Rights and Freedoms*. The *Charter*’s language avoids the ambiguity of the First Amendment, at least as concerns moral freedoms such as conscience and religion, instead drawing more from documents such as the UDHR and ECHR. Section 2(a), the first of the fundamental freedoms, relies on simple, but comprehensive terms: “everyone has the [fundamental freedom] of conscience and religion.” In addition, religion is also singled out for protection under s. 15, which prohibits discrimination on the basis of a number of listed grounds including religion. With these two sections working hand in hand, the *Charter* arguably provides a more complete picture of rights and freedoms than the U.S. First Amendment text of “free exercise,” “no establishment,” “equal protection” and “due process.” As Bruce Ryder notes, the *Charter* allows for a very sophisticated understanding of “equal religious citizenship,” largely through the interaction of ss. 2(a) and 15.1 To put it another way, s. 2(a) no doubt allows for “liberty of conscience” as that phrase has been understood for centuries. But does the separate appearance of “conscience” in s. 2(a) offer something more?

Freedom of conscience and religion are the first two of eight fundamental freedoms declared in the *Charter*.2 In fact, it is conscience that occurs first of all, before even religion. On that basis alone, conscience arguably deserves recognition as a strong, independent freedom. Irwin Cotler pointed out this possibility shortly after the *Charter* came into force by contrasting s. 2(a)’s text with the constitutional experience across the border: “the express protection for

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2 I count as follows: (i) conscience; (ii) religion; (iii) thought; (iv) belief; (v) opinion; (vi) expression; (vii) peaceful assembly; and (viii) association. One might add freedom of the press and other media of communication as one or even two additional freedoms.
freedom of association and the *specific reference to conscience* as well as religion, should inspire us to develop our own understanding and rights theory." The early years of the Dickson Supreme Court hinted that this would happen, taking the entrenched *Charter* as the catalyst to fundamentally re-shape Canada as a constitutional monarchy, distancing itself from the Court’s approach to the *Bill of Rights* while simultaneously becoming the focal point for envisaging Trudeau’s version of a liberal, secular, multicultural society.

Regrettably, this enthusiasm for change has not extended to judicial interpretation of freedom of conscience. In general, Canadian courts have not fully embraced the conscience branch of s. 2(a), as this chapter will show (despite creative attempts by litigants). Nor has the fact that “conscience” appears in other human rights statutes been of much assistance. A number of provincial human rights codes provided for freedom of conscience, but these too have largely escaped analysis by adjudicators. The dearth of jurisprudence of the content and scope of freedom of conscience, has rendered it a largely undiscovered burl on our living constitutional tree.

Part of the problem must lie in conscience’s all too close association with religion. As discussed in chapter 2, despite some recognition of a difference between the two, the overwhelming view, beginning in the early 17th century and continuing through most of the 20th century, is that they are synonymous. The American influence here is powerful – the idea of liberty of conscience has been connected to religious freedom ever since Roger Williams began writing in the 1600s. Moreover, as was seen in chapter 3 with other international human rights documents, rarely does the word “conscience” appear apart from “religion” in rights texts. That has limited the development of conscience as separate from religion.

This chapter follows from the previous one by examining the place of “conscience” in Canadian laws. The intention at this stage is to continue with a descriptive overview of conscience as it appears in legal doctrine. I first focus on Canadian human rights codes, the

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Canadian Bill of Rights and the Charter, examining debates leading up to the adoption of some statutory provisions referring to conscience as well as those related to the text of the Charter itself. I then explore in detail the case law in Canada on conscience. As in chapter 3, doctrinal approaches to conscience in Canadian law follow similar patterns to those in other jurisdictions. I therefore employ the same nomenclature used earlier: Undifferentiated Conscience is where religion and conscience are treated similarly or as meaning the same. This occurs (i) by exclusion, where “conscience” is left out of a statutory or quasi-constitutional texts; (ii) by omission, where debates over text that includes the word “conscience” show little or no inclination to treat it as an independent right deserving separate protection; and (iii) by interpretation, where freedom of religion, as assessed judicially, is assumed to cover the entire field. On the other hand, Distinct Conscience is where conscience’s independence is recognized, (i) by design, where constitutional or statutory debates over the term acknowledge a difference; (ii) by application, where ordinary rules of statutory interpretation suggest assigning independent value to different words; and (iii) by judicial interpretation, where conscience is expressly adverted to as reflecting a category of moral compulsion separate and apart from religion.

1 Undifferentiated Conscience in Canadian Law

1.1 The Absence of “Conscience” Simpliciter

In some ways the Charter is not a particularly exceptional human rights document; while its entrenched constitutional status gives it weight and permanence, most of the protected rights contained therein are not novel or surprising. They appear in other human rights codes in Canada, and, as was seen in chapter 3, in other jurisdictions. Including “conscience” as a protected fundamental freedom, however, puts the Charter in a select group of rights.

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5 For reasons of space, I have not explored all doctrinal uses of the word “conscience” nor have I explored every decision that may pronounce on aspects of conscientious belief. For example, I did not review debates leading up to the adoption of the Canadian Bill of Rights as well as cases on blasphemy or civil marriage. As my goal is to show, ultimately, that inclusion of conscience in the Charter is deserving of further development. Of course, examination into these other areas deserve further research.
documents in Canada. Most Canadian human rights statutes do not single out conscience for protection.

Provincial acts first began prohibiting discrimination on the basis of religion or worship in the early 1930s. Early forms of protection were frequently included within a larger regulatory scheme. Housing, insurance or employment statutes often led the way. For example, section 4 of the *Insurance Act, 1932* (Ontario) added the following:

> Any licensed insurer which discriminates unfairly between risks within Ontario because of the race or religion of the insured shall be guilty of an offence.\(^6\)

It was not until later that provinces began passing more specific anti-discrimination legislation in codified form, beginning with Saskatchewan in 1947.\(^7\)

The language of human rights codes throughout Canada is similar, but not identical. All federal, provincial and territorial human rights codes prohibit discrimination on grounds that include religion,\(^8\) normally, because of “religion” or “religious belief.” Yet, there are a few variations. Ontario’s Human Rights Code, for example, does not refer to religion, instead forbidding discrimination on grounds of “creed” only.\(^9\) In contrast, the *Canadian Bill of Rights* (“*Bill of Rights*”) protects freedom of religion as a human right and fundamental freedom and prevents discrimination on the basis of religion.\(^10\) One constant is that in virtually all cases, conscience is absent.

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\(^6\) S.O. 1932, c. 24, s.4.

\(^7\) See, Ontario Human Rights Code, S.O. 1961-62, c. 93; Saskatchewan Bill of Rights Act, S.S. 1947, c. 35, s.3.


\(^9\) Human Rights Code, R.S.O. 1990, chap H.19, at ss. 1, 2, 3, 5, 6, etc.

\(^10\) Canadian Bill of Rights, S.C. 1960, c. 44, s. 1.
As far as I am aware, conscience was never mentioned or discussed in any of the debates leading up to passage of these acts. Even the discussions surrounding the inclusion of religion as a ground of discrimination were largely cursory.\textsuperscript{11} Even the \textit{Bill of Rights}, by protecting only religion and not conscience, did not go as far as international rights documents that existed such as the UDHR.

Excluding conscience from the protections set out in these statutes likely occurred because none of them protect liberty interests – as a group they generally protect against discrimination only. The B.C. \textit{Human Rights Code} is a representative example. Section 8 of that Act holds that, regarding accommodation, a person must not, without justification, discriminate against another because of the “race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.” Each of the other operative provisions in that Act are similarly worded, with only the context of the discrimination changing: from discrimination in publication, to the purchase of property, to wages, and so on. Protecting religious equality but not liberty (such as religious or conscience-based freedom) is a deliberate policy choice. Freedom and equality are two different things, as Isaiah Berlin pointed out.\textsuperscript{12} Freedom may not necessarily lead to equality; we may, for example, decide to sacrifice some liberty in order to prevent glaring inequality. “Conscience” does not fit within those traditional categories of discrimination that have existed – it may therefore be slightly more difficult (although not impossible) to conceive of “conscience” as an equality right rather than a freedom. For one, there is not a strong history of persecution or discrimination based on purely conscience-based acts – as discussed in chapter 2, the historical connection with religion means that most examples of persecution are usually associated with religious belief; likewise, it is religion, not conscience, that is usually listed as a ground in anti-discrimination statutes. Moreover, for some reason legislators seem wary of opening up legal language to spurious claims. For example, adopting language from s. 8 of the B.C. \textit{Human Rights Code} above, situations where someone is denied “any

\begin{footnotesize}
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\item I reviewed the Hansard debates for all provincial human rights statutes cited in n. 7, supra, prior to enactment. No mention of conscience was found.
\item Isaiah Berlin, “Two Concepts of Liberty” in \textit{The Proper Study of Mankind: An Anthology of Essays} (London: Pimlico, 1998) 191. Berlin leaves no doubt as to this differentiation: “Everything is what it is: liberty is liberty, not equality nor fairness nor justice or culture, or human happiness or a quiet conscience.” (at 197).
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accommodation because of the . . . conscientious beliefs of that person” could be seen to be problematic. An individual’s conscience, if construed broadly, could be offended in almost any situation where he or she is denied a place to stay. Religious beliefs, in short, act as a more clearly understood brake on extravagant claims. In a way, however, as will be shown later on in this chapter, the absence of “conscience” from statutory provisions dealing with discrimination actually helps the claim for its independence in those situations where it is expressly listed as a freedom.

Obviously, there is limited value in comparing human rights legislation that does not expressly include conscience, with the Charter’s s. 2(a), which does. Nevertheless, it is instructive knowing that I was not able to uncover, in provincial rights Codes or the federal Bill of Rights, any debate related to whether the express term “conscience” should be included as a possible ground for discrimination, or not. Equally important, although more disheartening perhaps, are those instances where conscience is expressly protected in statutory instruments, but its inclusion entailed a similar lack of debate. In such cases, the omission of discussion again tells us little as to whether the word is to carry any meaning independent of religion, and if so, its nature and scope. These occasions are examined next.

1.2 The Omission of Debate About “Conscience”

Some provincial and territorial human rights statutes do include conscience as a distinct freedom. Saskatchewan, Quebec and the Yukon have all adopted some form of protection for liberty interests or against discrimination that include mention of conscience. Section 3 of the Saskatchewan Bill of Rights Act states that

Every person and every class of persons shall enjoy the right to freedom of conscience, religion, opinion and belief.\(^\text{13}\)

Quebec’s Charter protects

freedom of conscience, freedom of religion, freedom of opinion” and others.\(^\text{14}\)

\(^{13}\) S.S. 1947, c. 35, s.3.
The Yukon *Human Rights Act* is the most expansive, as far as religious and conscientious protection goes. It is organized into two substantive rights sections, part one being the “Bill of Rights” and part two “Discriminatory Practices.” In its Bill of Rights section, the Yukon Act establishes the freedom of religion and conscience. Discriminatory practices include the grounds of “religion or creed, or religious belief, religious association or religious activity.” In addition, Alberta attempted to include conscience in its failed *Alberta Bill of Rights Act* in 1947. Nevertheless, despite the appearance of “conscience” in all these documents, there is little in the legislative debates suggesting that much thought was actually given to it as a distinct freedom. To show the extent of the omission, I turn to a more detailed examination of debates surrounding the *Alberta Bill of Rights* and Saskatchewan’s 1947 *Bill of Rights Act*.

*Alberta*: In his Speech from Throne on February 13, 1946, Premier Ernest Manning highlighted a legislative initiative that would follow: “To this end, legislation designed to establish by law certain fundamental rights and responsibilities of citizenship will be submitted for your consideration. This legislation will embody measures designed to ensure all citizens an opportunity to enjoy a full measure of democratic freedom and to attain a reasonable standard of social and economic security.” A little over a month later, Manning introduced the comprehensive *Alberta Bill of Rights* which provided for a number of rights and freedoms related to “citizenship” of Alberta, including freedom of worship, expression, assembly, freedom to engage in work of one’s choice, acquire property, refuse to do or not do any act unless contrary to law, etc. The worship provision included a reference to conscience:

> It is hereby declared that every citizen of Alberta shall be free to hold and cherish his own religious convictions and to worship in accordance with the dictates of his own conscience.  

14 See Quebec *Charter*, s. 3. It is worth noting that the language adopted in the Quebec *Charter*, in both French and English, provides for a more clearly demarcated separation of each freedom – compare the use of “freedom of conscience, freedom of religion” in the Quebec *Charter* to the Canadian *Charter*’s “freedom of conscience and religion” in s. 2(a).

15 See Yukon Human Rights Act, s. 3.


17 Ibid at s. 3.
All these basic liberties were set out in Part I of the Act; Part II was a comprehensive program of Social Credit reform, including provisions related to work, loans and credit.

Little heed was paid to conscience in the discussions regarding the Bill. In fact, the majority of the debates centered on the Part II provisions, with only a few speeches devoted to rights and liberties, and the bulk of those simply providing a broad overview of the importance and distinctiveness of Alberta’s approach.

Religion and conscience barely rate a mention. Nothing was said in Premier Manning’s introduction to the Bill on March 26, 1946. A brief reference by the Minister of Public Works, W.A. Fallow, to the codification of the basic liberties set out in Part I notes that Alberta is the only place in the Anglo-Saxon world where such liberties are so clearly stated. Later that same day, Manning discussed the specific provisions on liberty, stating only that most laws are filled with restrictions on the liberty of the individual. In the next day’s debates, Manning elaborated on the general need for rights protection: “There has been a trend in recent years to infringe on the rights of people. Eternal vigilance is the price of freedom.”

Then comes the only reference to religious freedom in the entire reported debates on the Bill. Mr. A.J.E. Liesemer, a C.C.F. member of the legislature from Calgary, said that freedom of religion was “voiced in the Atlantic Charter” and is therefore an unnecessary inclusion in the Bill. As reported in the Scrapbook Hansard, this provoked a “storm over the application of these words which was closed when Harper Prowse (Army) said ‘I submit no one knows just what Churchill and Roosevelt did mean in the Atlantic Charter.’” In fact, over the course of three readings, little discussion seems to have occurred over any of the freedoms and liberties

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18 “Manning promises grim fight for Alberta Bill of Rights”, Alberta Scrapbook Hansards, March 26, 1946. It should be noted that direct transcriptions of legislative debates did not begin in Alberta until 1972. Prior to that the Scrapbook Hansards, as they are called, reported on selected aspects of the proceedings in the Alberta legislature. Thus, there are possible questions over accuracy. Nevertheless, the originality of the Bill of Rights made it sufficiently controversial that broad interest was assured – passage of the Bill through the legislature was tracked very closely, and the speeches of the participants quoted at length. It is unlikely, therefore, that a speech dissecting religious freedom or conscience was made by not reported.

19 Ibid.

20 “May alter clause in Bill of Rights,” Alberta Scrapbook Hansards, March 27, 1946.

21 Ibid.
set out in Part I, including s. 3 on religion and worship. The Bill was ratified by the legislature on March 28, 1946: some of the listed liberties were specifically read out, but nothing was said as to how conscience fits within religious freedom; in fact, there were no questions on the inclusion of “conscience” in the Bill.\textsuperscript{22}

The \textit{Alberta Bill of Rights}, while arguably ahead of its time, never became law. It was rendered ultra vires by a decision of the Privy Council in \textit{Alberta (A.G.) v. Canada (A.G.) (Bill of Rights)},\textsuperscript{23} the Court holding that Part II of it contained matters that were largely in respect of banking, and therefore outside the power of the Alberta legislature. Since the Privy Council also found that the whole statute represented a unified policy approach, so that the offending part was not severable from the remainder, the entire \textit{Alberta Bill of Rights} had to be struck down. No subsequent Alberta government has ever attempted to repeat Manning’s experiment by passing a comprehensive rights code that includes conscience. Of course, it is possible that even the inclusion of the two terms was not meant to imply anything beyond a synonymous linking of conscience with religion. In any event, Alberta’s current \textit{Bill of Rights} protects religion only.\textsuperscript{24}

\textit{Saskatchewan}: Saskatchewan was the first jurisdiction in Canada to pass a comprehensive regime that protected fundamental freedoms such as conscience and religion. In 1947, one year after Alberta’s attempt (and one year before the United Nations adopted the Universal Declaration of Human Rights), J.W. Corman, the Attorney General for the province, introduced the \textit{Saskatchewan Bill of Rights Act}.\textsuperscript{25} It was the first general law in Canada to prohibit discrimination and protect various civil liberties. It gave to all persons the right to freedom of conscience, religion, opinion and belief at the same time as prohibiting discrimination in accommodation, employment, occupation and education. To this day,

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\textsuperscript{22}“Alta Bill of Rights Act is Ratified by Legislature,” Edmonton Journal, March 28, 1946.
\textsuperscript{23}[1947] 4 D.L.R. 1 (P.C.).
\textsuperscript{24}R.S.A. 1980, chap. A-14, s. 1.
\textsuperscript{25}1947, S.S. 1947, c.35 (“Saskatchewan Bill of Rights”).
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Saskatchewan remains one of only two provinces (Quebec being the other) that provides protection against discrimination while promoting certain fundamental liberties.

The Saskatchewan Bill of Rights was inspired by Saskatchewan Premier Tommy Douglas. He saw a need to provide for fundamental rights and liberties, to protect them from abuse and exploitation by other individuals, private institutions and government. In many ways, it was ahead of its time: requests for copies of its rights-protecting language came from around the globe.

On the other hand, the role that “conscience” played in the Saskatchewan Bill of Rights is less clear. The legislative debates are largely silent in respect of freedom of conscience. Only two legislative members discussed the concept of entrenched freedoms: Social Welfare Minister Mr. D. S. Valleau noted the four freedoms worth protecting – freedom from want, from fear, freedom of expression and freedom of religion – but failed to mention conscience. “In a world of education and wisdom,” he argued, “freedom of expression and religion do not have to be stated.” Mr. P.J. Hodge (Member for Rosthern) went a little further – his speech was the only one to mention freedom of conscience in all of the public debates surrounding the proposed Act. Referring to the fact that the Saskatchewan Bill of Rights provides “the right to freedom of conscience…and expression,” he attempts to point out problems with these newly granted rights:

> But, after listening to the radio address of the Attorney General, where he intimated that people who did not have the same political philosophy as himself; and so on, that there should be a

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26 See Doris French Shackleton, *Tommy Douglas* (Toronto: McLelland and Stewart, 1975). As Shackleton notes, the Bill had an immediate effect in Saskatchewan: shortly after its passage an American dance hall owner in North Battleford was reprimanded for refusing entry to a black railway porter. The owner was advised that it was no longer lawful in Saskatchewan to bar “negroes from establishments” (at 198).

27 Ibid.

28 These freedoms were first declared in the Atlantic Charter, see Douglas Brinkley and David Facey-Crowther, eds., *The Atlantic Charter*, (Palgrave-McMillan, 1994).

29 Legislative Assembly of Saskatchewan, Fourth Session, Tenth Legislature, 37th day, March 21, 1947, Second Reading of Bill 65, *An Act to Protect Certain Civil Rights*. 
court established for them, they should be tried if they doubted the sincerity of those
statements.\footnote{30}{Ibid.}

One can only guess at what Mr. Hodge intended by this statement; nevertheless, it is not a
considered reflection on the nature of conscience or the ways in which it differs from religion.
It represents the entire extent of discussion over the term “conscience.”\footnote{31}{Ibid.} So, while to this day
the Saskatchewan Bill of Rights remains a testament to Saskatchewan’s progressive
commitment to human rights, it unfortunately contributes nothing to the question of how
freedom of conscience may be treated distinct from religion.\footnote{32}{Ibid.}

Thus, while some provinces’ statutes expressly call for freedom of conscience, legislative
discussions surrounding its inclusion have, without exception, been negligible. Conscience is
either discounted, assumed to be very similar to religion, or ignored. In none of the debates
that led to freedom of conscience being adopted in provincial rights instruments was
consideration given to conscience as a separate concept, different from religion. Nor were the
contours of conscience-based freedom explored or even considered. As will be seen, debates
over the provision of “conscience” in s. 2(a) of the Charter are not altogether different,
although, since there was one occasion where conscience was singled out for a short
discussion, I have treated the Charter as sufficiently distinct from provincial attempts as to
include it as Distinct Conscience (Category 2) discussed below. In the next section, however, I
complete the examination of Undifferentiated Conscience by reviewing Canadian
jurisprudence treating religion and conscience as synonymous.

\footnote{30}{Ibid.}

\footnote{31}{Ibid. Critics of the Saskatchewan Bill of Rights found fault with it, but not over the inclusion of a religious and
conscience-based freedom. Mr. A.W. Embury (Representative for Mediterranean Territory) accused the Douglas
government of totalitarian socialism, but ignored the religious clause. “[T]his Bill is a callous, cynical piece of
socialist whimsy or political preference,” he railed. “It’s a sort of a general anaesthetic administered to the body
politic while the painful operation of socialism is performed on them.”}

\footnote{32}{Its innovation is perhaps best captured in the slightly overstated speech of Minister Vallee’s: “I feel that …we
are playing a major part in the affairs of this world…. [it is] possibly the most important Bill that [has] ever come
before this House” (ibid).}
1.3 Undifferentiated Conscience in Jurisprudence

Pre-Charter: A limited number of cases referring to conscience preceded the constitutionally entrenched right of conscience in 1982. Many dealt with the swearing of oaths in legal proceedings. In *Frank v. Carson* the Upper Canada Court of Common Pleas determined that Jews may swear an oath in a manner that is suitable to their religion: “The form of administering the oath is of no consequence in law, so long as it is administered in such form and with such ceremonies as the parties declare to be binding on their consciences. The commission, therefore, should be adapted in its terms to the rules of the law.” The point was that anything binding on one’s conscience carried some moral weight and assumed a level of seriousness that approaches a religious conviction.

Other cases mentioning conscience centred on the scope of religious practice and the extent of legal regulation of that practice. In *Bishop of Columbia v. Cridge*, the British Columbia Supreme Court had to decide whether the Church of England could prohibit Reverend Edward Cridge, a former clergyman, from preaching or officiating. The court referred to conscience a number of times, declaring at one point that, as in England, there is unlimited freedom of conscience in Canada. Further, everyone is at liberty to “preach what he likes, and where he likes” and is not forced to belong to any church or society which a person’s conscience disapproves. At the same time, freedom of conscience does not prohibit a church from ensuring that a person follows its internal laws before paying him or her for preaching. Likewise, in *Reference Re. Marriage Act (Canada)* the Supreme Court of Canada found a federal marriage law, which deemed valid any marriage performed by a provincially authorized person, to be ultra vires. In the course of his reasons, Davie J. examined article 129

34 Ibid, at para. 52.
36 Ibid at para. 12.
37 Ibid.
38 (1912), 46 S.C.R. 132.
of *Marriage Act*,\(^{39}\) which allowed those authorized by law to solemnize marriage the option to refuse to do so in certain cases (the “conscience clause”): “no officers can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.” Justice Davie reasoned that, in view of the unrestricted breadth of an officer’s power to marry, the clause is reasonable. It would not be right to compel a priest or clergyman to celebrate a marriage that his church forbade him to celebrate. It is evident here that the Court considers a person’s conscience to be bound up with his or her religion. The “conscience clause” only makes sense in a religious context.

Many cases further illustrate the age-old link between conscience and religion discussed in chapter 2. None pay much more than lip service to conscience, treating it synonymously with religious freedom. In *Chaput v. Romain*,\(^{40}\) Taschereau, J. (as he then was) declared that the Canadian state neither establishes nor compels religion. He concluded by saying [translation]: “All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. *The conscience of each is a personal matter and the concern of nobody else.*”\(^{41}\) In other words, religion is inextricably tied up with a person’s conscience, and is none of the state’s business. In *Chabot v. School Commissioners of Lamorandière*\(^{42}\) a similar connection is shown. The Quebec Court of Appeal held that the Quebec *Education Act* could not extend so far as to deny the claimant’s right to control the religious education of his children. The decision allowed Chabot, a Jehovah’s Witness, to compel the school authorities to accept his children but exempt them from Roman Catholic religious instruction. Casey J. referred to religion as an aspect of an individual’s conscience, noting:

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\(^{39}\) R.S.C. 1906, chap. 105.


\(^{41}\) Ibid at SCR 845 (emphasis added).

\(^{42}\) (1957), 12 D.L.R. (2d) 796 (Que. C.A.).
What concerns us now is the denial of appellant’s right of inviolability of conscience, a denial that is coupled with or effected by…active interference with his right to control the religious education of his children.\textsuperscript{43}

There is no doubt that in these cases conscience is being used within a religious context. Of course, it is possible to argue that the cases do not preclude the possibility of conscience being treated more broadly – given that the factual backdrop to the case was religious, it is possible that “conscience” was employed simply to reflect a form of religious belief. Put differently, perhaps the cases establish that conscience is a necessary component of religious belief, but is not exclusively the province of religion. Yet, to my knowledge, there are no examples of pre-

Charter judicial decisions where conscience is employed in this way.

The connection between religion and conscience also leads to clashes between the two, albeit again in the context of conscience as a reflection of religious belief. In Donald v. The Board of Education for the City of Hamilton,\textsuperscript{44} for example, two school children of Jehovah’s Witnesses were suspended because they refused, on religious grounds, to sing the anthem, repeat the pledge of allegiance and salute the flag. The Public Schools Act at the time allowed pupils to exempt themselves from any exercises of “devotion or religion.”\textsuperscript{45} In oral argument, the Witnesses sought to establish that it is not for the state to “decide as regards [students’] consciences. The singing of the anthem and the salute of the flag are devotions to religion.”\textsuperscript{46}

Although more properly characterized as a freedom of religion case, the Ontario Court of Appeal treated the Jehovah’s Witness students in a similar manner to conscientious objectors. That the appellants “conscientiously believe the views which they assert,” the Court stated, “is not … in question.” The boys’ conduct did not, therefore, injure the moral tone of the school.\textsuperscript{47} Again, however, the Court seems to accept the argument only because the Witnesses’

\textsuperscript{43} Ibid at 807.

\textsuperscript{44} [1945] O.R. 518 (C.A.).

\textsuperscript{45} R.S.O. 1937, c. 357, ss. 7(1).

\textsuperscript{46} Donald, supra n. 44 at 520.

\textsuperscript{47} Ibid at 525, 526.
conscience existed through their own religious convictions. It did not spring out of an independent moral universe unconnected to religion.\textsuperscript{48}

The paucity of pre-Charter cases examined seem to exhibit a trend toward ignoring conscience as distinct from religion. Even with the advent of the Charter and the express recognition of conscience in s. 2(a), conscience-based freedom has faced an uphill struggle to be recognized. Although, as expected, there may be a numerically more significant number of cases under the Charter, most still fit within Category 1, where conscience-based freedoms have either been ignored or treated no differently from religious freedoms.

Charter Decisions: The earliest cases on s. 2(a) consist largely of attempts to remove some of the vestiges of the old, “shadow establishment” that existed in the religious realm; little discussion occurred over the word “conscience.” For example, in the first test of s. 2(a) of the Charter, \textit{R. v. Big M Drug Mart},\textsuperscript{49} the Supreme Court of Canada largely ignored the matter of conscience, since the case was easily decided on the basis of freedom of religion. In the prior judgment at the Alberta Court of Appeal, Belzil J.A.’s dissenting opinion reflects a typical Category 1 approach to conscience. “For the present purposes the word ‘religion’ added in Article 2(a) [sic] of the Charter can be treated as synonymous with ‘conscience,’” he argues, as freedom of religion “secured by the Canadian Bill of Rights…has the same meaning as the ‘freedom of conscience and religion’ guaranteed by the Charter.”\textsuperscript{50} In saying this, Justice Belzil adopted the Attorney General for Alberta’s argument that the word “religion” in the Bill

\textsuperscript{48}As a final example of one of the more outrageous decisions (obviously a product of its time), Chief Justice Sloan of the British Columbia Court of Appeal linked religion, ideology and conscience together in a disquisition on communism in \textit{Martin v. Law Society of British Columbia} [1950] 3 D.L.R. 173 (B.C.C.A.). Notably, at para. 17 he stated: “Marxism exercises a strange power over its adherents. The moral needs of man which Marxism forbids to be expressed in terms of human ideals, are injected instead into a mechanistic conception of politics to which they impart the force of a blind passion somewhat like that which inflamed the minds of Nazi youth during the Hitler regime. Communism is a complete philosophy of life. It wishes to be not only a state but a church judging the consciences of men. … This was illustrated in our own Canadian “spy trials”, which disclosed that some Canadians became so indoctrinated with Communist ideology, that they convinced themselves they should secretly befriend Russia even to the extent of doing irretrievable harm to their own country.”

\textsuperscript{49}[1985] 1 S.C.R. 295.

\textsuperscript{50}[1984] 1 W.W.R. 625 (Alta. C.A.) at paras. 97, 103.
of Rights should be treated the same as “conscience and religion” in the Charter. There is, at best, only a slight difference, the A.G. maintained, as the concept of freedom of conscience is included in the concept of freedom of religion “in any event.”

Belzil J.A. bolstered his reasoning by referring to Black’s Law Dictionary where the right of conscience is defined as equivalent to religious liberty or freedom of conscience. Chief Justice Dickson seemed to adopt some of this point of view in the same case, when, in the context of showing a strong connection between religion and conscience together, he said:

Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of “freedom of conscience and religion”.

Even the case which represents the Supreme Court of Canada’s strongest endorsement of conscience as an independent freedom, R. v. Morgentaler, was, for the majority, decided without reference to conscience. The majority found that the abortion provisions of the Criminal Code offended s. 7 of the Charter and so ignored s. 2(a) arguments. It was only Justice Wilson’s impassioned concurring opinion that spoke to a comprehensive vision of conscience-based freedom under s. 2(a).

In 1993, the Supreme Court had occasion to decide whether the assisted suicide provisions of the Criminal Code were unconstitutional. It is hard to imagine a situation more conducive to a serious discussion about conscience than the question of whether one can take one’s own life. Although the decision to terminate life is not likely to engage religious freedom, since many religious tenets speak to preserving the sanctity of life, it could well fall within a matter of

51 Factum of Appellant at the Alberta Court of Appeal, in Supreme Court of Canada Record of Case, January 19, 1984 at para. 21.

52 Note, however, that Chief Justice Dickson in Big M Drug Mart made reference (in obiter) to the possibility of conscience as an independent freedom. His views on it followed the majority decision of Justice Laycraft at the Alberta Court of Appeal which recognized conscience as a distinct liberty under s. 2(a) – which aspect of both cases is discussed below – see infra at n. 97 and accompanying text.

53 Big M Drug Mart, supra n. 48 at para. 120.


55 Wilson J’s decision in Morgentaler is discussed in more detail at infra n. 120 and accompanying text.
one’s conscience to determine when life ends. As Ronald Dworkin has argued, the conviction that human life is sacred, through our conscience, may paradoxically be a compelling reason to allow euthanasia.  

In the case, *Rodriguez v. British Columbia (A.G.)*, Sue Rodriguez, a terminally ill patient who had amyotrophic lateral sclerosis (or Lou Gehrig’s disease), wished to arrange for a qualified physician to provide her with the technological means to end her own life, once she no longer wished to live. Surprisingly, conscience-based arguments were not invoked by most of the key participants in the litigation. At trial, the only *Charter* provisions in issue were ss. 7, 12 and 15. Section s. 2(a) was not listed as a ground in any of the constitutional questions posed in the Notice of Motion documents filed with the Supreme Court of Canada. A passing reference to conscience was contained under the heading of s. 7 arguments in Rodriguez’s factum:

15. The Appellant further submits that the principles of fundamental justice are violated and in particular: (a) that the state is interfering with the Appellant’s Charter s. 2(a) right to follow her freedom of conscience.  

Of the nine interveners, including a number of provincial Attorneys General and non-profit coalitions and associations ranging from those promoting euthanasia to those vehemently opposed to it, only the Right to Die Society made mention of the role that conscience might play in a decision involving suicide:

18. In decriminalizing suicide, our society has recognized that an individual should, as a matter of law, be free to choose according to the dictates of his or her conscience, whether he or she wishes to continue to live.  


58 Factum of Sue Rodriguez to Supreme Court of Canada, Applicant’s Memorandum of Argument, para. 15, filed April 13, 1993. The connection between liberty in s. 7 and freedom of conscience in s. 2(a) is worth noting – I address this matter in more detail in chapter 7, infra at text to note 59 and following.

59 Factum of Right to Die Society of Canada, para. 18, filed with Supreme Court of Canada on May 18, 1993.
During oral argument at the Supreme Court, Justice L’Heureux-Dubé raised a question of counsel for the interveners, the Canadian Conference of Catholic Bishops, that hinted of a possible role for conscience to play. She seemed disappointed by its absence from debate:

I suppose you agree with whatever faith you represent that there is a freedom of conscience here. So, is it not a conscience decision? Your own conscience dictates what you are going to [sic] – so nobody has gone into that area too much. Nobody has discussed that.60

The answer was non-committal; Justice L’Heureux-Dubé did not push the point further.61

Unfortunately, these few hints and opportunities were largely swept aside when it came to the decision itself. The majority avoided any reference to conscience at all. In dissent, Chief Justice Lamer casually referred to the importance of freedom of conscience just twice: the question of whether choosing suicide is a right should be answered while “keeping in mind that the Charter has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions.”62 He followed this by quoting, with approval, Dickson C.J.’s statement in Big M Drug Mart that individual conscience lies at the “heart of our democratic tradition.”63 In a separate dissent, Justice McLachlin (as she then was) hinted at how conscience could have been invoked. She avoided characterizing it as a “right to die” case, referring instead to the fact that Sue Rodriguez would “like to live” but because of an incurable disease, will not stay alive for long. McLachlin J. added that “one’s life includes one’s death.”64 These are all fine statements of purpose; however, they all fail to take the concept of freedom of conscience very far at all.

In Rodriguez, the Supreme Court missed an opportune moment to develop a concept of conscience-based freedom. The few references to conscience in the course of litigation remained undeveloped at the final appeal level and in the four opinions rendered by the Court. In the end,

60 Transcript of Oral Arguments at the Supreme Court of Canada, Robert Nelson for Intervener Canadian Conference of Catholic Bishops, on file at the Supreme Court of Canada, filed May 20, 1993, at page 182.

61 Ibid.

62 Rodriguez, supra n. 56 at para. 59.

63 Ibid, quoting from Big M Drug Mart at 346.

64 Ibid at para. 211.
perhaps the only legacy that the case leaves for freedom of conscience comes from Sue Rodriguez herself. In her testimony at trial, she made a plea that only makes sense on the basis of conscience:

Q: Why do you want to be able to exercise your right to commit suicide with the assistance of a physician?

A: I feel that it’s my right, and I want to die with dignity. I just feel that inner guidance tells me that it is the right thing for me to do and I should be allowed to do that.65

As shown in chapter 2, in the words of those such as Mensching and Gandhi, perhaps “inner guidance” is all that can be said about what conscience is, and how that makes it both similar to, and different from, religion.

Rodriguez may be the most conspicuous missed opportunity by the Supreme Court, but it is not the only one. Another case where freedom of conscience could have played a role, but for the majority of judges did not, is B.(R.) v. Children’s Aid Society of Metropolitan Toronto.66 There, a challenge was made to the Ontario Child Welfare Act provisions that allow the state to deem certain children to be in need of protection. During a surgical procedure, Sheena B., a minor, was given blood transfusions contrary to the family’s beliefs as Jehovah’s Witnesses. The parents claimed, amongst other things, that the Child Welfare Act provisions contravened s. 2(a) of the Charter. The majority ignored any arguments based on freedom of conscience. The minority, as discussed further below,67 seemed to countenance a role for an independent freedom of conscience by indicating that the religious freedom of the parents could be in conflict with the freedom of conscience of the child.

65 Transcript of Oral Arguments at the Supreme Court of Canada, Christopher Considine for Appellant Sue Rodriguez, on file at the Supreme Court of Canada, dated May 20, 1993.

66 [1995] 1 S.C.R. 315. A similar and more recent case, also lacking in discussions of conscience is A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 S.C.R. 181. The Court seems to return to conflating the two concepts, going so far as to say that “[t]he protection afforded to freedom of conscience and religion by s. 2(a) of the Charter covers religious practices as well as religious beliefs” (at para. 214) and “the interference with A.C.’s religious conscience far exceeded the ‘non-trivial’ threshold established in Amselem…” (at para. 215).

67 See infra n. 143 and accompanying text.
The last case in this section epitomizes the confusion in this area. In *R. v. Myrridon*\(^68\) at issue was Manitoba’s *Remembrance Day Act* which, like Sunday shopping legislation seen in cases such as *Big M Drug Mart* and *Videoflicks*, effectively prevented shop owners from opening their stores on Remembrance Day. The accused argued that the Act violated his freedom of thought, belief and opinion (less so, expression) under s. 2(b) of the *Charter* by making an analogy to the then recently decided case of *Big M Drug Mart*. Since the preamble of the Act attempts to inculcate certain beliefs in Manitobans, the accused argued that it was a form of compelled belief (albeit not religiously motivated, which somewhat explains his reliance on s. 2(b)). A unanimous Manitoba Court of Appeal held that the Act did not violate s. 2(b) of the *Charter*, but in a concurring judgment, Twaddle J.A., perhaps confused by the accused’s own arguments, tied himself in knots over the two fundamental freedoms granted in s. 2(a) and (b). In one passage he conflates religion and conscience, interpreting *Big M Drug Mart* to mean that “freedom of conscience and religion …[means] freedom from conformity to religious dogma.”\(^69\) In another passage, however, he seems to treat them as distinct, by referring to the protection of “secular beliefs” as part of s. 2(a).\(^70\) The end result is a perplexing mix of fundamental freedoms including religion, conscience, thought, belief and opinion.

This section has examined a sampling of Canadian legal doctrine (both statutory and jurisprudential) where conscience is not mentioned, or when it is, remains undifferentiated from religion. Yet it is also safe to say that the discussion in these cases has never been more than superficial – neither legislative debates nor judicial decisions have dealt with the idea of conscience in anything more than a cursory fashion. The next section examines those instances in Canada where conscience has received distinct treatment. Unfortunately, as will be shown, the idea of conscience as independent from religion has not always been achieved with any more thoroughness.


\(^{69}\) Ibid at para 37.

\(^{70}\) Ibid at para 40.
2 Distinct Conscience in Canada: The Burl Revealed

As shown in the previous section, the Charter is not the first Canadian legal enactment to separate conscience from religion. But whereas the recognition of conscience in some provincial human rights codes seemed to occur without real understanding, a series of statutory enactments dealing with conscientious objectors in Canada tells a slightly different story.\textsuperscript{71}

Over two hundred years ago, in the first legislative attempt to recognize objectors contained in the Militia Act of 1793, the genesis of a distinction between religion and conscience was made. The Act provided in s. 3 that “persons called Quakers, Mennonites and Tunkers (Brethren in Christ) who from certain \textit{scruples of conscience}, decline bearing arms, shall not be compelled to serve in the … militia.”\textsuperscript{72} Although this section required proof of membership in one of the designated churches, signed by a religious authority, it is clear that ability to avoid military service was predicated on conscience, not necessarily on membership in a particular religion, or its doctrines. That this is so becomes clearer in later amendments to the Militia Act. In 1868 the wording changed so as to exempt “any person bearing a certificate from the society of Quakers, Mennonites, or Tunkers or any religious denomination, \textit{otherwise subject to military duty, but who, from the doctrines of his religion is adverse to bearing arms.”\textsuperscript{73} In the newly amended provision, personal conscience, separate and apart from religious belief, was removed, leaving the emphasis on religious denomination (either those listed or otherwise) as the precondition to exemption. Two more changes make the point even clearer: in 1940, the National War Service Regulations established that conscientious objectors could pursue alternative arrangements to service if the “doctrines of his religion” make them averse to combat, and the “tenets of their religion” prohibit such combat. These provisions were amended in 1942 to allow postponement to “any individual conscientiously objecting to the bearing of arms,” thus removing the requirement to belong to a religion in


\textsuperscript{72} Statutes of Upper Canada (23 Geo. III), Militia Act, 1793, s. 3 (emphasis added).

\textsuperscript{73} Statutes of Canada (31 Vic., c.40) Militia Act, 1868, s. 17.
which military service is prohibited.\textsuperscript{74} This series of legal provisions points out how conscience and religion can function separately.

It was not until the enactment of the \textit{Charter} and the entrenchment of a broad spectrum of constitutionalized rights that a serious attempt to differentiate conscience from religion in a context broader than that of national defence, could be made. While the Diefenbaker government had created the first national human rights regime – the \textit{Canadian Bill of Rights} – its perceived failure led to a realization, in the subsequent Liberal governments of Lester Pearson and Pierre Trudeau, that a renewed approach to human rights was a practical necessity if Canada was to become a modern, rights-based democracy. Constitutional entrenchment of rights was seen as the way forward.

From the start, conscience was promoted as one of a number of distinct freedoms, although connected with that of religion. Trudeau first mooted the idea as Justice Minister under Pearson in “A Canadian Charter of Human Rights”\textsuperscript{75}, a policy paper presented at the Federal-Provincial First Ministers’ Conference in Ottawa, February 5-7, 1968.\textsuperscript{76} In the paper, the government laid out its case for a broad, entrenched, rights-based document that would be part

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\textsuperscript{74} Canada Gazette, National War Service Regulations, 1940, s. 18 (Recruits), as amended in 1942.

\textsuperscript{75} The Honorable Pierre Elliott Trudeau, Minister of Justice, Catalogue No. CP 22-568, January 1968 (“A Canadian Charter”).

