Diminishing Disadvantage and Curtailing Power:  
A Reimagining of  
‘Freedom of Conscience and Religion’  
in Canada

by

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ABSTRACT

This dissertation is a contribution to the growing scholarship that challenges the claim that the legal protection of religious freedom in liberal democratic orders is fair, neutral and universal. Using Canada as my case, I ask whether the historical domination of Protestant Christianity has left its mark on contemporary secular regimes. The answer is clearly yes.

In the dissertation I focus particularly on the issue of exemptions. I question whether the current dominant understanding of freedom of religion and conscience (shaped as it is by a Protestant dominated past) can deal fairly with marginalized, minority, and non-Christian perspectives, beliefs, and ways of life.
In developing this argument, I make three major claims. The first is that the dominant interpretation of section 2(a) turns “freedom of conscience and religion” into “freedom of conscience in religion.” The collapsing of conscience into religion, alongside the understanding of religion as private, belief-driven and chosen, restricts and narrows what and who receive exemptions.

In contrast to this view, my second claim challenges the priority given to beliefs over values. I argue that the state has a special and equal interest in justifications based on beliefs and justifications based on values when these reflect a person’s ‘sense of being.’ My conception of a ‘sense of being’ introduces a moral argument for why we should be protecting “religion” and “conscience” that is not tied to narrow Christian dominated views.

Finally, I propose an alternative understanding of the basis for exemptions that looks at these questions through the lens of advantage/dominance and disadvantage/marginalization. I argue that exemptions should amplify and protect those who are disadvantaged and at risk but be granted on a more limited basis to dominant/powerful majority groups. My approach mitigates the impact of differences in power, status and opportunities on the substance of the s. 2(a) right of 1) minority religious communities (including non-mainstream Christians) that may not prioritize conscience in the same way as the mainstream, 2) Indigenous peoples, and 3) individuals acting on their consciences without connection to religion.
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# Table of Contents

**Acknowledgments** .............................................................................................................. iv

**Table of Contents** .................................................................................................................. vi

**Chapter 1:**
Religious Exemptions in the Absence of Clear Religion ................................................................. 1
   1.1 Surveying the Theoretical Landscape ....................................................................................... 2
   1.2 My Project ............................................................................................................................... 11
   1.3 Outline of Dissertation ........................................................................................................... 18

**Chapter 2:**
Freedom of Conscience “in” Religion .......................................................................................... 23
   2.0 Introduction ............................................................................................................................. 23
   2.1 Religion’s Role in Canada’s Founding and Development ......................................................... 26
   2.2 Managing Religious Difference ............................................................................................... 29
   2.3 Unequal Treatment of Religion ............................................................................................... 31
   2.4 Desecularization of Canada ..................................................................................................... 38
   2.5 Persisting Christian Impact on Society .................................................................................. 46
   2.6 Neutrality and Undoing Christian Privilege .......................................................................... 49
   2.7 Contesting Law’s Neutrality: Freedom of Conscience “in” Religion ....................................... 59
   2.8 Minority Religious Claims ...................................................................................................... 63
   2.9 Indigenous Peoples ................................................................................................................ 73
   2.10 Non-Religious Other ............................................................................................................. 79
   2.11 Conclusion ............................................................................................................................. 91

**Chapter 3:**
A Short History of Freedom of Conscience “in” Religion ............................................................... 94
   3.0 Introduction ............................................................................................................................. 94
   3.1 Historical Conscience Stems from Christianity ..................................................................... 96
   3.2 Impact of Conscience “in” Religion on the Development of Toleration ............................... 113
   3.3 Changing Definition and Conception of Conscience After the Reformation ....................... 138
   3.4 Conclusion ............................................................................................................................. 168

**Chapter 4:**
Weighing Impact on the Sense of Being ...................................................................................... 171
   4.0 Introduction ............................................................................................................................. 171
   4.1 Incorporating Critical Theory ................................................................................................. 173
CHAPTER 1:

RELIGIOUS EXEMPTIONS IN THE ABSENCE OF CLEAR ‘RELIGION’

Citizens in liberal democracies regularly seek exemptions from obligations the law imposes on the basis of their religious beliefs and practices. These exemptions can be written into constitutional documents and statutes. Often the same treatment is not extended towards those who are not religious or do not offer religious justifications for their beliefs or actions. A Sikh student can wear a kirpan, or ceremonial dagger, to school; a student who wants to carry a knife to school for non-religious reasons does not get a similar exemption. An individual who objects to working on a religious day of rest or a holiday is entitled to compensation if fired; not so a worker who objects on moral reasons. A Muslim woman is allowed to wear the hijab, or head covering, in the courtroom; an individual wearing a hat is required to remove it. A strong argument could be made that a religious belief or practice is weightier than mere preference. ¹ But it is also the case that exemptions and protections are often not extended towards those who hold moral convictions or deeply held beliefs or practices without a nexus with religion. The law seems to privilege religion. In the Canadian Charter of Rights and Freedoms, freedom of religion is listed alongside freedom of conscience, but freedom of religion is granted more attention and greater protection than freedom of conscience. In this dissertation, I intend to answer the following questions: When are exemptions from the law on the basis of freedom of religion and

conscience justified? How can the law avoid favouritism, inequality and arbitrariness when issuing exemptions for some and not others?