\textsuperscript{76} While Trudeau was a quietly religious man – he rarely talked about his on Catholic beliefs in public as Prime Minister – his earlier writings sometimes contained references to religious matters, and to conscience, but not a legal freedom of conscience. A few samples are instructive: From his writings in Jacques Hébert’s journal \textit{Vrai}, he once said, “It is in this sense [that life in society requires subjection to governmental order] that one can say that authority, philosophically speaking, comes from God or from the nature of things, since God has created man with a nature that compels him to live in society: subject, that is, to politics. Political authority comes from God in the same sense as the queen’s authority in a beehive comes from God.” (Pierre Elliott Trudeau, “To prevent sedition”, cited in Trudeau, \textit{Approaches to Politics} (Toronto: Oxford University Press, 1970) at 30; “It is the duty of citizens, therefore, to examine their conscience on the quality of the social order they share and the political authority they acknowledge. If the order is rotten and the authority vicious, the duty of the citizen is to obey his conscience in preference to that of authority…So when you teach people to obey authority, you ought to add that it is possible to disobey it with an equally good conscience.” (Trudeau, “Must the tyrant be assassinated,” cited in \textit{Approaches} at 36.); “That is why certain political rights are inseparable from the very essence of democracy: freedom of thought, speech, expression,….assembly, and association….The rights listed are so basic that they are regarded in democratic philosophy as inalienable –that is, to assure the effective participation of all citizens in the development of public policy, these rights must remain vested in each citizen independently of the laws. To guarantee that they will remain beyond the reach of the state, many democratic constitutions have felt the need to include a ‘bill of rights’, treating these rights as in some sense anterior to the very existence of the state.” (“The Right of Protest,” cited in \textit{Approaches} at 80-1.) (Note how religious freedom is not listed as one of Trudeau’s “basic rights!”).
of the patriation of the constitution within Canada. Freedom of conscience and religion appeared as “Political Rights” alongside freedom of expression, assembly and association. Two reasons were supplied for adding conscience as a right. First was to protect non-believers. The paper argued that “consideration could be given” to increasing the traditional freedom of religion to include, “for example,” conscience as a way to protect persons who choose to have no religion. Although the language suggests some initial hesitancy, the government never wavered from its position in all subsequent papers and drafts of the Charter. In fact, by the late 1970s in a policy paper entitled “Constitutional Reform: Canadian Charter of Rights and Freedoms” Otto Lang, Minister of Justice, stated unequivocally that “freedom of conscience is to protect those who choose to have no religion.”

The second reason proffered for including conscience was more peculiar. Referring to previous Supreme Court rulings such as Robertson and Rosetanni v. R. and Henry Birks & Sons v. City of Montreal, in which the Lord’s Day Act was held not to deny one’s freedom of religion, Trudeau noted that “this is not to say that such limitations are consistent with freedom of conscience.” In other words, he seems to be making the point that the legislation could be subject to attack if there were a fundamental freedom of conscience on the books. Given that the Lord’s Day Act was federal legislation, and could have been amended or rescinded by the majority government of the day, it is not clear why this should be so. Nevertheless, as noted, the federal government’s desire to include freedom of conscience in an entrenched Charter was consistent from the outset – unfortunately, what the concept actually meant was largely glossed over.

77 A Canadian Charter, supra n. 74 at 55.


79 Ibid, at page 5.


83 A Canadian Charter, supra n. 74 at 56.
2.1 Debates and the Text of the Charter

*The Formation of a Distinct Conscience*: Just as with international human rights documents and other provincial statutes, the inclusion of conscience in the *Charter* raised virtually no concerns. It was not for lack of opportunity. In all sixteen federal drafts of the *Charter*, the fundamental freedom of religion was juxtaposed with “conscience” each time (in other words, “religion” never appeared without “conscience”). In four volumes of testimony produced by the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (“Special Joint Committee”), comprising over 5000 pages of text, “conscience” appears only a handful of times, most often simply accompanying religion in a reference to the

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complete s. 2(a) phrase.\(^8^5\) The only sustained discussion on conscience came in the 42\(^{nd}\) session when Member of Parliament Svend Robinson objected to the reference to God in the preamble, which Jake Epp had proposed in amendments made on January 20, 1981. In debate the next day, Robinson compared the preambular reference to “God” unfavourably with the fundamental freedom of conscience appearing in section 2:

Now, the 1960 Bill of Rights did not contain one fundamental freedom which is contained in the proposed Charter of Rights. That proposed freedom is the freedom of conscience, Mr. Chairman – a freedom which is recognized in the International Covenant on Civil and Political Rights which was, of course, enacted well after the Diefenbaker Bill of Rights… What that means, of course, is that we, as a dualistic society, respect diverse viewpoints; we do not entrench one particular religion; indeed, we do not entrench any religion at all.

We leave Canadians free to choose for themselves on the basis of their own consciences… The proposed preamble would not reflect that reality…\(^8^6\)

On the day after that, David Crombie noted that Robinson’s objection was based on the fact that a lot of people do not believe in God.\(^8^7\) Other than this single, short-lived, exchange, the concept of conscience was ignored throughout the 12 weeks of hearings. It could be said that “freedom of conscience” thus simply slipped into acceptability as one of a number of fundamental freedoms.

A somewhat similar story emerges from the briefs submitted to the Special Joint Committee, although one or two exceptions stand out. Only three submissions speak in any detail to the matter of conscience as a potential fundamental freedom, and all of them are opposed to the concept.\(^8^8\) Concerns about freedom of conscience in matters of church employment were put forth by the Canadian Council of Catholic Bishops, who feared that Catholic institutions’ requirements that staff be of the “Catholic faith and conform to a lifestyle consonant with

\(^8^5\) Senator Gil Molgat and Mark MacGuigan, Chairs, Special Joint Committee on the Constitution of Canada (Respecting the Document entitled “Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada), Proceedings, 1980-81; 1\(^{st}\) Session, 32\(^{nd}\) Parliament (Ottawa: Queen’s Printer, 1981).

\(^8^6\) Ibid, 42\(^{nd}\) Session, January 21, 1981 at 42-41.

\(^8^7\) Ibid, 43\(^{rd}\) Session, January 22, 1981 at 43-45.

\(^8^8\) All told, 914 briefs were submitted to the Committee. These are only available at the Library and Archives of Canada (although 82 digitized briefs are available at “Canada’s Rights Movement: A History”, http://www.historyofrights.com/primary_committee.html (accessed October 4, 2010)).
Catholic morals” could be perceived as a denial of freedom of conscience under the proposed s. 2. More telling are the worries expressed by the Canadian Association of Chiefs of Police and the Canadian Association of Crown Counsels. The Chiefs of Police declared that the words “of conscience” in the proposed s. 2(a) were vague and unnecessary. For them, the risk lay in courts interpreting the freedom overly broadly, so that some sections of the criminal law, particularly those related to drug and morality offences, could be held to be unconstitutional. The Canadian Association of Crown Counsel questioned the necessity and wisdom of including conscience as a fundamental freedom, “particularly its placement as an equivalent of religion.” They argued that if conscience were to be considered a freedom, it belonged with the list of expressive-type freedoms guaranteed in s. 2(b), although in the final analysis they argued it was not necessary there either. Thus, in the public’s eye, the only troubling aspects of a proposed freedom of conscience were that it could be interpreted to mean the freedom to do anything one wished (mirroring David Richards’ overly broad approach to freedom of conscience wherein he advances the idea that snorting cocaine could be considered an act of conscience) and that it might be seen as a freedom that stands on an equal footing with religion, which offended those who believe that religion should be singled out for special treatment. But the criticisms represent whispers in the wilderness; the public was overwhelmingly silent on the idea of conscience, at least on the evidence of submissions made to the Committee.


92 See David Richards, Tolerance and the Constitution (New York: Oxford University Press, 1986) at 75-77. See also, infra, chapter 7 under the section on “Floodgates”.

93 One other submission worth noting is that of Professor Noel Lyon of the Faculty of Law at Queen’s University, who offhandedly remarked that freedom of religion is simply the way we have historically defined freedom of conscience, and since “conscience” is formulated more broadly, it is the preferred term – submission made Nov. 21, 1980 at 9.
For the most part, the provinces also left the matter alone. Virtually all the provincial draft proposals echoed the federal “conscience and religion” formulation, again without further comment or debate. In one inexplicable instance, however, “conscience” was dropped. A draft titled “The Canadian Charter of Rights and Freedoms, Provincial Proposal (In the Event That There is Going to be Entrenchment)”, submitted significantly far along in the process, excluded the word “conscience” so that the fundamental freedom language was changed, for the first time, to read: “2. The [Charte] recognizes the following rights and freedoms…(a) freedom of religion.” The tabular comparison of drafts to that point notes that the provincial position on this change was unanimous. No explanation is given as to why conscience was removed; there is no published record giving reasons for the change. It may even have been an inadvertent omission or typographical error. In the next federal draft, one week later, conscience was returned without mention of the attempted alteration by the provinces. Neither the provinces nor the federal government made any further changes to the text of s. 2(a).

It turns out, therefore, that “conscience and religion” became the final form of the provision with little discussion. Other than a few hints and a minor exchange over the preamble, nothing, other than its presence in an entrenched constitutional text, signaled that a conscience-based freedom evinced a newly found desire to protect those without religious beliefs. Even Jean Chretien, Justice Minister at the time of the 1980 constitutional talks, makes reference to conscience’s stealth-like inclusion in the Charter: “At one point we got bogged down trying to define freedom of conscience,” he writes, “‘So why put it in the charter?’ someone asked…I said, ‘Yeah, why? Let’s leave it out’.” Feeling a kick under the table from Pierre Genest, the federal government’s legal advisor, he realized it needed to stay in. All this suggests that the thought given to something supposedly fundamental was, unfortunately, meager. The burl may

94 Annex to Document 830-84/031, August 28, 1980.

95 Ibid at 2.


97 See Jean Chretien, Straight from the Heart (Toronto: Key Porter, 1994) at 173.
have been revealed, but much remains hidden, as evidenced by the judiciary’s similar reticence to engage with conscience.

2.2 Distinct Conscience in Charter Cases: A Quixotic Journey

The early years of the Dickson Court saw a fundamental re-shaping of Canadian jurisprudence, as the Charter gave the judiciary powers to review legislation in light of an entrenched bill of rights. Some of the early s. 2(a) cases did make forays into the realm of conscience, despite the fact that most of these claims were clearly based on religious grounds. The high water mark of conscience-based jurisprudence remains to this day the 1988 case of R v. Morgentaler. There are, however, a few cases that discuss conscience as a separate branch of s. 2(a). I will review them chronologically, which provides a convenient method of organizing “conscience-based” jurisprudence in Canada into three stages: pre-Morgentaler, the Morgentaler case itself, and post-Morgentaler.

Conscience Before Morgentaler: Not long after the Charter passed into law, freedom of conscience appeared in a judicial decision. In the first big test of s. 2(a) of the Charter, R. v. Big M Drug Mart, Justice Laycraft at the Alberta Court of Appeal held that freedom of conscience in the Charter seems designed to include the rights of those whose fundamental principles are not founded on theistic belief. In this, he was reiterating some of the comments made by the drafters of the Charter as outlined in the section above. He also found, albeit in obiter, that s. 2(a)’s reference to conscience was significant in that it reflected on corporate mens rea: “if [a corporation] can have a bad conscience [when it is found guilty of a crime] it does not strain language to hold that in the same manner it can have the good conscience…of its officers.” Justice Laycraft was likely influenced by the arguments made by Big M Drug Mart. In its factum, the drug store noted that the language of s. 2(a) contrasts directly with that of the Canadian Bill of Rights because the word “conscience” is included. As it stated, the

98 Supra n. 49.
99 Ibid at para. 42.
100 Ibid at para. 25.
word was added in order to ensure non-religious beliefs are treated as fundamental freedoms which should also be protected, so that individuals are not only free to choose a religion but free to choose no religion if their conscience so dictates.\textsuperscript{101}

As previously mentioned, the Supreme Court of Canada largely ignored the matter of conscience on appeal, since the case was easily (and arguably more properly) decided on the basis of freedom of religion. Nevertheless, Chief Justice Dickson did comment on the possibility of conscience as an independent right:

\begin{quote}
It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition….It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or “firstness” of the First Amendment. …

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.\textsuperscript{102}
\end{quote}

In my view, this passage better reflects Dickson C.J.’s view on the twin freedoms in s. 2(a), than does his earlier reference to “the single integrated concept of ‘freedom of religion and conscience’.”\textsuperscript{103} It is clear that he sees religious belief as a quintessential form of conscience-based belief – the integrated concept is merely reference to the fact that it is those two belief-based freedoms that are contained in s. 2(a), different from other fundamental freedoms such as expression, association, and thought. Nevertheless, taken together, Dickson C.J.’s two

\begin{footnotes}
\textsuperscript{101} Factum of Respondent at the Alberta Court of Appeal, in Supreme Court of Canada Record of Case, filed March 1, 1984 at 29-30.

\textsuperscript{102} Supra n. 49 at paras. 122-3.

\textsuperscript{103} See supra n. 52.
\end{footnotes}
passages illustrate a level of confusion or ambiguity as to what freedom of conscience might be.

Shortly after Big M Drug Mart, Judge Alexander Davidson of the County Court of the Judicial District of York, in the first appeal of R. v. Magder, noted the Supreme Court’s unsettled approach. At issue was Ontario’s response to the legislative void left by the Supreme Court’s striking down of federal Sunday closing legislation (the Lord’s Day Act) in Big M Drug Mart. In a succinct passage, Davidson J. noted conscience’s similarity and distinctiveness to religion:

It seems to me that even though the majority appear to differentiate between “religion” and “conscience” in the Charter, it has struck down the Lord’s Day Act dealing with Sunday observance as infringing both freedom of religion and freedom of conscience. As such, it seems to me inherent in their decision that there is some close connection between conscience and religion as expressed in Section 2(a) of the Charter.

If I am wrong in my interpretation of the proximity but not exact similarity of conscience and religion, and the court felt that they were indeed secular in relation to conscience and religious in relation to religion then the striking down of the Lord’s Day Act as infringing conscience would seem to me to be obiter.

His ideas about conscience and religion are sophisticated and nuanced; in a brief paragraph he anticipates the ideas fleshed out in greater detail by Wilson J. in Morgentaler, as will be seen.

The Magder case was appealed. Tarnopolsky J.A. drew from Judge Davidson’s argument, and delivered the first comprehensive analysis of the parameters of conscience as an independent value in his 1984 decision in R. v. Videoflicks. Justice Tarnopolsky employed an analytical approach familiar from earlier religious freedom cases, but broadened it to incorporate conscience-based belief. Two elements governed his analysis.

\[\text{References}\]

104 R. v. Magder, February 17, 1984, unreported. (Appealed from the decision of Harris J, Provincial Court, Criminal Division; later consolidated with others to become R. v. Videoflicks at the Ontario Court of Appeal and R. v. Edwards Books at the Supreme Court of Canada.)

105 Ibid at paras. 39-40.

First, he recognized that some people attach religious significance to acts or symbols that do not carry any such meaning for others. He referred to the case of *New York v. Sandstrom*\(^{107}\) where Justice Lehman, in a concurring opinion, used the “homely” example of the “partaking of food” as illustrating a human activity that can take on significant religious meaning.\(^{108}\) What for many is simply a basic human appetite – critical for survival, but limited only by personal taste preference – can, for religious observers, be forbidden temporarily or permanently. Tarnopolsky J.A. applied this reasoning to draw out the contours of conscience:

> essentially the same reasoning would apply to the fundamental freedom of conscience, except that freedom of conscience would generally not have the same relationship to the beliefs or creed of an organized or at least collective group of individuals.\(^{109}\)

Although he gave no parallel examples, nor developed a method of assessing conscience-based freedom claims, it is presumed that he might be referring to a vegetarian morally opposed to eating meat, who may find him or herself subject to a law or regulation that failed to provide for a special diet.

The second element of Justice Tarnopolosky’s definition arose over a concern for the boundaries of the legal concept of conscience. He feared that freedom of conscience could be easily abused, which meant that, as with religion, it should not apply to merely any individual act or symbolic statement, but should be based on a set of beliefs which is binding on, or at least strongly felt by, someone. Conscience must direct, in a powerful sense, a person’s behaviour. Yet, it is also both individualized and compelling. “It does not follow,” Justice Tarnopolosky wrote, “that one can rely upon the Charter protection of freedom of conscience to object to an enforced holiday simply because it happens to coincide with someone else’s Sabbath.”\(^{110}\) In other words, my conscience, at least for constitutional purposes, cannot be offended just because someone else’s religious freedom is protected. My conscience must be directly affected and my own behaviour must be compelled by my conscience. Ultimately,

\(^{107}\) 279 NY 523 (1939, Court of Appeals).

\(^{108}\) Ibid at 535.

\(^{109}\) Videoflicks supra n. 105 at para. 45.

\(^{110}\) Ibid; emphasis added.
Tarnopolsky J. was prepared to accept that a businessperson’s sincere belief, based solely on conscience, requiring him or her to close shop on a day other than the Sabbath, could qualify as a matter needing protection under the conscience branch of s. 2(a). In the specific case before him, however, no such evidence was tendered.

At the Supreme Court of Canada, Videoflicks metamorphosed. The conscience branch of s. 2(a) was discussed in argument, but largely ignored in the decision. The appellant Paul Magder, contended in his factum that including “conscience” in s. 2(a) made the Charter different from the Canadian Bill of Rights, therefore rendering precedents based on freedom of religion under the latter of limited authority and value. The rights in s. 2(a) must be read disjunctively, one as religious, one as non-religious, one (religion) “abstract” and the other (conscience) “concrete.” This was only a first salvo; Magder went even further. He argued that despite Tarnopolsky J.A.’s apparent support for an independent right of conscience, his opinion had not gone far enough:

[At page 44 of the Ontario Court of Appeal decision] Tarnopolsky J.A. says that one cannot use freedom of conscience to object to an enforced holiday because it coincides with someone else’s Sabbath. The problem with the above argument is that if freedom of conscience means one is free not to have a religion, then atheists and agnostics are entitled to be treated equally in the eyes of the law. However, the only way in which one can obtain relief from a government regulation is by having a religious or parallel conviction. Thus, in its attempt to distinguish religion from conscience, the Ontario Court of Appeal effectively unites them in effect.

Stated otherwise, a conscience-based belief, if it is to have any meaningful content under s. 2(a), must be available to those without religious beliefs, to use as a sword against government regulation, in the same way religious believers are able to use freedom of religion to attack government action. To put it bluntly, the appellants hoped to convince the Court that neither government (nor the courts) have any right to determine that religious – or other corresponding beliefs – are any more important than rights that might flow from a belief in the value of economic occupation. In effect, Magder’s argument raised some of the same

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111 See Appeal Book, Supreme Court of Canada, Factum of Appellant, filed October 21, 1985.

112 Factum of Appellant, ibid, at para 51.
difficulties that Sullivan and others, discussed later in chapter 5, have identified over First Amendment free exercise rights, but applied to the broader concept of conscience.\footnote{As outlined most cogently by Winnifred Fallers Sullivan – see chapter 5, infra, especially at section 1.}  

On the other hand, the Ontario government accepted the notion of an independent right of conscience, but was careful to keep it well within the boundaries of its traditional place alongside religion. It relied on a generous reading of the words of Chief Justice Dickson in Big M Drug Mart, citing the passage quoted above\footnote{Supra n. 104.} as standing for the proposition that conscience-based beliefs are protected as well as religious beliefs, as is the right not to have a religion.\footnote{See factum of the Attorney General for Ontario, Supreme Court of Canada Appeal Book, filed November 12, 1985, at para. 65.} In sum, according to Ontario, “the inclusion of freedom of conscience in s. 2(a) simply makes clear that freedom encompasses systems of belief which may not be recognized religions.” No other Attorneys General, nor interveners, made argument on the basis of freedom of conscience.

In his majority decision, Chief Justice Dickson favoured a detailed analysis of religious freedom. He made only a passing reference to conscience, observing that freedom of religion, unlike freedom of conscience, “has both individual and collective aspects.”\footnote{Ibid at para. 66.} He stated that s. 2(a)’s purpose is to protect a wide range of beliefs, hinting that conscience-based beliefs might be similar to religious beliefs, except for the lack of a divine element: “The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.”\footnote{Edwards Books, supra n. 105 at para. 140.} In other words, the first few noted beliefs could be conscience or religious; the belief of a higher order of being is limited to religious. It would be easy to read too much into this statement, however, as the rest of the paragraph is devoted to a discussion of religious practices and freedom of religion. Moreover, it is possible that Chief Justice Dickson is simply

\footnote{Ibid at para. 97.}
alluding to the fact that there are some religions that do not require a belief in a higher or different order. Despite this ambiguity, it is clear that he again favours some form of separation between religious and conscience-based freedom.

Chief Justice Dickson also quoted directly Tarnopolsky J.A.’s passage cited above on enforced holidays. In doing so, he echoed Tarnopolsky J.A.’s general concern over the possible abuse of the conscience branch, but shifted the focus slightly. Tarnopolsky J.A. reasoned that one’s own freedom of conscience cannot be breached by a law that may operate to protect another if one’s own conscience is not engaged or behaviour is compelled. He was urging a specific caution about the over-extension of “conscience.” Chief Justice Dickson’s concern was of a different order. To avoid an explosion of claims by religious believers based on re-characterizing secular laws as state compulsion, Dickson C.J. was troubled over the vast reach of religious belief, such that legislation prohibiting theft or murder, for example, could be construed as “state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill.” Thus, in contrast to Justice Tarnopolsky, Chief Justice Dickson seems to suggest a broader concern over the reach of all fundamental freedoms, including both religion and conscience. It is likely he was trying to contain the very wide position staked out by Paul Magder in the submissions quoted above.

In sum, in the few instances prior to 1988 where some initial steps to flesh out a role for conscience were taken, courts toed a relatively traditional line: namely, that if conscience was mentioned in a judgment at all, it was offered as a hypothetical freedom for atheists and other non-believers. This was in keeping with the nature of the matters in issue since none of the cases required much analysis of conscience – each one was ultimately decided on the basis of freedom of religion. The closest anyone came to singling out the unique nature of conscience was Tarnopolsky J. in Videoflicks who was prepared to accept that sincere beliefs, even those based on conscience, could qualify as matters deserving protection under s. 2(a). But even that case lacked evidence of such a conscience-based belief. In essence, all discussions over the

119 Ibid at para. 99.
120 Ibid.
nature and scope of conscience in the early Charter cases were obiter. That changed, somewhat, with Madame Justice Wilson’s opinion in R. v. Morgentaler.

Morgentaler – The Burl of Conscience Extracted: The only Supreme Court of Canada decision to date that truly engages with the conscience branch of s. 2(a) is Madam Justice Wilson’s concurring opinion in R. v. Morgentaler,121 decided two years after Edwards Books. The case was Dr. Henry Morgentaler’s first attack on the constitutionality of the abortion provisions of the Criminal Code. The majority, composed of Dickson C.J., Lamer and Wilson JJ., found the provisions offended s. 7 of the Charter and struck them down.

Justice Wilson agreed but for different reasons, including a finding that the provisions offended s. 2(a) of the Charter. Her opinion contains a lengthy exposition on the nature of conscience and its relationship to religion. Taking note of Dickson C.J.’s broad and expansive approach to Charter interpretation, she quotes at length from his passage cited above, noting that individual conscience is central to western notions of human rights and freedoms, to our democratic traditions, and to notions of dignity.122 She ends the reference by concluding that Dickson C.J. takes religion as simply an example, albeit a primary one (“the paradigmatic example”), of a conscientiously held belief.123 This theme is then expanded upon:

…I do not think [Dickson C.J.] is saying that a personal morality which is not founded in religion is outside the protection of s. 2(a). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a)…

It seems to me, therefore, that in a free and democratic society “freedom of conscience and religion” should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation,

121 Supra n. 53.

122 Some of which is quoted above at n. 101 -- see Big M Drug Mart at paras. 120-23.

123 Ibid at 176-77 (para. 251). She fails to highlight the somewhat depressing end to Dickson C.J.’s sentence quoted at n. 101 above, where he states that “other sorts of governmental involvement in matters having to do with religion” (my emphasis), thus seeming to bring back the requirement of a nexus between conscience and religion.
“conscience” and “religion” should not be treated as tautologous if capable of independent, although related, meaning.\(^{124}\)

Wilson J. found that the abortion provisions of the Criminal Code endorsed one value (the state forbidding a pregnant woman certain options) at the expense of another (a woman’s right to choose). A woman’s right to choose, however, is constitutionally protected by the freedom of conscience guarantee in s. 2(a): “[t]he decision whether or not to terminate a pregnancy,” Justice Wilson concludes, “is essentially a moral decision, a matter of conscience…[which] must be the conscience of the individual.”\(^{125}\) This takes a broad view of conscience-based freedom. It includes beliefs grounded in secular morality. It allows claimants to strike down laws that offend conscience, just as they are able to do so with laws that offend religion. Again, however, as Justice Tarnopolsky did in Videoflicks, she leaves out as much as she includes. She makes no attempt to describe the contours of the freedom: for example, how broadly defined is its scope? What are secular moral decisions – are they equivalent to ethical decisions or are they different? Regardless, the decision stands as the most important Supreme Court pronouncement on conscience.

Where did the impetus come for such a novel argument? Two sources are the records and arguments made throughout the Morgentaler litigation and Justice Wilson’s own judicial and personal background.

Much of the ideas developed by Wilson J. arose out of the trial of Henry Morgentaler. Dr. Morgentaler’s counsel, Morris Manning, had included as one of the witnesses in the trial, Dr. Roger Hutchinson, an expert on comparative religious studies at the University of Toronto. Hutchinson testified how different religions treat abortion differently. In his examination in chief, Manning asked the following:

**Q:** What is your understanding of the word “conscience”?

**A:** It has to do with those decisions we make that ought not to be coerced. If it’s an issue of conscience, one comes to the judgment oneself, through discourse with others, through exchanging arguments, through becoming informed, on various aspects of the issue at stake. … So it’s a matter of conscience, for Buddhists, that we do not insist on a definition of religion

\(^{124}\) Ibid at 178, 179 (paras. 251, 253).

\(^{125}\) Ibid at para 249.
that presupposes a deity, because that would not check with their own religious beliefs and if we insisted on that, we would be violating their conscience.\textsuperscript{126}

Hutchinson went on to detail the different approaches that various common religions take on abortion. One of those he described at length was the United Church. He noted that its position is that the “decision to have an abortion is a matter of informed conscience for the woman in consultation with her religious advisor and physician.”\textsuperscript{127} Further, he stated that the United Church believes that no woman should be forced to carry to term a pregnancy when her circumstances warrant an exemption. The church stresses the right of all persons to be moral agents and to exercise their informed conscience: in matters such as abortion, which is a moral issue, the final decision ought to be made by the pregnant woman -- possibly in consultation with her doctor and others who may legitimately aid in the decision, but all whom must defer to the woman’s ultimate choice. He added that there should be “conscience clauses” for medical practitioners (mirroring “conscience clauses” for taking oaths) since no medical practitioner should be forced to perform a procedure that is against his or her conscience.\textsuperscript{128} In cross-examination, Hutchinson reiterated that the United Church, in particular, would argue that the Criminal Code provision at issue violated the Charter because abortion is the kind of matter that ought to be decided by a woman.\textsuperscript{129} Manning, in his address to the jury, relied on some of Hutchinson’s testimony, pleading that “[Abortion] is a very private matter. A matter between her, herself, her doctor, herself [sic] and her conscience and her religious advisor, her boyfriend, whatever.”\textsuperscript{130}

This expansive view did not persuade the trial judge, Associate Chief Justice Parker, however. In his trial decision, he limited Dr. Hutchinson’s statements, holding that the term “‘informed conscience’ … was always used in the context of one’s religious beliefs.” Addressing the concern over the potential limitless reach of conscience, Parker added: “If freedom of

\begin{itemize}
  \item \textsuperscript{126} Examination in Chief of Dr. Roger Hutchinson, Appeal Book, Supreme Court of Canada, vol. 11 at 2480, filed June 17, 1986.
  \item \textsuperscript{127} Supreme Court of Canada Appeal Book, ibid, at vol. 12, 2486.
  \item \textsuperscript{128} Ibid.
  \item \textsuperscript{129} Ibid at 2506.
  \item \textsuperscript{130} Ibid at vol. 1.
\end{itemize}
conscience were meant to protect the freedom to do anything as long as it accorded with one's conscience, [s.2(a)] of the Charter would know no bounds.”

At the Supreme Court of Canada, Manning continued to touch on themes of conscience developed by Dr. Hutchinson, stating in Morgentaler’s factum that the “notion of conscience involves making decisions through discourse with others free of coercion” and “the fact that the decision is taken away from the woman prevents her from exercising her informed conscience as a free moral agent.” It is reasonable to assume that Justice Wilson’s decision was influenced by these arguments.

Do any of Madame Justice Wilson’s earlier judgments prefigure such an innovative decision as her opinion in Morgentaler? In the three Supreme Court Charter decisions involving religion or s. 2(a) that Bertha Wilson participated in prior to Morgentaler, she steered a more traditional course, in terms of legal reasoning and her thinking about s. 2(a). In Big M Drug Mart, her concurring opinion focuses on the effects of legislative provisions, rather than the purpose, reasoning that the first stage of any Charter analysis is to inquire whether legislation has the effect of violating an entrenched right or freedom. In R. v. Jones where Thomas Jones was convicted of truancy under provisions of the Alberta School Act by virtue of his attempts to educate his children in his own way, Justice Wilson finds no infringement of s. 2(a). She reasons that the Act accommodates religious freedom. Requiring a person to apply for an exemption from public education recognizes the proper secular role of public school authorities in educating children. Following her own approach in Big M Drug Mart, she proceeds by examining the effects of the legislative provision, finding them to be insignificant. The decision concentrates on the religious branch of s. 2(a) and thus is of limited importance to developing a stand-alone freedom of conscience. Finally, in her only other case involving s. 2(a) of the Charter, Reference Re Bill 30, an Act to Amend the

132 Factum of Appellant, filed December 5, 1986, vol. 11, paras. 60, 64.
133 Supra n. 49 at para. 160.
135 Ibid at para. 65.
the constitutionality of a Bill extending public funding of Catholic separate schools in the province through to Grade 13 was in issue. Justice Wilson, speaking on behalf of a majority of four judges, determined that Bill 30 was a valid exercise of provincial power under s. 93 of the Constitution Act, 1867. Given the facts of the the case, conscience was never going to be of relevance to the decision. Thus, Morgentaler is the only decision under s. 2(a) where a disquisition on conscience makes any sense.

The other aspect to consider is whether Bertha Wilson’s religious background or personal philosophy provide clues for the eventual decision in Morgentaler. I do not intend to delve into a full biographical review of her life, but some context from her life history may be instructive. Ellen Anderson’s biography describes Wilson’s strong religious nature: she married a Presbyterian Minister, Reverend John Wilson, and her religious views informed much of the way she lived her life. Her religious spirit also infused her approach to judging, in the sense of her strong regard for justice and fair play and her knowledge of people. As Lorna Turnbull quotes her saying, in reference to her time as Reverend Wilson’s wife in Scotland, “I became intimately involved with the drama of the daily lives of … people, their joys and their sorrows…I discovered how complicated people are, how lonely proud people are, how dependent on the rest of us old people are and how most of us are locked up tight inside ourselves…pretending to be something we are not.” This is about as close as we can get to something akin to conscience – at least as far as other biographical material goes, conscience does not appear to have been something Wilson discussed with family or friends, nor wrote extra-judicially about. It is certainly not discussed by Anderson nor by other authors in Brooks’ edited collection of essays, Justice Bertha Wilson: One Woman’s Difference. Kent Roach, in a chapter examining Justice Wilson’s decision in Morgentaler, characterizes it as one in a line of decisions emphasizing her liberalism. He downplays the role that conscience

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as an independent value plays in the decision. For Roach, the thread connecting much of Wilson’s decision-making is liberty. The *Morgentaler* decision protected women’s freedom, whether or not they wished to have an abortion. As Roach states, for Justice Wilson the “context was abortion, but the principle was freedom.”

In sum, Justice Wilson’s six-paragraph reflection on conscience in *Morgentaler* remains the Supreme Court’s only serious incursion into s. 2(a)’s belied branch (and even then, technically decided within the context of s. 7 right to liberty). In the succeeding decades, the Supreme Court has failed to expand on Wilson J.’s ideas in its s. 2(a) jurisprudence. Most of the subsequent decisions that treat conscience as something distinct keep that distinction within the traditional limits first set out in the *Charter* debates – of merely protecting the freedom to be non-religious.

Before moving on to examine the post-*Morgentaler* cases, I return to the case of *Myrrmidon* because it is perfectly positioned as a transition between the pre- and post-*Morgentaler* era. *Myrrmidon* was argued in-between *Morgentaler*’s Supreme Court oral hearing and decision, but its decision published after *Morgentaler*. Recall that it involved a challenge to Manitoba’s *Remembrance Day Act* requiring stores to close on November 11 each year. One of the arguments the accused made was to claim that all religious and conscience-based freedoms, as expressed in s. 2(a) of the *Charter*, were simply examples or manifestations of the more broader expressive freedoms set out in s. 2(b). Justice Twaddle’s concurring decision runs into difficulty with these various threads. As previously mentioned, he joins conscience with religion into a single freedom that entitles everyone to be free from conformity to religious dogma. But in other passages, he takes issue with the accused’s attempt to enfold all religious and conscience-based freedoms into s. 2(b): “The accused invites us,” Twaddle JA disdainfully relates, “to treat ‘conscience’ as nothing more than a particular kind of thought and ‘religion’ as nothing more than a particular kind of belief.”

Later on he struggles to discern what the inclusion of the words “thought,” “belief” and “opinion,” add substantively to the text of s. 2(b), ultimately deciding to adopt Peter Hogg’s view that the point is moot as the

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140 *Ibid* at 198.

141 *Myrrmidon*, supra n. 67 at para. 36.
additional words must have negligible, if any, impact.\textsuperscript{142} He ends the passage with a query displaying an understandable measure of confusion given the various formulations of these freedoms around the world: “Why is it that ‘thought’ and ‘belief’ are coupled with ‘opinion’ and ‘expression’ in the Charter rather than being coupled with ‘conscience’ and ‘religion’ as they are in the [UDHR], I do not know.”\textsuperscript{143} In an illuminating conclusion he muses, without having to decide the matter, whether secular practices might be “protected in the same manner as religious beliefs by the Charter.”\textsuperscript{144}

All told, Twaddle J.A.’s decision seems to have it both ways: to lump conscience together with religion, at one and the same time also recognizing its distinct nature apart from religion. It may be that, straddling the oral argument and written decision in \textit{Morgentaler, Myrrmidon} simply reflects some of the ambivalence to the concept of conscience shown by earlier jurisprudence as well as the two sets of majority \textit{Morgentaler} judgments. As we move further ahead in time, it is clear that courts have, for the most part, shied away from the broad reach of freedom of conscience found in Justice Wilson’s decision in \textit{Morgentaler}.

\textit{After Morgentaler – Conscience Contained}: Since \textit{Morgentaler}, the Supreme Court has had very little to say about conscience. A few decisions may reference “conscience” as a word contained in s. 2(a) of the Charter, but the extent of the discussion beyond that is negligible. In his sole concurring opinion in \textit{B.(R.) v. Children’s Aid Society of Metropolitan Toronto},\textsuperscript{145} Chief Justice Lamer gave a small nod to conscience as a distinct liberty by restraining the scope of s. 7’s version of “liberty” so as not to include basic fundamental freedoms. He stated that liberty, as set out in s. 7, is to be restricted by virtue of it being a qualifier of the rights of life, liberty and security of the person. In another concurring opinion in \textit{B.(R.)}, Major and Iacobucci JJ. held that, while parents may feel that they have a religious right to prevent

\textsuperscript{142} Quoting from Peter Hogg, \textit{Constitutional Law of Canada} (2nd edition) (Toronto: Carswell, 1985) at 713.

\textsuperscript{143} Ibid at para. 40.

\textsuperscript{144} Ibid.

\textsuperscript{145} [1995] 1 S.C.R. 315 (“\textit{B.(R.)}”).
doctors administering blood transfusions to their children, there is an equal and opposite infringement upon a minor’s freedom of conscience that allow doctors to proceed. Freedom of conscience arguably includes the “right to live long enough to make one’s own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.”146 Thus, on this basis, freedom of conscience, could, in the right circumstances, be used to negate freedom of religion and vice versa. It is an intriguing proposition; it clearly gives some independent meaning to “conscience,” although it is much less developed than Wilson J.’s opinion in Morgentaler.

Two other decisions offer even less. In an almost off-hand comment in Chamberlain v. Surrey School District No. 36, Justice Gonthier, in a dissenting decision on behalf of himself and Justice Bastarache, characterized La Forest J.’s majority opinion in the B.(R.) case as giving the right of parents under s. 2(a) to rear their children “according to their conscience, religious or otherwise.”147 It would be easy to make too much of this comment, but it does indicate the broader view of conscience as discussed in chapter 2. In Syndicat Northcrest v. Amselem,148 Jewish residents of a condominium claimed that freedom of religion includes the right to install individual sukkahs on the balconies of their co-owned housing during the festival of Succot. The majority of the Court noted that only “beliefs, convictions and practices rooted in religion” are protected from the guarantee of freedom of religion. These should be kept separate and apart from practices that are “secular, socially based or conscientiously held.”149 Although this may be taken as acknowledging conscience as something independent from religion, it is a weak endorsement at best, not even going as far as the views of Major and Iacobucci in B.(R.). There is no indication that the other practices referred to would fit under an enlightened notion of freedom of conscience.

146 Ibid at 437.
149 Ibid at para. 39.
The most recent Supreme Court of Canada case on freedom of religion has given faint hope again for a renewed conscience jurisprudence.\textsuperscript{150} In 2003, the Alberta government enacted a provision requiring photographs on all driver’s licences. Up until then, exemptions from the photographic requirement were granted to groups such as the Wilson Colony Hutterites, who are against having their photographs taken – based on the Second Commandment (which states “You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth” (Exodus 20: 4)).\textsuperscript{151} The new law removed all exemptions to the requirement. The Wilson Colony members challenged the universal photo requirement as violating their constitutionally protected religious freedom and equality rights. They claimed that the requirement would effectively prohibit Hutterites from holding driver’s licences, ultimately threatening the viability of their communal lifestyle.

The decision, \textit{Alberta v. Hutterian Brethren of Wilson Colony}, consists of a single majority judgment (McLachlin C.J. on behalf of a majority of 4 judges) upholding the regulation, and two separate dissenting judgments that would have upheld the old exemption (Abella J. and LeBel J. opined separately on behalf of a minority of 3 judges, and Fish J. rendered a single sentence minority decision concurring with both Abella and LeBel JJ.). Given that the Alberta government admitted that s. 2(a) of the \textit{Charter} was infringed, all seven judges glossed over the nature of the limit on the fundamental freedom of religion. The two main opinions, rendered by McLachlin C.J. and Abella J., however, provide a short, but instructive, reminder that the s. 2(a) right does include conscience in addition to religion.

For the majority, McLachlin C.J. acknowledges the plethora of different religions and practices in a pluralist society, finding it “inevitable that some [of these] … will come into conflict with laws … of general application.” She continues:

\begin{quote}
this pluralistic context also includes ‘atheists, agnostics, sceptics and the unconcerned.’ Their interests are equally protected by s. 2(a)… In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important.\textsuperscript{152}
\end{quote}

\textsuperscript{150} \textit{Alberta v. Hutterian Brethren of Wilson Colony} [2009] 2 S.C.R. 567 (\textit{“Wilson Colony”}).

\textsuperscript{151} Ibid at para. 29.

Abella J., on the other hand, displays at the same time a more conservative and more progressive analysis than the majority. After citing Dickson C.J.’s oft-quoted statement in *Big M Drug Mart* that “an emphasis on individual conscience and individual judgment…lies at the heart of our democratic political tradition,”153 she goes on to quote him further:

> It is the centrality of the rights associated with freedom of individual conscience that “underlies their designation in the Canadian Charter of Rights and Freedoms as ‘fundamental.’ They are the *sine qua non* of the political tradition underlying the Charter.”154

She continues with a number of quotations from *Big M Drug Mart* and the European Court of Human Rights in *Kokkinakis* that refer to freedom of conscience and the principle of individual conscience.

On its face, the majority’s recognition of a right of conscience is uncontroversial; it merely reflects the reality that the non-religious may also find protection under s. 2(a). A more favourable reading would see it as part of a slow but steady move to reveal a different kind of s. 2(a) – one seen clearly by Justice Wilson in *Morgentaler*, but which has been clouded by majority decisions since. Similarly, one could say that Abella J.’s minority view offers nothing new regarding conscience, since it relies heavily on past Supreme Court precedent, and, to a lesser extent, European jurisprudence. That she reminds us of the Court’s earlier discussions on conscience, however, is important in itself (it is unfortunate, perhaps, that she did not refer to Wilson J.’s exegesis on conscience in *Morgentaler*). Both judgments seem to be signaling, even if very cautiously, a message of openness to future discussions on conscience.

Justice LeBel, in his separate dissenting opinion, also offers his own provocative reading of s. 2(a) and the relationship of religion to conscience. His is the most enigmatic approach, displaying unease with the entire concept of the s. 2(a) freedom based on religion. In doing so, he exhibits a judicial humanness and fallibility that is rare:

> Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the Charter. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers

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153 *Big M Drug Mart*, supra n. 48 at 346.

of the Charter thought fit to incorporate into the Charter an express guarantee of freedom of religion, which must be given meaning and effect.\textsuperscript{155}

This is a very revealing statement. It seems as if LeBel J. is wishing that freedom of religion did not have to exist. For him, the other fundamental freedoms contained in s. 2 \textit{almost} cover the field of religion by proxy. The passage suggests, at the very least, that conscience must be different from religion. It gives an impetus of hope to those who seek to resurrect freedom of conscience, insinuating that “conscience” is the broader category of freedom, encompassing religion.

Although the three opinions in \textit{Wilson Colony} might be taken as evidence of the Court’s recognition of conscience as something independent from religion, they provide little more than weak endorsements. And in \textit{A.C. v. Manitoba (Director of Child and Family Services)},\textsuperscript{156} the only other religious freedom case of 2009 decided one month prior to \textit{Wilson Colony}, the Court travelled the all-too-familiar ground of conflating conscience with religion, noting, in a case with facts somewhat similar to those in \textit{B.R.}, that legislative interference with A.C.’s “\textit{religious conscience}” – by allowing for forced treatment orders to be made to children under the age of 16 without consulting them – was apparent.\textsuperscript{157} Thus, the Court has yet to return to Justice Wilson’s strong theory of freedom of conscience, while remaining ambivalent about where it may go in the future.

Given that Wilson J.’s decision regarding conscience in \textit{Morgentaler} represents the only serious foray by the Supreme Court of Canada into conscience-based freedom, it is not surprising to find that lower courts have shown a reluctance to embrace the concept. Only two cases, both from the Federal Court, follow closely in the footsteps of Wilson J.: \textit{Roach v. Canada (Minister of State for Multiculturalism and Citizenship)}\textsuperscript{158} and \textit{Maurice v. Canada (Attorney General)}.\textsuperscript{159} In \textit{Roach}, the applicant, Charles Roach, sought a declaration entitling

\textsuperscript{155} Ibid at para. 180.

\textsuperscript{156} Supra, n. 66.

\textsuperscript{157} Ibid at para. 216.

\textsuperscript{158} [1994] 2 F.C. 406 (“\textit{Roach}”).

\textsuperscript{159} [2002] 215 F.T.R. 315 (“\textit{Maurice}”).
him to become a Canadian without having to take the oath of citizenship. He argued that the oath required him to pledge, against his conscience, allegiance to the Queen. Justice Linden, in dissent, but not expressly overruled on this point, followed Wilson J.’s decision that freedom of conscience is broader than religion, consisting of views based on “strongly held moral ideas of right and wrong” which are not necessarily founded on “organized religious principles.”

Section 2(a) therefore allows challenges to legislation based on beliefs which could not be considered religious, but remain profoundly moral or ethical. He distinguished such beliefs from those that are better described as political and would therefore be covered under s. 2(b). For Linden, J., an applicant is entitled to the protection offered by freedom of conscience if he or she could show that such moral beliefs are subject to governmental burdens that are more than trivial or insubstantial. In this case, Roach failed to do so.

A few years later, in Maurice, the Federal Court takes Justice Wilson’s arguments even further, granting a freestanding right to freedom of conscience. The case required the Federal Court to determine whether conscience can dictate one’s dietary habits. Jack Maurice, a federal inmate, sought the right to a vegetarian diet on the basis that it was a matter of his freedom of conscience. Although the Corrections and Conditional Release Act and Regulations allowed prisoners to obtain special diets on spiritual or religious grounds (relying on freedom of religion under s. 2(a) of the Charter as the basis for the policy), Maurice argued that his vegetarianism was a matter of conscience. The case was complicated by the fact that Maurice had previously received vegetarian meals because he belonged to the Hare Krishna faith. He later renounced his faith but maintained his desire to eat a vegetarian diet. Correctional Services Canada (CSC) refused to accede to his new request, arguing that there was no longer a spiritual or religious reason to continue with the alternative diet. Maurice countered that he was under a conscience-based obligation. The Federal Court agreed with Maurice, reasoning that s. 2(a) of the Charter protects both freedom of religion and conscience. The CSC regulations potentially deny inmates the ability to freely exercise their

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160 Ibid at para. 45.

161 Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 4(e), (h), 75; and regulations SOR/92-620, s. 101. Section 101 of the Corrections and Conditional Release Regulations provide that the “necessities required for an inmate’s religion or spirituality should be made available to the inmate, including a special diet.”
conscience. Justice Campbell held that vegetarianism is founded on a belief that the consumption of animal products is morally wrong, providing a strong example of how an independent freedom of conscience might be protected under s. 2(a) of the Charter:

\[\text{Maurice}\] represents the apogee of jurisprudence in Canada on conscience-based freedoms. Together with Wilson J.’s decision in \textit{Morgentaler}, it provides hope for my view that a differentiated conscience could, and should, flourish in Canada.

3 Conclusion

All told, there is a relatively sparse amount of Canadian doctrinal material that establishes conscience as something independent from religion. Nor, fortunately for my argument, is there much that denies its separate existence.

The judiciary occasionally recognize conscience’s importance as a distinct freedom. In four cases, \textit{Videoflicks}, \textit{Morgentaler}, \textit{Roach} and \textit{Maurice}, courts have shown a willingness to adopt the wider interpretive approach in fact situations where religious belief is either attenuated, or not present, and thereby realizing a conscience-based freedom. At the same time, since U.S. jurisprudence on religious freedom has strongly influenced developments in Canadian law, the courts here often show a reluctance to treat conscience differently from religion. American case law has rarely supported a fully-fledged conscience-based freedom (although, as shown in chapter 3, there are some exceptions). This is a shame. As was seen in chapter 2, Martha Nussbaum’s detailed historical overview of the genesis of the First Amendment text concludes that the phrase “liberty of conscience” was dropped largely by virtue of changed syntax.\(^{163}\)

\(^{162}\) \textit{Ibid} at paras. 9, 12.

\(^{163}\) See supra, chapter 2.
Thus, despite obvious historical differences between the two countries, it is not altogether incorrect to see how an accident of grammar in the U.S. has been a major contributor to impeding a Canadian understanding of a fundamental freedom!

Nor is the case for a robust form of conscience-based freedom in Canada significantly aided by assessing constitutional and statutory debates over the inclusion of the word “conscience” in various human rights documents. In almost all instances where “conscience” appeared, the word seemed tacked on, preceding “religion” almost as a printed appendage with little thought or weight given to its presence. No doubt this contributes to the many cases, decided both before and after the Charter, that treat conscience as synonymous with religion or ignore conscience as a potential basis for a freedom claim. In the main, the Canadian experience in this regard compares with others around the world.

It need not be this way. Since law provides the framework for freedom, developing conscience as an important freedom in its own right could be a way for Canada to lead. Doubtless there will always remain problems of interpretation regarding the kind of Constitution we should have in Canada – as Cass Sunstein and Ronald Dworkin state, there is “nothing that interpretation just is...” as “every interpretive strategy is grounded in some assumption of political morality.” Even so, it is not far wrong to say that lawyers and the judiciary (and even the broader legal and political community) have failed when it comes to the simple constitutionally entrenched phrase “freedom of conscience.” One of the strongest cases for developing an independent freedom of conscience relies on the plain text of the Constitution itself. Freedom of religion is limited in scope; adding freedom of conscience to it must add some value. Words in constitutional texts should not be redundant, but should carry their own meaning. As will be shown in the next chapter, one of the limits of considering only freedom of religion is that it does not do justice to the constitutional text and canons of interpretation. If we can give effect to an interpretation of the word “marriage” that is contemporary and


relevant to the times we live in, then we should also give effect to a word that is present in our Constitution, and is, arguably, less open to dispute than the concept of marriage.

The work of thousands ensured that “conscience” appeared as a fundamental freedom in the *Charter*; it should be the role (sometimes even the duty) of lawyers and judges to interpret and use it. In general, this has not happened, particularly at the most important level of constitutional analysis by the Supreme Court of Canada. It is as if, given a mile, our top court has only taken an inch.

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Chapter 5

The Problems and Limitations of Freedom of Religion

Since the conditions for a fully-developed legal freedom of conscience have existed for some time, it should not be a major step to allow it to be realized constitutionally and take its place alongside traditional religious-based belief. So far, I have described basic historical and theoretical aspects of religion and conscience, how they have been seen as both undifferentiated and distinct, and how this has carried over into legal doctrine. This chapter begins to explore the more normative aspects of this analysis by looking at some problems and limitations associated with the current interpretation of freedom of religion.

There are three main aspects of constitutional freedom of religion, as expressed and interpreted under s. 2(a) of the *Charter*, that are in need of revisiting: first, the current approach ignores the constitutional text and normal methods of constitutional interpretation. Second, legal religious freedom, as it has been interpreted in the modern era, has become exceedingly difficult to uphold because religion itself is no longer a clearly understood and defined concept. The changing shape of religious belief in the 21st century creates inherent difficulties in defining religious freedom in contemporary secular states; this leads to problems coping with the inexorable presence of strong forces which tend to expand freedom of religion into incoherence, or at least leads to a need to contemplate conscience as its inevitable replacement. The nature of modern pluralistic and secular states seems to call for recognition of a greater variety and multiplicity of norms encompassed by the broader term “conscience”. Third, constitutional religious freedom, remains the only redoubt for the communal qualities of religion, which, in my view, are not subsumed by a generous reading of freedom of conscience. Religion’s nature as a communal practice is special and different from individual conscience and worth preserving constitutionally. I examine this in the last part of the chapter. To begin the process of normative re-evaluation, I analyze s. 2(a) from first principles – as an ordinary piece of legal text.
1 Conscience and Religion: Interpreting the Constitution

Basic principles of statutory interpretation remind us that religion should not be singled out, and therefore favour granting conscience independent status. There are a number of reasons why this should be so.

The first relates to the very framing of the interpretation problem. Most attempts to ascertain whether the three-word phrase of “conscience and religion” represents more than a single concept start with “religion” as the primary word and “conscience” its secondary analogue. The initial question then proceeds by way of statutory analysis of the word “religion” and whether “conscience” adds to it, is superfluous, or an elegant variation of it. But this presupposes a certain starting point. The analysis could begin at a different point and proceed in the reverse direction, ie, by examining the meaning of “conscience” as the primary word, with “religion” then analyzed in light of what it adds to the provision. This might arguably be a more appropriate method of interpretation since “conscience” appears first in s. 2(a). Yet consideration is rarely, if ever, given as to whether “religion” is redundant, superfluous, an elegant variation or subset of, conscience. Why is it assumed that religion is first and that conscience follows? As Martha Minow says, in a slightly different context, our unstated points of reference are treated as norms, which lead to assumptions about what is normal and what is therefore different. That same approach seems to apply in the case of analyzing this phrase. Perhaps it would make a difference to how the interpretation should proceed if religion was always seen as secondary. However, even if one begins with religion, the result is the same.

Second, assuming religion as a starting point for analysis, the rules of statutory interpretation lend weight to a disjunctive and distinct reading of the two words. Elmer Driedger’s famous “one principle” approach says that legislative words should be read in their grammatical and ordinary sense in harmony with their context. Each word in legislation is normally considered

\[\text{1 See infra at n. 3 and accompanying text for the discussion of these statutory interpretation techniques and characteristics in the context of the word “religion”}.\]

\[\text{2 Martha Minow, } \textit{Making All the Difference: Inclusion, Exclusion and American Law} \text{ (Ithaca, NY: Cornell University Press, 1990) at 51}.\]

\[\text{3 See Ruth Sullivan, } \textit{Sullivan and Driedger on the Construction of Statutes}, 4^{th} \text{ ed. (Toronto: Butterworths, 2002) at 87}.\]
important, and uniformity and consistency are valued over stylistic variation and aesthetic appeal.\(^4\) On this broad premise, conscience deserves being treated separately from religion.

Two linguistic canons of construction bear examination in the context of s. 2(a). The first is the presumption against the use of superfluous or meaningless words. Every legislative word is important and presumed to have a specific role to play in advancing government’s purpose.\(^5\) As Randal Graham puts it, drafters are assumed never to use extraneous language, and guard against the use of multiple, redundant words that may create confusion.\(^6\) The rule applies to individual words within a phrase but also between parts of a legislative scheme. Thus, words that appear together in one section of a statute are assumed to mean the same elsewhere. The opposite is also true: words that appear in one place together but do not appear in another place together are intended to do different things.

All common law courts have approved this presumption. A straightforward example is the case of *A-G’s Reference (No 1 of 1975)* where the English Court of Appeal held that the words “aid, abet, counsel or procure” must each have a distinct meaning since otherwise Parliament would be indulging in tautology.\(^7\) In the Supreme Court of Canada, Lamer C.J. in *R. v. Proulx* pronounced that “[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage”\(^8\) and in *R. v. Kelly* the same Court declared it to be a “trite rule of statutory interpretation that every word in the statute must be given meaning.”\(^9\) The Supreme Court of Canada also applies the same presumption in its interpretive approaches to the *Charter*.

Of course, the presumption can be rebutted where the meaning of the additional words is shown not to be superfluous or that repetition was deliberately intended. If either of two words

\(^4\) Ibid at 151.


\(^7\) [1975] Q.B. 773 at 779 (C.A.)


\(^9\) [1992] 2 S.C.R. 170 at 188.
could have been used on its own without any change in meaning, it is possible that the tautology was intended. The well-known English statutory interpretation expert Francis Bennion illustrates this by referring to the *Children Act 1989* which imposes a duty to “safeguard and protect” the welfare of a child. Bennion argues that the phrase is an example of surplusage since either term would have sufficed on its own.\(^{10}\) The same can be seen in the dissenting opinion of McLachlin J. (as she then was) in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* where she noted that there may be instances where general phrases in statutes are employed not to confer unmentioned powers, but “to ensure that the powers clearly given be exercised without undue restraint…in the hope of avoiding arguments seeking to unduly restrict the effective exercise of … powers.”\(^{11}\) The majority did not take issue with this point.

Rebutting the ordinary presumption does make sense in those few cases involving synonymous pairings of words, or general, commonly used statutory phrases, such as “any matters related thereto,” which can be found in its variant forms in hundreds of statutes. The argument is much less compelling, however, when dealing with specific examples of infrequently used constitutional language such as “religion” and “conscience.” Even the limited background discussion and constitutional debate over the meaning of the two words is enough to make a strong case for treating them independently. Moreover, there are many words more synonymous with religion than conscience: faith, belief and worship immediately come to mind. “Creed” is even more likely, especially given that some statutes employ that term instead of “religion”.\(^{12}\) More compelling still, the importance of every word in a constitutional document cannot be understated – if anything, surplusage in a constitution simply does not exist.

The other canon of construction that has some bearing is the presumption of consistent expression. Legislative drafters are not stylists – elegant variation is to be avoided at all costs,

\(^{10}\) Bennion, supra n. 5 at 994.


\(^{12}\) See e.g. *Human Rights Code*, R.S.O. 1990, chap. H.19. Sections 1-6, for example, prevent discrimination on the basis of creed but not religion – in other words, “creed” acts as a surrogate for “religion”.
taking a “far second place to certainty of meaning.”\textsuperscript{13} The same words should have the same meaning and different words should have different meanings. Where a different form of expression occurs, it is proper to infer that a different meaning is intended.\textsuperscript{14} As the Supreme Court noted in \textit{R. v. Barnier} “‘appreciating’ and ‘knowing’ must be different, otherwise the Legislature would have employed one or the other only.”\textsuperscript{15} This presumption of consistency applies to patterns of expression found in disparate parts of a statute as well. So, where Parliament provides exclusive jurisdiction to the Admiralty Court by express provision in one section of an Act (“Admiralty Court has exclusive jurisdiction”) it must not intend exclusive jurisdiction where such words are not used in another section of an Act.\textsuperscript{16} Again, it makes sense to treat this presumption as even more forceful in the case of constitutional provisions. The Supreme Court has been careful to take this approach in other areas involving the \textit{Charter}. Perhaps the best example comes from the distinct trio of words in s. 7, “life,” “liberty” and “security of the person.” In \textit{Blencoe v. British Columbia (Human Rights Commission)},\textsuperscript{17} for example, the majority of the Court confirmed that previous attempts to collapse the three s. 7 interests (notably, by McEachern C.J.B.C. in the preceding Court of Appeal decision\textsuperscript{18}) into a single right protecting a person’s dignity against the stigma of undue, prolonged humiliation and public degradation, was improper. Justice Bastarache, on behalf of a majority, made it clear that, to the extent possible, the interests protected in s. 7 should be kept analytically distinct (and the minority did not take issue with the majority on this point).\textsuperscript{19}

With this in mind, the inclusion of “conscience” in s. 2(a) should not be ignored or glossed over. It is not an elegant variation of religion, redundant or superfluous. To give the constitution’s terms full meaning, “conscience” must have independent content. In addition, \hfill

\textsuperscript{13} Bennion, supra n. 5 at 995.

\textsuperscript{14} See Sullivan, supra n. 3 at 162-3.

\textsuperscript{15} [1980] 1 S.C.R. 1124 at 1135-36.


\textsuperscript{17} [2000] 2 S.C.R. 307.

\textsuperscript{18} See \textit{Blencoe v. British Columbia (Human Rights Commission)}, (1989) 49 B.C.L.R. (3d) 216 (“\textit{Blencoe}”).

\textsuperscript{19} Ibid at para. 48.
since “religion” appears in s. 15 without being partnered with conscience, the different formulations increase the force of the presumption that the intention in s. 2(a) was to give conscience separate meaning. (Granted, it might be slightly more difficult to conceive of “conscience” as a ground of discrimination, but that only helps the claim for its independence.) To put this another way, if conscience was meant to be synonymous with religion, then would not s. 15 have read: “without discrimination based on colour, conscience and religion, sex, age…”? As words that appear together in one place but not in another are intended to do different things, “religion”’s appearance in s. 15 is important. From that fact alone, it also has independent content and meaning.

Nor is it correct to rely on the maxim *noscitur a sociis*, which holds that the meaning of a word can be determined by its association with other words, to restrict the interpretation of conscience. That maxim aids in containing the possibilities of meanings of words by providing a context for understanding: Graham’s example of the difference between a single word “chips” and the phrase “fish and chips” shows how the single word is changed by circumstance – without “fish and,” the word “chips” could be taken to mean wood chips or paint chips.\(^{20}\) Clearly “conscience” will have some connection to religion (its inclusion in s. 2(a) instead of 2(b), for example, makes this clear) but this does not make it perfectly synonymous with religion in the same way “fish” is not synonymous with “chips”.

Finally, even though it is more relevant to problems of absurdity, the “golden rule” of statutory interpretation maintains that statutory language should be compared against the plain meaning of words, unless it is impossible to do so. As John Willis states, the rule holds that the “grammatical and ordinary sense of the words is to be adhered to,” so that a departure from the plain meaning of a word is likely rare.\(^{21}\) Words in their context have to be absurd or meaningless if they are to be ignored. There is nothing to suggest that “conscience” is without

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\(^{20}\) Graham, supra n. 6 at 87.

meaning; instead, as shown in detail in chapter 2, it has a rich history of its own, integrated with religious toleration and theory.\textsuperscript{22}

On the basis of proper canons of construction, therefore, there is little doubt that conscience, as a concept, should be dealt with independently of religion under s. 2(a). Moreover, given the extent of the interpretive “General” provisions of the \textit{Charter}, particularly s. 27 protecting our multicultural heritage, and the Supreme Court’s invocation to interpret all rights in a “purposive” and “large and liberal” manner,\textsuperscript{23} the need to preserve conscience as a distinct freedom is even clearer.

\section{Understanding Religious Freedom: Problems of Comprehension}

There is a growing body of academic commentary, largely American, that finds the very concept of religious freedom troubling. These problems can be divided into three main categories: (1) definitional; (2) historical; and (3) jurisprudential. Of course, the three are interrelated, as jurisprudential problems often arise because of the weight of precedent and through difficulties defining concepts. Nevertheless, it is convenient to treat them separately for purposes of analysis.

\textsuperscript{22} A point worth noting, but which for reasons of space cannot be examined in detail, is the provision of “conscience” in both the English and French versions of s. 2(a). The French version of s. 2(a) of the \textit{Charter} is an exact replica of the English: “liberté de conscience et de religion.” The words have a somewhat different meaning in each language, however. In French, conscience is a combination of the English words “conscience” and “consciousness” – two similar, but distinct, concepts. Conscience combines a state of self-awareness (reflection) with moral judgment (right/wrong). Consciousness is limited to the state of awareness, not necessarily involving reflective self-awareness.

2.1 Difficulties in Defining Freedom of Religion

Winnifred Fallers Sullivan, a religious and legal scholar who has spent much of her academic career analyzing and assessing First Amendment jurisprudence, views securing a true, principled religious freedom in law as ultimately futile. In her latest and powerful work, *The Impossibility of Religious Freedom*, she bluntly urges a complete rethinking of legal religious freedom:

Religion and law today speak in languages largely opaque to each other...What is arguably impossible [about legal religious freedom] is justly enforcing laws granting persons rights that are defined with respect to their religious beliefs or practices. Forsaking religious freedom as a legally enforceable right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities.

The political idea of providing legal protection of religious freedom was a force for tolerance during more formative times, but, she continues, it has now “arguably become a force for intolerance.” The shift to an equality-based approach would, for her, accomplish all that religious freedom sets out to do and more – it would end discrimination in the case of those who do not identify as religious, whose religion is marginalized or disfavoured, or who are afraid of revealing private aspects of themselves. Sullivan seems to suggest that all that is needed is religious equality to sufficiently protect religious freedom, and would do so in a non-discriminatory way.

Sullivan structures her extended argument around a Florida case in which she was involved as an expert witness, *Warner v. Boca Raton*. The case involved a number of Boca Raton residents, of various religious denominations, who were charged with offending a city by-law


25 Ibid at 3, 8.

26 Ibid at 151.

27 Ibid at 8. I discuss the underinclusiveness of a religious equality approach at Part 3(c), infra.

28 Unreported, United States District Court for the Southern District of Florida, West Palm Beach Division, Case No. 98-8054-CIV-/CIV-KLR.
that restricted cemetery displays to a certain size and shape. All of the claimants felt compelled by their own religious beliefs to “decorate” their graves in a manner appropriate to their sincerely felt religious understanding. But as Sullivan reports, they were limited in their ability to explain their motivations. As witnesses, they struggled to describe the complex process of identity formation and motivation that leads to “religious belief.” Instead, they combined religious references with references to family tradition, personal piety, and the religious context surrounding death, to support their argument that they were religiously compelled to mark the gravesites as they did.\textsuperscript{29} In the end, all claimants were unsuccessful. Nobody was able to convince the judge that they were exercising a form of religious freedom. It was ultimately an unsatisfactory result, not only for the claimants, but for Sullivan as well.

In Sullivan’s eyes, the underlying problem with legal religious freedom, exemplified in cases such as \textit{Warner}, is definitional. Legal protection of religion – as with all legally enforceable concepts – requires a workable definition, which does not exist today:

\begin{quote}
With all the good will in the world and unlimited expertise, the religious life of the \textit{Warner} plaintiffs (and indeed, perhaps of most people at most times, but certainly today) resists legal definition in a fundamental way….\textsuperscript{[I]}f what the plaintiffs in the \textit{Warner} case did is not real religion, legally, then perhaps there is very little real religion in this country.\textsuperscript{30}
\end{quote}

Legal religious freedom is trapped. A narrow definition of religion would mean that clearly religiously-minded people, like the claimants in \textit{Warner} (or, in Canada, the “reb
count outcast” Jews wanting personal succahs in \textit{Syndicat Northcrest v. Amselem}\textsuperscript{31}) would be left unprotected. If the definition of religion is expanded to include any self-described “religiously motivated” behaviour, then all persons would theoretically have the power to determine whether a particular law comports with their religion, as they define it.\textsuperscript{32} They would be privileged over those who would or could not so describe their motivation. Sullivan makes the point that accepted definitions, or practical and agreed upon approaches to line-drawing, were available when political rights to religious freedom were contemplated in the lead-up to the

\textsuperscript{29} Ibid at 143.
\textsuperscript{30} Ibid at 138, 147.
\textsuperscript{31} [2004] 2 S.C.R. 551(“Amselem”).
\textsuperscript{32} Ibid at 150.
First Amendment. In modern pluralistic states, however, these consensus definitions or practices are rapidly becoming unworkable.\textsuperscript{33}

The concern is obviously not an abstract one – it also echoes that of Justice Rehnquist’s (as he then was) plea in \textit{Wallace v. Jaffree} for some degree of consistency in religious jurisprudence.\textsuperscript{34} In that case he highlighted the alarming irrationality of many decisions under the no establishment clause of the First Amendment: decisions that, for example, allow States to lend parochial schools geography textbooks containing U.S. maps, but not maps themselves; enable remuneration for bus transportation to and from religious schools but not for field trips emanating from such schools; or forbid public school religious instruction to students but allow those same students to be released for religion classes elsewhere and subject them to truancy laws to enforce attendance.\textsuperscript{35} The simple truth is that no workable definition of religious freedom can be constructed to take into account the myriad inclusions and exclusions encountered in American jurisprudence on religion.

Legal instruments, such as the First Amendment, which guarantee free exercise of religious freedom, may be unable to protect local, small ‘p’ protestant religious beliefs and practices, because judges do not see these as being part of “traditional” religious practice, or as having a “nexus” with religion. Herein lies a weakness with a typical freedom of religion analysis – religious understanding has changed dramatically since the formation of religious freedom as a fundamental liberty. Sullivan quotes Danièle Hervieu-Léger’s work which recognizes, in many modern religions, the important shift in focus from a centralized religious authority to local, transient, or “ground-up” religions based significantly on individual experience. The work of David Hall and Robert Orsi also lends credence to this argument. They describe the same de-institutionalizing phenomenon as “lived religion” – populist or folk religions that are based on people’s lives as much as on doctrine.\textsuperscript{36} Thus, in modern states, where religious life

\textsuperscript{33} Ibid at 151.

\textsuperscript{34} 472 US 38 (1985).

\textsuperscript{35} Ibid at 78-9.

is incredibly disestablished and pluralistic, these forms of “lived” religions need to be protected legally, if religious rights are to have any valid meaning. According to Sullivan this cannot happen with any kind of coherence or fealty to the original idea of religious freedom contained within the First Amendment.\(^{37}\)

None of this is all that surprising, at least in the American context, which was founded on the “fundamentally Protestant attitude” that promotes suspicion on “any worldly religious authority beyond the self,” and encourages the view that American’s religious beliefs “should be held with some tentativeness.”\(^{38}\) It places a huge burden on the legal determination of religious freedom, and its definition, however. Trying to accommodate all religions, as Lori Beaman and Thomas Curry have noted, requires a broad, functionalist definition of religion, meaning that religion has little or no authority of its own, but rather is seen only in instrumental terms as to whether it is good or bad for the state.\(^{39}\) It also opens the floodgates to accepting all manner of practices as “religious.” The alternative approach, taken by “separationists” who argue for a strict separation between church and state, requires the state to involve itself improperly in the business of religion because government is implicated in delineating its boundaries.\(^{40}\)

In most modern societies, religions lack the “legal and epistemological muscle that once gave them shape,” Sullivan contends, particularly when placed against the authority of the rule of law.\(^{41}\) The rule of law, and secular positivistic law in general, is the new “civil religion,” whose subject matter is the province of judges, and which enjoys an unprecedented hegemony – the rule of law is “king.”\(^{42}\) As Phillip Hammond puts it, “[l]egal institutions replace churches

\(^{37}\) Ibid at 152.


\(^{40}\) See Hammond, supra n. 38 at chap 3. See also, Curry ibid at 83; Sullivan supra n. 24 at 143.

\(^{41}\) Sullivan, supra n. 24 at 153.

\(^{42}\) Ibid. Philip Hammond makes a similar point -- see supra n. 38 at xiii.
as the place where society…engages the profoundest ethical issues, and legal-moral language replaces theology.” 43 This is troubling to many conservative thinkers who defend religious accommodation and take offence over the very idea of a “civil religion.” For them, the courts have no business in the naves, minarets, or temples of the nation. 44

Religious belief does present unique challenges to the rule of law. Freedom of religion is bounded, as are all freedoms, but in a different way from others such as opinion, expression, assembly and association. Limits to its nature as a “freedom” come not only from the state or even from the nature of human society but also from the peculiar nature of religion itself. Think of intensely religious persons: when their religious rules come into conflict with secular laws, they will frequently display unwavering loyalty to the former, submitting to an authority outside of themselves and their government. They claim to be doing what must be done, despite massive legal obstacles (and usually, in addition, some social, psychological and cultural ones) blocking their way. 45 For this they are often both admired and despised (depending on one’s point of view). The most recent Supreme Court of Canada religious freedom decisions all exemplify this: Moise Amselem, who pitted himself against Jewish authority, in building a personal succah; Gurbaj Singh Multani who, despite substantial stigma, attempted to wear his kirpan to school; and the Hutterites of Wilson Colony who would not compromise by having their drivers’ licence photographs taken. This enforced freedom is the great paradox of religious freedom. Sullivan captures it nicely:

What can the ‘free exercise’ of religion mean, then, if it is not the freedom to do what we desire? Religious freedom, affirmatively understood, must mean something like the freedom not to be free, in ways not already constrained by biology, culture, government or economic circumstance – the freedom to be bound by claims beyond ‘this world’ and beyond the state. 46

The same point has been argued by European commentators such as Peter Edge. Commenting on some of the jurisprudence of Article 9 of the European Convention, where the European Court seems to suggest that belief has some element of choice, Edge claims that this

43 Hammond, ibid at xv.
44 See Curry, supra n. 39.
45 Ibid at 156.
46 Ibid (emphasis added).
misconceives the idea of freedom of religion. Like Sullivan, for him choice in the context of religion, may be, or more often is, irrelevant.\footnote{See Peter W. Edge, “Religious Rights and Choice Under the European Convention on Human Rights” (2000) 3 Web JCLI http://webjcli.ncl.ac.uk/2000/issue3/edge3.html (accessed June 2009). See also John Garvey, What are Freedoms For? (Cambridge: Harvard University Press, 2000) at 45-6 – religious adherents value freedom not because of autonomy, but because it is a path to the Truth and must be followed.}

Sullivan concludes her argument by reflecting on modern religion’s Janus-faced relation to law: one face associated with the “irrational, the savage and the ‘Other’, to be feared and kept separate,” the other face responsible for our highest “ethical reflection[s] and behaviour[s].”\footnote{Sullivan, supra n. 24 at 154. See also Charney, supra n. 23. Charney also makes note of the idea of freedom of conscience set out in s.2(a), and like Richard Moon, suggests that conscience should be placed on a lower plane than religious freedom (at 49, 70-71) (see Moon, infra, at n. 148 and accompanying text).} The former, often visible and unignorable in events such as religiously motivated wars and terrorism, the latter, indispensable for countries ruled by law, but mainly invisible in ethical ideas such as the “golden rule.” The ambivalence toward religion revealed by this split, however, is concealed within the entrenched, constitutionally enforced “Delphic utopian language” of human rights. The impossibility of religious freedom is thus revealed in the words and acts of courts and legislatures making specific the promises of rights. For Sullivan, there is no realistic balancing act. The impossibility is as much about law as it is about religion.\footnote{Sullivan, ibid at 153-4.}

Even if one does not entirely subscribe to the views of those such as Sullivan and Hammond, it is difficult to reach the conclusion that a principled definition of religion, for legal purposes, is achievable. The Supreme Courts of both Canada and the U.S. have tried to define religion in a number of ways: functionally by examining the purposes of religion; substantively, as including the concepts of a divine being, or supernatural power; or methodologically, in determining what it is that people who belong to religions do – for example, assemble together for activities that may resemble worship or meditation. In order for courts to be as inclusive as possible, given more claims made by increasingly outlandish or marginal religions, questions related to forms of belief – whether theistic, animistic or other -- are usually deemed irrelevant for purposes of establishing whether a practice is religious or not. Such pragmatic and
common-sense approaches are not always fruitful, however, and stumble where practices are illiberal, unfamiliar or distasteful to a judge.

In cases such as *Lyng v. Northwest Indian Cemetary Protective Association* and *Amselem*, majorities of both the United States Supreme Court and the Supreme Court of Canada have held that courts should never attempt to judge what is central (and therefore by implication peripheral) to religion. Despite this fact, courts continue to be put in the position of having to decide the right and wrong of religious practice. Background material in both the *Amselem* and *Multani v. Commission scolaire Marguerite-Bourgeoys* cases reveals much legal skirmishing over the “correct” and “appropriate” religious practices. Since *Multani* arose after the “nexus” and “sincerity” test developed in *Amselem*, the dispute was reframed by the government lawyers somewhat: rather than inquire into the appropriateness to the Sikh faith of carrying a kirpan (which a post-*Amselem* court should not do) the argument was over whether a kirpan was a weapon or not (which, in my view, acts partly as a proxy for making an inquiry into whether it is central to Sikh religious practice).

In the more recent *Alberta v. Hutterian Brethren of Wilson Colony* case, the majority opinion highlights how s. 1 of the *Charter* has become the new battlefield for making religious inquiries: the majority holding that the deleterious effects of a mandatory driver’s licence photograph are “not trivial, [but] at the less serious end of the scale.” How so? According to Chief Justice McLachlin, because “it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion.” Although Colony members may, as a result of the legislation, have to make a choice whether or not to drive, the “costs on the religious practitioner in terms of money, tradition or

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50 485 U.S. 439 (1988) (and obviously in the now long line of cases following *Lyng*).

51 *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256 (“*Multani*”). There was a lengthy discussion in oral argument at the Supreme Court of Canada over what a kirpan is, including LeBel J.’s pointed question (no pun intended) to Julius Grey: “Is it sharp or not?” – see Oral Argument to *Multani*, Supreme Court Record, April 12, 2005, on file at the Supreme Court Library. This is discussed in much more detail in chapter 7, infra.


53 Ibid at para. 98.
inconvenience” are not severe enough. The law is justified since it does not “negate the choice that lies at the heart of freedom of religion.”

The difficulty judges have in truly understanding all religious practices is not intentional. Much can be explained by realizing that judges come from a relatively narrow religious spectrum – in Canada, from a religious and cultural background that is most likely Protestant, Catholic or Jewish. That background will undoubtedly inform a judge when deliberating. An empathetic judge may be able to understand differences; however, at some point a judge’s belief system will be so far removed from a religious claimant's as to cause friction.

This need not be a problem – as Mark Modak-Truran argues, recognizing religious convictions as a “silent prologue” to a judge’s decision making should be seen as perfectly normal. What he proposes is a clear demarcation between a judge’s deliberation (where religious convictions can inform) and a judge’s written opinion (where religious beliefs should not be relied upon). “Deliberation” occurs in private; “opinions” are public. In theory, this approach has much to commend it. By separating the two stages of judicial activity – in effect, creating a distinction between thought and action – a judgment should appear as religiously neutral. The difficulty, of course, is in knowing what a judge thinks while deliberating. Perhaps subconsciously, it is easier for judges to turn down religious freedom claims where the

54 Ibid at para. 105.

55 Statistics on the religious backgrounds of Canadian judges are not available, but I expect results to be not wildly dissimilar from those in the U.S. A useful source for the U.S. is Adherents.com, which lists the religious affiliation of all U.S. Supreme Court justices (up to 2005) (Adherents.com, Religious Affiliation of the Supreme Court, online: Adherents.com <http://www.adherents.com/adh_sc.html> (accessed 24 June 2010)). The list shows that the judges belong to a few main religious groups, mostly Christian: Episcopalian (32.4%), Presbyterian (17.6%), Catholic (10.2%), Unitarian (9.3%), Jewish (6.4%), Methodist (4.6%), Baptist (2.7%) Congregationalist (1.9%), Disciples of Christ (1.9%), Lutheran (0.9%), Quaker (0.9%), Huguenot (0.9%), Protestant (not further defined) (12%), and not a member of any church (0.9%). The site also notes those major religions that have never been represented on the U.S. Supreme Court, such as Pentecostals, Mormons, Muslims, Buddhists, Jehovah’s Witnesses, Mennonites, and Eastern Orthodox. Interestingly, the site lists the religious affiliation of Canadian Prime Ministers, but not judges.


religious practice strays further from the orthodox, or is removed from, or outside of, their own experience. This may provide a rationale for, wherever possible, re-formulating disputes as conscience-based, rather than religiously motivated. I will return to this idea in chapter 6.

2.2 Difficulties in Understanding History

Unlike the Charter, which has been in force for fewer than 30 years, the First Amendment is over 200 years old. It is not all that surprising, therefore, to encounter disagreements over its provenance and operation. While these disputes may not be completely material to an understanding of s. 2(a) of the Charter, they highlight an important point that is relevant to our situation – that problems regarding the interpretation of religious freedom can arise over the historical context of its adoption.

Thomas Curry provides what is probably the best example of how historical analysis can lead to widely disparate views on what constitutional freedom of religion is. In his critique of First Amendment jurisprudence, Curry argues that the fundamental problem with legal religious freedom in the United States arises from five basic “misassumptions” over its genesis: First, that free exercise of religion is assumed to be the equivalent of religious toleration. Second, that members of the First Congress disputed the definition of establishment of religion. Third, that the Free Exercise and No Establishment provisions serve different purposes and exist in tension with each other. Fourth, that the amendment’s purpose is tied either to government aid or hindrance of religion. Finally, that the First Amendment requires government to maintain a neutral stance between assisting or impeding religion, between religion and nonreligion, and between differing religions. For him all of these misconceptions proceed from a mindset essentially derived from Christendom. The main thrust of the Bill of Rights was not to promote an individual’s free exercise, he says, but rather, to ensure that the government had no power in religious matters. According to Curry, the First Amendment, like all constitutions, is directed solely at limiting government. Thus, a government should not be considered neutral,

58 Curry, supra n. 39 at 8.

59 Ibid at 11-12.
for purposes of religious freedom, but powerless. The no establishment clause was not meant to reflect an abstract nonpreferentialism over anything religious; instead, it set out to ensure government did not show preference for a single church, sect or religion:

Establishment of religion has always involved a government preference. That has been the human experience and probably always will be. It is certainly how Americans of 1789 understood the term... The concept of neutrality is not a useful one for Church-State relations. It conjures up an image of government maintaining an impartial attitude, withholding assistance equally from all – and refraining from impeding any – of the parties to a conflict. The language of incapacity, want of mandate, or lack of competence would better describe the situation of government with regard to religion in America... The role of the court is to say what is secular, not what is religious; what is within the limited powers of the State, not what assists or impedes the Church.  

In tandem with Sullivan, he laments that the United States Supreme Court, at least since the beginning of the twentieth century, has placed an impossible burden on the no establishment clause by creating meanings that were never intended. Rather than interpreting the religious provisions in the First Amendment as two separate clauses, the Court should see them as a single, mutually reinforcing concept intended to keep government away from anything religious. Religion is a matter that should be left entirely up to the individual, leaving government deprived of any power over anything to do with “belief, doctrine, devotion, or practice.”

The argument sounds familiarly accommodationist, yet Curry also takes issue with the likes of Richard John Neuhaus or Gustav Niebuhr whose accommodationist arguments seek a place for religion in public debate. Curry, however, sees their arguments as mere updated versions of writers such as Burke and Gladstone, whose belief was that clauses declaring that the government shall not be involved in religious establishment still gave the state a responsibility for the spiritual welfare of its citizens. Take Neuhaus’ argument, for example: he bemoans both the loss of communal religious values in public debate, and courts’ insistence on ignoring content and focusing only on sincerity of belief. He argues that religion needs to reclaim its

60 Ibid at 15-16, 20.
61 Ibid at 71.
place as a public reality with a role in the public’s business. The modern view of religious freedom where individual conviction is paramount is deplored. For Curry, arguments such as these – in effect, that prohibiting the establishment of any one religion implies that government is still able to assist all religions in a neutral fashion – would have astonished the founders, and are wrong in principle. They proceed from the assumption that government will assist only those religions that are generally acceptable to the majority. Put otherwise, how can religion have a role in the public sphere when it is almost certain that any value, virtue or principle professed by one religion will be gainsayed by some other religion? Even if there is agreement amongst many religions (or particularly the “great religions”) it is the lesser known, marginalized religions, that will be exposed. Curry’s concern over neutrality extends all the way down – government is not entitled to be neutral even between religion and irreligion (thereby taking issue with Chief Justice Rehnquist’s opinion in Hialeah as this maintains the fiction of a First Amendment geared towards neutrality rather than powerlessness:

Neutrality implies the possession of power on the part of one who is neutral and also involves a subjective judgment. Justifying decisions on the basis of neutrality is, and has been, little more than an invitation to those on the losing side to proclaim that the Court is not neutral at all but partial to their opponents. To give judges the power to be neutral between religion and irreligion would be to endow them with arbitrary power to extraordinary degree.

In fact, the very argument that government can be nondiscriminatory in religious matters is, for Curry, a violation of the First Amendment since it promotes the view that government is able to assess what is evenhanded in the religious realm. This itself takes government too far into an area it should not tread. Government cannot decide what is true or useful by sponsoring “sanitized” religious activities for the good of society. It must stay completely out


64 Ibid at 35-37, 64.

65 An interesting take on this idea is found in Stephen Prothero’s, God is not One: The Eight Rival Religions That Run the World and Why Their Differences Matter (New York: Harper Collins, 2010) especially at chap. 1.


67 Curry, supra n. 39 at 60.
of the religious arena; attempting to determine even what is and is not in fact, religious, goes too far.\textsuperscript{68}

Curry’s analysis is, on the surface, well-stated, and he buttresses it with strong historical research. But the premise that government can stay out of religion – and that the freedom of religion stands only for that – is certainly subject to debate. What one person sees as government staying out of religion for another person may be seen as eminently religious. The Alberta government driver’s licence program, the cause of a dispute in \textit{Wilson Colony}, is a perfect example. If a government program affects one religious group, but not others, and the government says that the objective of its policy is to bolster public safety, is it “staying out of religion?” Curry’s response might be that courts cannot examine laws using a religious criterion, namely whether they aid or hinder religion, since this takes them down the path of assessing what is religious. For practical purposes, this means that the courts should not be examining the effects of a legislative provision.\textsuperscript{69} That is, in my view, impossible to avoid. It also ignores the carefully constructed arguments of Eisgruber and Sagar and others who claim an important place for religious equality based on an examination of legislative effect. It also brings us back to the initial difficulty that Sullivan adverted to: defining religion for purposes of constitutional law.

Moreover, much of the debate regarding separation of church and state is haunted by the peculiarities of U.S. First Amendment jurisprudence, as Rex Ahdar and Ian Leigh argue. They group a number of countries according to the way in which they allow various forms of establishment, ranging from formal de jure to informal de facto arrangements. Within these groupings, state governments can exhibit, over one or more religions, strong or weak preferences and strong or weak control.\textsuperscript{70} “It is simplistic,” they explain, “to regard establishment as a zero-sum question where a special status for one religion necessarily

\textsuperscript{68} Ibid at 59-60.

\textsuperscript{69} See ibid at 50-51.

implies a disadvantage for other faiths.” The anomaly is the United States, where the “endorsement test,” developed by its Supreme Court, has had a significant historical impact on how religious freedom is analyzed.

Endorsement is based on the principle that religion can be promoted both directly and indirectly, and both are potentially harmful and constitutionally impermissible. As Justice Sandra Day O’Connor puts it: “Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favoured members…” This simplistic approach has been the subject of numerous academic and judicial critiques. Ahdar and Leigh argue that a better approach, and one that also retains the neat distinction between freedom and equality, is to replace endorsement with coercion. Where the state attempts to coerce a particular religious point of view, courts should be able to intercede.

This is where a robust understanding of conscience could come in; where religious freedom may butt up against freedom of conscience. Conscience can be used to test the state’s level of coercion. A positive state act, or even the mere existence of an established religious display in a public setting, could be examined against what a reasonable person of good conscience, aware of our Constitution and its traditions, would feel. This allows the freedom to be tested in both ways: the angst experienced by those not of an established faith can be set alongside the

71 Ibid at para 47. This does ignore the fact that the UN Human Rights Committee has shown some concern over state preference for religious schools in decisions arising out of Canada: see Waldman v. Canada (Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996 – discrimination against Jewish parents who bear full cost of sending child to private Jewish school) although in Tadman v. Canada (Communication No. 816/1998, UN Doc. CCPR/C/67/D/816/1998) it was determined that provincial funding of Roman Catholic schools is not discriminatory under Art. 26 of the ICCPR; see also Tufyal Choudhry, “Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights Article 26,” (2003) Eur. H. R. L. Rev. 24 at 32-35. In my view, these are largely arguments on equality grounds, not religious freedom grounds.


slight felt by religionists when their faith, often dominant, is ignored.\textsuperscript{74} In these kinds of cases, freedom of conscience can function as a balance against freedom of religion. By making freedom of conscience the paramount morally-based freedom, and reserving religious freedom for special circumstances, a uniquely Canadian approach to the problem of belief-based claims could be crafted. This approach would dovetail nicely with the Supreme Court’s fears, expressed in cases such as \textit{Amelem}, that courts should not be the arbiters of religious dogma.\textsuperscript{75} It may be perfectly acceptable for rabbis assessing the sanctity of a communal sukeah, or imams deciding the role of a niqab in Islam, to thumb through the Torah or Koran, or other religious texts, parsing sentences and looking for the truth. Courts, on the other hand, should not directly or indirectly become involved in such debates – as with examining content under a modern notion of expressive freedom, judicial determination of religious doctrine should be forbidden. This allows for intra-religious debate itself to flourish, unencumbered by judicial doctrine (which is a good thing, since religion, like any social practice, only grows and stays relevant with continued discussion and reflection and evolution).

The point of highlighting Curry’s view and critiquing First Amendment terms such as “establishment” is that many versions of history will always come into play in attempting to assess religious freedom, and these versions of history often depend on the religious sensibility of the proponent and the language which frame historical (and thereby legal debate). These are epistemological problems. This is as true for s. 2(a) of the Charter as it is for the First Amendment. At the very least, it points to how the lack of consensus over the constitutional meaning of freedom of religion may arise out of misunderstandings of meaning and of history. As a result, that lack of consensus also reveals itself in religious jurisprudence.

\subsection*{2.3 Difficulties of Judicial Interpretation}

Even those who do not necessarily agree with Sullivan or Curry are often less than enthused with courts’ take on religious freedom, particularly in recent years. The concerns are probably

\textsuperscript{74} Ahdar and Leigh, supra n. 70 at para. 83.

\textsuperscript{75} See \textit{Amselem}, supra n. 31 at para. 50.
most acute in the U.S., where the religion clauses in the First Amendment are unnecessarily complicated: Kent Greenawalt and Martha Nussbaum, to name two prominent commentators, have each expressed frustration over trying to rationalize both free exercise and establishment clause jurisprudence. Greenawalt describes the Court’s majority decision in Employment Division v. Smith, for example, where it abandoned a longstanding approach to free exercise doctrine, as “striking,” noting that Justice Scalia “struggled mightily to make the decision appear consonant with other cases” at the same time as failing to ask the “crucial question of how the [compelling interest test] affects bargains struck.” While the majority tried to downplay this reversal, it “fooled no one familiar with free exercise law.” At the least, one would have expected some support for such a radical departure, but, as Greenawalt notes, there was nothing – not even a claim of an “obligation to be faithful to the constitutional text.”

Of the same case, Nussbaum comments on the majority’s refusal to apply precedent, “sweeping away years of jurisprudence with breathtaking confidence” in a manner “shocking for its lordly way with precedent.” Referring to another recent case, McCreary County, Kentucky v. ACLU, she finds it “alarming” for a justice of the Court to pronounce that it is perfectly all right for government to publicly endorse monotheism at the expense of polytheism or nontheism.

This concern arises over the proper analytical approach to use in resolving religious freedom cases in the modern era. While a number of different perspectives have been advanced, I


77 Nussbaum, supra n. 73 at 153, 155.

78 545 U.S. (2005)

79 Nussbaum, supra n. 73 at 5. Scalia J.’s dissent calling for endorsement, is built on, among other things, the reference to “God” found throughout the structure of the U.S. government and state; the words of the presidential oath “So help me God”; the opening of the Supreme Court with the invocation “God save the United States and this Honourable Court”; “In God we Trust” on coins; the Pledge of Allegiance “One nation under God”, etc. Lest we too easily feel smug in our differences, we should remember that there is the preamble to the Charter, and in recent times, Prime Minister Harper’s fondness for ending his speeches with “God Bless Canada.” – see Colin Campbell, “The Church of Stephen Harper”, Maclean’s magazine online, http://www.macleans.ca/culture/lifestyle/article.jsp?content=20060220_121848_121848, accessed February 19, 2010.
choose to highlight three areas – subjectivity and individualization, religious equality, and the notion of utility – that evidence the shaky foundation of legal religious freedom.

(a) Religious Belief as Individual Freedom

The interpretation that the Supreme Court of Canada (and the United States Supreme Court) has constructed for religious freedom under s. 2(a) is highly subjective. As Iacobucci J., for the majority, opined in *Amselem*,

[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an *individual* demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of *his or her* spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.  

Elsewhere in the same case, Justice Iacobucci speaks of the essence of freedom of religion being “intensely personal” and all about “personal convictions.” Religion is not a social phenomenon so much as individual, whose end is one’s self-definition and fulfillment. As Epp Buckingham puts it, “the judgment…seems to leave no place for religious institutions or communities in determining religious practices for their adherents.”

Benjamin Berger finds this understanding of religious freedom, in part, due to the very nature of law. In its “rendering” of religion, law – at least in terms of constitutional jurisprudence – must transform it into an idea within a liberal tradition that is meaningful. The idea that makes sense to liberalism is individual autonomy. As Berger ably demonstrates, this transformation occurs in three stages: first, religion is treated as something that essentially takes place within an individual; second, because it is an expression of personal autonomy, religion deserves

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80 *Amselem*, supra n. 31 at para. 46 (emphasis added).
81 Ibid at paras. 54, 39.
protection; finally, and ineluctably, religion is therefore private. Law thus circumscribes the religious experience, in a way that make sense within “the horizon of significance endogenous to law” but therefore “process[ing] religion in terms exogenous to religious cultures,” particularly by ignoring its communal and cultural elements. As a result, he is pessimistic about the ability of Canadian constitutional law (presumably through the interpretation of judges) to perceive religion as anything other than individual and private, since religion has become the object of individual choice and preference. For him, liberal ideology and legalism have rendered religion as “quintessentially private.” Berger relies on a number of cases to make his point, including Big M Drug Mart, Amselem, Zylberberg v. Sudbury Board of Education (Director) and Trinity Western University v. British Columbia College of Teachers. Although he does not find fault with the legal approach to understanding religion, in effect because it is doing so within an internally coherent system, he is disheartened. The fundamental shortfall that remains, for Berger, at the core of legal discourse about religious liberties, is that law is blind to aspects of religion as culture. This ultimately cynical view can be overborne in a simple move: by understanding the primary moral freedom as conscience, as I set out in chapters 6 and 7.

(b) Religious Freedom as Equal Liberty

Since it was clear in Warner that the claimants were being treated differently on account of some kind of belief or practice that was important to them, Sullivan steers her argument away

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84 Ibid at 285.

85 Ibid at 277.

86 Ibid.


89 Berger, supra n. 83 at 284-5.
from upholding an idealized but impractical analysis of freedom of religion towards an analysis based on equality. As she notes, American law has accommodated differences in areas such as gender, race, ethnic origin, and culture. When law is tailored to account for difference, equality and discrimination issues are often presented. “Courts and legislatures will be required to decide when a particular practice is religious and when a practice is ‘cultural,’” she informs us, using the contemporary example of some Muslim women and their desire to wear a hijab, and whether this practice should be characterized as a religious, political or cultural. Treatment that differs between groups, regardless of the basis for the differentiation, thus becomes enfolded into a form of discrimination analysis for her. In the case of the Warner claimants, Sullivan argues, it may be that city officials discriminated against them on the basis of religious belief, regardless of whether the decorations fit within traditional religious practice or not.

The equality approach is contrasted with that of traditional religious freedom guarantees. Having established the inability to accurately define what is meant legally by religion, and the lack of a plausible political consensus about why and how religion itself, and the religiously motivated, should be privileged in law, Sullivan delivers a death knell to religious liberty. She takes Steven Smith’s point regarding the incoherence of religious neutrality, and follows it to its logical conclusion. What remains is a renewed belief in equality as a principle to deal with these forms of legally mandated differentiation:

[T]he principle of equality would suggest that for purposes of the “free exercise” clause, simply including “other” religions is not enough. Persons not explicitly motivated by religion should have the same rights to “free exercise.” Likewise, for the “establishment” clause, entirely excluding religion from government places and government benefits solely because such benefits are religious is increasingly understood as discriminatory to persons identifying themselves as religious.

90 Sullivan, supra n. 24 at 149.

91 See Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995) at 94 (freedom of religion can never be “neutral” since it is based on Judeo-Christian ideas)

92 Sullivan, supra n. 24 at 150.
The privileges given to religion were a product of a theory of liberal enlightenment that began as a desire for peace in a time when it was impossible to imagine a society without religion. Even if it is accepted that a select few of those living and writing over 200 years ago were not solely interested in, and concerned only about protecting, Christian religions – Jefferson himself showed an egalitarian, pluralistic spirit in his well-known phrase, “the Jew and Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination deserve protection”\(^{93}\) – there was still the seeming lack of concern for the non-religious, irreligious or for unknown and yet to be invented religions. That old world is now largely a historical anachronism. “Unless ‘religion’ is to be broadened to include everyone,” Sullivan urges, “to give legal protection to religion is to privilege those who understand themselves to be religiously motivated over those who understand themselves to be motivated by equally deeply held secular values.”\(^{94}\) What the plaintiffs in cases such as *Warner, Amselem* and *Wilson Colony* are really seeking – although usually framed in religious terms – is the right of all individuals to a life outside the state wherever possible – “the right to live as a self on which many given, as well as chosen, demands are made.”\(^{95}\) There is nothing inherently “religious” about this idea. It is the fact of conviction, not its substance, that matters. Again, conscience may well be a more appropriate label to apply to these matters.

Some of Sullivan’s ideas are undoubtedly radical, but in taking equality as an endpoint of religion’s favoured constitutional status, rather than its liberty interests, she has some strong allies. Christopher Eisgruber and Lawrence Sagar in their recent work, *Religious Freedom and the Constitution*, also demand a vision of religious freedom that focuses on equality, rather than religion.\(^{96}\) They focus on the legal test requiring a “compelling state interest” to justify encroachments on religious freedom.\(^{97}\) Although the test has been discarded by the U.S.


\(^{94}\) Sullivan, supra n. 24 at 157.

\(^{95}\) Ibid at 159.


\(^{97}\) This test emerged in the American jurisprudence from *Sherbert v. Viner* 374 U.S. 398 (1963) (denial of unemployment benefits to a woman who had been fired because she refused to work on Saturdays for religious reasons).
Supreme Court – in favour of a method that upholds laws that are “neutral and generally applicable”98 – there have been legislative attempts at both federal and state levels to revive the “compelling state interest” standard.99 Eisgruber and Sager view the balancing approach suggested by the “compelling state interest” test to be indeterminate, resting on no coherent normative foundation and prone to ad hoc behaviour by judges.100

As an alternative, they develop a concept for legal religious freedom that is more akin to an equality right: the theory of “Equal Liberty” (the capital letters supposedly giving it additional heft), which examines not how government should behave towards religion, but how government should treat persons who have diverse commitments regarding religion (or even its rejection). The basic idea of Equal Liberty is that concerns about fairness lie at the core of religious freedom and should inform all approaches to First Amendment matters. As they put it, “an equality-based approach to free exercise is fair and workable, and is likely in the end to protect religious believers more effectively than the awkward idea that religiously motivated conduct should be presumptively exempt from legal regulation.”101 Equal Liberty removes some of the normative element to religious freedom analysis, so that the debate is not over whether religion is good or bad, or what its optimal role in public life should be, but examines instead the distributional fairness of government services that may impact on religious matters.102

In brief, the theory of Equal Liberty consists of three components. First, no one should be devalued on account of his or her spiritual beliefs. Second, there is no constitutional reason to

98 See Employment Division v. Smith, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to persons dismissed from their jobs on the basis of their ceremonial use of peyote).


100 Eisgruber and Sager, supra n. 96 at 85.

101 Ibid at 15.

102 Ibid at 19.
treat religion as deserving of special benefits (other than the commitment to ensure equality as granted by the first component). Third, all persons, regardless of their religious or non-religious viewpoints, are entitled to equal rights of “free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish.”

The idea of Equal Liberty is not particularly novel in Canadian constitutional law. As Bruce Ryder notes, the Charter allows for a very sophisticated understanding of “equal religious citizenship,” largely through the interaction of ss. 2(a) and 15. To put it another way, s. 15 protects against discrimination on a number of enumerated (and analogous) grounds, including religion, that ensures a broadly based appreciation of fairness and equality, along the lines modeled by Eisgruber and Sager. The concern of American theorists thus usefully highlights what is made explicit in Canadian constitutional law: the more frequent legal concern in modern society arises over the persecution of religious practitioners compared to others, not the freedom to exercise it. The freedom, as defined by our courts, and discussed above in part (a), is more often one of individual belief, that even in religious practitioners, resides in conscience.

(c) The Utility of Religious Freedom

Equality may be a natural fit for religious freedom; the utility of belief-based acts, on the other hand, may seem an odd approach to take. Even in their article, “An Economic Approach to Freedom of Religion,” Michael McConnell and Richard Posner, proponents of using cost-benefit of analysis in religious freedom cases, admit that “[r]eligious reasoning and religious faith may seem antithetical to economic reasoning and values; religious freedom may seem unquantifiable even in principle and therefore beyond the reach of any economic or socio-scientific metric.” Nonetheless, McConnell

103 Ibid at 52-53.


and Posner offer a sophisticated picture of the relevant considerations in applying a utilitarian analysis to questions of religious freedom. The argument proceeds as follows: first, one must establish a baseline from which to assess whether a cost or benefit (often described as a “tax” or a “subsidy”) has been imposed. Whether a tax has been levied or a subsidy has been provided is assessed in comparison to what an affected parties’ position would be in the absence of the particular government action.

Normally, efficiency is employed in a utilitarian analysis in order to assess government regulation; however, in the religious context, utility requires something more. In an efficiency-based model, taxes or subsidies are only justified to the extent that the net benefit of the tax or subsidy outweighs its net cost. McConnell and Posner show that there are fundamental problems with using an efficiency-based model in approaching religious issues. First, such a model could end up favouring the establishment of a particular religion. For example, “if it could be shown that inculcating public school students with the tenets of the Mormon faith would produce net social benefits, perhaps in the form of a more orderly and productive citizenry, such inculcation would be permitted.”

Second, the same kind of analysis could favour a direct ban on a particular religion or religious activity if it could be shown that the aggregate disutility of the religion to society outweighed its benefits to adherents. Though the Canadian constitutional guarantee of religious freedom is worded differently, these concerns would apply equally in Canada, where legislation motivated by considerations particular to a specific religious tradition has been invalidated, and the banning of specific religious practice would seem antithetical to the guarantee of conscientious and religious freedom enshrined in s. 2(a) of the Charter.

Thus, efficiency must be discarded as a baseline for evaluation. Instead, the most appropriate baseline for resolving questions of religious freedom is, as McConnell and Posner argue, “neutrality.” By this, they mean that religious institutions and activities ought to be compared with non-religious institutions and activities in order to properly conduct a utilitarian analysis. Thus, “a regulation is not

University of Toronto, for assisting with the argument that follows-- see Kieslowicz, Haigh and Ng, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48(3) Alta. L. Rev. 679.


neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.” This approach actually shares much in common with Eisgruber and Sager’s “Equal Liberty” theory of religious freedom discussed above – a somewhat surprising result, given Eisgruber and Sager’s opposition to balancing-type approaches. However, like McConnell and Posner, Eisgruber and Sager’s view is fundamentally comparative; both views use the comparison of religious to non-religious activities as a litmus test.109

This leads to some important ambiguities in these two forms of cost-benefit analyses. Take the case of Sherbert v. Verner in the U.S., which McConnell/Posner and Eisgruber/Sagar both do. Mrs. Sherbert, a Seventh Day Adventist, lost her job because she refused to work on Saturday, and as a result was denied unemployment benefits on the basis that she “voluntarily” left her job. The law in South Carolina contained an exemption for those who worshipped on Sundays, but not Saturday Sabbatarians. Before the U.S. Supreme Court’s ruling, Mrs. Sherbert was disadvantaged because she paid into the unemployment insurance plan at the same rate as other employees, but was unable to access her insurance benefits for reasons related to her religion. After the ruling in Sherbert, Saturday Sabbatarians were insured against an additional risk (the loss of employment for religious reasons). As additional risks are brought within the scope of the insurance plan, the global cost of the insurance (and hence each employee’s contribution) rises. Neither Sullivan’s nor Eisgruber and Sagar’s approaches, however, can explain why anyone should be entitled to an exemption on the basis of their day of worship in the first place; if there had been no exemption for Sunday worshippers, their day of worship would not matter.

108 McConnell and Posner, supra n. 105 at 35. Compare Ryder, supra n. 104. Though Ryder, in offering his view of the Canadian conception of equal religious citizenship, does not explicitly dismiss a utilitarian analysis, he seems to take up a position in opposition to it: “the ‘baseline’ for measuring state neutrality in Canada is the position of equal religious citizenship. Measures taken to promote the capacity of religious believers to fully and equally participate in Canadian society are consistent with state neutrality as long as they are extended in an even-handed manner to all adherents of religious or conscientious belief systems” (at 95). Jeremy Webber, in his article “The Irreducibly Religious Content of Freedom of Religion” in Avigail Eisenberg, ed., Diversity and Equality: The Changing Framework of Freedom in Canada, (Vancouver: UBC Press, 2006), cited at n. 66 in chapter 2, takes issue with the entire analysis offered by Posner and McConnell (and by implication, Ryder). His view, stated simply without doing it full justice, is that neutrality is unworkable since the supposed extra costs associated with activities based on religion (such as choosing to work on a Sabbath or engaging in polygamous marriages) only make sense if the value of such activity is assumed to be greater to religious practitioners than the value others may give to those activities but for non-religious reasons. As Webber says, the “super-ordinate value of religious observance is assumed” (at 185). Webber, however, seems to discount the fact that this is only true, arguably, because the constitution has privileged religion. Imagine if “freedom to participate in sports” were a protected fundamental freedom in the Charter – by definition the super-ordinate value of sporting activity would be greater to athletes than non-athletes.

109 Eisgruber and Sagar, supra n. 96 at 53.
approaches would have supported an opposite result in *Sherbert*. Moreover, non-religious employees, could never make a successful claim for the loss of employment for religious reasons. But what if a non-religious employee felt compelled to stay at home on Saturday for reasons of conscience? – perhaps her terminally ill daughter can only be visited on Saturdays. Nonetheless, she would be required to shoulder a portion of the increased cost for the maintenance of the insurance plan. The argument has been made that because they have little to no risk of losing their employment for religious reasons, they bear a disproportionate amount of the plan’s new cost. Yet they may lose their job for reasons that others may view as equally compelling.

This kind of utilitarian approach gains support from unexpected quarters. Martha Minow, in *Making all the Difference*, argues for a fundamental change in how law constructs and understands differences between people (which would include religious or belief-based differences). From a perspective that analyzes religious treatment primarily in order to ensure the best solution to social diversity, Minow ends up supporting the kind of utilitarian analysis advocated by McConnell and Posner. She employs a utilitarian approach by asking who should bear the costs of the differences that exist between religious groups and others. Whereas such differences are often attributed to the minority community – the majority group is “normal” and the minority group is burdened with “difference” – Minow argues that difference is actually best understood as “as a pervasive feature of communal life.”

Adopting this approach alters the focus on disagreements about the accommodation of differences in religious practices: “Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions.” In considering ways to structure social institutions, institutions of justice must therefore attempt to distribute more fairly the burdens attached to difference. At its heart, her sophisticated social constructivist argument recognizes that there are serious problems in trying to establish

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110 Minow, supra n. 2 at 11.

111 Ibid at 43.

112 Ibid at 11.
the boundaries of religious freedom, and a combined equality and cost/benefit analysis may offer a way out of this morass.\textsuperscript{113}

Though Minow may not have intended to be perceived as a utilitarian, she nonetheless insists that it is unfair for minority groups to bear the full costs of difference, and that the most just solution is one that reshapes institutions such that the costs of difference are distributed more evenly. This is supported by the view that all difference is relative; if difference does not belong to one group but is rather a pervasive characteristic of an entire society, it is unfair to concentrate the costs of that difference with specific minority groups. Those who disagree with Minow will argue that taxpayers should not be made to shoulder the extra burdens associated with people’s particularities. But, as Minow observes and the Supreme Court of Canada admits, the costs of treating all people fairly always persist; the only real question is who bears them.

Minow’s argument does not go as far as it could, however. The costs for our hypothetical parent who felt compelled to avoid work on Saturdays in order to visit her terminally ill daughter, for example, might better be borne by the entire society, rather than the specific individual. The same costs of difference exist for those under burdens of conscience, and, in a just system, should be accounted for. Both Minow’s view and the Court’s, in other words, require an assessment of the various costs and benefits of conscience and religious freedom in particular situations. The real difference is in assessing the fairness of the unequal distribution of costs. This leads to differences in determining what kinds of government interests are sufficiently compelling to justify limits on freedom of conscience and religion, but not to a wholesale rejection of a cost-benefit analysis. It also shows, though, that assessing the costs and benefits of only religious freedom is at best, a partial solution to the problem.

In the above section, I have highlighted some of the limitations that exist with assessing constitutional freedom of religion. Although the problems are not insurmountable, they do contribute to a widespread dissatisfaction with religion’s place as a fundamental freedom. These difficulties become more acute when we examine freedom of religion from a slightly

\textsuperscript{113} Minow does not seem to fall into the common social constructivist trap of creating false epistemic rationalities and is therefore not open to an attack on anything other than the rationality of her claim: see, for example Paul A. Boghossian, \textit{Fear of Knowledge: Against Relativism and Constructivism} (Oxford: Oxford University Press, 2009) who provides a strong critique of much social constructivism.
different angle – its continued expansion into areas not traditionally viewed as religious. This underscores the “inevitable:” conscience’s eventual dominion over individual moral choice.114

3 Modern Freedom of Religion: the Inevitability of Conscience

Since the Reformation, the individualization of religion has proceeded without relief, to an extent that modern-day, quasi-religious mutations exist that are almost unrecognizable as religion to all but a practice’s local adherents. The sociologist Danièle Hervieu-Léger, who has explored widely the role of religion in a post-modern world, has followed these trends closely. For her, the evidence is unassailable: empirical studies show that the religious landscape in the West has continued on a trajectory towards greater individualization and subjectivization of belief and practice, such that individualism has become a “recurrent theme of all sociological reflection on religious modernity.”115 One of the most obvious manifestations of this movement is what she refers to as the “mystical-esoteric” (known more colloquially as the New Age), whose religiosity is entirely “centred on the individual and his or her personal fulfillment.”116

As already noted, the seeds for this de-institutionalization were planted centuries earlier. The Protestant Reformation, through the teachings of Martin Luther and John Calvin, followed by writers such as Voltaire and Locke, began an approach to religious belief (at least the Christian forms of it) that minimized the role of the church, treating individual conscience as a key element in moving away from the rigid, doctrinal authority of the Catholic church. The trend has been relentless. In Hervieu-Léger’s eyes, this “desacralization of religion is…a necessary condition for the advent of a universally shared ethical religion” in the twenty-first century.117

114 Hammond, supra n. 38.

115 See Danièle Hervieu-Léger, “Individualism Religious and Modern: Continuities and Discontinuities” in David Lyon and Marguerite Van Die, eds., Rethinking Church, State, and Modernity: Canada Between Europe and America (Toronto: University of Toronto Press, 2001) 52 (Translated by David Lyon and Marguerite Van Die).

116 Hervieu-Léger, ibid at 55.

117 Ibid at 60.
Certainly the changes in the practice of Christian religions are impossible to ignore. Today’s Christianity is a “friendly Christianity,” as the Italian philosopher Gianni Vattimo proclaims, that “eradicates, in principle, all the transcendent ineffable and mysterious qualities of the sacred, relying only on God’s intimacy with the individual.” In my view, the logical end point of this process of individuation is, in terms of how courts construct constitutional law and the fundamental freedoms of religion and belief, a greater role for a conscience: one that is truly separate and apart from religion as a robust concept of its own. It may go so far as to require a reconception of many aspects of legal religious freedom as a matter of conscience, rather than sacrament. For if courts view religion as little more than a system of belief held by an individual – a “religion of one” – then it makes little sense to perpetuate a constitutional conceit when freedom of conscience is available and more coherent.

There is little doubt that churches today do not hold the same authority over the minds and behaviour of individuals that they once held in the 17th century. Whereas Locke assigned the duty of protecting morality to the church, that role is minimized in our pluralistic, largely secular society. Locke relied on the church to establish a basic level of reasonableness and logic in the ordering of civil society. We fall far short of that ideal today. Illogicality and unreason pervade our world and churches seem unable or unwilling to enter the fray except in the most cursory ways. For example: in the widespread acceptance of tobacco and advertisement of it, but the proscription of cannabis; in the apparent condonation of violence in mass media and popular culture, such as films, TV and video games, but vehement protestation of it when it spreads into real life; in the adoption of Millian ideas related to liberty of private behaviour and expression, but the increase in intolerance and self-censorship

118 Quoted in Hervieu-Léger, ibid at 63.

119 I recognize that much of the thrust of this “individuation thesis” comes out of the Christian tradition. Nevertheless, similar narrative arcs could be found within other major religions. The dispute over veiling and the role of women in Islam, for example, reflects, to a large extent, disputed views of Islam that centre on the role of the individual within the faith – see Stephen Prothero, God is Not One (New York: HarperOne, 2010) for an overview of these effects in other world religions.

120 See Amselem, supra n. 31 at para 189 per Binnie J., dissenting.

in the public realm;\(^{122}\) and in the difficult debates regarding the ordination of women, same-sex marriages and child abuse that have occurred within Christian churches themselves. Without passing judgment on these apparent contradictions and hypocrisies, there is no question that the role and place for religion in such a world is much more complicated than it was during Locke’s time. That is not to say that religious freedom does not deserve protecting. Far from it. What it means, however, is that the very idea of protecting religious freedom, so important to western development in the 16\(^{th}\) century, needs revitalizing in the 21\(^{st}\).

Moreover, legal claims once made by adherents of traditional religions are now being made by more difficult-to-assess groups or sects, or by non-believers who lay claim to what may well be legitimate alternate grounds for legal relief. Take Lori Beaman’s example of the Church of the Holy Shoelaces, mentioned in chapter 1: should such a sect be entitled to the protections of a fundamental freedom related to religion? Or a storeowner: should his devotion to spending time with his family on Saturdays mean that he should be allowed to open his store on Sunday? What if it were because his conscientious belief of a Saturday “family day,” is much more important to him than Sundays, which hold no special meaning? What if someone wished for exclusion from our drug laws because the meaning of existence can be found only while getting high and listening to Jimi Hendrix on an iPod? Or using peyote (or maybe even snorting cocaine) to “see God” (used in the colloquial sense, not religious)? In most western democracies, some or all of these activities may well be guaranteed, and protected from the operation of general laws that prohibit them, but only if they form an aspect of a (generally traditional) religious belief or practice. Whether they would be protected on the grounds presented – I deliberately chose either marginally “religious” or even non-religious rationales – is another matter. Conscience-based freedom, however, may offer a helpful method of examining the dilemma from a different vantage point.

A vibrant debate is currently being waged in the United States over the exact contours and parameters of the First Amendment protection of religion. Following the trend of recent U.S. Supreme Court jurisprudence on the Free Exercise and Establishment clauses, some scholars argue that the ultimate form of protection contained within the First Amendment clauses is

\(^{122}\) Ibid.
that of conscience, not religion. Phillip Hammond (now Professor Emeritus of Religious Studies at the University of California, Santa Barbara) is one of those scholars. In the next section I present his argument in more detail. There are two main reasons for examining the United States experience: first, there is a rich tradition surrounding religious freedom in that country that should not be ignored; second, and more important, if there are plausible arguments as to why Americans should consider adopting freedom of conscience as the default belief-based freedom – under a bill of rights that only expressly refers to freedom of religion – the argument for Canada doing so under an express freedom of conscience provision is that much stronger.

Hammond is one of the few American religious scholars to explore the inter-connection between conscience and religion, and the possibility of building a First Amendment jurisprudence on the basis of conscience. He develops his argument by way of pushing the separationist argument to its logical and, as he says, structural, conclusion.123

Two main approaches to First Amendment analysis are based on a “separationist” or “accommodationist” model. Separationists, as the name implies, believe in a strict separation of church and state, and overall state neutrality, which they believe creates the optimum conditions for a state to ensure the free exercise of religion. Ideally, these conditions approach pure secularism. Accommodationists, on the other hand, believe that there is a role for government to play in ensuring religious liberty is not inhibited, even if in doing so it may indirectly favour one religion over another. In the U.S. context the accommodationist position therefore means that the “no establishment” clause in the First Amendment does not translate into complete disavowal of some of the norms of Christianity that existed at the time the clause was drafted.124 In contrast, as separationists increase the idea of state neutrality, they expand the concept of freedom of religion beyond the traditional into areas more accurately seen as beliefs of conscience. The distinction is somewhat crude, as the two groups are more accurately represented as the endpoints of a broad continuum. Nevertheless, the categories remain useful.

123 Hammond, supra n. 38.

124 Ibid at chap 1.
According to Hammond, the accommodationists are fighting a losing battle, largely over terrain involving conscience. The same endpoints that distinguish religious values between accommodationists and separationists also reflect the opposite ends of a debate involving conscience:

[F]rom the separationist perspective, the Constitution was written at a time when the word “religion” had a common meaning, and now it does not. In other words, separationists want government to favor and protect everything they think it is that the Framers then had in mind by religion, including conscience. But they find in today’s world that the word “religion” no longer adequately covers all such phenomena. Instead, in the effort to protect the consciences of all individuals, government refrains…from endorsing anybody’s conscience. This has the effect of allowing free play of everybody’s conscientious efforts, whether “religious” or not, without regarding some of those efforts as privileged because they are religious.

Accommodationists, on the other hand, do not agree that individual religious liberty is best protected when government is religiously neutral…Accommodationists want religion to have a privileged place…They do distinguish between religion and conscience.125

As a committed separationist (or more accurately, a proponent of strong state neutrality), Hammond highlights the “structural” and historical forces at play that point towards increased state neutrality. These forces exist to some extent everywhere, not just in the United States – he argues that even in so-called religious states such as Pakistan and Indonesia, where modified forms of pluralism occur, the move to neutrality is virtually inevitable, as states pursue other political and social goals.126 Hammond uses this inevitability to build a strong argument for revitalizing conscience in the American First Amendment. Because the structural consequences of increasing pluralism, multiculturalism and government neutrality leave little room for a liberty based purely on religion, a radical rethinking of the purpose of religious freedom in the 21st century is required. Conscience fills the gap.

To these external forces shaping liberty of belief, Hammond adds the unique framing of religious freedom under the First Amendment, which requires that the state not establish any

125 Ibid at 9; emphasis in original.

126 Hammond cites the work of N.J. Demerath III in “Religious Capital and Capital Religions” (1991) 120 Daedalus 21 at 38-40. In the U.S., Hammond notes that a change such as the movement from religious-based schools or universities (which were the only kind of schools in existence in the 18th century) towards public schools (a result largely attributable to immigration and increased urbanization) reflects a structural change (a sometimes unintended consequence of other goals or objectives) that necessitates a reformulation of the idea of religious freedom and the role of state – see Hammond, ibid at 25-7.
religion at the same time as it must allow free exercise of it. In many instances, he notes, the
two ideas create points of contention or even pull in opposite directions, as the inexorable
movement to fully developed pluralism occurs. There is thus no stopping the eventual opening
up of religious liberty to conscience. He relies on two United States Supreme Court cases,
Epperson v. Arkansas127 and County of Allegheny v. American Civil Liberties Union,128
decided over a period of twenty years, to illustrate this natural evolution well.

In Epperson, a challenge was made to an Arkansas law prohibiting the teaching of evolution in
public schools. For a unanimous United States Supreme Court, Justice Fortas held that the law
was intended to prevent teachers discussing evolution, thus conflicting directly with the free
exercise clause and the no establishment clause. “A parti-
cular segment [of our body of
knowledge] is proscribed,” stated Fortas, “for the sole reason that it is deemed to conflict with
a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis
by a particular religious
group.”129 The teachings of a certain sect or dogma, in this case
Christian, were held to be constitutionally impermissible because they affect both the free
exercise of religion (non-Christians are unable to participate fully in the life of the school) and
its establishment (the law represents the state favouring a Christian view of civilization).
Epperson is thus a good example of the two branches of the First Amendment working in
harmony.

But in Allegheny, the easy relationship between the two clauses faltered. Here, the U.S.S.C.
had to determine the constitutionality of two religious holiday scenes set up in Pittsburgh – a
crèche installed in the lobby of the City-County building and a menorah set up outside the
same building near a Christmas tree. In this case, the Court split in part, and the division lay
largely in the judges’ perceived differences between the free exercise and no establishment
clauses. Justice Blackmun for the majority described the two freedoms as protecting far more
than Christian diversity, instead guaranteeing “religious liberty and equality to the infidel, the

127 393 US 97 (1968) (Epperson).
129 Epperson, supra n. 127 at 103.
atheist, or the adherent of a non-Christian faith.”

130 For Blackmun J., the crèche scene clearly violated the no establishment clause since it gave the impression that the state was promoting or endorsing Christianity. Applying a long line of precedent that stood for the proposition that endorsement of one religion implies establishment and is not permitted under that clause, he determined that the crèche had to be dismantled. At the same time, Justice Blackmun also saw the crèche as violating the free exercise clause since it sent a signal to non-Christians that their religious beliefs (or non-religious beliefs) were not endorsed and may not be practiced to the same extent as Christian beliefs. Justice Kennedy’s partial dissent, on the other hand, held that the no establishment clause permits government some latitude in accommodating the important role religion has in society. He would have allowed the displays as a legitimate part of the nation’s Christian heritage as anything less would “border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular.”

131 The divergence of opinion prises apart the apparent uniformity between the free exercise and no establishment clauses. “Accommodation” of certain religious practices becomes the wedge. In allowing the crèche as an accommodation of religion in Allegheny, Justice Kennedy’s characterization contradicted a well-established body of precedent. Instead, the test for accommodation, as Justice Blackmun noted, is that it must lift “an identifiable burden on the exercise of religion” or be used “specifically for the purpose of facilitating the free exercise of religion usually by exempting religious practices from general regulations.”

132 Prohibiting the display of a crèche did not impose a burden on the practice of Christianity (except to the extent that some Christian sects seek official approval), and permitting the display was therefore not an “accommodation” of religion in the conventional sense.

133 For Hammond, the two sides in Allegheny reflect the difficulties of reconciling free exercise and no establishment in states where modern pluralism exists. The dissent believes that

130 Allegheny, supra n. 128 at 590.
131 Ibid at 657.
132 Ibid at n. 59, citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos.
133 Ibid.
recognizing the historical role of religion is acceptable – in the U.S. this occurs under the no establishment clause – by accommodating certain beliefs under certain conditions in the public sphere. The majority, in contrast, adamantly maintains that religion and non-religion alike need to be equally protected under the no establishment clause, otherwise the free exercise clause is placed in jeopardy. The decision pits the separationist model (where free exercise is defined broadly, so as to include conscience-based claims of the non-religious) directly against the accommodationist model (where the state should in some cases accommodate purely (largely traditional) religious beliefs). The difficulty lies primarily in what accommodationists understand as religious freedom – that it requires the protection of some form of indefinable “traditional” religion – compared with the separationist view of free exercise as encompassing a form of conscience-based freedom (or, more properly in the U.S. context, something like a freedom “based on religion”). As Hammond observes, “what strict separationists see clearly – that once conscience is accorded the same protection that religion receives, Establishment Clause cases necessarily involve free exercise considerations – accommodationists do not see.”

Even Michael Perry’s argument, outlined in chapter 2, that human rights concepts originate from a religious basis, does not preclude the idea of religious freedom inevitably giving way to conscience. In fact, the inexorable expansion of conscience proceeds regardless of whether or not it is accepted that all human rights are religious in origin. Perry’s grand theme speaks to neither the issue of whether freedom of conscience is as important as freedom of religion nor the trend towards conscience-based freedom. Put otherwise, it is quite possible to side with Perry’s basic claim and agree that “conscience,” as a right, has a religious basis or that the idea of human rights, as human concepts, are grounded in religion without damaging the notion that freedom of conscience will inevitably supersede freedom of religion. Perry’s top-down thesis may be compelling and historically accurate but it does not mean that the specific rights set out in human rights documents themselves are religious or embedded in religious

134 The problem continues to plague the U.S. Supreme Court, as reflected in more recent cases such as *Lee v. Weisman* 505 U.S. 577 (1992) where the judges struggled with, and disagreed over, the legality of mandatory prayers at public school graduation.

135 Hammond, supra n. 38 at 65.
understandings of the world. From the bottom up, therefore, it is important to examine the rights on the ground, what they protect and their nature and scope. Perhaps it is true that some commonly found human rights, such as rights to life, liberty, property, security, or equality and non-discrimination, have a strongly embedded religious essence. How the rights and freedoms are interpreted today is a distinct matter, empirically established, as Hammond reveals. And the interpretation given to freedom of religion continues to expand its scope into the realm of conscience.

The argument made by American writers such as Hammond has much to commend it. Once a court has recognized forms of belief that are not connected to religion, it will be very difficult to put that genie back in the bottle. In Canada, of course, “conscience” has never been so confined.

Thus, “conscience” in constitutional provisions such as s. 2(a) of the Charter, can act as a bridge between an 18th century conception of natural rights and the social, political and cultural rights associated more with the 20th century (see, for example, s. 26 of the Republic of South Africa’s constitution providing for a right to housing).136 Although the newer rights are often felt to rank slightly below the old – “the twentieth-century graft on an eighteenth century tree” as Johannes Morsink puts it137 -- developing an independent freedom of conscience moves us away from the strict religious freedom of the 18th century and recognizes a wider horizon of moral and belief-based rights. A natural evolution of religious freedom lies in recognizing and privileging freedom of conscience over religion. That said, I do not believe that religious freedom should be abandoned entirely – its real benefit may lie in protecting those matters that are unique to religion, such as the idea of community and the communal practices that emerge from it. One of the serious limitations begat by judicial interpretations of freedom of religion, focused as they are on individual adherent’s claims, is a reluctance to acknowledge and protect the communal aspect of religion.

4 Understanding Religious Freedom: Protecting Community

In chapter 2 I discussed Michael McConnell’s argument that conscience was intentionally removed from the text of the First Amendment because religion was thought to deserve special treatment. On its face, this may seem to be an argument against my position. In fact, it is an argument that, at least in the context of s. 2(a) of the Charter, supports a proposal to treat the two terms differently. McConnell’s view does however, highlight the importance of maintaining an independent religious freedom, in appropriate situations.

McConnell refutes the model of religious Equal Liberty developed by Eisgruber and Sagar, and their attempt to limit the expansion of it by protecting private enclaves where Equal Liberty would not apply. McConnell cites the example given by Eisgruber and Sagar of the absolute right of churches and synagogues to select their own spiritual leaders without anti-discrimination laws limiting them in any way – Catholic doctrine forbids women from becoming priests, despite equal rights provisions that prohibit discrimination on the basis of gender. Eisgruber and Sagar claim that this is protected by freedom of religion since it comes within a sphere of private responsibility, akin to allowing a person to select his or her psychiatrist or confiding in a neighbour. As they state, “aspects of religious practice that are uncontroversially secure from the reach of some state commands are so secure because they are private in general and recognizeable ways, not because they are religious.”

McConnell disagrees. He allows that the separation between church and state bears a basic resemblance to the public-private distinction, but holds that religion is singled out because it is special, not because there are private aspects to it. It is true that persons can choose any psychiatrist or confide in any neighbour they wish, but this is not analogous to the religious situation, McConnell states. The institutions of religion are protected; a more perfect analogy


139 Ibid at 20-21.

140 Christopher L. Eisgruber and Lawrence G. Sagar, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct” (1994) 61 U. Chi. L. Rev. 1245 at 1276. They have retained this position in their book, Religious Freedom and the Constitution, supra n. 96, although slightly modified by basing it also on a “right to association”: see, chap. 2, especially at 63-67.
would be if clinics or hospitals could choose to hire only male psychiatrists, which is obviously not the case. “The religious exception,” McConnell contends, “is sui generis.”

In this, McConnell is referring to one aspect of freedom of religion that can be singled out as something different from conscience-based freedoms: religion’s close relationship to community. In fact, others have made similar arguments. In *The Culture of Disbelief*, Stephen Carter argues for the protection of religion qua religion. A strong accommodationist, he is against characterizing religion as just another form of individual, conscience-based belief. His main point is that religion is, at its heart, a social activity. “Accommodation…can be crafted into a tool, that accepts religion as a group rather than an individual activity,” he advises, so that “accommodation becomes not the protection of individual conscience, but the preservation of religions as independent power bases that exist in large part in order to resist the state.”

A number of Canadian scholars have noted this as well. Janet Epp Buckingham, Benjamin Berger, Iain Benson, Richard Moon and David Schneiderman all seek to establish religion’s communal nature as one of its primary characteristics and an important rationale for its continuing status as a constitutionally protected freedom.

Epp Buckingham treats religious community as a unique aspect of religion. In a telling line, she contrasts this feature of religion with conscience:

> While the Charter’s protection for freedom of conscience has been presumed to be, like the other protected individual rights, devoid of collective attributes, freedom of religion must include some acknowledgement of the collective aspects of religion.

For her, the importance of conscience as an individual freedom is a given. It is the communal aspect of religion that remains underdeveloped.

Unfortunately, the distinction breaks apart somewhat in much of the interpretation that the Supreme Court of Canada has constructed for religious freedom under s. 2(a). Recall

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141 McConnell, supra n. 134 at 21.


143 Epp Buckingham, supra n. 82 at 272.
Iacobucci J.’s explanation of freedom of religion in *Amselem* as having a nexus with religion in which individual sincerity, connected to one’s own spiritual faith and independent of official dogma, is crucial.\(^\text{144}\) Put otherwise, the subjectivity of religious belief is paramount. It seems as if there is little support for recognizing a communal aspect to religion. Epp Buckingham’s statement sums it up well: the judgment in *Amselem* leaves little or no room for religious communities and broader religious practices.\(^\text{145}\) Richard Moon also notes this, contrasting the majority’s view in *Amselem* with Justice Bastarache’s position, who “draws on a different conception of religion” emphasizing its “social and institutional character” not simply “individual conscience in moral or spiritual matters.”\(^\text{146}\) And as Benjamin Berger argues, it is the very nature of law in a liberal state that facilitates this transformation.\(^\text{147}\) Although Justice Bastarache’s approach would take direct account of religion’s communal nature (as he puts it, “the other dimension of the right [observing rites and sharing faith through gathering] has genuine social significance and involves a relationship with others”\(^\text{148}\)) his was a dissenting view.

In my view, however, it would be disingenuous to accuse the Supreme Court of never considering the communal aspects of religious freedom. In the majority decision in *Reference re Public Service Employee Relations Act*,\(^\text{149}\) Le Dain J. notes that freedom of association is particularly important for the exercise of other freedoms such as that of religion, as it “afford[s] a wide scope for protected activity in association.”\(^\text{150}\) More recently, in cases such

\(^{144}\) *Amselem*, supra n. 30 at para. 46.

\(^{145}\) Epp Buckingham, supra n. 79 at 261.

\(^{146}\) See Richard Moon, “Religious Commitment and Identity: Syndicat Northcrest v. Amselem” (2005) 29 S.C.L.R. (2d) 201 at 208-209. See also: Charney, supra n. 23; discussion at chapter 7, infra n. 38 and accompanying text.

\(^{147}\) Berger, supra n. 83 at 279.

\(^{148}\) *Amselem*, supra n. 30 at para. 137. Bastarache J. also quotes Timothy Macklem, holding that religion is a “necessarily collective endeavour” (ibid). Note also that the Court’s early forays into religious freedom – *Big M Drug Mart* in particular – indicate an understanding of the collective dimension of religious freedom: see supra n. 107 at paras. 94-106.


\(^{150}\) Ibid at para. 143. I do not make much of Le Dain J.’s inclusion of conscience in this statement, as it is most likely he was simply referring to the complete freedom as it appears in the text of the constitution. In 1987, there
as *Bruker v. Marcovitz*\(^{151}\) and *Wilson Colony*, the Court somewhat reorients freedom of religion in the direction of a collective right, by noting the communal aspects of religious freedom – paying lip service to Bastarache J’s expanded discussion in *Amselem*.\(^{152}\) At least, in *Wilson Colony*, both majority and dissent acknowledge this potential aspect of freedom of religion. McLachlin C.J. for example, states:

My colleague Abella J. notes … that “freedom of religion has ‘both individual and collective aspects’”. …While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim — that of the individual claimants for photo-free licences — into an assertion of a group right.\(^{153}\)

On the one hand, Chief Justice McLachlin’s point seems to signal a departure from the individualized treatment of religious freedom discussed at length in *Amselem*. On the other, it is a small concession. First, it appears not to form part of the analysis of the s. 2(a) freedom itself, but is only relevant to a reasonable limits analysis pursuant to the *Oakes* test under s. 1. Moreover, at least for the majority, communal factors are further limited to the final proportionality stage of the *Oakes* analysis, and do not function, therefore, as overarching aspects of the freedom. In fact, the majority retains the framework identified by Berger, seeing the essential claim of the Hutterites, as it did that of the claimants in *Amselem* and other recent religious cases, as a series of individual rights-based claims. The broader collective freedom advocated by Epp Buckingham is not made out.

Likewise in the case of *Bruker*. Although Mr. Marcovitz was found liable for damages on the basis that his individual religious freedom did not extend as far as allowing him to refuse to provide Ms. Bruker a *get* (despite his claim that he sincerely believed that granting one was

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\(^{152}\) A shift in focus which may now offer some solace to Epp Buckingham, as both cases occurred after publication of her article.

\(^{153}\) *Wilson Colony* supra n. 52 at para. 31.
contrary to his religious freedom), the decision is not based on a strong view of the collective freedoms of a religious faith trumping those of an individual. Justice Abella for the majority suggests some support for the notion of a communal religious freedom, particularly when she states that

under Canadian law, marriage and divorce are available equally to men and women. A *get*, on the other hand, can only be given under Jewish law by a husband. For those Jewish women whose religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry. It is true that *get* also requires the consent of the wife, but as Ayelet Shachar points out in *Multicultural Jurisdictions*, the law has a disparate impact on women…The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs.  

However, the Court relies on four main reasons for awarding damages to Ms. Bruker, none of which depend on religion’s communal aspect.  

If conscience-based freedom takes over as a pre-eminent form for intensely individual belief- and morally-based actions, “religion” in s. 2(a) may be freed up as the more apt freedom for communal practices, as Epp Buckingham and Berger have proposed. Religion as a communal right can be treated somewhat differently from the individualized freedom of conscience. While it makes a lot of sense for the State to avoid determining a subjective understanding of morality or belief on the level of individual conscience, it makes less sense in the context of establishing the contours of a religion. As Bastarache J. notes in his dissenting opinion in *Amselem*, where religious doctrine is pitted against state obligation, for example, there may be a need to understand the internal ordering of a particular group’s religious belief:

Religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience…By identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion. … It is one thing to assert that a practice is protected even though certain followers of the religion do not think that the practice is included among the religion’s precepts and quite another to assert

154 *Bruker*, supra n. 150 at para. 82.

155 Ibid at para 92. The reasons given are: its clear disbelief of Mr. Marcovitz’s religious rationale for refusal, a strong view of gender equality as an important public interest goal, the need to ensure the dignity of Jewish women (also, in effect, an indication of equality as the crucial value here) and the public value of ensuring contractual obligations are maintained.
that a practice must be protected when none of the followers think it is included among those precepts. If...a practice must be connected with the religion, the connection must be objectively identifiable.\textsuperscript{156}

There is merit in incorporating Bastarache J.’s concerns, although they would, I believe, best work in those modified religious freedom cases which are specifically communal or do not belong under the umbrella of individual, conscience-based claims. A religious freedom that is largely a communal freedom also recognizes the preamble’s reference to God as a “secular humility,” allowing for other truths and normative and “authoritative communities” to flourish as “counter-balances to state authority.”\textsuperscript{157} Unfortunately, although the Supreme Court of Canada has delivered some positive signals regarding religion’s communal character, it would be easy to make too much out of these few limited forays.

For this reason, Schneiderman and Benson take a different tack. They see the Supreme Court’s hesitance as a call to conceive religious freedom differently – as a form of associational right that may well find protection under s. 2(d) of the Charter’s guarantee of freedom of association. In this sense freedom of association would function as one part of the “common rights of citizenship.”\textsuperscript{158} While arguing that other fundamental freedoms could be employed to achieve more collective goals is a noble start, I am not sanguine about large-scale attempts to do so through the use of the constitution or the courts, particularly in religious cases. The lack of a strong endorsement by the Supreme Court of Canada of s. 2(d) is revealing. In its early jurisprudence, for example, the Court held that freedom of association did not include the rights to bargain collectively or to strike. Like other fundamental freedoms, it was possessed individually, not communally in groups or associations.\textsuperscript{159} Part of this inevitably flows from

\textsuperscript{156}\textit{Amselem}, supra n. 31 at para. 135.


\textsuperscript{159}See \textit{Deslisle v. Canada (Deputy Attorney General)}, [1999] 2 S.C.R. 989 and \textit{Dunmore v. Ontario (Attorney General)}, [2001] 3 S.C.R. 1016. Of course, if the Court does expand s. 2(d) to cover communal aspects of religious practices, that would reduce the importance of freedom of “religion” under s. 2(a) even further, making conscience, in my model, the sole freedom with legal significance.
the fact that legal claims are initiated by individual claimants, and it is thus sometimes inappropriate or impossible for a court to opine more broadly. Even the apparent volte face the Court made in 2007 in *Health Services and Support – Facilities Subsector Bargaining Association v. B.C.* followed by *Ontario (Attorney General) v. Fraser*, is largely illusory. In the *Health Services* case, the majority of the Court gave greater content to associational rights, allowing employees the right to unite and to present collective demands to employers. It held that s. 2(d) of the *Charter* allows for a procedural right to collective bargaining. Nonetheless, there still seems to me to be a gap between the Court deciding as it did in *Health Services* and endorsing an expansive notion of freedom of association which recognizes a connection between religion and association.

The European Court of Human Rights, by way of contrast, has made such an explicit determination. In *Metropolitan Church of Bessarabia v. Moldova*, the Court found that Moldova violated Art. 9(1) of the European Convention by tying Art. 9 to Art. 11 (a similar provision to s. 2(d) of the *Charter*). By refusing to recognize the Metropolitan Church of Bessarabia, Moldava breached the guarantee of freedom of religion. The Court stated:

> [S]ince religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords...

It is a powerful statement – the idea of protecting religious communities qua communities belongs, one would think, in any well-developed notion of freedom of religion. As yet,

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162 Ibid at para. 118.

163 Again, it is worth pointing out the similarity to some of the language in *Big M Drug Mart*, supra n. 107. While it is possible to find some authority for the protection of group activity in Dickson C.J.’s opinion in *Big M Drug Mart*, it also seems that what is given with one hand, is taken away by the other: for example, “the essence of the concept of freedom of religion is the right to … manifest religious belief by worship and practice” (para 94) and “for many Canadians [Sunday] is a day which brings a balanced perspective to life, an opportunity for man to be in communion with man” (para. 134) can be contrasted with “the purpose of freedom of conscience and religion
however, our Supreme Court has not connected the two, and certainly has not found the notion of association residing in a more fully elaborated freedom of religion.\textsuperscript{164}

Another way of envisioning this difference is to note that “religion” appears in the equality provision of the \textit{Charter} but “conscience” does not. Section 15 has, as its purpose, the idea of substantive equality. As the Supreme Court has recently made clear in cases such as \textit{R. v. Kapp},\textsuperscript{165} and \textit{Withler v. Canada (A.G.)},\textsuperscript{166} the concept of substantive equality requires more than simply the presence or absence of difference but, more importantly, what characteristics different treatment is based on, and whether these characteristics are predicated on group characteristics that are relevant to the circumstances. While it is an inherently comparative right, it also requires a nuanced approach that looks at the full context of the claimant group and the impact of the impugned law.\textsuperscript{167} Moreover, the two subsections that comprise constitutional equality under the \textit{Charter}, s. 15(1) and (2), are meant to work together – subsection (1) preventing discriminatory distinctions that impact adversely on those enumerated and analogous groups, subsection (2) by allowing governments to develop programs aimed at helping those same disadvantaged groups improve their situation. The very nature of a s.15 analysis requires examining whether a group is subject to continued prejudice or disadvantage that is based on another group-based action – stereotyping. Even the ill-fated \textit{Law} test, which was the approach taken in equality claims prior to the \textit{Kapp} decision, reflected a concern over a law’s impact on the human dignity of members of a claimant group.\textsuperscript{168} In the end, the perpetuation of disadvantage and prejudice, occurring largely through stereotyping, is central to the s. 15(1) equality analysis, and only makes sense when considered in terms of

\textsuperscript{164} It is possible to find some authority for the protection of group activity in


\textsuperscript{166} [2011] SCC 12.

\textsuperscript{167} Ibid, paras. 39, 40.

\textsuperscript{168} \textit{Law v. Canada (Minister of Employment and Immigration)}, [1999] 1 S.C.R. 497.
group effects. Section 15(2) confirms this by suggesting that government can design programs to ameliorate disadvantages suffered by a group.

Religion is part of this equation; although it may be difficult to imagine an ameliorative program singling out a religious group for special treatment, this does not negate the importance of seeing religious equality as an instance of the group-based nature of religious freedom. If a government were able to justify such an ameliorative program (for the Hutterites, perhaps?) it would be on the basis of the presence of a religious group or community warranting special treatment.

By suggesting that conscience be fully protected, or that s. 15 do for religion some of the work that s. 2(a) has heretofore done, I am not arguing that there is no need to ensure a broad religious freedom allowing for many forms of religious practice, nor that religious persecution should be condoned. There obviously remains a strong need to recognize religious freedom and protect it wherever it is threatened. In tandem, however, the presence of “religion” as a ground of discrimination in s. 15 of the Charter provides the necessary connection for many religious group claims. All of the recognized (and analogous) grounds listed in s. 15 reflect groups who have historically been discriminated against: race, national or ethnic origin, disability, and of course religion, are identifiers for communities of people who have known persecution and marginalization, and who have sought protection and the removal of historical barriers to equality. As Donna Greschner notes, equality under the Charter works on the level of community in three ways for three different communities – the “universal community of human beings,” the “political communities of Canada” and “identity communities” – whereby individuals belonging to communities of interest and commonality share qualities or characteristics on the basis of religion, language, sex and culture. Section 15 acts on the level of membership in an identity group; it is aimed at “ending discrimination against members of groups” and protects the right to belong.¹⁶⁹ In my view, s. 15 is a better place for resolving

many group religious claims since a group element is built into the architecture of s. 15. This is not the case for the fundamental freedoms under s. 2(a).170

Including freedom of religion as a basic human freedom sends an appropriate signal of its significance. But it is also important to understand the difficulties that inhere in maintaining a rigid form of religious freedom that excludes other similar belief-based freedoms, particularly where claims are centred on personal autonomy. Religion is distinct from conscience, but not as often as we may sometimes think.

5 Conclusion

Many of the problems associated with religious freedom can, fortunately in Canada, be addressed in a much easier and less controversial way than in the United States. Sullivan’s impossible-to-define religion, Curry’s irreconcilable history and Greenawalt’s and Nussbaum’s impenetrable First Amendment case law, reflect a peculiarly American situation, without parallel in this country. Whereas Philip Hammond’s American solution, to recognize an independent freedom of conscience, is controversial because of textual, historical and analytical difficulties with the First Amendment, our own “First Amendment” – s. 2(a) of the Charter – is not subject to the same controversies. There is no weighty baggage brought about by the “no establishment” and “free exercise” clauses. The Charter’s text is much simpler and direct.

“Everyone has the fundamental freedom of conscience and religion” is a seemingly straightforward declarative sentence. In the more than 25 years since its coming into force, religious freedom under s. 2(a) of the Charter has been interpreted very broadly. As was shown in chapter 3, the Supreme Court of Canada has provided only bare internal limits to religious liberty, preferring instead to restrict the freedom through the use of the justification provision of s. 1. Much more tellingly, s. 2(a) contains an underdeveloped, but magical burl, 170

170 This argument has not been readily accepted by the Supreme Court of Canada, however, where s. 15 claims to religious discrimination have been summarily dispensed with: see, for example, Wilson Colony, supra n. 52 at paras. 105-108 (the s. 15 claim is “weaker” than the s.2(a) claim) and Multani, supra n. 51 at para. 80.
found in the word “conscience.” Unlike the First Amendment, our Constitution does not single out religion as the sole moral guide, giving only it special status or deeming it the only form for beliefs and practices deserving protection. Our Charter protects both religion and conscience. Both are operative, which means conscience-based freedom should take its place legitimately alongside religious freedom.

Times change. Our ideas, laws, constitution and courts must follow. In the Same Sex Reference, the Supreme Court held that the word “marriage” in the Constitution Act, 1867 means something very different today from what it was in 1867 – it is not a frozen concept. As the Court noted:

*Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.171

Although several centuries ago, the Court continued, it would have stretched credulity to breaking point to recognize a marriage between two persons of the same sex, the recognition of such a marriage in several Canadian provinces and European countries belies a different reality today.172 In my view, the same can be said of the language in s. 2(a) of the Charter. It is no longer sufficient to see only the old tree of religious freedom; freedom of conscience is a real part of that tree in the twenty-first century. Conscience deserves a place alongside religion. In the next chapter, I move onto the positive side of the normative argument by developing in detail the reasons for having a strong conscience-based freedom.

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172 Ibid at para 25.
Chapter 6

The Benefits of Freedom of Conscience

*I think that the matter is pretty well decided by the fact that in the [Charter], freedom of conscience is as important as freedom of religion and conscience by its nature, it comes before religion, and by its nature can only be individual.*

- Julius Grey in oral argument before the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*

Having seen a number of instances where courts struggled to make sense of religious freedom and instead gave nascent protection to conscience-based claims – particularly in cases such as *Welsh, Planned Parenthood, Morgentaler, Maurice* and *Wilson Colony* – there is cause to believe freedom of conscience can be further developed. There are two related reasons for doing so: First, some practices that in the past might have been artificially placed under a religious banner, will be more properly framed and analyzed not as religious claims but under the banner of conscience. This is beneficial because not only will it allow the full flowering of a conscience-based freedom, but at the same time it may act to preserve some measure of coherence within the category “religion.” Second, with a robust and clarified freedom of conscience, otherwise meritorious claims for religious freedom – that in the past might have been perceived as spurious simply because they may have arisen from marginal or peripheral groups at some distance from the mainstream – may actually gain credence since there will be less reason to view them as fabricated religious claims. Without needing to frame a conscience-based claim as a religious one, a claim for properly compelled behaviour might be more likely to be assessed on its own merits. Freedom of conscience can thus be seen in a broader light, as a concept that subsumes religious freedom. It could better reflect courts’ natural tendency to fix on the individual side of rights analyses. If “conscience” can do some of the work that has, so far, been almost exclusively the province of “religion,” our constitutional text, I believe, will be richer for it. At the same time, by focusing on freedom of conscience for individual claims, religiously-based communal claims could be given the breathing room to develop in their own specialized way.
There are five areas which claimants and courts could rely on in developing freedom of conscience; they are all somewhat linked: (1) conscience’s universality, which may, in some cases, avoid the problems that exist because of singling out or giving religion preference; (2) its suitability to individualized rights claims; (3) its relationship with pluralism, and thus, better connection to modernity; (4) its coherence as a freedom; and (5) that freedom of conscience captures a wider variety of practices – practices that are equivalent to religious practices but fall outside the concept of freedom of religion. Each of these is discussed in turn.

1  A More Universal Freedom than Religion

One of the biggest problems with constitutionally protecting religious freedom in a modern state – at least the “freedom to” or “free exercise” aspect of religious freedom – is that it may not be seen as important to those uninterested in religion. A quick perusal of other Charter rights points out the singular nature of religious freedom in this regard: rights to liberty or security, equality and to mobility, for example, are generally available to, accessed by, and treated as important by everyone. Other fundamental freedoms such as expression, assembly and association are utilized regularly by most of us. Even more circumscribed rights, such as procedural rights on arrest or detention, still apply to those who find themselves in the situation described in the right – upon arrest or detention, for example. Grounds of discrimination are largely universally applicable, even if the reasons for creating such categories are suspect in themselves: historical disadvantage or stereotyping have occurred based on race or colour, because of national or ethnic origin, sex, or mental or physical disability.¹

At first blush, age and religion seem different. Age restrictions are common – voting and driving are only the most obvious ones. But age is only somewhat different, in that many age-based discriminatory practices are necessitated by the fact that, as Justice Bastarache noted in

¹Grounds of discrimination such as race, colour, gender, ethnicity, etc. are arguably not “natural” states – humans, however, have always had a penchant for categorization, which has, in these cases, led to historical disadvantage and discrimination. In this sense, grounds become de facto universally applicable – everyone belongs to a race or colour, for example – because they have become convenient markers used everywhere.
\textit{Gosselin v. Quebec (A.G.)}, we are all “trapped in the continuum of time” which gives us all the luxury of being able to be both “young and foolish as well as old and crotchety.”\footnote{Gosselin v. Quebec (Attorney General) [2002] 4 S.C.R. 429 at para. 225.} Thus, our rights at any given age are universally applicable to all at that age: the only variant is time. And time may be an appropriate indicator in which to make age-based distinctions in some situations, since our capabilities and development alter over the course of a lifetime and therefore depend, to some extent, on age. Likewise, religious freedom and religious equality, if interpreted narrowly, might single out “believers” and grant them special protection; a religious skeptic, or non-believer, could be left out and unable to seek legal protection for his or her choices. But courts have interpreted “freedom of religion” broadly, so as to include the freedom not to believe.

However, there are still some gaps. The examples of a prisoner seeking a vegetarian diet, or a school child covered by a “do not resuscitate” order put in place by his or her parents, put this into stark relief. If the prisoner or child had religious reasons for so doing, then freedom of religion would ensure their protection. If the reasons are not based on religion, but some other strong belief system, there is a good chance that they would not receive the same legal guarantees. In this way religious freedom is felt by some to play favourites. It protects some forms of belief, but not others. It brings to mind a recent bumper sticker, sardonically proclaiming “No You Can’t Have My Rights – I’m Still Using Them.” Through constitutional freedom of religion clauses, religious rights are reified into tangible items of property that have limited availability and are applicable only to some. Conscience, on the other hand, is not similarly limited. As argued in chapter 2, all humans (at least those of a certain age) are endowed with a conscience, even if they ignore it, or use it inappropriately.

Various systems of universal ethics claim that we have an “obligation to others.” This claim has a heavy, leaden quality to it, like having to do unwanted chores. Followers of Kant claim to find the source of this obligation in rigorous argument, but like Matthew Crawford, I am not
able to follow it. As he says, a better approach is one based on solidarity between humans, not obligation to them:

[S]olidarity with others is a positive attraction, akin to love. It is not an abstract imperative, but an actual experience we have from time to time. Its scope is necessarily smaller, its grip on our affections tighter, than that of any vaporous universal.

This could be the way that conscience contributes to a better formulation of belief-based freedoms. Solidarity with others can come through recognizing a robust freedom of conscience – because, in my view, it is something all adults innately share. Conscience is one of the true universals, but grounded in the everyday, the real. It would be a rare person who does not feel pangs of conscience in eating meat while reading about the cruelty of factory farming, or in ignoring loved ones or failing to consider pain we may cause to others. Our consciences are part of the shared experience that allow us to gain this solidarity with others. In this sense, conscience is something even stronger than religion. It is less divisive because it acts without boundaries; in contrast, while the bonds tying religious communities together are very powerful, inter-religious divisions and disagreements can be just as forcefully destructive.

Moreover, conscience is broad enough to cover the “will to believe,” which summarizes William James’ argument for protecting fideistic religious belief (belief without reason).

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4 Ibid at 201 (emphasis in original).

5 Much has been written on both the inclusiveness and divisiveness of religion. A good reference source is: Stephen Prothero, God is Not One (New York: HarperCollins, 2010). My favourite encapsulation, however, is a joke by Emo Phillips, awarded a prize by Ship of Fools as the funniest religious joke of all time: “Once I saw this guy on a bridge about to jump. I said, ‘Don’t do it!’ He said, ‘Nobody loves me.’ I said, ‘God loves you. Do you believe in God?’ He said, ‘Yes.’ I said, ‘Are you a Christian or a Jew?’ He said, ‘A Christian.’ I said, ‘Me, too! Protestant or Catholic?’ He said, ‘Protestant.’ I said, ‘Me, too! What franchise?’ He said, ‘Baptist.’ I said, ‘Me, too! Northern Baptist or Southern Baptist?’ He said, ‘Northern Baptist.’ I said, ‘Me, too! Northern Conservative Baptist or Northern Liberal Baptist?’ He said, ‘Northern Conservative Baptist.’ I said, ‘Me, too! Northern Conservative Baptist Great Lakes Region, or Northern Conservative Baptist Eastern Region?’ He said, ‘Northern Conservative Baptist Great Lakes Region.’ I said, ‘Me, too! Northern Conservative Baptist Great Lakes Region Council of 1879, or Northern Conservative Baptist Great Lakes Region Council of 1912?’ He said, ‘Northern Conservative Baptist Great Lakes Region Council of 1912.’ I said, ‘Die, heretic!’ And I pushed him over.”

James articulated three general conditions why protecting something incapable of proof is needed: first, the belief is not susceptible to ordinary methods of scientific validation as false; second, the consequences of believing anything is momentous to advancing human interests; and third, the issue of believing or not believing something cannot be avoided, but is forced on us by the needs of the living. James says many forms of basic trust of others, or beliefs about being likeable or lovable, satisfy these three conditions. Conversely, a lack of these – mistrust or low self-confidence – undercuts the capacity to realize aims that are crucial to living well. Religious beliefs fit the same pattern, as belief in the existence of God may be consistent with scientific theories, is not unreasonable, and makes it possible for some individuals to achieve the ends needed to live well personally and ethically. Such beliefs are not only consistent with a conception of natural morality, but may enhance the capacity to be alive to the internal ideals of morality. If so, under James’ view, religious belief can advance not only personal ends, but important moral ends as well.\(^7\)

It does no harm to James’ argument to replace religious belief with conscience, as beliefs based on one’s conscience are not always subject to scientific validation, may be important to human advancement and may serve important moral ends. In fact, my version of conscience can speak for all beliefs that may be seen as unconnected with rationality, whether based on religion or whether good or bad. The moral motivation of freedom of conscience requires a much-enlarged understanding of the scope of universal toleration beyond the confines of Locke and Bayle. As David Richards writes, “[T]he narrower theistic definition of conscience would almost certainly unjustly narrow the underlying conception of freedom and rationality in the way that Locke and Bayle condemned.”\(^8\)

Even religious persons may be motivated by a complex amalgam of religious and secular standards, depending on context. A broadly conceived guarantee of an inalienable freedom of conscience could more accurately protect freedom and rationality, the highest-order goods, from which all other goods in life are interpreted and given weight. If there is to be any human

\(^7\) Ibid. See also David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986) at 75-77.

\(^8\) Richards, ibid at 97.
right or freedom, then arguably there should be the inalienable ability to freely act on one’s conscience. The primacy of both toleration and respect among democratic values depends on it. Freedom of religion does not go far enough. Moral standards that could be characterized as secular, “that are neither intrinsically religious, nor necessarily sanctioned by … religious standards” observes Robert Audi, but that lead one to the “same actions as a religious moral commitment, should be respected without impiety and adopted as major guides to moral conduct.”\(^9\) Of course, this cuts both ways: a broad conception of freedom of conscience would also protect the irrational or illiberal. But to some extent, that has already occurred with religious freedom anyway. Limits on conscience will need to be drawn in a similar fashion to limits placed on religious beliefs.

Those who do not harbour traditional religious beliefs, but feel the pull of conscience directing them to act might feel excluded or alienated from those who are able to rely on the constitution to protect their religious claims. Conscience fits the modern constitutional state, with an eye to the future while still retaining knowledge of past wrongs. It, better than religion, finds the middle ground that Sachs J. attempted to carve out in *Lawrence v. State (Ministry of Trade and Industry)*:

> The reasonable South African (of any faith or none) who is neither hyper-sensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution…neither attempts relentlessly to purge public life of even the faintest association with religion…nor regards the religiously-based practices of the past to be as natural and non-sectarian as the air one breathes simply because of their widespread acceptance.\(^10\)

It is, in effect, the reasonable person acting with a free conscience, who views religious freedom favourably but not exclusively.\(^11\)

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\(^9\) Robert Audi, “Religiously Grounded Morality and the Integration of Religious and Political Conduct” (2001) 36 Wake For. L.R. 251 at 253-4. What this means is that freedoms based on conscience are equally valid and deserving of protection as those based on religion; in fact, freedom of conscience, by allowing both religious and non-religious motivations, is more inclusionary.


\(^11\) Rex Ahdar and Ian Leigh view Sachs J’s test as unworkable – see Ahdar and Leigh, “Is Establishment Consistent with Religious Freedom” (2004) 49 McGill L.J. 635 at para 77. One wonders if they would be more open to the idea of the test as conscience-based, rather than an objective, reasonable person-based.
It is easy to imagine situations where non-religious conscience-based belief might be protected: for example, prisoners who seek vegetarian diets for moral reasons, school children who do not wish to participate in dissections (on real, as opposed to virtual, specimens), a pharmacist who is opposed to dispensing morning-after pills because he does not wish to condone licentious behaviour, or whistleblowers who refuse to remain silent in the face of fraudulent behaviour. In each case, a person may claim that they are doing what must be done, what commands them, or what is necessary given that alternatives are either unfathomable, incomprehensible or irrelevant to them. If their reasons are not linked to religion, does it seem just that their claims should be ignored? Is it right that, in a regime that protects only the religious believer, these claims are privileged?\(^\text{13}\)

One prevailing view is that religion deserves special treatment; American religious scholars such as John Garvey and Steven Smith argue for religious freedom’s exceptionalism.\(^\text{14}\) Given that it is my position that “conscience” under the Charter should be granted independence, as “religion” could often be treated simply as an aspect of a more fully realized conscience-based freedom, I am not convinced of their arguments.

John Garvey’s claim is that the only valid justification for religious freedom must be sectarian. He recognizes that there are no nonsectarian-liberal, neutral, justifications for the constitutional right to religious freedom. Arguments from autonomy (religious choices require protection) or from peace and security (that religious freedom is necessary for ensuring stable democracies) both fail under scrutiny: why protect religious choices but not other valid human choices, and why should religious choices be constitutionally valued? Why protect groups that are no threat to civil order, and why not ruthlessly suppress some religious behaviour in the

\(^{12}\) Some schools do enable children to perform “virtual” dissections on programs such as Scienceworks (see http://www.camcor.com/scienceworks/slide.html). However, not all school boards can afford computers or this software, for their students.

\(^{13}\) There is no doubt that, as with religious freedom, some conscience-based claims are likely to cause concern: claims that husbands are free in conscience to discipline their wives or children, or prevent their wives from working, for example. I recognize that, like all fundamental freedoms, there will be limits – my argument is a more general one in favour of allowing freedom of conscience to flourish. Canadian courts will need to consider what limits are justifiably placed on the freedom through an analysis of s. 1 of the Charter.

name of order? Garvey agrees these are strong rejoinders, but argues that exemptions from secular laws redound to religious believers because they are the only groups who must avoid betraying God and suffering the harms of eternal damnation. The problem with this argument, as Larry Alexander points out, is that it breaks down when examined under a religiously pluralist lens. If exemptions are justified for particular religious beliefs, then claims based on beliefs that come from other religions should be rejected.

Even accepting the Protestant view that humans may be wrong, necessitating a wide religious tolerance does not resolve the paradox. As Alexander states:

Suppose I believe that God commands me to secure the welfare of children to the best of my ability. Indeed, I would violate any law that prevented me from helping a child whose welfare was endangered. And suppose, further, that a Christian Science couple believes God commands them not to seek medical attention for their sick child. If the law commands them to do so, they cannot appeal to my point of view to justify an exemption for them. From my point of view, they are threatening to breach God’s duties, not comply with them. It is true, however, that I may be mistaken. That may be a good reason to allow them to protest the law and urge its repeal. But I have to take action now, and I cannot both compel them to have the child treated and exempt them from that requirement.

For Alexander, there is no social or public good realized, in other words, from complying with a conception of God’s duties unless it is felt to be the correct thing to do. If it is only imagined to be a duty, then it is difficult to see why it is a good thing to protect. Moreover, while from the perspective of a believer God’s command may trump secular rules or laws, from the perspective of a nonbeliever this view of God’s command is wrongheaded, and should allow the state to promote its laws above the perceived, but false, religious ones.

Steven Smith approaches the same exceptionalism from a slightly different angle. His lengthy analysis attempts to prove that the case for protecting conscience as a liberty right under the U.S. Constitution is tenuous. By doing so, he seeks to privilege religious liberty. Although,

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15 Garvey, ibid at 67.
17 Ibid, at 42.
18 Smith, supra n. 14.
as I showed in chapter 3, the U.S. Supreme Court has protected conscience in cases such as Welsh and Planned Parenthood, Smith is not convinced it is warranted. For him, religious freedom is protected since it is clearly set out in the First Amendment that only religious freedom is protected. Conscience-based freedom, since not expressly stated, is suspect. What Smith does not do, or what he never questions, is whether the same difficulty might arise trying to argue from first principles that there is a logical need to protect religious freedom. He does not subject religious liberty to the same kind of rigorous analysis because it has always been assumed that it is beyond review – it is, without doubt, constitutionally protected.¹⁹

My purpose here is to take Alexander’s approach a few steps further, at the same time turning Smith’s argument on its head, by asking whether a similar argument might be made that the case for protecting religion is equally tenuous. If there is a principled reason for protecting religious freedom but not conscience, then even in countries such as Canada where an entrenched constitutional protection appears to exist for both conscience and religion, a reason would exist for conscience to fade away or take a back seat to religion. In contrast, if my argument is accepted, even in part, it makes a strong case for treating conscience in s. 2(a) in the same way as religion: it is either independent and deserving of protection simply by virtue of it being mentioned as a fundamental freedom in our Charter, or both religion and conscience should fall together as false freedoms – in effect, making the point that Arneson makes. In my view, the worst case is to protect one but not the other.

Smith begins by defining an act of conscience as one that is based on a sincere conviction about what is morally required or forbidden. He gives the example of a doctor refusing to perform an abortion because she believes it is morally wrong (a conscience-based decision) and compares that to doctors who base their decisions not to terminate a pregnancy on the safety of the procedure, its cost effectiveness, or psychological harm to the patient. The latter

¹⁹ See also Richard Arneson, “Against Freedom of Conscience” (2010) 47 San Diego L. Rev. 1015. Arneson takes a similar tack to Smith, although he challenges the idea of protecting conscience without necessarily favouring religion.
physicians may have good justifiable reasons for not performing abortions, and they may even have a moral basis, but for Smith their reasons are not ones based on conscience.  

Four possible justifications for the state protecting freedom of conscience inform Smith’s analysis: objectivist, conventionalist, subjectivist and nihilist. Using conscientious objectors as his example, Smith builds on Alexander’s argument to formulate a position questioning why a state might want to (or should) respect claims of conscience. In the end, he concludes that it would be difficult for the state to justify a generalized protection for individuals who claim that their conscience prohibits them from performing state duty. But, in my view, his argument compels a similar conclusion for a generalized religious freedom.

I will take the case of the Sunday closing laws as my example. I will also adopt Smith’s argument from the objectivist position only: although it is not entirely true that all religions believe in some objective eternal law based on God or some other higher order, the case for religious freedom in western democracies has never been grounded on conventionalist, subjectivist, or nihilist assumptions. Religious freedom, as developed in the West, is at heart a protection associated with, as the Supreme Court says, “belief in a divine, superhuman or controlling power…the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.” For purposes of this argument, therefore, assume that the state has made a decision to prohibit commerce on Sundays after careful consultation – that for reasons of justice and policy, retail activities should not occur on that day. A law is therefore passed which forbids stores to open on Sundays. I, a person of strong religious convictions, believe that this action is morally impermissible because my faith will not allow me to be party to a sacrilege – opening on Sunday in my religion reflects a

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20 Smith, supra n. 14 at 328. I can accept the cost justification and possibly the unsafe nature of the procedure, but it seems to me that refusing to perform an abortion because it may be detrimental to a woman’s psychological health could very well be based on one’s conscience.

21 See Alexander, supra n. 16.

22 Smith, supra n. 14.

23 My analysis very much parallels Smith’s, which builds on and is informed by Alexander, supra n. 16. Thus, I cannot lay claim to its originality – my examples help flesh it out in a Canadian context.

reverence for God and should not be prohibited. That I take my case to the sovereign ruler; she meets with me to discuss. She is persuaded that my convictions are honest and sincere. Should I therefore be excused from this law? Or should the command itself be changed?

Under an objectivist version, it is my sincere view that God’s eternal and true laws exist. This leads to two propositions: 1) I am obliged to follow this objective moral order; 2) in my judgment, being complicit with the state in having to close a store on Sunday is incompatible with this moral order (in addition to my belief that opening on Sunday is God’s will, perhaps a law requiring Sunday closure acknowledges a Christian view of the world that is not acceptable to my religion). The sovereign appreciates that the first proposition distinguishes my objection from those who simply do not want to close their stores on Sunday for materialist reasons, or who would rather close on random days throughout the week for convenience sake. My objection seems to have some force. If the sovereign agrees that there is an objective moral order, then she may well think of it as having a different status from the others. But if she does not feel this way, then my objection may be viewed even less favourably than others who for materialist reasons wish to open on Sunday since a concern over complicity with the state’s “evil,” “wrong” or “Christian” practice seems delusional. Others are at least honest, open and rational in their desire to remain open on Sunday.

Assume that the sovereign does accept that there is an objective moral order. In such a case, it would make sense to her why I would raise the concern I have raised and argue that it is morally wrong for me to be closing on Sunday. But why should the sovereign accept my reasons as sufficient for her to excuse me? Even if she agrees with my first proposition, it is clear that she does not agree with the second, since the state chose to forbid store openings on Sunday based on its own Christian view of the world. If she accepted proposition two, then it is entirely possible that there would not be a Sunday closing law at all (or at least not on grounds based on religion). So it would appear to the sovereign that I sincerely but mistakenly believe that closing stores on Sunday is wrong and therefore sincerely and mistakenly believe that I am morally forbidden to collude in this endeavour.

25 It was part of Cathar belief that the holy day was a Tuesday, not Sunday. See Malcolm Lambert, The Cathars (Malden, Mass.: Blackwell Publishers, 1998).
But why should this sway the sovereign? Citizens disagree with government decisions and judgments all the time on many different matters. What special claim do I have to refuse to abide by this law? How do I differ from all the other citizens who sincerely but mistakenly believe (in the sovereign’s view) that the policies are flawed, but follow them anyway? Does my mistake, given that it is based on a religious obligation, carry more weight? Remember, if anything, in the eyes of the sovereign the proper moral stance is to close stores on Sunday.

Take this as a comparison. What if I claim that I cannot close a store on Sunday because I hold a belief that failing to open it every day (or at least on Sundays) will give me an infection – that my body needs to be working in the store every day or else it breaks down? If this belief were true, a benevolent sovereign may choose to allow me an exemption. However, what if medical experts explain to the sovereign that there is no such medical condition and that my belief, despite its sincerity, is pure fallacy. If they can show that closing my store on Sunday and resting will not cause any infections to take root, then the benevolent sovereign should not accept favourably my mistaken belief in the harm caused. In fact, it may be less persuasive than those who wish to remain open on Sunday for more “pure” reasons such as the desire to make money: at least their beliefs are true. Why is a mistaken view of a moral obligation based on religion so different that it is entitled to greater deference than a mistaken belief in physical harm?

One response might be that mistaken (but sincere) moral beliefs can cause greater psychological distress where they force one to act against his religious dictates. Again, this may be correct, but it may not be. It is not obvious that acting against one’s religious convictions results in more psychic pain than others who are required to act against their own strongly held values or desires. To me, of course, it is different, because my belief is independent of my desires. But since the sovereign does not accept my moral judgments or conclusions, the claim for relief is, to her, surely no different from others’ claims.

Perhaps it is a matter of doing what is thought to be right. But as Smith says, this is somewhat of a truismp, given that we can only ever choose any course of action based on a belief, even when it is religiously based, and even if it is judged to be wrong:

To be sure, it may seem paradoxical for an institution to instruct individuals to do what they believe to be right but then punish them when they follow that instruction because their
judgment diverges from the institution’s [because the institution perceives it as wrong]. But the paradox is illusory. The fact is that no matter how profoundly and pervasively fallible they may be, both individuals and institutions can only do their best to act in accordance with what they believe to be right, and each should be able to acknowledge that the others are subject to the same limiting truism.26

Does this help make the case for protecting religion and religious freedom? If religion refers to a person’s belief about the divine and that translates into moral actions and prohibitions, then the truism leads to the conclusion that individuals should act in accordance with their religion. That gives me a reason to want to open my store on Sunday. But it does not bolster the argument that the sovereign should defer to a moral judgment she believes is wrong.

This leads to the final argument, which is that the sovereign should not ask or force its citizens to be false to themselves; that the lesser of two evils is to let me do the wrong thing (objectively wrong, in her mind) as opposed to being false to myself. But again, the question is why is authenticity to self so important? Why would the sovereign not respond that there is nothing so special about authenticity, that everyone else is closing their store on Sunday and their authenticity to themselves is not questioned or relevant. She might add, with a flourish, “And how are you being more false to yourself by acting under compulsion against a religious belief – one I believe to be mistaken – than these other store owners are by acting under compulsion contrary to their sincere desires?”27

My case might be strengthened if I could show that perhaps the moral order we are talking about places authenticity – living in accordance with one’s sincere beliefs, true or false – on the highest plane, as a moral good of the highest order. Religious perspectives frequently cast some moral principles or duties in this hierarchical fashion – some morals are derived from God, which accept us into the kingdom of God. This is John Locke’s view: God is only interested in sincere, voluntary beliefs, thus making authenticity central to morality (“Faith only, and inward sincerity, are the things that procure acceptance with God;” “God, I say, is the only judge in this case, who will retribute unto every one at the last day according to his

26 Smith, supra n. 14 at 339-40 (citations omitted).

27 Ibid (with some modification for my scenario) at 341.
deserts; that is, according to his sincerity and uprightness…”28). We have thus reached a reason, perhaps, for protecting a religious viewpoint – authenticity to self. As Smith notes (in applying the argument to the context of conscientious belief), however, it is a long way around and is not altogether convincing, depending as it does on a number of assumptions and clarifications.29

Moreover, there is just as plausible an argument that authenticity provides a reason for protecting conscience as an equally valuable moral stance, independent from religion. Smith refers to Charles Taylor’s position that “each of us has an original way of being human…his or her own ‘measure.’”30 This means that a “secular” reading of authenticity is just as important, as it “takes on an independent and crucial moral significance. It comes to be something we have to attain to be true and full human beings.”31 As Smith ends his argument for a fictional conscientious objector on objectivist grounds, “by assigning high importance to authenticity, these or similar moral positions might give you, the beneficent sovereign, reason to respect judgments of conscience even when you do not agree with those judgments.”32 Ultimately, however, Smith finds no compelling reason to protect conscience: “the case for conscience seems to depend on metaethical objectivism – on a commitment to the idea that morality is in some sense natural, or given, or objectively true. But that is not enough…”33 In a sense, I agree. I, however, have likewise found no compelling reason to protect religion. By inverting Smith’s argument and showing that religious freedom is no more (or no less) deserving of protection than that of conscience, we are almost back where we started.

My position is that, given the difficulties inherent in distinguishing religious from non-religious freedom, it would be beneficial, wherever possible, to turn to conscience as the


29 Smith, supra n. 14 at 340-42.


31 Ibid at 20 (Smith), 26 (Taylor).

32 Smith, ibid at 21.

33 Ibid at 37.
default for belief- or morality-based freedoms. In Canada, the express wording of s. 2(a) of the Charter makes this step easy, and, one hopes, less polarizing than in the United States. As I showed in chapter 2, “conscience” has a meaning that can be severed from its religious overtones. In recognizing two significant factors – the inherent difficulties of controlling religious-based freedom, and the simplified wording afforded conscience-based freedom by virtue of s. 2(a) of the Charter – the move can be both straightforward and clarifying. Since, in the final analysis, s. 2(a) of the Charter protects both conscience and religion, there is little merit in privileging one over the other.

This is still not sufficient to dispense all the criticism, however. Richard Arneson’s extreme view questions whether categorical legal privileges should exist at all, advocating for a case-by-case analysis of any claim made for accommodation or special treatment. He gives the example of three classes of users of psychedelic drugs burdened by laws prohibiting their use: (i) a religious group whose rituals require daily ingestion of psychedelic drugs; (ii) a group of environmental activists whose weekend gatherings depend on ingesting psychedelic drugs to establish solidarity, community, and their continued good work on the environment; and (iii) a group of surfers whose belief in the sport’s beauty and its mastery requires psychedelic drugs so as to transform a merely enjoyable activity into a sublime and moving experience. He sees little difference in any of these situations, suggesting that what is crucial is to avoid wrongful discrimination:

If our political morality gives special legal status to the claim for accommodation made by people whose free exercise of religion is burdened by legal requirements, then the first group is favored for accommodation over the latter two. If our political morality gives special legal status to allowing people to live in accordance with their conscientious judgments about how they ought to live, then depending on the interpretation of this norm, the first two groups will be favored for accommodation over the third. My position is that both forms of legal privilege – the religious liberty privilege and the conscientious liberty privilege – involve wrongful discrimination. They wrongfully favor some types of claims over others equally meritorious.

34 Arneson, supra n. 19.
35 Ibid at 1030.
36 Ibid.
In essence, either his position calls for a radical change in the constitutionalization of certain rights or it takes us back to an argument similar to the Equal Liberty position advocated by Eisgruber and Sagar. Regardless, Arneson might not take as strong a stance against allowing a broader understanding of freedom of conscience where, as in Canada, that particular freedom is expressly stated in our Constitution and the protection of equality is addressed in a separate constitutional provision, since the language is more inclusive than language that limits freedom to religious situations only. Moreover, Arneson seems to assume too much—firstly, that the third group could not make out a claim based on freedom of conscience while the second group could, and that all three are equally meritorious. It seems to me that a s. 2(a) claim to freedom of conscience could quite plausibly be made by both the environmental activists and the surfers. Whether they are equally meritorious could depend on some of the factors related to conscience-based claims that are discussed in chapter 7 as well as the limiting aspect of s. 1 of the Charter which might apply differently between surfers and environmentalists.

Richard Moon comes at the problem from the opposite direction. He argues that after the Supreme Court of Canada’s wide-ranging discussion in Amselem, the protection granted to conscience seems to be of a lower order than that of religion. In his view, the Court has determined that religious beliefs and practices are different from secular ones, deserve special protection and accommodation, and can only be restricted for compelling reasons. It is highly unlikely, he argues, that any court will extend protection to any belief or practice that an individual might consider important or valuable, but not obligatory, and that does not have some connection to moral duty. For Moon, what makes religion special, and different from “mere” conscience, is that religious beliefs and practices connect individuals to cultural communities and are part of deeply-rooted cultural identities.

37 See chapter 5 at n. 95 and accompanying text.


39 Moon, ibid at 216. This helps deal with the problem he sees in the majority decision in Amselem that the Supreme Court views religious commitment as completely linked to individual choice and subjective sincerity, making it hard to distinguish from a non-religious person’s sincere and chosen beliefs (at 219). Note, however,
This is a useful distinction, but ultimately insufficient. The individual sincere belief test developed by the Court in *Amselem* has given religion a large degree of subjectivity, manifested almost entirely, in legal terms, in individual autonomy. This is nothing new. In its first freedom of religion case, *R. v. Big M Drug Mart*, Chief Justice Dickson highlighted the importance of individual choice in determining religious belief:

> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. … For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.\(^{40}\)

The Court has never wavered from this approach, which reached its apogee in the individual sincerity test in *Syndicate Northcrest v. Amselem*.\(^{41}\) As Benjamin Berger notes, the test makes it unlikely for Canadian constitutional law to render religion in an image anything other than individual and private:

> There is, of course, a strong connection between law’s sense of religion as centrally a matter of individual autonomy and the translation of religious commitment into matters of preference…Religion is to be protected because it is the object of individual choice…religion comes out in a shape easily assimilated into a distinction critical to the liberal political imagination: religion is quintessentially private.\(^{42}\)

Thus, the Court pays little attention to deeply-rooted traditions or cultural communities, at least as far as legal religious freedom is concerned. As I argued in the previous chapter, by foregrounding freedom of conscience as a strong individual claim, however, some interpretive space may be opened up for courts to view freedom of religion as a communal freedom, less

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\(^{41}\) [2004] 2 S.C.R. 551 (“*Amselem*”).

connected to individual autonomy and more associated with aspects of religion that are not private.

Besides, other cultural communities exist that have no connection to religion or religious practices. Strong communities are created over deeply-rooted identities in sports – avid hockey and soccer fans the world over (for that matter, many fans of many sports) are both connected to a community (and it would be easy to see that as a “cultural” community) that is deeply rooted in their identity. They are part of a tradition that is easily over a century old, and share in those common histories. In Canada, the “national” sport of hockey is the subject of a number of university courses, most comparing it to a form of organized religion. Even communities defined by workplace, such as police officers and fire fighters might reasonably be considered to be bound by deeply rooted traditions: for example, when a police officer is slain in the line of duty, shared values and traditions are evidenced through heavily symbolic and public funerals, attended by officers from across the continent. One could also guess that the same may hold true for motorcycle gangs such as the Hell’s Angels, artistic communities such as ballet companies, or, more contemporary online communities such as “gamers.”

Some judges have recognized a similar point, noting that conscience, when expressly stated in human rights or constitutional documents, reflects a broader, more encompassing right. For example, Justice Tarnopolosky in R. v. Videoflicks implicitly found that conscience-based freedoms would subsume religious freedoms in many cases. Justice Wilson saw conscience as

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43 Examples are easy to come by, but a good one appeared when the former soccer star Diego Maradona was appointed coach of Argentina’s national team: see Jonathan Franklin, “Maradona the messiah,” The Globe and Mail (13 November 2008) A2. The idolatry over Maradona is hard to ignore, and reflects a direct connection with religious devotion: for example, he has inspired La Iglesia Maradoniana – the Church of Maradona – where the faithful cite their own version of the Lord’s Prayer: “Our Diego, Who art on Earth, Hallowed be they left foot, Thy magic come, Thy goals be remembered.”).


45 See Josh Wingrove, “Couple says son’s disappearance has to do with video game” The Globe and Mail (21 October 2008), A19 (Brandon Crisp, a young boy from Barrie, Ontario, died after running away from home, ostensibly because his parents refused to allow him to continue playing video games fearing he was addicted. In the initial days following his disappearance, speculation was that he had fallen prey to a “gaming community” who kidnapped him, luring him to play the game for money – a theory subsequently proven wrong).

more universal in *R. v. Morgentaler*\(^{47}\) where she declared that freedom of conscience and religion means extending religious beliefs to those beliefs conscientiously-held beliefs regardless of whether they are grounded in religion or a secular morality.\(^{48}\) Lord Nicholls in *R. (Williamson) v. Secretary of State for Education and Skills* made the point that the beliefs of atheists, agnostics and skeptics are “on an equal footing” with religious beliefs for purposes of fundamental freedoms, where such freedoms expressly include both religion and conscience.\(^{49}\) As he bluntly put it, it does not matter if a practice is characterized as religious, since it will also be protected if it is based on conscience. These statements place conscience at a higher level than religion; none accept that religion should be singled out for special treatment.

It is worth noting that these cases all arise out of documents where religion and conscience are given equal weight, such as in s. 2(a) of the *Charter* or art. 9 of the European Convention. Since the First Amendment only speaks to “religion” and does not mention “conscience,” American courts do not go quite so far as equating conscience-based beliefs with religious ones or treating conscience as a more universal freedom. Yet, as we have seen in the context of conscientious objectors exempted from service due to beliefs in relation to a “Supreme Being,” courts have been willing to fashion remedies where a person’s non-religious beliefs parallel or function as religious.\(^{50}\) Again, if the American approach is only steps away from granting conscience a status that overarches freedom of religion, it reinforces that it might be a better approach in Canada to treat conscience as the more universal freedom.

### 2 Conscience is More Suited to Individual Freedoms

The introduction of the *Charter* has changed the socio-political structure and environment of Canada. The traditional and collectivist legal culture has ceded to a more individualist,


\(^{48}\) Ibid at 179.

\(^{49}\) See *R. (Williamson) v. Secretary of State for Education and Skills* [2005] 2 AC 246; 2 All ER 1 (HL) at para 24.

American approach to rights. To some extent, this is what rights-talk does (although s. 1 of the Charter, especially with the Supreme Court’s newfound appreciation in Alberta v. Hutterian Brethren of Wilson Colony of the final proportionality arm of R. v. Oakes, makes some attempt to bring collective goals into the debate). As discussed in chapter 5, the individualization of rights means that a truly fulsome account of freedom of religion remains elusive, as its communal nature has been, for the most part, left out.

In Kantian terms, it is our free, autonomous will that grounds morality, so that individuals must be allowed to choose their own ends. As many have contended, the essence of being human is the capacity to choose freely, even where such choices lead to unsatisfactory consequences. A liberal state need not impose a conception of the good upon its members; however, even under a broader model of autonomy such as that offered by Joseph Raz, where a state can attempt to offer positive approaches to ensure the promotion of autonomy, and the avoidance of harm, freedom of conscience can have a more prominent role. A broadly defined freedom of conscience is arguably more suited to a very wide range of liberal conceptions of autonomy. As the Supreme Court of Canada has oftentimes noted, at the heart of the Charter lies respect for the autonomy of the individual (within the parameters laid out by s. 1). It has done so in cases as diverse as Morgentaler, where Justice Wilson grounded liberty in the


52 The libertarian idea of state neutrality, in which the implementation and promotion of ideals of the good life are not a legitimate matter for government action – government action should be neutral in terms of the good life – is argued by, for example, Robert Nozick, Anarachy, State and Utopia (New York: Basic Books, 1974). Joseph Raz offers a more sophisticated version in The Morality of Freedom (Oxford: Clarendon Press, 1986) esp. at chapter 15. As he states: “[Autonomy-based freedom] does not extend to the morally bad and repugnant. Since autonomy is valuable only if it is directed at the good it supplies no reason to provide…worthless let alone bad options. To be sure autonomy itself is blind to the quality of options chosen. A person is autonomous even if he chooses the bad…This may sound very rigoristic and paternalistic…[of] the state forcing people to do what it considers good for them. Nothing could be further from the truth. [The] state considering anything to be valuable or valueless is no reason for anything. …Autonomy means that a good life is a life which is a free creation. Value-pluralism means that there will be a multiplicity of valuable options to choose from, and favourable conditions of choice. The resulting doctrine of freedom provides and protects those options and conditions.” (at 411-12; emphasis in original).
fundamental concepts of human dignity, personal autonomy, privacy and choice \(^{53}\) and *Godbout v. Longueuil*, in which La Forest J. described it as “extend[ing] to matters that are...inherently personal [and] implicate basic choices going to the core of what it means to enjoy individual dignity and independence.” \(^{54}\)

This is why freedom of conscience could be important. Courts are poorly positioned to make collective decisions about rights, since their task is to fashion a response and remedy to the individual disputes that appear in front of them. Even religious claims generally arise in this way – the most clearly realized and articulated freedom of religion claims are framed as private liberty interests. Although they may have ended up voicing a freedom for a broader group – Multani with his kirpan, Amselem’s balcony sukah, and the Wilson Colony Hutterites without drivers’ photographs – all represented private claims for religious freedom. The common denominator in these claims, however, is a broad conception of conscience. All, to some extent, are conscience-based, individual claims that happen to fit within a doctrine of religious belief. For Multani, Amselem and the Hutterites, religion acts as a proxy for the more general freedom of conscience that each claimant sought. In this way, conscience could become the default claim under s. 2(a).

Thinking of conscience as potentially the primary claim makes sense conceptually and practically. To see how this might work, below is a side-by-side comparison of a few excerpts (including arguments from counsel) from the cases of *Amselem, Multani* and *Wilson Colony* where I have replaced the original statement, based on a religious argument, with one focused on conscience.

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\(^{53}\) *Morgentaler*, supra n. 46 at 166.

existence of religious obligation. Once that is done, it is a serious error in law for court to tell a practicing individual that his/her conception of his/her religious obligation is incorrect.

Para. 41: Religious beliefs which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Para. 42: Personal understandings of religion are deep in the religious convictions of many. If one could be denied rights because a court in a hostile environment found those understandings to be false, little indeed would be left of religious freedom.

Oral Argument of Steven G. Slimovitch at Supreme Court of Canada, Jan. 19, 2004

“The notion of freedom of religion clearly only protects freedom of religion so the obligation is that a plaintiff explain to a court has to be a religious obligation. So what is a religious obligation? This court has said, profoundly personal beliefs that govern one’s perception of oneself, humankind, nature and in some cases a higher or different order of being.”

“Conscience-based beliefs which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Para. 42: Personal understandings of conscience are deep in the convictions of many. If one could be denied rights because a court in a hostile environment found those understandings to be false, little indeed would be left of freedom of conscience.


“The notion of freedom of conscience clearly only protects freedom of conscience so the obligation is that a plaintiff explain to a court has to be a conscience-based obligation. So what is a conscience-based obligation? This court has said, profoundly personal beliefs that govern one’s perception of oneself, humankind and nature.”
**Multani – Original Text**

Para. 1: This appeal requires us to determine whether the decision of a school board’s council of commissioners prohibiting one of the students under its jurisdiction from wearing a kirpan to school as required by his religion infringes the student’s freedom of religion.

Paras. 37-8: In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere. Gurbaj Singh says that he sincerely believes he must adhere to this practice in order to comply with the requirements of his religion.

**Multani – Replaced and Revised Text**

Para. 1: This appeal requires us to determine whether the decision of a school board’s council of commissioners prohibiting one of the students under its jurisdiction from wearing a kirpan to school as required by his conscience infringes the student’s freedom of conscience.

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**Wilson Colony – Original Text**

Factum of Appellant, filed with S.C.C. April 14, 2008

Para. 71: [T]he restrictions *Amselem* sets for courts that adjudicate claims of religious freedom apply as well to Alberta Government Services when it evaluates any claim for an exemption. The subjective character of this freedom implies that a person who claims a religious objection to the photo requirement with apparent conviction is presumptively entitled to an exemption. To rigorously inquire into the claimant’s past practice, to insist that his current claim be consistent with his past practice, to demand that his beliefs be consistently conceived, or to be skeptical of the sincerity of beliefs that are not shared by a religious community, undermines the purpose of the freedom...

FN #61: Would [it] be consistent with Court’s decision in *Amselem* if the two [Hutterites]...
who [initially] had been photographed had subsequently been refused no-photo licences, after deciding that they had erred? Genuine respect for freedom of religion, as this Court describes it in *Amselem*, demands deference to an individual’s claim to an inconsistent religious commitment.

Para. 87: We wish to focus on Mr. Justice Iacobucci’s somewhat unusual use of the word “qualify” in this passage [citing para 72 in *Amselem*]…. Rather, “qualify” is used here in a more general, grammatical sense - religious experience resists *adjectives*. It resists modification, description, specification and *comparison*. The point Iacobucci J. makes here is that religious significance is by its nature *incommensurable*.

Para. 90: The distinctive implications of religious freedom for proportionality analysis correspond to the distinctive character of religious freedom. Freedom of religion differs from other fundamental freedoms in that it does not protect an objectively-defined domain of activity from state interference (as freedom of expression or freedom of association do, for example). Instead, this particular fundamental freedom is personal and subjective - actions that are encouraged or discouraged by a person’s sincere spiritual commitments are protected from laws that conflict with those beliefs. Where a law of general application conflicts with religious freedom, the problem is not with a law as such, as it would be if a law interfered with an objectively-defined sphere of activity. Rather, a law impairs freedom of religion when it conflicts with religious beliefs that individuals *happen to hold*.

Para. 87: We wish to focus on Mr. Justice Iacobucci’s somewhat unusual use of the word “qualify” in this passage [citing para 72 in *Amselem*]…. Rather, “qualify” is used here in a more general, grammatical sense – an act of one *conscience* resists *adjectives*. It resists modification, description, specification and *comparison*. The point Iacobucci J. makes here is that a *conscience* is by its nature *incommensurable*.

Para. 90: The distinctive implications of *freedom of conscience* for proportionality analysis correspond to the distinctive character of *conscience-based freedoms*. Freedom of conscience differs from other fundamental freedoms in that it does not protect an objectively defined domain of activity from state interference (as freedom of expression or freedom of association do, for example). Instead, this particular fundamental freedom is personal and subjective - actions that are encouraged or discouraged by a person’s sincere moral commitments are protected from laws that conflict with those commitments. Where a law of general application conflicts with conscience-based freedom, the problem is not with a law as such, it would be if a law interfered with an objectively defined sphere of activity. Rather, a law impairs *freedom of conscience* when it conflicts with commitments that individuals *happen to hold*. 
In my view, the meaning and forcefulness of the original text is not lost with the replaced text. Conscience is able to stand in, relatively easily, for religion. This simple exercise illustrates, in general, how straightforward it could be to replace religious-based claims with conscience-based ones where a claim is essentially one based on individual belief (even if originally cast in religious terms). Obviously it requires a different way of thinking: it is, for example, a much more conventional statement to say “wearing a kirpan to school as required by his religion” as compared to “wearing a kirpan to school as required by his conscience.” Yet, I think it is only a matter of convention that could be overcome.

Since Amselem, it could be argued that s. 2(a) stands for the idea that all spiritual practices are protected under our Charter even though they may not be part of an established belief system or belief system shared by others. The Court has acknowledged the “intensely personal” nature of religious practice. This individualized approach makes it more compelling to shift the focus to conscience. While an individual’s conscience is unique, many would be troubled by the idea that religious freedom could apply to a very small group of ten practitioners, or especially one. Since little or nothing is lost by reframing many individual religious legal claims into conscience-based claims, freedom of conscience could become much more important. Once contemporary religious believers become characterized as private theists, it seems to me, conscience is the more appropriate fundamental freedom.

Moreover, the tendency to equate religious liberty with non-establishment or separationism is curbed by broadening the freedom to include conscience. As Rex Ahdar and Ian Leigh note, the prevailing wisdom is often described in terms that make separation the ultimate goal, as

55 See Amselem, supra n. 24; also Moon, supra n. 37 at 202.
56 Ibid at para. 54.
57 Beaman’s Church of the Holy Shoelaces is a fictional church with ten members. My guess is that she makes it very small in order to tease out problems of membership and institutional religion. In other words, can we really call something a religion, if the number of followers is insignificant? – see Lori Beaman, “Defining Religion: The Promise and the Peril of Legal Interpretation” in Richard Moon, ed., Law and Religious Pluralism in Canada (Vancouver: UBC Press, 2008) 192.
opposed to understanding it as an instrumental concept leading to increased religious liberty. Framing the discussion, wherever possible, in terms of conscience, removes the idea of separation as an ultimate endpoint since conscience-based liberty does not necessarily act in the service of religious freedom. It is a freedom in its own right.

3 Conscience Fosters a Plurality of Beliefs

A properly realized freedom of conscience may also be seen to match well with the idea of pluralism. Where pluralism rejects a single, universal and absolute source of normative human values, conscience-based freedoms could be seen to follow suit. Limited only by human capacity, as we have seen, conscience reflects the diversity of opinions, beliefs and practices based on individual states of mind. Since pluralism holds to the view that values are conditional, predetermined by historical and cultural contexts but centred on local, personal and incomplete perspectives governed by the self, conscience could become one of the focal points on which these ideas rest. And as pluralism acknowledges the possibility of a plurality of contradictory, incommensurate and incompatible values, conscience provides the repository for them. As Harel Arnon explains it in the context of the pluralistic vision of the good life found through “moral imagination,”

\[\text{exercising moral imagination is analogous to creating art…A play can be tasteless, or poorly done, but it cannot be ‘false.’ Similarly, in a pluralist society, there is a shared understanding that moral choices cannot be true or false in this sense, since there are no absolute universal}\]


60 It is the inclusion of “practices” that highlights the important differences between s. 2(a) and s. 2(b) of the Charter: see discussion at n. 66, infra.

61 Of course, there are many different senses in which pluralism is employed: moral and religious pluralism, in which competing beliefs vie for what is the good life; pluralism in human nature, in which commonality amongst humans is reflected against our different needs and wants; and the idea of moral pluralism in which a morally pluralistic context is thought to provide a more fertile source of deepening moral insight than a monistic one – see, for example, Michael Perry, Love and Power: The Role of Religion and Morality in American Politics (New York: Oxford University Press, 1991) at 6.

criteria against which to judge them. Pluralism does not entail a lack of moral commitment; instead it offers a dual mindset, one that embraces commitment to moral values on one hand but remembers that choices are acts of ‘moral imagination,’ personal and subjective, on the other hand.63

Allowing pluralism and conscience to fully flower acts as a brake on the kind of local factionalism that worried James Madison in Federalist No. 10 when he noted that “the variety of [religious] sects dispersed over the entire face of [the Confederacy] must secure the national councils against any danger from that source.”64 Under this conception of freedom of conscience, it remains more universal than religious freedom, while still allowing for pluralism’s recognition of our moral imagination.

It thus seems important in a modern, pluralistic society to have a strong freedom of conscience that focuses partly on individual morality and ethics.65 As with a freedom of expression that protects speech, dance, and visual art, freedom of conscience broadens the realm of moral freedom. But unlike freedom of expression, freedom of conscience protects the activities that flow from conscientious practices; expression normally stops shy of physical acts.66 In this vein, the words of Justice Tobriner in People v. Woody,67 discussing the importance of a peyote ceremony to religious believers, ring out:

In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.68


65 I discuss other aspects of the freedom that might engage a court, in addition to morality and ethics, in chapter 7.

66 The Supreme Court of Canada has defined freedom of expression to include anything that conveys meaning. As Chief Justice Dickson noted in Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927, this could, depending on the circumstances, go beyond mere expression to include activities (he gives the example of parking a car), but these would be considered unusual for purpose of freedom of expression (at para 41).


68 Ibid at 821-22.
Yet religious freedom is only part of the social and cultural tapestry that is Canada. Replace the last few words of Tobriner J.’s quotation with “protect the rights of those whose conscience honestly require them to do x” and the point is no different: the magnificence of Canadian society is further enhanced when we protect those whose moral beliefs and practices resist conformity, and reflect diversity and self-expression in operation. That is a strong reason to seek a firmer protection of conscience.

Prioritizing freedom of conscience, rather than freedom of religion, may also help to tone down some of the divisive rhetoric that exists when religions clash with each other and with secular society. Sometimes a change in the way a problem is framed is enough to provide a new way of looking at things that alleviates friction. The use and abuse of religion and religious freedom in a multicultural, pluralistic society, described by Lori Beaman in the *B.H.* blood transfusion case, is revealing.69 The case pitted Jehovah’s Witnesses against the medical community. Much of her thesis is built around the fact that law, together with social work and medicine, implements practices and judgments regarding what is a “good religion” and what is “bad religion”.70 In my view, giving conscience a stronger role could circumvent this type of problem. In a case where the state is seeking to transfuse blood against the wishes of one of its citizens, for example, invoking freedom of conscience, instead of religion, changes the attack. While claimants such as B.H., perhaps quite rightly, would want to assert religious freedom, judges could manage a case differently. If judges sought argument on conscience-based grounds as well, and then couched their decisions in the language of conscience instead of religion, it could aid in defusing the situation. Although, in such instances, the court may still have to decide between “good conscience” and “bad conscience”, the end result, it seems to me, lessens the destructive rhetoric by limiting the need to discuss, in normative terms, religious belief. In other words, I find it less troubling to make legal distinctions between acceptable and unacceptable conscience-based decisions than I do between practices based on Islamic faith or Church of Scientology, or between foundational religious practices and those that might be culturally tied to religious practices. The ideas of Mark Modak-Truran, discussed in chapter 5, are apposite here – the demarcation between a claimant’s urgings


70 Ibid at 61. See also, Beaman, supra n. 55 at 201.
(which may be religiously based), a judge’s deliberations and that same judge’s written opinion (where conscience could prevail), could provide a corrective to potential religious flashpoints. As I attempted to show in the examples of replaced text in Amselem, Multani and Wilson Colony above, judgments using the language of conscience can be, in my view, less fraught than judgments using the language of religion.

There is danger in the naïve assumption that societies are marching inexorably toward “modernity,” where a pure freedom of religion and toleration are seen as ideal end states. Reality is much less certain: people of different faiths, ethnicities and cultures can live together in relative harmony for a long time, and then suddenly find themselves embroiled in violent and destructive clashes, as recently occurred in the Balkans. However, as I have outlined, many religious claims, at least those based on individual claims for redress, could have been framed as conscience claims. Think of the claims of most of the leading Canadian s. 2(a) cases to date: shopping on Sundays; refusing blood transfusions; building a private succah; bringing a symbolic knife-like object to school – all could have been structured and decided as claims based on, by virtue of being a sincerely held moral belief, a need to protect one’s freedom of conscience.

Giving priority to freedom of conscience makes sense in a fully plural society. For example, should claims by “naturists” for the right to be nude in public, made on the basis of religion be any stronger than claims based on strong moral choice? As the religious aspect of such choices is seen as increasingly eccentric, it becomes more artificial to frame them as issues over religious freedom. “Conscience” preserves a certain nobility of the Charter while allowing pluralism to evolve naturally. A broad approach to freedom of conscience preserves the inherent tension built into pluralism-based tolerance, which demands that value be given to opposing views on their own terms. It shows a respect for the idea of dignity and moral virtue

71 See the Digambara sect of Jainism religion, which expects certain believers not to wear any clothing, as they “wear” the environment around them – see Encyclopedia Brittanica entry on Digambar (Jainism sect). As this dissertation was nearing its completion, a Barrie, Ontario man claimed that he should be entitled to drive nude and present himself at various fast food take-out windows on the basis that it was an exercise of freedom of expression – see Allison Jones, “Drive through naturist challenges nudity laws” (2010), Sept. 28, online at http://www.theglobeandmail.com/news/national/ontario/drive-through-naturist-challenges-nudity-laws/article1729517/ accessed Nov. 16, 2010. I would recommend his counsel argue the case on the basis of freedom of conscience!
that the Supreme Court of Canada has pronounced as one of the integral features of the
Charter.

In tandem, an independent conscience-based freedom allows the non-religious who seek the
protection of the constitution to feel some affinity with those who are able to claim a specific
religious freedom. Like religious believers, the non-religious are not monolithic: some atheists
expressly deny God; others that humans can assert absolutely nothing about Him. Some hold
that the scientific method can explain everything; some that laud humans in such a way that it
is more accurate to say that they are affirming humans than denying God; and others do not
reject the God of the Bible but reject the false idea of God. There are those who have no
religious experience and therefore simply refuse to be bothered about it, whereas others claim
to be atheists because they wish to protest against the evil in the world. Finally, there are the
ones who react against religious beliefs in general, while others react against Christianity in
particular.\textsuperscript{72} Thus, freedom of conscience can also include the idea that atheism itself is not
amenable to a single definition. In the end, conscience could provide a way forward to
recognizing the almost infinite variety of beliefs and non-beliefs created in the human mind.

This does not mean, of course, that freedom of conscience is a panacea that will resolve all
disputes. There is little doubt, however, that tensions occur where individuals feel that they do
not have access to rights and freedoms that others have.\textsuperscript{73} As described above, religion is
sometimes a common flash point simply as a result of its current privileged constitutional
status.\textsuperscript{74} As long as freedom of conscience is not interpreted in a manner that detrimentally
affects religious-liberty seeking claimants, changing the focus of s. 2(a) could offer an
important symbolic change in an age of almost unquantifiable diversity.

\textsuperscript{72} See the \textit{Pastoral Constitution on the Church in the Modern World} (1965), available at the Vatican website:
http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-

\textsuperscript{73} A good example of this in Canada is the case of \textit{R. v. Kapp} [2008] 2 S.C.R. 483 (Japanese and other fishers
protested against perceived favoritism granted to aboriginal fishers.) One could also imagine some backlash in
many of the freedom of religion cases: if, for example, the Supreme Court had decided \textit{Wilson Colony}
differently, other groups may have sought licensing exemptions by claiming that the Hutterites were receiving preferential
treatment.

\textsuperscript{74} See supra under heading, “A More Universal Freedom.”
At the same time, an enhanced freedom of conscience need not be seen as another futile attempt at arguing for complete state neutrality nor an attempt to push religion aside on the basis that conscience is a more secular form of understanding liberty of choice. In fact, protecting conscience recognizes that the true and good of political community can be endorsed by the state – without it being associated with a particular (in the West, largely Christian) religious outlook. As Charles Taylor and Gérard Bouchard noted, the idea is not to denigrate freedom of religion by giving it a lower moral or legal status, but to accept that freedom of conscience is a broader category, that includes all deep-seated convictions and thus allows all individuals, in an incredibly diverse society, to decide their own way of living.77

4 A More Coherent Freedom

In chapter 5 it was shown how the difficulty of coming up with a working definition of religion has hampered courts in their ability to develop a principled approach to legal religious freedom. Winnifred Fallers Sullivan offered as proof of this the seemingly straightforward case of Floridian residents who attempted to personalize their families’ cemetery displays in *Warner v. Boca Raton*. Similar problems exist in Canada, although perhaps slightly attenuated. For this project, I reviewed the entire appeal record of the *Amselem* and *Multani* freedom of religion cases at the Supreme Court of Canada, hoping to find some commonalities with Sullivan’s *Warner* litigation. My findings were both similar and different from hers. In the end, however, I agree with her broad conclusions: in Canada, as in the United States, claims framed as religious disputes are often artificial legal creations that bear little

75 Larry Alexander is one of number of writers who does not see liberalism as above the fray of battling sectarian creeds – it is just as loaded as any belief system – see “Liberalism, Religion and the Unity of Epistemology” (1993) 30 San Diego L.R. 763 at 791-3; also Michael Sandel, “Political Liberalism”, 107 Harv L.R. 1765.

76 A view that would seem to support Raz’s arguments for a “thick” version of autonomy that provides the best set of initial conditions allowing for the good life and restricting harm in all its forms – see Raz, supra n. 51 at chap 15, “Freedom and Autonomy.”


resemblance to the true flowering of religious freedom. A closer examination of Amselem and, in particular Multani, shows how.

**Amselem**

The now-familiar analytical approach in s. 2(a) religious freedom cases comes from the Supreme Court’s decision in Amselem. As set out in Iacobucci J.’s majority decision, freedom of religion under the Charter must have a nexus with religion in which an individual’s sincerity is paramount. The Court developed this approach with the assistance of the applicants’ and their counsel, including Moise Amselem and Gabriel Fonfeder, and interveners, including the League for Human Rights of B’Nai Brith Canada, the Ontario Human Rights Commission and others. The claimants’ main contention throughout the Supreme Court litigation (beginning with the application for leave and continuing through the hearing) was that the judges at trial and first appeal incorrectly allowed themselves to become the arbiters of religious dogma by examining whether Judaism “religiously” obliges a certain practice. They argued that it is not within the purview of a court to question the existence or define the content of a religious obligation. Judges are not entitled to draw any negative inferences (such as the “intransigence” by which Morin J. characterized the appellant’s refusal to agree to a communal succah) where a person is simply exercising their sincere belief. Such an interpretative exercise is irrelevant because the Charter protects not religious beliefs per se, but an individual’s concept or understanding of his or her religious belief. At its limits, freedom of religion should allow a person the right to maintain beliefs which are rank heresy to the followers of even the same faith. In other words, the Charter protects freedom of

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79 Amselem, supra n. 24 at para. 46.


81 See Factum of Appellant Amselem, Supreme Court Record, filed July 15, 2003 at paras. 38, 41.
religion in toto, not freedom of mainstream views of religion or established religion, but the widest possible view of one’s personally held beliefs.  

Given the factual background of *Amselem*, it was the first real opportunity for the Supreme Court to develop its jurisprudence on the personal scope of religious freedom – until then, every major s. 2(a) case involved some form of state law or regulation (Sunday closing, school prayer practices, etc.) that pitted a claimants’ belief against the State’s. The issues in *Amselem* reflected doctrinal divisions within a practicing religion. It was to be expected, therefore, that significant discussion occurred over the nature and scope of practices during Succot.

The evidence at trial bears this out. The claimants devoted a large portion of their evidence to their own religious practices and understandings regarding the festival of Succot. Gabriel Fonfeder’s affidavit described what Succot represents to him, what kind of privacy he requires in his succah and how he always maintained his own succah. In contrast, the respondents – the condominium owners – framed the case as a struggle over “correct” interpretation of religious doctrine. They enlisted the aid of religious experts, such as Rabbi Barry Levy, a professor of Jewish Studies and Dean of the Faculty of Religious Studies at the University of McGill. Levy gave his expert opinion on certain matters related to the Jewish holiday of Succot.

Levy’s purview was wide, covering areas such as the requirement to build one’s own succah versus the use of a common succah, how a common succah may affect the proper practice of Succot, what aspects of succah use can be considered fulfillment of a religions

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82 Oral transcript of arguments before the Supreme Court of Canada, January 19, 2004 (there is no pagination or paragraphing in the oral transcript, so specific references are not possible). David Matas, counsel for B’Nai Brith, noted that he had, in *Jack*, unsuccessfully argued for an internal limit to freedom of religion similar to that proposed by Syndicat Northcrest in this case.

83 The case of *Jack and Charlie v. R.* [1985] 2 S.C.R. 332 did hint at a personal level of religious freedom, but the Court not develop the idea very thoroughly (aboriginals convicted of killing a deer out of season were denied a claim that it was for religious purposes and therefore justified; the Supreme Court held that there was no evidence that fresh meat was required for a religious purpose).

84 See Affidavit of Gabriel Fonfeder, Supreme Court Record, dated December 9, 1997, filed July 15, 2003 at paras. 8, 11, 14, 15.
“commandment” and what are “matters of convenience.” 85 At trial he was asked a series of questions in direct and cross examination all aimed at establishing the contours of accepted religious practice. For example:

**Direct Examination**

Q: Is there an obligation to build a sukkot?

Q: Is there an obligation to have one on one’s property?

Q: How can one fulfill Biblical commandments other than by having a sukkot on one’s own property?

Q: What about the prohibition regarding cooking?

**Cross-Examination**

Q: What is the distinction between Sukkot as concerned [sic] between the Sephardi view and interpretation and the Ashkenazi interpretation?

Q: Would the degree of religiousness, for lack of a better term, be the same in the Sephardi tradition as in the Ashkenazi tradition?

Q: Would a communal sukkot for example in the City of Outremont be acceptable on a religious level?

Q: Could we have one sukkot for the whole of the town of Outremont? For the City of Montreal? One for the nation of Canada?

Q: Could we have a sukkot that is [approximately] 15 feet by 100 feet? How many people could this contain? 86

In his answer to the last question, Rabbi Levy became an expert on crowd size: “if we assume 100 x 15 across, that is 3 or 4 rows of people, assuming the average person is 30 inches wide, that equals well over a 100 people”! 87 The Supreme Court justices must have realized that


86 Examination of Barry Levy, Supreme Court Appeal Record, dated 17 March 1998, filed July 15, 2003. Note that the written examination record employs somewhat different spellings and word forms for sukkot and Sukkot as does the final Supreme Court decision. I have employed the exact text as found in the written examination record.

87 Ibid.
asking this of a religious scholar, at least to an outsider, borders on the absurd. Requiring a rabbi to estimate the number of people that can fit into a given space is not part of any reasonable conception of the parameters of a constitutionally entrenched freedom of religion. It certainly makes it easier to understand the Court’s ultimate determination that an individual’s sincerity regarding a practice or belief is sufficient to ground a claim for religious freedom.

Few would argue with the importance of having judges removed from the business of assessing religious doctrine. The *Amselem* test does not mean, however, that the courts have vacated their role as arbiters – it is now up to judges to test both the nexus to religion and the sincerity of a claim. This might include evidence of community practice and a claimant’s historical observance within that community, as well as his or her commitment to a particular stance. The individual sincerity approach is not without its difficulties, however, as will be seen more clearly below in the *Multani* discussion. In *Amselem* these difficulties were obscured because of the very public disagreement on doctrine that existed between the expert rabbis.

Some of the claimants and interveners in *Amselem* implied that there should be an independent role for conscience in s. 2(a) matters. This chapter opens with a telling quote from Amselem’s counsel, Julius Grey. Not only does he seem to suggest the need to recognize freedom of conscience as independent, but he also suggests that it is more important, both because it literally appears first – before “religion” under s. 2(a) of the Charter and s. 3 of the Quebec Charter – and because it represents the essence of an individual freedom since it can only be exercised individually. Later, Grey builds on this idea:

> even if…the Court were able to look at the content and conformity with established religious belief, it surely would not decide which rabbi is correct. Once there is some rabbi who says this and the other, that surely then becomes a matter of individual conscience, but I think even before we get there, it’s a matter of individual conscience and sincerity suffices.  

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88 Oral transcript of Argument before the Supreme Court of Canada, January 19, 2004. Both B’Nai Brith and the World Sikh Organization referred to the freedom to include an independent role for conscience in their facta – see facta of the World Sikh Organization and B’Nai Brith, both filed November 17, 2003.
The point is an important one, echoing the argument developed by Sullivan in *Impossibility*. Unfortunately it is a point overlooked by the majority of the Supreme Court in *Amselem*: once sincerity becomes the touchstone for assessing religious freedom, then it truly focuses on individuality, with little if no anchoring to the concept of religion as a communal, social activity. The notion that religious practices contain certain accepted doctrines, precepts and historical practices is cut back severely. When what is at stake is essentially a personal decision (with some difficult-to-assess connection, or “nexus,” with religion) at that point it becomes more accurate to say that an activity or practice is conscience-based rather than religious. In sum, the Supreme Court’s own test for religious freedom, if it is to avoid a descent into incoherence, begs to become a broader test of freedom of conscience, since it is so highly individualistic. *Amselem*, albeit unwittingly, thus paves the way for a more fully realized freedom of conscience.

*Multani*

The relevant facts in *Multani* are straightforward: a Sikh schoolboy, Gurbaj Singh Multani, was prevented by the school board, Commission scolaire Marguerite-Bourgeoys, from wearing his kirpan to school, after his parents, the school and the school board, failed to come up with a workable solution for him (for example, one of the ideas, rejected by Multani, was to wear a plastic replica kirpan to school). The family then lodged a claim that the decision was contrary to Multani’s religious freedom and also discriminated against him based on his religion. After initial success, they lost at the Quebec Court of Appeal, leading to their appeal to the Supreme Court of Canada.

One of the most compelling observations to be made upon reviewing the Supreme Court appeal record in *Multani* is that it illustrates how legal disputes are modified in light of precedent, yet lawyers remain wary and cautious of change. Fewer than two years after the decision in *Amselem*, and involving some of the same counsel, *Multani* reflects only a few of the lessons learned.
The case was framed in a somewhat similar vein to that of Amselem.\(^89\) Despite the Amselem requirement that a claimant’s practices or beliefs need only have a bare “nexus with religion,” reflecting a “sincere belief,” Multani’s lawyers maintained some aspects of earlier religious claims, taking many opportunities to provide evidence of the “legitimacy” of the Sikh religion. A key piece of evidence at trial was the affidavit testimony of Manjit Singh, a Chaplin of the Sikh religion at McGill University and Concordia.\(^90\) He refers to the sacred symbolism of the kirpan, noting that it is to be worn at all times, day and night. Its symbolic nature is reflected in the fact that it is blunt and has never been intended as a weapon, so, as Singh states, it should not be construed as a knife or dagger. Multani’s refusal to wear a replica plastic kirpan is not a novel or unusual decision for someone of his faith and belief but a “perfectly reasonable religiously motivated interpretation.”\(^91\) Multani reiterates this point, noting in his affidavit that, to him, a plastic replica does not follow the rules of Sikhism.\(^92\)

Arguably, the volumes of documentary evidence regarding Sikhism and the role of the kirpan, tendered as evidence at the Supreme Court, were unnecessary in light of the decision in Amselem. One possibility for including them is, of course, legal counsel’s overcautious approach; it is difficult to imagine such evidence would hurt one’s religious freedom case, yet it may well help it. Given the relatively lowly requirements of nexus and sincerity, however, would it not be sufficient for the claimant to lead evidence from a single expert to establish that a steel kirpan is not a weapon but a religious symbol of the Sikhs? That should be sufficient to establish a “nexus to religion.” The only issue remaining would be Multani’s sincerity, and as stated in his factum, this was agreed upon: “[n]o doubt has been cast on the sincerity of [Gurbaj Multani’s] religious views.”\(^93\) The intervener Canadian Civil Liberties

\(^89\) The following is taken from the Supreme Court of Canada Appeal Record available on microfilm at the Supreme Court of Canada library. Where possible, I provide specific references, but the cataloguing of the Appeal Books does not seem to follow a particular logic, and it is often not possible to provide specific reference points.


\(^91\) Ibid at para. 25.


\(^93\) Factum of the Appellant, filed January 10, 2005, at para. 4.
Association took this approach, treating the Supreme Court’s requirements from Amselem at face value. They noted that s. 2(a) was infringed for the simple fact that

[t]he appellant established that his subjective belief that wearing a kirpan is a precept of his faith; that these beliefs are sincerely held, and that a total ban on wearing kirpans interferes with sincere beliefs.\(^{94}\)

Only the World Sikh Organization (WSO) seemed to reflect on the tension between the old approach requiring voluminous expert religious evidence and the sincerity of belief approach from Amselem. It recognized that, while objective proof of doctrine is not required in a claim of religious freedom, it may prove useful in order to help show the “consistency of a claimant’s belief with that of other adherents of the faith.” Acknowledging that “everyone knows Sikhism is a major world religion and not a sect or a cult,” the WSO implied that documentary and expert evidence about a religion can help establish individual sincerity.\(^{95}\)

Thus, the shadow cast by Amselem formed two parallel narratives in Multani. First, the importance of sincerity reflects a very individualized approach to religion, one that is, in actuality, more strongly associated with a person’s conscience. It was irrelevant for the school board to suggest that other Sikhs can content themselves with non-metal replicas of the kirpan, since Multani’s “religious views must be accommodated, if reasonably possible, without regard to what other Sikhs may think or do.”\(^{96}\) A symbolic kirpan made of plastic or wood does not conform to Gurbaj Multani’s sincerely held religious belief.\(^{97}\) What follows from individual sincerity, according to Multani in his factum, is a trend towards individuality and conscience: quoting from Big M Drug Mart and Amselem, he refers to the approach as a “natural consequence of the individual nature of freedom of religion as explained in Big M, and of the fact that the Charter protects not only religion but conscience which can only be

\(^{94}\) Factum of Intervener Canadian Civil Liberties Association, filed March 21, 2005 at para. 11.

\(^{95}\) Factum of World Sikh Organization, filed March 21, 2005 at paras. 10, 26.

\(^{96}\) Factum of Appellant, filed January 10, 2005 at para. 31.

\(^{97}\) Factum of Intervener Ontario Human Rights Commission, filed at the Supreme Court of Canada on March 18, 2005, at para. 34.
individual in nature.” The WSO reiterated the point, fixing its examination on the personal nature of freedom of religion (while perhaps overstating its affects):

The right to freedom of religion is inviolable, and any interpretation of this right should have regard to the intensely personal nature of this right….and whether or not it affects others with different belief systems is an irrelevant consideration.  

Sincerity of belief thus takes on immense weight in the legal constitutional analysis of freedom under s. 2(a). In the context of a religious belief, there are certain markers that allow a court to test sincerity and ensure that false claims are minimized.

The second narrative, also a result of the approach adopted in Amselem, is that the party opposing a claim – usually government or its delegated body – is tempted to reframe the issue from that involving a religious practice into a more secular concern. In Multani, much argument hinged on the question of whether a kirpan was or was not a weapon. Manjit Singh testified that the kirpan had long ago lost any association it had with weaponry. The Canadian Civil Liberties Association noted the same point, relying on evidence from a Board of Inquiry hearing in Pandori in 1981 which found as fact that the kirpan has lost any association it had with weaponry and that it is now more like the mace in the House of Commons than a knife.

Thus, the non-claimant party, in the face of an object or practice purported to be religious and thus constitutionally protected, seeks to remove it from its ordinary context by arguing that there is a secular reason for it to be regulated or controlled. Because the kirpan is made of steel and looks like a knife, it becomes a weapon to the school board. This leads to a proposed “solution” that purports to retain the basics of a religious form (ie, a plastic or wooden knife-shaped object substituting for the real thing) as if the form itself is sufficient to appease a sincere religious belief. Even in oral argument at the Supreme Court, counsel for Multani was

98 Factum of Appellant, para. 30, filed January 10, 2005. Although the Supreme Court has not had occasion to make the point, it is likely that religious freedom would be circumscribed in a similar manner to expressive freedom, which includes threats of violence, but stops short of actual violence. Religious freedom would likely end where harm to another – or some similar formulation – begins (see R. v. Keegstra [1990] 3 S.C.R. 697.


101 Factum of Intervener Canadian Civil Liberties Association, filed March 21, 2005 at para. 20.
questioned at length by more than one judge over the provenance of the kirpan: “to be [sic] a kirpan is a dagger and a dagger is an arm” (Bastarache J.); “Is it sharp or not?” (Lebel J.); “is it a weapon or a symbol?; and “[is] it a weapon but it is worn for religious purposes and we have to deal with it on that basis?” (Binnie J.). In answer to this line of questioning, Julius Grey relied on a simple analogy that a kitchen knife may not be a weapon, but may resemble a weapon in the same way as a compass in geometry resembles something that stabs easily.

Ignored in this approach is whether it makes any sense to remove the religious object from its religious context – whether an object’s form governs its religious content. To a religious observer, the reframed issue is nonsensical. A Sikh, for example, would not grab a knife from the kitchen drawer as a replacement kirpan if for some unimagined reason his regular kirpan went astray, much as a muslim woman would not wear a balaclava in public if her only hijab or burka was lost or ruined. Granted, given the importance of sincerity, one expects opposition counsel to raise such concerns. By doing so, they can advance both the secular problems resulting from religious practice, and expose potential insincerity – in Multani’s case, either the kirpan is a dangerous weapon, or an insincerely devout Sikh would admit that a kitchen knife was equivalent.

How might a broader freedom of conscience alleviate this? If the claims were recognized as based on freedom of conscience, a counter-claimant would be forced to confront the specific requirements of the claimant. Arguing that a practice is not religious or that an accommodation complies with religious strictures will not suffice. In Multani, for example, the government tried to advance the position that a replica kirpan was a proper form of accommodation. The evidence of Multani himself, however, was that a replica kirpan would not suffice for him. That other Sikhs had agreed to using a plastic replica in other cases may

\[\text{Transcript of Oral Argument, Appeal Record, dated April 12, 2005.}\]

\[\text{Ibid. A similar methodology was employed by the Alberta government in the Wilson Colony case where the proposed solution was to have the photographs taken (which was at the heart of the Hutterites religious objection) but kept “stored away” so that only government officials could use them (see at para. 2). Or, more recently in Ontario in the case of R. v. N.S., where an alleged victim of rape wished to remain in her burka while testifying at the accused’s criminal trial. An alternative to her wearing the burka was proposed so that the defence could, in its words, “conduct a proper examination of her credibility,” by seeing her eyes and face: see transcript of evidence, on file with author, at para 22 (case received leave to appeal to the Supreme Court of Canada: March 17, 2011).}\]
have cast doubt on the nature of the religious practice; it is difficult to imagine how it could cast doubt on Multani’s own conscience-based belief.

This would carry through to the s. 1 justification stage. Conscience would ensure that evidence tendered at trial is relevant to a full and complete s. 2(a) and s. 1 analysis. The government would be more likely to consider alternatives that minimally impair the individual claimant’s conscience, rather than alternatives that are simply suitable to some members of a religious group. Moreover, in the new heightened proportionality component of the Oakes test (established by the Supreme Court in Wilson Colony), the merits of the claimant’s conscience-based argument ensure a more critical eye will be brought to bear on the evidence. Take the Wilson Colony case itself. There, if each of the Hutterites had made the claim that their individual conscience forbid them to have their photographs taken, it may have led them to be more specific in their grievances, which in turn would have led government to adduce more specific evidence of accommodation. As it stood, the majority of the Supreme Court found that

the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony’s rural way of life. The claimants’ affidavit says that it is necessary for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be possible to hire people with driver’s licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor.\textsuperscript{104}

Because the claim is based on freedom of religion, the Court is suggesting that the Hutterites need to show the Colony would cease to exist in order to succeed. However, if each individual Hutterite had testified that he or she could not continue as a Hutterite in good conscience, then the government would need to adduce evidence specifically aimed at justifying its breach of individual conscience. I am not sure whether the ultimate decision would have been any different, but conceptualizing it in this fashion makes the connection between the freedom and justification more coherent.

The problem courts have with assessing exemptions from general laws due to religious freedom, is that the Oakes test under s. 1 of the Charter degrades into a test which favours

\textsuperscript{104} Wilson Colony, supra n. 50 at para. 97 (emphasis added).
claimants whose views are closer to orthodoxy and favours the government where it is easily able to claim salutary effects of the measure. As Larry Alexander notes, in a passage which could have been written regarding the Supreme Court of Canada’s decision in *Wilson Colony*:

The Seventh Day Adventists and the Amish will win on matters like Sabbath observance and family control over education and only when the state interests are quite marginal. On the other hand, Native American beliefs regarding use of peyote as a sacrament are sufficiently out of the mainstream, and the state interesting in banning drug use sufficiently significant, that an exemption will be denied.105

If, on the other hand, a claimant’s views are removed from the religious cloak, and seen as conscience-based, perhaps a judge’s perception will change. For while it is true that a claimant’s conscience may seem strange, outlandish, or bizarre, at least a judge has to contend with the fact that she or he has the same basic apparatus – an inner voice that provides guidance. In contrast, it is easier to dismiss odd religious practices as having no nexus to any traditional religion – as the Supreme Court of Canada was effortlessly able to do by not even granting leave to appeal to the accused leaders of the Church of the Universe, whose scripture extolled the importance and virtues of marijuana: see *R v. Reverend Brother Michael Baldasaro* and *Reverend Brother Walter Tucker*.106

5 Conscience Captures a Wider Array of Claims

The last, but not least, reason that could be argued for elevating conscience to a higher state than religion is probably the most compelling. Put simply, conscience is more comprehensive than freedom of religion and could be used to protect a broader segment of beliefs and practices. If we think of freedom of religion as simply the way we have historically defined the notion of freedom of conscience, then, by definition, “conscience” in s. 2(a) will be wider in scope than “religion”.

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105 Alexander, supra n. 16 at 43.

106 2009 ONCA 676 (CanLii), leave to appeal to Supreme Court of Canada dismissed, April 22, 2010.
As a starting point, freedom of conscience might protect those who are persecuted at the time for heresy, but in retrospect, are creating new religions. Martin Luther may have received little or no protection for his beliefs under a traditional notion of freedom of religion because, before his writings and the mounting of his 95 theses, Protestantism, as a religion, did not exist. Similarly, Joseph Smith (and later Brigham Young) may not have had to lead his adherents from New York to Ohio, then to Missouri and finally to Utah to escape the long arm of the state if his freedom of conscience were protected. The result in each of these cases may have been quite different.

It is also clear, however, that conscience-based guarantees can go beyond any connection to religion. The ability to hear the voice of truth, humanity, reason or moral law is not dependent on membership in a religious community nor on a belief in God. The most telling jurisprudential example of this is the vegetarian prisoner case of Maurice discussed in chapters 4 and 6. Since Maurice, a federal inmate, had renounced his religion, he could only seek a vegetarian diet on the basis that it was a matter of conscience. The Federal Court accepted the broader argument, finding that the prison regulations (allowing vegetarian diets for religious reasons only) offended s. 2(a). As a result, Corrections Canada was required to take active steps to ensure freedom of conscience, not just freedom of religion, was protected.  

Similar situations have been referred to in this dissertation. The school child who is repulsed by live dissection on moral, not religious, grounds. The teachers who face a life-threatening situation involving a non-religious child who has previously signed a “do not resuscitate” order. The pharmacist who is opposed to issuing morning after pills. The whistleblower. Most intractable would be the person who wishes to end their life due to a devastating terminal illness. All would be able to put forth an argument relying on a constitutionally protected freedom of conscience where freedom of religion’s underinclusiveness would likely fail to adequately capture their circumstances.

Unfortunately, freedom of conscience has not reached its maturity in legal decision-making. It is still unclear what makes a conscience-based claim. Does it require some connection to morals? Or some connection with other values, ethics or beliefs? Will it open up

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uncontrollable floodgates? Will it be too difficult to ascertain and keep distinct from religion? What about the fact that religion is still singled out for special protection in the Charter – under s. 15, for example – which may reduce conscience’s import. Or those remaining remnants of the Christian façade in our Charter that may privilege religion – is it wise, for example, to ignore the fact that “God” appears in our “confessional preamble,” as George Egerton calls it? With these tensions in mind, there may be roadblocks to removing some privileges of religion. “He” may just loom over, literally and figuratively, the fundamental freedom of conscience. In my view, however, the beneficial factors outweigh these concerns, and point towards making freedom of conscience a much more fully realized freedom in s. 2(a). In the next chapter, I propose a way in which this could occur.

Chapter 7

Conscience in Legal Doctrine: An Approach to s. 2(a)

Like a burl, freedom of conscience in constitutional terms lies largely inert. Some inroads have been made: as we have seen, a few bold judges have begun to realize freedom of religion’s limitations, and developed a small body of conscience-based jurisprudence. Yet, for the most part, the institutional inertia that has kept constitutional conscience-based claims to a minimum, remains.

In this chapter, I take the reasons that might lead to a greater role for conscience, as discussed in chapter 6, and propose a model that could aid courts in understanding and assessing freedom of conscience claims. The model is based on four key points. First, that a claim in conscience is individual in nature and can be used as both shield and sword. Second, that the claim has some connection to morality. Third, that the strongest conscience claims evince some form of compulsion; and lastly, that, in legal terms, floodgate concerns are acknowledged and addressed. After elaborating each point, I use them to help develop a possible methodology for freedom of conscience claims under the Charter.

1 Four Important Factors in Conscience-Based Claims

1.1 Conscience is an Individual Shield or Sword

Given conscience’s ancestry as belonging to self-knowledge, it is still viewed mainly as a subjective force, something self-regarding that looks inward. Although its biblical roots tend to obscure its individual aspect in religious doctrine, conscience reflects the distinctive human capacity for choice. It has antinomian characteristics, as Edward Andrew points out: like equity, conscience situates itself outside of, and above law, but is still attached to it as a
standard bearer.\(^1\) (In fact, equity itself is often referred to as conscience-based law). I believe that in its modern guise, conscience prescribes a way of viewing the world, and acting within it, that is directed entirely at the self. Unlike reason, which is a universal virtue directed at both the self and others (think of Kant’s practical reason), conscience only makes sense in terms of individual thoughts and behaviours. It would be illogical, in my view, to direct one’s conscience at another: “my conscience says you ought to do this or ought not to do that” is difficult, if not impossible, to conceive; “reason says you ought to do this or ought not to do that” is logical.\(^2\) The emphasis of conscience, in other words, is on individual decision and agency. As outlined previously, a conscience-based decision need not be rational, but it must be one’s own. It does not prescribe to others a particular course of action or belief.

The beginnings of this modern understanding of conscience can be traced back to the Protestant Reformation and Martin Luther’s appearance at the Diet of Worms. The minutes of his trial contain the following famous passage between Luther and Dr. Johann von Eck, Pope Leo’s spokesperson:

Von Eck: Lay aside your conscience, Martin. You must lay it aside because it is in error.

Luther: …my conscience is captive to the Word of God: I cannot and will not retract anything, since it is neither safe nor right to go against conscience…I cannot do otherwise.\(^3\)

Many take Luther to have meant that any belief held by the conscience is inviolable; that conscience is king. This is inaccurate; Luther was not arguing for the right of an individual to hold to any belief, however erroneous, just because one’s subjective conscience is inviolable. Instead, throughout the trial, Luther underscored his obedience to God, and conscience’s role as captive to it. He reiterated the dangers of allowing purely subjective conscience to hold sway: “if conscience is separated from the Word of God, it is like a ball which is kicked about

\(^1\) This section borrows from Edward G. Andrew, *Conscience and its Critics: Protestant Conscience, Enlightenment Reason, and Modern Subjectivity* (Toronto: University of Toronto Press, 2001), particularly at chaps 2-4. For discussion on conscience’s antinomian character, see Andrew at 8.

\(^2\) Ibid. While it is arguable that pangs of conscience can arise in relation to others – the sense of shame or pride felt before others for betraying or upholding, respectively, one’s conscience, for example – it is still conscience’s effect on the self that is relevant, and, in my view, cannot be used in the same other-regarding way as reason.

Thus, for Luther, conscience is always present, but remains bound to an individual’s religious worldview. But by calling for an independent “conscience,” even if, in his case, it was tied to religion, he also started the ball rolling on allowing a legal freedom of conscience to develop in parallel with that of legal religious freedom.

In contrast to freedom of religion, which I have argued might be better used for communal rather than individual claims, for me the very nature of conscience means that, if it is to be considered as a separate constitutionally protected freedom at all, it will be centred on the individual. While religions resemble communities by virtue of having one or more elements such as founding documents (“constitutions”), authority and leadership figures, dispute resolution processes and institutions – and, as was shown in chapter 5, leading some to argue for a conception of religious freedom that recognizes a communal element – freedom of conscience is more clearly focused on the individual and less convincingly subject to the same duality. A conscience-based freedom would most likely be directed toward personal autonomy. Although there are some occasional nods to a kind of extra-human conscience, as set out in Durkheim’s ideas of the “collective conscience” or in criminal law being the “legislated conscience of a nation,” the liberal and historical understanding of “conscience” sits much more comfortably with the individual. Even those courts that have recognized conscience as an independent freedom have treated it as incapable of applying to anything other than a natural person. Put another way, it seems metaphysically impossible to guarantee

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4 Ibid at vol. 9, p. 123; vol. 16, pg. 107; vol. 18, pl. 374.


6 Although the common translation of Durkheim’s work into English relied on the term “collective consciousness” there are hints that “conscience collective” is more accurately described in English as “collective conscience”: see George Simpson (Trans.), in Emile Durkheim, The Division of Labour in Society (London: The Free Press of Glencoe, 1933) at ix. Simpson states that “it seems to me that [consciousness] is a gross misinterpretation of Durkheim’s meaning. A conscience for Durkheim…is pre-eminently the organ of sentiments and representations” (at ix).
freedom of conscience to an association or other legal person. This has been echoed in a number of judicial opinions: Tarnopolsky J.A. in Videoflicks, Dickson C.J. in Edwards Books and Wilson J. in Morgentaler accept that freedom of conscience is most clearly an individual freedom. The European Court has held the same – that conscience is a freedom that can be claimed by an individual only. For me, if conscience is to exist as an independent freedom, it must be, as both Dickson C.J. and Wilson J. said, the “conscience of the individual.”

Moreover, as was discussed in chapter 5, the absence of the word “conscience” in the equality rights section of the Charter is part of the reason for keeping freedom of conscience focused on the individual. The nature of s.15 analysis is comparative, requiring an examination of legal effects that occur between groups – on distinctions made on grounds that are either enumerated or analogous to race, sex, disability, etc. Since religion is part of this equation, and since religions have always existed as part of communal human life, there will always be strong arguments for maintaining a form of religious freedom that includes a collective component. By contrast, conscience lacks this formal connection to community.

That said, freedom of conscience should otherwise be treated analogous to religious freedom. It can act both as a shield, protecting against government intrusion, and a sword, compelling governments to act on behalf of individuals. This can be illustrated by recognizing that there are moral imperatives which prohibit action (“thou shalt not”) and moral imperatives which mandate it (“thou shalt”). Both the negative and positive forms can implicate religious belief, conscience, or both. For example, “do not work on the sabbath” or “do not eat meat” are negative moral absolutes, the first tied to a religious compulsion, the latter may or may not be religious. Likewise, “a man shall marry more than one woman” or “one shall always give thanks” are positive imperatives with a religious (in the first case, according to some branches of Mormonism, for example) or conscience-based rationale (in the second, although again,
there may also be a religious basis for giving thanks). Of course, the categories are somewhat fluid and can often be reversed: “one should only eat vegetables” becomes the positive form of a moral imperative prohibiting the eating of meat (but in so doing, loses some of its moral force if eating meat is seen as harmful). Further, there are imperatives of both types which are likely to be cast as legal imperatives and others that are unlikely legal: “one shall always give thanks” is a positive example of a non-legal imperative, “do not be an adulterer,” a negative that has, at least in the past, been legally mandated. And there are elective commands as opposed to imperatives, which are less likely to engage legal claims of freedom of religion or conscience: “a man may marry more than one woman.” But again, there are often no clear distinctions between legal and non-legal imperatives, and between permissive and imperative: for example, in the Syndicat Northcrest v. Amselem case, the claimants felt compelled to use their balconies as sukkahs. In the Warner case, at issue was a felt need by the claimants to decorate their families’ graves in a certain manner. In both cases, the plaintiffs found themselves at odds with other religious experts who argued these actions were not required by religious doctrine. Finally, the basic typology of positive and negative, imperative and elective, can be further refined. Negative moral imperatives can be based on a code of ethical absolutes that are true and apply at all times; or they can be limited to specific situations. An example of the first would be the strict prohibition against blood transfusions that Jehovah’s Witnesses feel is a universal and timeless moral obligation. In the latter category would fall those selective conscientious objectors who may oppose a particular war on the basis that it is unjust, but who do not oppose all wars. And even a strict vegan may have to eat meat in response to an emergency or crisis where the need to survive overshadows everything else. As is clear, however, from all of this, conscience is similar to, but broader than, religion.

Courts have recognized both the shield and sword in conscience-based claims. In Morgentaler, for example, Justice Wilson wrote that all women need freedom of conscience in order to pursue their own decision regarding abortion. Government, in general, should not be able to interfere with one of the most profound choices that humans (women) can make. If the Criminal Code provisions regulating abortion did not exist (as is the case currently), women would be free to exercise their consciences in deciding whether to carry a child to term or not.

(subject to certain health and safety considerations). Justice Wilson’s decision thus used freedom of conscience defensively, to protect against state intrusion. The claim made by the inmate in *Maurice*, in contrast, employed freedom of conscience as a sword, seeking to have Corrections Canada change its practices for vegetarian prisoners. Whereas before the case, the government only provided special meals for religious believers, the decision resulted in a change in policy so as to provide similar meals to all “genuine” vegetarians (those guided by their conscience).

### 1.2 Some Connection to Morality

The principal philosophical tradition that gave rise to a Western concept of liberal democracy is liberalism – a system of values that rejects religious persecution and intolerance. Liberalism is difficult, if not impossible, to adequately define, but there are some recognizable characteristics inherent in most conceptions of it. John Gray highlights four common elements: it is individualistic, egalitarian, universalist and meliorist.\(^\text{12}\) For him, it is the moral primacy of the person against claims on any social collectivity that gives liberalism its individual aspect. As Michael Sandel puts it, liberalism treats each person as separate, with his or her own interests and aims, free and independent – the “unencumbered self.”\(^\text{13}\) At the heart of this individuality lies human conscience and its concomitant freedom. Individual conscience lets us act in a manner that is true to self.

If it is to have some deeper meaning – and traction, especially for purposes of legal constitutionality – freedom of conscience must be more than simply any act of a conscious or sentient mind. That much is true. The need to have some moral component attached to an act could be an obvious point of departure. It would be difficult to imagine freedom of conscience being used to backstop an argument that conscience required driving on the wrong side of the road (unless it was to avoid something alive in the way), or using a sledgehammer instead of a screwdriver to affix a hinge to a door. On the other hand, it is much more plausible to accept


the views of someone claiming to be a vegan because her conscience would not let her eat meat. We might even grant the same person some ground to argue that her conscience will not allow her to see other humans eat meat or even to prevent others from eating meat, although her demands upon others at this point call for deeper analysis since her moral repugnance may clash at that point with another’s right or freedom.

In the same way that “religion” has been interpreted broadly for purposes of constitutional law, one way for courts to deal with the multitude of possible freedom of conscience claims is to rely on a very broad understanding of morality. Moral convictions and commitments could be those that result from a conscious effort to discern, hopefully after some consideration, what choices one makes about what is right rather than wrong, just rather than unjust, good rather than bad. It could be subjectively determined, as it has been in freedom of religion cases, but with some elevated sense of moral purpose akin to the “nexus with religion” approach. For some, there is obviously a strong connection to religion in the choices that will be made. In this broad sense, individual subjective morality seems to belong within a conscience-based legal claim; whether it is necessary or simply sufficient and how far that morality can affect others is less certain. Much depends on how moral actions are categorized.

What makes the case of vegetarianism potentially different from the choice of which lane or tool to use, could be, at least for courts, the fact that some reasonably important moral component is engaged (albeit, subjectively). For many, choosing what one eats, or how one sees the killing of animals in order to eat, engages issues of right versus wrong, justness and unjustness, and good against bad. We have already seen this in the limited jurisprudence on freedom of conscience: courts have all interpreted “conscience” as belonging to a moral or ethical dimension. In Welsh, Amselem, Morgentaler, and Big M Drug Mart, for example, the


15 Note, however, that in the German Conscientious Objector Case I, 12 BVerfGE 45 (1960) at 55, the Court spoke of conscience as an “inner moral command” that steers a person “away from evil and toward the good,” suggesting a more objective version of the morality of conscience.

courts refer to conscience as consisting of deeply held beliefs and practices that are akin to religious beliefs and practices. Chief Justice Dickson captured it well when he referred to the possibility of conscience as a secular parallel to religion, the latter simply a “prototypical” and “paradigmatic” system of belief and practice that might well be subsumed under the larger body of a conscience-based liberty.\(^\text{17}\) Justice Wilson in Morgentaler similarly articulated the freedom as belonging to some form of personal morality that exists outside religion, namely a “secular morality.”\(^\text{18}\) This followed Justice Black in Welsh, who characterized conscience-based beliefs as deep and sincere, but, unlike religious beliefs, sourced in ethics or morals.\(^\text{19}\) This ties conscience to religion, but at the same time recognizes its secular distinctiveness. It ensures conscience is tethered to its foundation in conscientia, and is not simply any decision made, or action taken, by a sentient being.

The difficulty that courts will face with this articulation of the freedom is, as might be expected, determining the exact parameters of “morality.” In cases of religious freedom, many practices are imbued with moral status because of their origin as a commandment from God, whereas the same will not always be true for conscience-based claims. Take a traditional mealtime setting as an example: as Justices Tarnopolsky and Lehman noted, the “partaking of food” can take on a variety of meanings that range from having nothing to do with conscience or religion to something fully religious commanded by a higher power. One may eat simply because of hunger (perhaps no connection to conscience or religion), or as part of a family gathering based on a long-standing family tradition in which a family member may feel tremendously bound to attend (engaging the subjective conscience of the family member who feels guilty about missing the meal), or which all the family agrees is of utmost important to maintaining family coherence for the good (a more objective version of conscience). At the far end of the spectrum would be the example of kosher meals in which the command of God creates moral requirements as to what can or cannot be eaten (a fully religious experience).

\(^{17}\) *Big M Drug Mart*, ibid at para. 123.

\(^{18}\) Wilson J. in *Morgentaler*, supra n. 8 at 179, quoting Professor Cyril Joad in *Guide to the Philosophy of Morals and Politics*.

\(^{19}\) *Welsh*, supra n. 16 at 340.
Yet to some, a moral requirement forbidding certain foods may seem equivalent to a moral requirement to drive on a particular side of the road.

In *Morgentaler*, Wilson J. seems to treat conscience as a matter of human agency. It is the “woman’s right to choose” she states, that must be constitutionally protected.\(^{20}\) Are any limits to be placed on this choice? Or is the constitutionally protected choice to have some grounding in morality, as is presumably the case in deciding whether or not to terminate a pregnancy, but then autonomy kicks in and allows individual choice to govern? In other words, is Justice Wilson advocating for a threshold decision based on morality in order to invoke freedom of conscience? This has a superficial attraction to it, but can also lead to confusion: washing hands before eating or prayer, for some religious adherents, is a matter of morality because it stems from a command from God. As with the offering of food, however, one can easily imagine decisions to terminate a pregnancy not based on morality – because having a child would, for example “cramp my single lifestyle,” or would add to the “four children I already have and I don’t need any more”. A person’s right to choose can all too easily become any decision made consciously. So perhaps what could be required is some basic, albeit subjective, grounding in morality. But is it sufficient?

As discussed in chapter 4, the only case in Canada in which a court relied solely on freedom of conscience to ground its decision is *Maurice v. Canada (Attorney General)*.\(^{21}\) Unfortunately, it is unclear in Campbell J.’s decision whether a moral element alone was sufficient to raise a claim of constitutionally protected freedom of conscience. His reasoning was ambiguous on this point – on one hand, it seemed as if some form of moral repugnancy or aversion was important (vegetarianism was based on the “immorality of eating meat”) – but at the same time he noted that “motivation for practising vegetarianism may vary.”\(^{22}\) This is an important distinction. Vegetarians cite numerous reasons for avoiding eating animal products (or, in the case of vegans, using them in any way): the love of animals; the need to alleviate the willful suffering of a fellow sentient being; the health benefits of avoiding meat; the increased

\(^{20}\) *Morgentaler*, supra n. 8 at 170-1.


\(^{22}\) Ibid at para. 10.
efficiency of a vegetarian diet; the negative environmental effects of raising livestock; the more aesthetically pleasing look of vegetables compared to muscles, wings and fat. Would an independent freedom of conscience protect a person who relied on any one of these reasons? Alternatively, does it require someone to rely on only those reasons that can be considered moral? (which might exclude the aesthetic reason for being a vegetarian?) Or does conscience require at a minimum, as Justice Campbell hinted, a connection to moral disgust?

At the same time, it needs to be recognized that treating conscience’s moral aspect as something that makes it analogous to religion may not be helpful. In *Malnak v. Yogi* and *Amselem*, for example, the courts found that conscience covers any principles that are based on the same purposes that anchor many religious beliefs; in both cases the judges expressed this specifically as a concern with fundamental problems of human existence. In my view, this connection of conscience to religion is not particularly useful for purposes of legal constitutionalism. Yes, religion and conscience are related, as Justice Dickson articulated, and yes, there is even the possibility that religion is, in some cases, a particular manifestation of conscience. But based on the theoretical analysis set out in chapter two, conscience has neither a purpose related to, nor is it always concerned with, fundamental problems of existence. As the preamble to the UDHR makes clear, conscience is much more concerned with a moral state, either in the mind of an individual, or, sometimes, as a collective state of being. Or as Gandhi described it, conscience is the final judge of rightness of every deed and thought, but need not concern itself with fundamental problems of existence. A legal version of freedom of conscience should be seen as sufficiently different its religious counterpart, at the very least to do justice regarding its place in the constitutional text, as discussed in chapter 5.

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23 See, for example, Peter Singer, *Animal Liberation* (New York: Ecco, 2002).

24 Another “moral” aspect to the situation in *Maurice* is that of equality or fairness in treatment between inmates, since inmates were entitled to vegetarian diets for religious reasons, but not conscience-based ones. This aspect of morality, however, is not one based on the practice of individual conscience but the morality of equality, which is captured in s. 15 of the *Charter* (and which Campbell J. ignored).

25 592 F.2d 197 (3d Cir. 1979).

It is worth mentioning that there have been some cases that hint as to whether a moral connection is at all necessary for a freedom of conscience claim. In *Williamson*, Lord Nicholls connected conscience-based behaviour or belief to a position comparable in importance to religious practice or belief.\(^{27}\) While most religious practices can be said to be grounded in morality, not all are. It is unclear, therefore, whether Lord Nicholls intended to mean that freedom of conscience is, of necessity, based on some kind of moral stance or whether it could be interpreted more broadly. And Justice Wilson’s interpretation of conscience in *Morgentaler* and Justice Fichbach’s in *Chassagnou* are broader still. Fichbach J.’s holding that one’s conscience aids in making decisions on how to live one’s life seems potentially limitless.\(^{28}\) Presumably, if pressed, he would counter that “how” one should live is a profoundly moral decision, but it is not abundantly clear that he wished to limit it in such a fashion. Recall David Richards’ argument that choosing to snort cocaine might be considered part of a fundamental decision as to how to live.\(^{29}\)

Part of the answer to some of these concerns must be context-specific. Moral disgust may be an important trigger for the exercise of conscience in some situations, but not all. In the cases of abortion and vegetarianism, for example, there may be a number of different considerations. For a woman whose conscience (or religion) is against procuring abortion, there is no issue – the pregnancy will be carried to term. But for a woman for whom abortion is a viable option, it is probably not realistic to speak of the moral repugnancy of taking a pregnancy to term, since her conscience is not engaged to such a level of disgust. On the other hand, for this woman, it makes sense to speak of the *choice* between having a child or aborting as engaging her conscience. (Of course, pregnancy resulting from a rape may be different, especially for a woman whose conscience normally goes against abortion.) Likewise, eating meat may be morally abhorrent to some; others, regardless of their religious beliefs or lack thereof, may not feel morally bound to forego meat, but base it on a choice made after careful consideration of other, non-moral options.

\(^{27}\) *R. (Williamson) v. Secretary of State for Education and Skills* [2005] 2 AC 246; 2 All ER 1 (H.L.) at para. 24.

\(^{28}\) *Chassagnou and others v. France* (1999) 7 BHRC 151.

In sum, where conscience has been invoked as a legal freedom in Canada, it has usually required some connection to morality, although the content of that morality, and the extent of its connection, is unclear. The importance of morality will thus need to be considered in developing a conscience-based framework for adjudication.

1.3 Compellable Practice

Another aspect courts may need to consider in formulating an independent freedom of conscience is whether a conscience-based practices should have similar effects on the person as those felt by adherents to religious doctrine. Many religious practices for example, if avoidable at all, are done so only at great personal cost to the claimant. To paraphrase from Sullivan, freedom of conscience may be seen as something paradoxical, as it often manifests as an inability to choose a path different from the one that is sought, and is therefore a freedom “not to be free.”

Conscience, in these situations, is not a “still, small voice” that whispers, but a voice loud and insistent enough that it compels some to suffer grave personal trauma, or even face incarceration, rather than fight against it. The prototypical examples are Thomas More and Mahatma Gandhi, whose unbending consciences – their “moral squint” – would not let them do the easy thing, or the common sense thing, but instead cast their views against majority opinion of the day.

Constitutionally protected conscience-based acts may therefore require a certain deliberateness and intent on the part of the rights-holder. In my view, it would be difficult to conceive of an act of conscience that is instinctual, reactive or hot-blooded. A person making a claim that his conscience made him dive into the water to rescue a drowning child would not be believed. Conscience-based decisions, at least those that might engage legal protections, are more likely


31 See Welsh, supra n. 16 at 337.

32 See Robert Bolt’s play, “A Man For All Seasons” where Cardinal Wolsey says to More: “You’re a constant regret to me, Thomas. If you could just see the facts flat on, without that horrible moral squint; with just a little common sense, you could have been a statesman.” (Samuel French: London) Act I, Scene 2, p. 21.
to be those that require some time to consider, such as the inner debate one would have over whether to become a vegetarian, have an abortion, object to war, or opt for euthanasia. They seem to flow from an imperative, similar to religious-based actions that receive legal protection. Stated differently, these decisions stem from a sense of conviction about an act: it is not what one wants to do, or why one wishes to do it, but the fact of compulsion that makes conscience-based decisions worthy of comparison to religious ones.

Much of the jurisprudence on freedom of conscience refers to the importance of compulsion in assessing claims. In some cases the court casts it in the language of duty: in Welsh, an individual’s beliefs can, Justice Black stated, “impose a duty…to refrain” in the mind of a conscientious objector; in Videoflicks, Tarnopolsky J. spoke of the belief that “requires” a person to close his shop on a day other than a Sunday. In the Maurice case Justice Campbell noted how Jack Maurice continued to seek a vegetarian diet against strong opposition, recognizing his “sustained efforts to maintain a vegetarian diet” as an important factor. Although Campbell J. did not invoke the language of compulsion, it is clear in his decision that he understood the deeply-felt nature of Maurice’s vegetarianism. In the Conscientious Objector Case I, the German Constitutional Court spoke of conscience as “absolutely compelling” a person to commit “unreservedly” to an idea. The commitment to the idea is such that exceptional grief or suffering would occur if a person had to act against it.

Where compulsion is absent, courts have decided the opposite. For example, in finding that Charles Roach could not rely on freedom of conscience to obtain his citizenship without swearing allegiance to the Queen, MacGuigan J.A. for the majority pointed out that the

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33 Compare with Kristen Monroe, The Hand of Compassion: Portraits of Moral Choice During the Holocaust (Princeton: Princeton University Press, 2004). Monroe uncovers in her interviews with people who rescued Jews from the Nazis, that many felt they had no choice, that their actions (which in many cases threatened their own lives) were not the result of deliberation. Does this not nevertheless involve the rescuer’s conscience? I do not think my suggestion for some form of deliberation goes against her position – it seems to me that a truly instinctive reaction (diving into water) is different from “rescuing” someone from the Nazis, as the latter does not arise without warning or come completely by surprise. The time for deliberation may not be long in such cases, but it is still sufficient to engage one’s conscience.

34 Welsh, supra n. 16 at 345.

35 Conscientious Objector Case I, supra n. 15 at 54.
Citizenship Act does not impose an oath of allegiance on an applicant.\textsuperscript{36} Similarly, where hunting advocates tried to rely on conscience as a basis to continue fox hunting, the court was unsympathetic to their plight, partially on the basis that nothing in the protection of animals legislation “compelled” them to act contrary to their consciences.\textsuperscript{37} In \textit{Africa v. Pennsylvania}, Justice Adams noted that MOVE’s philosophies were not “morally necessary or required” and thus were not given status as equivalent to religion.\textsuperscript{38} In these cases, the courts seem to recognize that, to be genuine, conscience-based decisions, at least from the perspective of the individual claimant, should be felt as forcefully as religious obligations are to adherents.

None of the cases, however, makes it clear whether compulsion is a necessary, necessary and sufficient, or a necessary but not sufficient, component of a constitutional conscience-based obligation. Nor is there consistency on whether the feeling of compulsion is derived subjectively – from the perspective of the individual claimant – or objectively. In \textit{Maurice}, for instance, Campbell J. discussed the nature of Maurice’s desire to avoid eating animals, but seemed to be of two minds regarding a person’s conscience-based motivation. For him, vegetarianism is a “dietary choice.”\textsuperscript{39} It could be that his understanding of freedom of conscience is shaped by extant jurisprudence on religious freedom – where courts, in cases such as \textit{Amselem} and \textit{Multani}, have shown a strong reluctance to inquire into the nature of religious doctrine. It makes some sense for courts to be equally leery about inquiring into the nature of a person’s conscience. In \textit{Morgentaler}, Justice Wilson observed that a person’s right to choose is an inherent right flowing from the nature of conscience as a fundamental freedom. Although some women may feel a compulsion to obtain an abortion at all costs, it is more likely that women choose to have an abortion amongst a range of alternative options. What brings the decision within the realm of conscience for her is not compulsion, therefore, but that the option to choose an abortion is an exceedingly difficult choice to make. So while Wilson J. never discusses compulsion as an attribute of conscience-based decision-making,

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she acknowledges the intense personal conviction that would almost certainly accompany a woman deciding whether or not to procure an abortion: it is not a entertained lightly; it may involve family members, friends, religious advisors, doctors and other health officials; and it is deeply felt. While perhaps not compelled, it is such a long way from another person’s decision to, say, drive on the wrong side of the road or snort cocaine, that it could be said to be different in kind. Thus, according to Justice Wilson, making a life-altering decision will engage an individual’s conscience.

Even if compulsion is necessary, there remains the problem of subjectivity. In Williamson, Lord Nicholls indirectly referred to the idea of conscience-based compulsion by recognizing that some beliefs carry with them “perceived obligations” to act in certain ways. He held these up against other beliefs that may lack an obligatory element, but without stating directly that legal freedom of conscience requires obligation nor whether it should be subjectively or objectively measured. Justice Brennan left a similar matter open in his dissent in Harris v. McRae, a case challenging the constitutionality of a law prohibiting federal funding for Medicaid abortions. While he noted that, in enacting the law Congress made a transparent attempt to “impose…morally acceptable and socially desirable” preferences on profoundly sensitive and intimate decisions, he neglected to offer a view on whether these preferences were flawed because they were objectively or subjectively understood. On the other hand, in Roach, the claimants own feeling that the oath was compelled seemed to carry little weight.

Thus, the notion of compulsion is adverted to, but not made a condition of, a valid freedom of conscience claim in many cases decided so far. Given the range of views in all these cases, compellability will become a key factor in developing a framework for conscience-based analysis.

40 Williamson, supra n. 25 at para. 32.

41 448 US 297 (1980).

1.4 Floodgates and Fraudulent Claims

The guarantee of religious freedom under the Charter protects one’s personal beliefs and self-directed activities, but does not extend to behaviour that harms others. It is also restricted to a belief system that has a “nexus with” religion and depends on a subjective level of sincerity. All that is required for a claimant to establish a freedom of religion claim is that he or she show that a belief is held in good faith and is not being advanced for an illegitimate purpose. These limits strive to achieve a balance between allowing religious freedom to flourish (by absenting the judiciary from inquiring into, or arbitrating over, religious doctrine) while containing spurious claims (by seeking a believer’s sincerity).

Any conscience-based guarantee will need to seek a similar balance, particularly to avoid what many see as potentially a very slippery slope. No less a figure than Mahatma Gandhi was challenged over the “mischief” caused by his desire to inculcate the importance of conscience in humans: “please stop the drivel that is being said in the name of that sacred but much abused word [conscience].” Gandhi restricted its use in two related ways – to willful behaviour and maturity brought about through experience:

Wilfulness is not conscience. A child has no conscience…Conscience is the ripe fruit of strictest discipline. [It] can only reside only in a delicately tuned breast.

Without limits, a constitutionally protected conscience could balloon into a legal licence to do just about anything. It calls to mind, for example, the submission to the Parliamentary Committee by the Association of Chiefs of Police, expressing concern that an entrenched freedom of conscience could allow drug and morality offences to proliferate.

Empirical proof of the need to control conscience-based freedoms can be found in the German experience with conscientious objectors. Initially, persons claiming conscientious objector status were required to prove their case in an oral hearing. When the process was streamlined

43 See Amselem, supra n. 11 at paras. 46, 50.

44 Question posed to Gandhi in the weekly Indian newspaper, Young India. Cited in Iyer, supra n. 24 at 120.


46 See chapter 4, supra, at n. 89 and accompanying text.
by moving from an oral hearing to a simple written notification, the number of applicants seeking conscientious objector status more than doubled. This rapid increase in claimants eventually formed the factual basis behind the Conscientious Objector II Case. One of the concerns expressed by the Court in that case was that the new process provided no adequate test of conscience; instead it opened the door “to an abuse of the appeal to conscience.”

The concern over opening the floodgates is a longstanding one, and covers diverse areas. Judge Zupancic in Chassagnou, for example, raises the question of what would happen if a group of non-land owners (recall the Chassagnou claimants owned some of the land designated for hunting) claimed a breach of conscience because, as animal rights’ activists, they were opposed to hunting and killing? Whose conscience, hunters or non-hunters, is to be preferred? In this he illustrates Mensching’s point, discussed in chapter 2, that there are almost always two sides to an exercise of conscience. A number of judges in other cases have expressed concerns over the potential abuse of conscience-based claims: in Videoflicks, Tarnopolsky J. sought to rein in bogus claims by centering his analysis on the individual, but noting that one’s conscience cannot be offended by others’ actions or freedoms. He also sought to ensure that conscience-based freedoms are based on beliefs which are binding on, or at least strongly felt by, someone. Likewise, running throughout Madam Justice Wilson’s opinion in Morgentaler is the notion that it is a deep and difficult decision for any woman to choose whether to have an abortion, which butts directly up against – as it did in 1988 – the state’s attempt to compel a woman to carry a foetus to term. For Wilson J. it is clear that a conscience-based decision must rest on a measure of profundity. The decision is an “important” one, “intimately affecting” one’s private life, that will have “profound psychological, economic and social consequences” and which engender “powerful


48 Other cases where the limits to conscience have been reached: in two applications against Austria in the 1960s and 70s, the European Commission on Human Rights found that freedom of conscience is not infringed by a system of compulsory voting or a requirement that farmers become members of the Health Service, nor is the state obliged to provide certain books which a particular prisoner feels are necessary for the development of his philosophy of life. See 1718/62 Yearbook 8, 168; 4982/71, Collection of Decisions 40, 50; 1068/61,

49 Morgentaler, supra n. 8 at para. 240.
considerations militating in opposite directions” for a pregnant woman. Put bluntly, for Justices Wilson and Tarnopolsky, conscience-based decisions need to be fundamental decisions that go to the heart of what a person is, and what he or she believes in. These constraints create an effective way of restraining spurious claims – even if the importance of the decision is assessed subjectively, which both Wilson and Tarnopolsky hint at in their judgments.

Clearly not all opinions or convictions constitute beliefs in the sense protected by Article 9(1) of the European Convention. If left ill-defined or without a clear methodological approach, a concept as conceivably open-ended as freedom of conscience might allow anyone to turn any act, like David Richards’ example of snorting cocaine, into an act of one’s conscience deserving protection. As Bruce Ryder puts it, a fear of anarchy is paramount in cases involving conscience-based activities. So far, courts have been careful to limit the freedom granted to conscience-based activities from becoming anything a person consciously wishes to do. For example, in R. v. Locke, a case in Provincial Court in Alberta, the claimant argued that Alberta’s compulsory seatbelt law violated, amongst others, his freedom of conscience. Although Judge Brown recognized that s. 2(a) could be interpreted broadly – it is “directed at [our] overarching spiritual or normative value systems [which are] commonly identified with religions but can also exist in a secular context” – he declined to allow the conscience-based claim. Judge Brown refused to accept that a belief based on the harm of wearing seatbelts is of the same order as the comprehensive value system protected by section 2(a).

Thus, there needs to be some way of controlling acts of conscience so that freedom of conscience does not become incoherent. Constitutional religious freedom is often curtailed by

50 Ibid at para. 241.
54 Ibid at para. 24.
55 Ibid at para 25.
its connection with the divine or supreme powers. Freedom of conscience could be constrained by requiring beliefs to be deeply held, or fundamental to one’s existence, and, as already noted, based on some requirement of compellability. My proposed test for freedom of conscience, set out in part 2 below, addresses some of these concerns.

This leads to another potential aspect of conscience-based claims. Many of the cases involving freedom of conscience require that a person’s conscience-based belief be sincerely held, in the same way that the Supreme Court’s test for religious freedom, developed in *Amselem*, requires a sincere, subjective belief. The need to have sincerity ground a conscience-based belief can be seen to be equally strong – in fact, arguably it is even more important than in religious freedom cases since conscience-based beliefs, by definition, do not have the imprimatur of a religion to back them up. As such, we see decisions based on conscience which require a “deep and sincere belief” 56 a “genuine belief” 57 or where petitioners are “sincerely convinced” 58 of their belief. This stands to reason. One way of locking the floodgates from spurious claims of conscience, is to test the validity and legitimacy of a claim through the sincerity of the claimant. It is an affront to the freedom itself if those claiming freedom of conscience were doing so simply to escape performance of a legal obligation binding on others. It might even be important to ensure that someone who, although not making a false claim, is acting purely for pragmatic reasons, should also be controlled. Sincerity aids in ensuring that the belief is as near as possible to compelled or mandatory. The fear, as described by Laurence Tribe in the context of religion, is that without sincerity, an overly broad approach to freedom of conscience would become a “limitless excuse for avoiding all unwanted legal obligations.” 59

Moreover, sincerity is one aspect of a freedom of religion claim that courts are comfortable assessing. As the Supreme Court stated in *Amselem*, it is qualified to “inquire into the sincerity of a claimant’s belief, where sincerity is in fact at issue,” despite being unable or unqualified

56 *Welsh*, supra n. 16 at 340.


58 *Whaley* supra n. 35 at para. 74.

to rule on the validity of religious practices or beliefs.\(^{60}\) Courts are used to assessing witness sincerity, and constitutional claimants are no exception. In a claim for freedom based on conscience, a court could examine, for example, whether the practice or belief reflects a pattern of behaviour that is consistent; whether there is some personal cost to the course of action taken by a claimant; whether the benefit received by avoiding a legal obligation is met by other costs that most other people would not voluntarily incur.\(^{61}\) Sincerity of belief was clear in both the \textit{Seeger} and \textit{Welsh} cases: Black J. on behalf of the majority in \textit{Welsh} forcefully described Seeger’s and Welsh’s passionate belief that killing was “wrong, unethical, and immoral” and that it was their consciences that would not allow them to participate in such an “evil practice.”\(^{62}\) Campbell J. in \textit{Maurice} also recognized this when he struck a suitably cautionary note by requiring proof of “cogent evidence” for a conscientious belief claim.\(^{63}\) In the case itself, for example, a few factors led the Federal Court to accept the legitimacy of Maurice’s conscience claim: his numerous requests and grievances, the extensive time and effort spent on judicial review and his sustained efforts, against institutional obstruction, to maintain a vegetarian diet.

\textit{Maurice} was decided before the Supreme Court’s decision in \textit{Amselem}, which held that a “nexus to religion” coupled with a “sincerity of belief” is sufficient to ground a claim of religious freedom. The actual nature of the belief is left to the subjective determination of the individual, and may, in some cases, be unreasonable. Do the same concerns arise in the case of conscience-based freedoms? Since, by definition, there is no “nexus to religion” in conscience-based freedoms, the \textit{Amselem} test might just collapse into a simple requirement of sincerity in any conscience-based claim. In doing so, however, the potential for false claims increases. In \textit{Williamson}, Lord Nicholls referred to the \textit{Amselem} test and adapted it for a conscience-based freedom. By equating a conscience-based act with a religious one – it must

\(^{60}\) \textit{Amselem}, supra n. 11 at para. 51.

\(^{61}\) On this point, it is worth noting the idea of “alternative burdens” suggested by Adam Kolber – see “Alternative Burdens on Freedom of Conscience” (2010) 47 San Diego L. Rev. 919. Kolber suggests that where alternatives are offered by government, for those such as conscientious objectors, they might even be more onerous, as a way to help ensure sincerity (at 928ff).

\(^{62}\) \textit{Welsh}, supra n. 16 at 337.

\(^{63}\) \textit{Maurice}, supra n. 21 at para. 15.
be of comparable importance to practices associated with religious beliefs – he addressed the need to limit conscience’s scope in order to prevent floodgates from opening. As discussed, connecting freedom of conscience to some form of morality may be one way to reduce the possibility of spurious or fraudulent claims.

On its own, sincerity is likely insufficient to guarantee freedom of conscience, however. In *Africa v. Pennsylvania*, for example, the court was unwilling to allow John Africa’s claim for a prison diet of raw food despite his seemingly genuine, deeply-held and sincere beliefs. In fact, the court found it difficult to conceive that Africa had not simply adopted religious-type language as a shield to protect himself, or that he had cynically created MOVE in order for it to masquerade as an organization deserving of First Amendment protection. Africa’s difficulty was in convincing the court that his beliefs were religious in nature.

An offshoot of the floodgates argument, related not to the propensity for unwarranted claims, but to the very place of conscience as a fundamental freedom, is that creating an independent freedom of conscience is unnecessary, adding little to the broad scope of Charter rights and freedoms already identified and developed. Thus, the argument goes, religious and expressive freedoms (such as thought, belief and expression) under s. 2, coupled with rights to liberty and equality under ss. 7 and 15, provide a full panoply of constitutionalized human rights protection. There are two short answers to this. Firstly, all rights and freedoms deserve as much protection as possible, in whatever form works. Secondly, and more importantly, is to turn the question around and ask why religious freedom should be singled out at the expense of a broader freedom of conscience. The advantages to broadening the freedom through the development of conscience, where appropriate, seem to be plain. The words in the Charter should all be treated with equal force. The mere fact that the Charter provisions sometimes overlap is not sufficient reason to ignore express words, such as “conscience”, found in the text. It is true, of course, that freedom of religion and conscience will oftentimes overlap. Conscience can also overlap with thought, belief and opinion. So can freedom of conscience and liberty under s. 7.64

64 See Wilson J.’s opinion in *Morgentaler* for evidence of this.
Yet, at the same time, religion and liberty can also very easily bleed into each other, although little has been made of this. In *Blencoe v. B.C. (Human Rights Commission)*, the Supreme Court had to determine whether the *Charter* applied to an administrative tribunal and the scope of “liberty” in the context of s. 7 of the *Charter*. The Court gave a broad reading to liberty:

> The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that “liberty” is engaged where state compulsions or prohibitions affect important and fundamental life choices...In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference...the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual’s personal autonomy...[T]he right to liberty in s. 7 protects the individual’s right to make inherently private choices...  

The Court then cited with approval a passage from *Godbout v. Longueuil (City)* that affirms s. 7’s broad scope, containing within its ambit the “right to an irreducible sphere of personal autonomy” over matters which by their very nature “implicate basic choices going to the core of what it means to enjoy individual dignity and independence.” If freedom of conscience contributes little to the right to liberty in s. 7, then so does religion. One can compare the passages from *Blencoe* and *Godbout* above as if they were discussing religion. Religious belief is something that allows one to make “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence;” religion deals with “important and fundamental life choices” that allow one to “live his or her life” in the way he or she chooses. If s. 7 is interpreted to include the exercise of religious freedom, it would make s. 2(a) entirely redundant.

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66 Ibid at paras. 49, 51.


68 See also the Supreme Court’s discussion in *B.(R.) v. Children’s Aid Society* [1995] 1 S.C.R. 315 where the issue of liberty under s. 7 was discussed in the context of freedom of religion. Lamer C.J. attempted to keep s. 2 and s. 7 separate by rejecting overlap between liberty interests and freedom of conscience and religion (at 344-5); LaForest J. seemed to render a broader reading of liberty to include a religious group from refusing a blood transfusion, but he still maintained that it is important to keep various sections of the *Charter* separate and not “subsume all other rights in the *Charter* within s. 7” (at 366).
But the fundamental freedoms in s. 2 are not redundant. They differ from the legal rights set out in s. 7 and elsewhere because freedoms, as compared to rights, recognize a positive element that respects the autonomy and individuality of all humans and permits it to flourish. Whereas the Supreme Court has tried to control the scope of liberty under s. 7 largely to situations involving a deprivation of liberty, the scope of fundamental freedoms is greater than this. Moreover, fundamental freedoms are not subject to the internal limits of s. 7’s “in accordance with fundamental justice.” To argue that freedom of conscience is unnecessary due to the protection of liberty in s. 7 makes little sense unless one is prepared to accept that freedom of religion is equally unnecessary.

1.5 Summary

These four factors provide a basis for assessing matters that more directly engage one’s conscience rather than religion. Human practices based on strong beliefs – such as vegetarianism, euthanasia, and conscientious objection – may have religious overtones, but they need not. These have so far represented the first early forays into Category 2-type conscience-based claims. The outer reaches of this category still remain unexplored, however.

Take homosexual marriage, for example. The Supreme Court of Canada pronounced, in Reference re Same Sex Marriage, this is unconstitutional, that homosexual marriage, as contemplated by proposed federal legislation, was intra vires Parliament. Provisions in the legislation allowing religious officials to exempt themselves from performing same sex marriages, were also found to be constitutional. The Court’s reasoning on the latter issue was based on the equality provisions of s. 15 of the Charter.

The decision led to the enactment of the Civil Marriage Act. The Act’s preamble makes reference to s. 2(a) of the Charter and the dual rights of freedom of conscience and religion,

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70 Bill C-38, Act respecting certain aspects of legal capacity for marriage for civil purposes, 38th Parliament, 1st Session, 2005.

stating that the Act does not “affect the guarantee of freedom of conscience and religion.” The preamble goes on to single out religious beliefs in particular, protecting the freedoms of “members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.” With this statement, it is clear that Parliament’s attempt is to protect the religious freedom of those whose belief systems are in conflict with homosexual practices.

Nevertheless, conscience lurks here too. Although freedom of conscience was not argued in the Same Sex Reference, if “homosexuality” can be imagined in place of “pregnancy” in the language taken from some of the cases on conscience referred to earlier, little is altered: for example, marriage reflects on a human’s “deepest emotional and sexual desires”; it is a “fundamentally important decision intimately affecting our private (and public life)”; and one’s choice of marriage partner is not easily (if at all) alterable, or capricious. Deciding whom to marry is a decision that socially and publicly recognizes a private commitment; marriage itself is a manifestation of personal integrity in the public realm. This is no less true for homosexual as it is for heterosexual marriage. In Andrew Sullivan’s words, “openly conceding one’s homosexuality is in some ways an act of faith, of faith in the sturdiness of one’s own identity and the sincerity of one’s own heart.” I take Sullivan to mean faith in a secular sense, in that it is at the core of one’s being and of one’s conscience, and is, accordingly, like religion, but not equivalent to it.

At the same time, there may be more than religious objections against sanctifying homosexual marriages – it may be against one’s conscience to do so. As in the cases of Maurice and Morgentaler, where conscience was in the foreground, there may well be a conscience-based non-religious reason to refuse to marry two homosexuals. This could give rise to a clash of conscience between the desire to marry and the sanctioning of that marriage. The provisions of the Civil Marriage Act that exempt religious practitioners fall into what has been shown to be

72 Ibid, at recitals 6 and 7.

73 The phrases are taken from Morgentaler, Videoflicks and Maurice, supra n. 8, 52 and 21, respectively.

74 See Andrew Sullivan, Virtually Normal (New York: Alfred Knopf, 1995) at 166, 179. See also Hammond, supra n. 40 at 78.
a common trap: they single out religious freedom for special treatment at the expense of freedom of conscience.

There is one final observation related to the relative paucity of jurisprudence on freedom of conscience. It may be that there is a certain “inertial fixity” to an argument for seeking a strong and independent freedom of conscience. In nearly thirty years of Canadian jurisprudence (and an even longer span of time in which “conscience” appears in rights-based documents) carefully constructed arguments for a free-standing and robust form of freedom of conscience have been raised, but so often rejected or downplayed that it has become, through practice, a virtual dead-entity, subsumed or overborne by its freedom of religion counterpart. Perhaps, the argument goes, the opportunity for developing a fully independent freedom of conscience has been lost. The best rejoinder to this comes by way of Alexander Bickel’s call for passive virtues in judicial decision-making.\textsuperscript{75} Courts have a singular discretion to choose when to engage in certain challenges to laws and when to invoke new rights. In my view, the living tree of the constitution means that conscience may simply be biding its time, like a burl yet to be revealed: the groundwork was laid by Chief Justice Dickson and Madam Justice Wilson; counsel at the Supreme Court continue to show a readiness to expand that vision; the Federal Court in \textit{Maurice} displayed judicial courage in taking it one step further; and as recently as 2009, a little more was exposed in \textit{Wilson Colony}. In my view it is only a matter of time before another step is taken and a more formalized approach to freedom of conscience is taken. Mindful of all the constraints discussed so far, I propose in the next section one such approach.

2 A Test for Conscience

In \textit{Amselem}, the Supreme Court of Canada spelled out a two-stage, three-component test for establishing a freedom of religion claim. An individual must first show that

\textsuperscript{75} See Bickel, \textit{The Least Dangerous Branch}, 2\textsuperscript{nd} ed. (New Haven: Yale University Press, 1986).
he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.\(^\text{76}\)

Then,

that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs \textit{in a manner that is more than trivial or insubstantial}.\(^\text{77}\)

The test has proven workable in subsequent cases; therefore, my proposed approach seeks to use it as a starting point, but modify it to fit within a framework more suited to conscience.

The three parts would require individual claimants to show, in the face of laws or conduct requiring them to act contrary to conscience, that

(1) he or she has a belief of a moral nature (defined broadly as described above), or a belief governing his or her perception of his- or herself, humankind, or nature, which either calls for a particular line of conduct that is subjectively obligatory or is a demonstrably fundamental decision that goes to the heart of who he or she is (in other words, is comparable with religious belief);

(2) he or she is sincere in his or her belief; and

(3) the impugned provision (or conduct), in purpose or effect, interferes with his or her ability to act in accordance with his or her belief in a manner that is not trivial or insubstantial.

Where a law imposes on such personal decisions in accordance with the above, it should be found to breach the fundamental freedom of conscience. This allows for an approach to freedom of conscience that strives to separate legitimate from illegitimate claims: arguments

\(^{76}\) \textit{Amselem}, supra n. 11 at para. 56.

\(^{77}\) Ibid at para. 59 (emphasis in original).
made by fox hunters in *Countryside Alliance v. HM Attorney General*, for example, should be distinguishable from those put forward by women seeking an abortion. While both take a similar form – each arise from laws that impinge on one’s ability to act on a desire – as much as anything, hunting animals feels very different from aborting a child. In my view, hunting is not something we should protect through freedom of conscience, while abortion is. Hunters are not, to my mind, engaged in an activity or behaviour that is of “comparable importance to religion.” Hunting is an activity easily abstained from. Determining whether to have an abortion, by contrast, is a quintessentially “moral decision.” Criminal prohibitions against abortion treat women as a “means to an end,” denying them of their “essential humanity.” Hunting regulations do no such thing.

### 2.1 Applying the Test: Two Hypotheticals

The idea of privileging freedom of conscience over freedom of religion can be made much clearer by modifying two real life examples. To illustrate the point of how a slight change in perspective could bring in the broader concept of conscience-based freedom I will employ the example of Sunday closing laws, a seemingly clear-cut case of religious freedom. If it is possible to bring this situation within the new model of freedom of conscience, it is easy to imagine how many others will also fit. Even if my logic is only partly convincing, it will show the possibility of this method in more obvious situations. To illustrate how the scope of this newly fashioned freedom of conscience could play out in a more clear-cut case, I imagine two different prisoners in a scenario based on *Maurice*: a Muslim prisoner seeking Halal meat and a vegan prisoner who cannot eat meat.

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78 *Countryside Alliance and others v. HM Attorney General and others* [2005] EWHC 1677 (QBD (Divisional Court)) at para 249.

79 Ibid.

80 *Morgentaler*, supra n. 8 at para. 253.
Case 1: Sunday Closing Legislation. Is it possible to fit R v. Big M Drug Mart under the aegis of conscience? I will make the case that the Lord’s Day Act could have been struck down as offending freedom of conscience, rather than religion.

At the outset of the decision, Chief Justice Dickson seems to frame the issues so as to suggest that the Court will consider conscience: “Does the Lord’s Day Act ... infringe upon the freedom of conscience and religion guaranteed in s. 2(a)…”81 Continuing in this vein Dickson C.J. gives a masterly exegesis on freedom in a liberal democracy – one that encompasses traditional believers and non-believers:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. …Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.82

He finds the Lord’s Day Act to operate against this ideal, through a form of Christian sectarian coercion that acts against the spirit of the Charter and the dignity of non-Christians. It creates “a climate hostile to… non-Christian Canadians” by translating Christian moral values into law “binding on believers and non-believers alike,” where non-Christians are prohibited for “religious reasons from carrying out activities which are otherwise lawful, moral and normal.”83 So far, so good. The thrust of his reasoning is the wider sense of the s. 2(a) freedom that is being contemplated, given that non-believers are included too.

But then a subtle shift occurs. Chief Justice Dickson moves from a wider view of the freedom to a narrow, religious view. He states that the legislation (which clearly has a religious purpose and religious motivation – a point which is not relevant to my argument here as I am concerned with the outer limits of the s. 2(a) freedom) over time becomes a subtle yet constant

81 Big M Drug Mart, supra n. 16 at para. 31.
82 Ibid at para. 95.
83 Ibid at paras. 97, 98.
“reminder to religious minorities” of their differences. He makes the same move one paragraph later, where the protection of “one religion and the concomitant non-protection of others” disparately impacts on some religions that could destroy the “religious freedom of the collectivity.”

He then finds that other religions are denied the right to work on Sunday:

If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

The wider, conscience-based community, is ignored.

There was no need to do this. In fact, without changing the argument, Dickson C.J. could have strengthened the holding by adding more generic, conscience-based words, thereby broadening the s. 2 freedom. He could have done this in two different ways, first by simply adding to the categories, as such (words in bold are my own):

If I am a Jew, a Sabbatarian, a Muslim or a non-believer, the practice of my religion or the exercise of my conscience at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my conscience or religious freedom.

Or, more radically, by treating conscience as the overarching freedom:

If I am a Jew, a Sabbatarian, a Muslim or a non-believer, my conscience does not forbid my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my conscience (and by implication, my religious freedom).

Why did he restrict his remarks to religious believers? It seems to me that Dickson C.J. was more concerned with fairness and equity than religious freedom. Since there is no known (to me) conscience-based objection to having to work on a particular day (a conscience-based claim might plausibly be made for mandating one day of rest per week, but I cannot see how it

84 Ibid at paras. 97, 98 (emphasis added).

85 Ibid at para. 100. Chief Justice Dickson performs a similar move in R. v. Edwards Books [1986] 2 S.C.R. 713 where he notes that “[t]he purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that governs one’s perception of oneself, humanking, nature and in some cases, a higher or different order of being. This seems to cover a broad variety of beliefs, religious or secular based. Yet, one sentence later, he says that the Constitution “shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice” (at para 97, emphasis added).
matters which day), only non-believers can benefit from the conscience-based claim. Some of those non-believers who do not feel the same pangs of conscience regarding a day of rest could then seek entitlement to work all seven days. Freedom of conscience, in this scenario, could put some at a competitive advantage over some religious believers. It was this concern, later expanded on in *Edwards Books*, that to my mind makes the claim less about conscience or religious freedom than it is about equality.  

A reframed conscience-based analysis of *Big M* shows the broader significance of freedom of conscience. It does not necessarily limit religious claims; rather, it is often conscience that forms the basis of a religious practice that deserves protection. And freedom of conscience is not constrained by tradition and dogma associated with religion – particularly in cases involving so-called unorthodox or non-mainstream religious practices: two good examples are *Employment Division, Department Of Human Resources of Oregon v. Smith* in the U.S. and *R. v. Jack* in Canada (although *Jack* arose prior to the *Charter*). Since aboriginal practices often lie outside orthodox theistic religious practices, many of these claimants find themselves losing out. Their disputes, squeezed into a religious freedom box, fail to gain the sympathy of judges. At the very least, a truly independent freedom of conscience, situated atop religious freedom, might help to facilitate these kinds of claims.

Case 2: *Prisoners and their Dietary Restrictions*. Assume that two federal inmates wish to receive special diets. Muhammad, a strict Muslim, wants only Halal meat. Jason, a strict vegan, is adamant that he should not have to eat (or wear) any animal products since to do so involves violence toward, and exploitation of, animals. The prison authorities, following

86 See *Edwards Books*, ibid at para. 115.
89 William Connolly, in *Why I Am Not a Secularist* (Minneapolis: University of Minnesota Press, 1999) makes a similar point.
regulations, refuse both requests. (This hypothetical assumes that prison regulations regarding special food requirements, as depicted in *Maurice*, do not exist.)

Each prisoner would be entitled to make a claim under the *Charter*. More important, under my approach to freedom of conscience, as will be shown, I would suggest that the claim for both proceed along a conscience, as opposed to religious, basis.

Muhammad could make a *Charter* claim that the Correctional Service of Canada’s regulation, in not allowing religious diet, offends s. 2(a) by interfering with his religious freedom. Relying on the first principles set out in *Big M Drug Mart* and *Amselem*, Muhammad’s main objection would be that the regulations create a climate hostile to Muslims. Since the federal government must provide food to inmates, its decision to provide only non-Halal meat prohibits or denies Muhammad’s right to eat in the manner he chooses (an obviously lawful activity). He would rely on the test in *Amselem* to show that, for him, the requirement of Halal meat has a clear nexus with religion (it is the permitted form of slaughtering meat to which many Muslims subscribe) and he is sincere in his request. For the latter, he might point to his own religious observances in general, as well as community practices and precepts. Finally, a regulation that controls what and how one eats is obviously not an insignificant or insubstantial interference in how one lives – even a prisoner must eat every day.

Yet the government might take issue with Muhammad’s claim, also relying on the *Amselem* test. Since religious claims require a showing of religious nexus, it might question the exact parameters of this connection. How is a “nexus with religion” assessed? Does a claimant need to show that some (at least one? or some number greater than one? if so, what is that number?) followers of the Islamic faith believe that meat must be prepared in a certain way in order to be consumed? Moreover, is it an insubstantial or insignificant burden since prisoners can simply refuse to eat the meat that is offered, but avoid starvation by eating the vegetables that are presumably also provided? In order for him to succeed, it would seem that Muhammad likely would need to show that, under the *Amselem* test, at least some members of the Islamic community consider Halal meat an important aspect of the religion and that *not* eating meat would undervalue the religious practice. As in both *Amselem* and *Multani*, the need for some expert religious evidence is apparent.
In contrast, Jason’s claim could proceed only under conscience grounds: he is not able to rely on a religious basis for his claim. Under the test I have developed for freedom of conscience, however, he is covered: for him, being a vegan is a decision that goes to who he is fundamentally as a person, and which has moral elements (humans shall not kill or exploit animals for their own gain). It is not a mere lifestyle choice – unlike snorting cocaine, what one ingests for basic sustenance is more important, and more closely akin to a compelled practice. His sincerity can be established relatively easily, since he has been a vegan for some time (his friends both inside and outside prison can attest to this), and it would be difficult to imagine someone fighting for the right to eat a vegan diet on a pretense, given the sacrifices it entails. Finally, as with Muhammad, the infringement is not insubstantial because eating is a matter of survival. In his case, however, there is no need to seek expert evidence of any kind since the claim is not connected to an external belief system (an expert description of veganism may be warranted, although one would expect evidence of this sort could be tendered by written report without much controversy).  

And this is where I see a real advantage to conscience-based claims: Muhammad need not rely on freedom of religion; he could base his claim along similar lines as Jason’s. He could argue that eating Halal meat is a matter of conscience for him. Thus, it becomes a moral issue – a personal commitment of significance to Muhammad as to how he wishes to live his life. The religious aspect need not be determinative. As I have mentioned, the real benefit, that the potential divisiveness of religious claims is lessened, occurs in two ways. First, there is no need, under this claim, to show a nexus with religion, or that the effect on one’s religion is not insubstantial – what others in the Islamic faith regard as the importance of Halal meat is irrelevant. Second, sincerity – the branch of Amselem which now bears most of the weight in religious-based s. 2(a) claims, engaging judges in some aspects of assessing religiosity – is unlikely to be difficult to prove, nor will it involve the court examining, even in a small way,  

90 Of course, the need for expert evidence does depend on the exact context of a claim and whether or not the opposite party was challenging this particular point. My guess is that in most circumstances the nature of veganism would adequately be covered by a claimant’s own testimony, since the issue is really more about what her/his own personal belief system concerning diet required, rather than how an “expert” defined veganism. But it is possible that the issue of “what is a vegan” could be a point of contention, therefore requiring expert evidence to introduce and be cross-examined on the subject. Even in this situation, however, the parties most likely could agree to tender written reports on the issue.
religious doctrine. It is much easier in conscience-based claims to assess a claimant’s state of mind for the very reason that conscience-based claims are concerned only with an individual conscience uncluttered by religious doctrine. In these circumstances, the possibility of a false claim occurring is actually remote. Institutional pressures act as a brake against frivolous claims, and thus perseverance, in many instances, could provide evidence of sincerity. Although it is somewhat true that institutional pressures may also militate against falsifying religious claims, the fact remains that there is a greater possibility of doing so, since adherents are often able to exploit the inevitable divisions within religious doctrine. Given that the Supreme Court has stated that religious beliefs are “fluid” and may well “change and evolve over time,”¹⁹¹ there is nothing to stop a claimant like Muhammad, for example, from arguing that his Halal diet requirement arose the day before he made his claim, upon his re-reading portions of the Koran. This would, hopefully, be more difficult to achieve under freedom of conscience – “my conscience told me yesterday I could eat meat but today I cannot” – rings less true.

Another potential benefit arises out of the government’s justification requirement set out in s. 1 of the Charter as applied in the Oakes test. While I have, for reasons of space, avoided discussing s. 1 in the context of a call for an independent freedom of conscience, it is worth briefly sketching out what might take place. After Wilson Colony the Supreme Court has acknowledged that the proportionality component of the Oakes test is crucial and should be the stage at which most matters are resolved because the overall balancing provided at the last stage “allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.”¹⁹² The key, therefore, lies not in how important the practice in issue is to the claimant (that will largely be covered in the s. 2(a) analysis), but in how important is the public good of the legislative provision. As the Chief Justice emphasized in Wilson Colony, it is the legislative goal that has become much more important throughout the stages of Oakes: “[I]ess drastic means which do not actually achieve the government’s objective are not considered…” since, if an alternative does not give “sufficient protection, in

¹⁹¹ See Amselem, supra n. 11 at para. 53.

all the circumstances, to the government’s goal" then it is not a real alternative.\textsuperscript{93} Taking Muhammad’s and Jason’s example: if the government’s purpose in not allowing inmates to receive Halal meat or vegan meals is to ensure the health or safety of inmates, and no suitable alternatives exist, the government may be able to show that the benefits of the law are ultimately more important than the individual costs.

What is different in a conscience-based framework, however, is that judges might perceive such a claim as more honest than a religious one, in light of the Supreme Court’s characterization of religion in cases such as Amselem and Wilson Colony. In 21st century legal terms, protecting religion has come to be more related to its appearance as a matter of “autonomy and choice” involving “personal belief rather than action” in “private rather than public life.”\textsuperscript{94} For the Supreme Court, personal choice is at the apex, as the most fundamental value is for an individual is the “fundamental right to choose his or her mode of religious experience.”\textsuperscript{95} Thus, the question that revolves around all constitutional religious freedom analysis is whether the limit “leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.”\textsuperscript{96} As was determined in Wilson Colony, however, these are not necessarily viewed through a religious lens – manifestly, personal choice becomes a matter of conscience. Conscience thus lends itself much more to idiosyncratic, eccentric and unknowable beliefs. Moreover, as Berger notes, the shift to the proportionality stage of Oakes

ironically

\textsuperscript{97} seem[s] to demand a meaningful reckoning with the actual significance of the practice or belief with which the legislation interferes. Applicants will be encouraged to adduce evidence of the significance of the practice within the worldview of the individual or community … [and] judges will have to engage with this very difficult task of seeking to understand religious belief and practice from the perspective of the applicant, precisely the messy business that the courts seem to wish to avoid.\textsuperscript{97}

\textsuperscript{93} Wilson Colony, ibid at para. 54.


\textsuperscript{95} Wilson Colony, supra n. 89 at para. 92.

\textsuperscript{96} Ibid at para. 88 (emphasis added).

While it might seem that limits to conscience would be more easily justified under s. 1 than limits to religion, this is not necessarily correct. Although the communal aspect of religion means that religious claims will not always be cast in terms of a lone challenger against the state – in other words, religious claimants may gain strength in numbers – the Supreme Court’s move to give primacy to both autonomy and *Oakes*’ proportionality lessens the impact of this argument. Just because a law of general application works for everyone except for the single conscientious objector (Jason the vegan), does not mean that it will have a better chance of passing constitutional scrutiny than a similar law that affects hundreds of Muslim prisoners (Muhammad and other Muslim inmates seeking Halal meat). Any law whose purpose is to interfere with religious practice will not likely be saved under s. 1, but a law that is enacted with a legitimate public purpose in mind (and it is difficult to expect government to enact anything different) may well affect a large number of believers, but it is each one’s ability to follow his or her personal choice that determines its constitutional validity. I see this as nothing more, nor less, than a question of conscience.
In chapter 5, I opened with the proposition that religion should not be privileged in Canada, and that conscience should be treated independently of religion, because of the simple fact that freedom of conscience is part of s. 2(a).

Based on ordinary rules of constitutional and statutory interpretation, and on the fact that “conscience” appears with religion in the fundamental freedom section of the Charter but not in the equality section, conscience should be considered as important to liberty but not equality. Freedom and equality are two different things, as Isaiah Berlin said: “nothing is gained by a confusion of terms…Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.”\(^1\) The point is analogous to the difference between formal and substantive equality – all religions need not be treated equally in an abstract sense but all should be treated with due concern and respect. A historically-based religion, engaging in valuable societal functions and supported by a majority of citizens, may, for them, be more “‘deserving,’ in a broad sense, of state assistance than a recent, tiny, insular religious community.”\(^2\) All this means that s. 15, and particularly the ameliorative provision under s. 15(2), can, and should, be part of a Canadian understanding of legal religion. The presence of conscience in s. 2(a) reinforces this point: there is a clear legal and analytical difference between freedom of religion and “equal


religious citizenship.”³ State coercion or encroachment on religion and conscience will always affect freedom and liberty; whether it occurs in the service of equality is another matter.⁴

Since a central commitment of our Charter, as the Supreme Court of Canada has noted, seeks to protect the dignity and vulnerability of all persons, and to treat all individuals as equals, a strong form of freedom of conscience would allow us to be fair in all matters of ultimate destiny, by protecting religious adherents and morally-bound non-religious individuals alike. An interpretation that is robust and recognizes the importance of freedom of conscience legitimizes the text of s. 2(a). It would avoid some of the mistakes made by others in the past, particularly those decisions interpreting the First Amendment, where religious membership has often been given advantage over non-membership. To rely on one’s legally-protected conscience is to assert one’s fundamental integrity and dignity, on a matter that is unconditionally serious, non-negotiable and binding. It is, in essence, religion writ small, deserving a generous constitutional protection.

And yet, to this day, “freedom of conscience,” as set out in s. 2(a) of the Charter, remains an underdeveloped enigma. It is still unclear, from the dearth of case law, whether, as a distinct freedom, it requires some connection to morals. As a constitutional right, it is seen as a claim that many fear will be abused and open floodgates that cannot be controlled, or that will impinge negatively on religious freedom. It sometimes seems to require compelled behaviour, but sometimes not. It has been characterized by some as giving licence to do anything, such as snort cocaine, or act out one’s passions without restraint. It is true that an overly broad


⁴ The Supreme Court of Canada has alluded to the occasional difficulty in distinguishing between liberty claims under s. 2 and equality claims under s. 15. See, for example, Adler v. Ontario [1996] 3 S.C.R. 609 at para. 166, where Sopinka J. states: “[it] is evident that there is some overlap between the claims based on s. 2(a) and s. 15 of the Charter. Under both sections, the appellants argue that the non-funding of private religious schools imposes an unfair burden on them. In both contexts, the argument is made that the appellants suffer an economic disadvantage in relation to parents who send their children to secular public schools. On the one hand, this economic burden is said to amount to an infringement of freedom of religion. On the other hand, this same burden is said to deny to the appellants the equal benefit of the law on grounds of religion, in breach of equality rights guaranteed under s. 15. During oral argument, it became increasingly difficult to identify whether a particular argument supported a claim under s. 2(a) or under s. 15.” (emphasis in original).
approach to constitutional freedom of conscience could be all of these, making it virtually meaningless as a concept. But so, too, could freedom of religion.

In this way, assessing freedom of conscience is not unique. There are always times when judges have to make inferences, ignore logic, and rely on their intuition, experience and knowledge. Particularly so, where the constitutional text is open or its boundaries are hazy, as in matters of religion or conscience. At those times, judges have turned to their hearts or their emotions to seek the just result. Much better, however, in my view, to rely on one’s conscience, as that is where those feelings and emotions reside. That is true whether one is religious or not.

I embarked on this dissertation, like most doctoral candidates, partly as a personal project. I end it with a story that I hope connects my own family history with the larger role for conscience I envision. I was born in England and emigrated to Canada with my parents when I was two years old. We moved to a very small town north of Calgary, Alberta. For many years, although we obviously spoke English, our family was not at all connected with our community. We had a British sensibility, if you will. My father came from a working class background, but he was the first in his family to receive a University education – becoming a doctor in 1954. In rural Alberta, that made us stick out as foreigners. To us, everyone around seemed American. To them, we were elitists (I can only say this with the benefit of years; at the time, I simply sensed it as an indefinable difference).

Politically and socially, we were also outcasts. My parents were the only left-of-centre types for miles around. We were also the only atheists. The town was in the middle of what is known as the Canadian Bible Belt, home to an evangelical Protestantism that is sometimes associated with former Reform party leader Preston Manning, and the current Prime Minster, Stephen Harper. In fact, after less than a year, my father made the very difficult decision, surely against his better conscience, to attend church in the town. Why? He was one of two doctors, young and new to the country. His patients were all very religious. They would ask my father about our religion. It became apparent to him after a few months that his practice would not likely survive unless he was seen as a regular churchgoer, for if patients learned of our “heathen ways” they would almost certainly ask to see the other, “Christian” doctor.
We were all, therefore, dragged along to Sunday service. I remember little of the experience, except that my father could barely contain himself in church, and would feel miserable for hours afterward. Eventually, we stopped going, once his reputation had solidified, and the locals accepted us, although always slightly at a distance, as nothing could make us exactly the same as them.

To this day, I retain some of these qualities of Englishness/Britishness, working class, atheist, outsider -- and yet, as an English speaking Canadian I am sometimes lumped in with all other English speaking Canadians. So I feel caught between a Canadian identity and a British one. Both of those values (whatever those may be!) exist inside me.

When I was eight years old, we moved to Calgary. Although it was a little easier fitting in, we still were political outcasts. In some ways, I continued to feel like I was part of a rebel community in Alberta, simply because I did not fit in with the mainstream conservative politics that were rampant. Another aspect of my community and culture thus took shape -- I became connected with a few people in Alberta who feel that the rest of the province has got it all wrong.

I then went to University in Calgary, and developed another sense of community there. As with many university educated Canadians, I am much more comfortable within groups that have similar, post-secondary experiences. In this way, I am part of what some might consider an elite class, but at the same time, since University education is now very common, I am part of the mainstream. At the very least, my experience is in stark contrast with those rural, non-University educated classes that exist throughout Canada. So I would have to add this to my make-up. Then I went away to Halifax for my LLB, to England for my LLM, and worked in Australia for 5 years as a law professor. Some other parts of me are made up of those experiences too. All these different elements give me a feeling sometimes of having one foot in the middle of the Pacific Ocean and the other in the Atlantic, and a hand each in Canada and England. In other words, I feel torn between a number of different locales.

Now I am part of an academic community, living in the large urban centre that is Toronto. Here I also feel the presence of a community that I am both part of and distinct from. Obviously I am privileged in the position that I have. But at the same time, I will never
understand the importance of “class” or “breeding” that seems to exist in Toronto. Again, there are a few internal conflicts that do not fit easily into any kind of model.

What does all this have to do with conscience? My cultural, political and social background is outwardly Caucasian, middle class, non-religious, English speaking Canadian. Yet, I have some very strong “beliefs” that do not fit within any of those easy categories. Two rather banal examples come to mind: I have an incredibly strong commitment to promises made and to punctuality. So much so that I feel a sense of dread if I do not meet a promise made, or if I am late. Like many of those religious adherents whose stories have been told in cases like Amselem, Multani and Warner (stories which in most ways, at least for the non-adherent, are rather banal and quotidian, just like my examples), I feel a distinct inner compulsion that forces me to be on time for everything I do. I feel I have failed if I do not meet an original promise, however trivial or insignificant that promise may be – to proofread a friend’s article, to write a reference letter for a student, to meet someone for coffee. More important, I also refrain from criminal behaviour, try to do the right thing and can become very despondent if I do not. To me, all of these are connected. They represent my conscience at work. That part of me that is made up of lessons learned from parents, from experience gained in diverse places, from a curious amalgam of English, Canadian and Australian sensibilities, and a strong desire to do the right thing. They are at the very heart of my being, of how I see myself in the world, reflecting my own cultural community and innermost desires and, I have no doubt, acting for me as religious beliefs do for others.

If a religious believer is able to rely on the protection of the Charter to build on his condominium balcony when his ownership agreement forbids it, or to take a symbolic item to school that is otherwise forbidden, then I, a non-religious believer, feel that I should receive analogous protection where my conscience is similarly engaged.

In one sense no bill of rights can prescribe our choices. I can always choose to live fully in harmony with my moral convictions and commitments, which may mean choosing my own demise – as Richard Arneson puts it, I could, given the choice between renouncing my faith or being burned at the stake, choose burning if my conscience says I should never renounce my faith: my life may be shorter, “but it will be a life lived in full harmony with [my] moral
The purpose of this dissertation, however, has been an attempt to show that the choice to live our life according to these convictions could be based on something more than religious belief; in fact, in Canada, given the text of s. 2(a) of the *Charter*, it *should* be based on more. Our constitution is a living tree, and that includes the roots, bark, sapwood, heartwood, branches, leaves, and burls.

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Bibliography

Books And Monographs


Ellen Anderson, Judging Bertha Wilson: Law as Large as Life (Toronto: University of Toronto Press, 2002).


Pierre Bayle, Miscellaneous Reflections Occasion’d by the Comet (London, 1708), vol. I, 283-84 [orig at II, 367]; Nouvelles letters critiques, II, 227

------------,

Ronald Beiner, Philosophy in a Time of Lost Spirit (Toronto: University of Toronto Press, 1997).


------------,


------------,


------------,


“Neutrality or Privilege? A Comment on Religious Freedom” (2005) 29 SCLR (2d) 221.


Robert Calhoon, Timothy Barnes and George Rawlyk, Loyalists and Community in North America (Toronto: Greenwood, 1994).


Nicholas Dent, “Rousseau and Respect for Others” in Susan Mendus, ed., *Justifying Toleration* at 115-135


David Edwards, “Toleration and Mill’s Liberty of Thought and Discussion”, in Susan Mendus, ed., *Justifying Toleration* at 87-113


H.E. Egerton and W.L. Grant, *Canadian Constitutional Development*, London 1907


J. Rufus Fears, Lord Acton, Essays in the Study and Writing of History: Selected Writings of Lord Acton (Indianapolis: Liberty Classics, 1985) vol. 2, at 389.


S.J. Godfrey, “Freedom of Religion and the Canadian Bill of Rights” (1964) 22 Fac. L. Rev. 61.


Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” (1996) 54 Uni. Tor. Fac. L. Rev. 1-64.

-------------, “Religion and American Politics: Three Views of the Cathedral” SSRN abstract 1267445.


William James, *The Varieties of Religious Experience*


Preston Jones, “Protestants, Catholics and the Bible in Late 19th C. Quebec”, *Fides et Historia* 33 (Summer/Fall 2001), 38.


Brian Leiter, “Why Tolerate Religion” SSRN Abstract –


----------, *John Locke: A Letter Concerning Toleration*


John Henry Plamenatz, Man and Society: Political and Social Theories from Machiavelli to Marx volume 1 pg. 49.


Pierre Trudeau, Statement by the Prime Minister, October 2, 1980, Ottawa, Office of the Prime Minister.


Facta from a number of Supreme Court of Canada cases – see references throughout dissertation.

Cases


Chabot v. School Commissioners of Lamorandiere (1957) 12 D.L.R. (2d) 796 (Que. C.A.).


Chatterjee v. Ontario (Attorney General) [2009], 1 S.C.R. 624.

Chrysler Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 S.C.R. 394.

Church of the New Faith v. Commissioner for Pay-Roll Tax (Vic.) (1983) 154 CLR 120.

Compassion in Dying v. State of Washington, 79 F.3d 790 (9th Cir., 1996).


Conscientious Objector I Case 12 BVerfGE 45 (1960).

Conscientious Objector II Case 48 BVerfGE 127 (1978).

Countryside Alliance and others v. HM Attorney General and others [2005] EWHC 1677
Countryside Alliance and others v. HM Attorney General and others [2006] EWCA Civ 817 (CA (Civil Division)).


Jehovah’s Witness Case 102 BVerfGE 270.


Malnak v. Yogi 592 F.2d 197 (3d Cir. 1979).


Muslim Headscarf Case 2 BVerfGE 1436/02 (2003).


R. v. Magder, February 17, 1984, County Court, Judicial Dist of York, unreported.


Rumpelkammer Case (1968) 24 BVerfGE 236.

Saumur v. Quebec (City) [1953] 2 S.C.R. 299.

Schachtschneider v. Canada (1993) 105 DLR (4th) 162


Tobacco Atheist Case 12 BVerfGE 1 (1960).


Warner v. Boca Raton, unreported, United States District Court for the Southern District of Florida, West Palm Beach Division, Case No. 98-8054-CIV-/CIV-KLR.