1.1 SURVEYING THE THEORETICAL LANDSCAPE

There is no theoretical consensus on how these questions should be negotiated. Political theorists began querying the widely agreed upon and taken-for-granted conception of religion as a distinct human phenomenon deserving of special treatment in the 1990s. A growing number of scholars began to perceive of the legal protections offered to religion as unfair. They took a variety of approaches in answering the question of how the law could avoid favouritism, inequality and arbitrariness. Some rejected special treatment for religious individuals and groups entirely.² Others expanded protections to secular commitments they considered analogous to religion.³ Still others suggested that exemptions only be granted to strongly held claims of secular moral conscience.⁴

Scholars who argued that religion was indeed deserving of special protection pushed back, offering three types of arguments:


The first type of argument was that religion is intrinsically good. John Garvey pointed out that religion is protected because, “religion is a good thing”. This line of argument has fallen into disuse. Religious justifications cannot convince non-religious citizens. Moreover, if religious beliefs and practices are protected because religion has intrinsic value, then each religious group may think of itself as worthy of protection but may not view others possessing different religious beliefs or values as worthy of similar protection.

A second type of argument was that religion is of benefit to the individual and society. Religion offers people a communal and individual identity. It protects minorities from the tyranny of the majority and from state power. Religious freedom also avoids conflict. Sandel, concerned with the benefits offered to society at large, suggested that religion contributes to “morally admirable ways of life” and should be protected because of “its place in a good life, or the quality of character it promotes, or (from a political

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point of view) its tendency to promote the habits and dispositions that make good
citizens.”

- A third type of argument reflected the idea that religious duties are a burden on the
individual. Religion is distinguished from non-religion on the ground that it is deeply
held and entails weighty claims. Some argued that the suffering of those who are
religious is greater because there are extra-temporal consequences to the violation of
religious commands. Others pointed out that religion involves duties to a higher,
transcendent authority which take precedence over the requirements of secular law. Still
others used terms such as “compelled to act”; “in the grip of conscience”; “demands
devotion and emotional commitment”; “pervades all aspects of a religious individual’s

10 M. Sandel, xii. See also Gregory C. Sisk, “Stating the Obvious: Protecting Religion for Religion’s Sake” Drake

11 Ira C. Lupu, “Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of


597–601.

14 Thomas Berg. “What's Right and Wrong with the 'No Endorsement of Religion' Test”, Washington University
DePaul Law Review. 50 (2000): 1, 28–30; Michael W. McConnell, The Origins and Historical Understanding of

Frederick Mark Gedicks and Roger Hendrix, “Democracy, Autonomy, and Values: Some Thoughts on Religion and

16 Sandel (1998), xiii.

17 Clifford Geertz, The Interpretation of Cultures (Basic Books, 1973), 126.
life”\textsuperscript{18}; “not answerable to human evidence, reason or debate”\textsuperscript{19}; and “extemporal consequences and internal trauma”\textsuperscript{20}.

The difficulty with this second and third type of argument is that they identify attributes that are not unique to religion (or to religious believers) and not shared by all religions. Hence these arguments are both underinclusive and overinclusive. Consider, for example, the claim that religion concerns faith and is not answerable to human evidence, reason or debate. Many religious individuals may not perceive a dichotomy between faith and reason. Within many religious traditions, there is room for questioning, debate, engagement with the wider surroundings, and disparate interpretations. At the same time, non-religious beliefs may also include elements of faith. Furthermore, there are profound differences between and among religions. The argument that there are serious repercussions for the violations of religious commands may not mean much for Buddhists, who do not possess the concept of religious commands.

Brian Leiter’s book, \textit{Why Tolerate Religion}, was published while the debate about the uniqueness of religion was still unresolved. He detailed the legal and philosophical problem of special treatment of religion and made a compelling argument that there is no justification for

\textsuperscript{18} Ibid.


privileging religion.\textsuperscript{21} According to Leiter, liberal democratic states should tolerate religious beliefs and practices just as they tolerate secular conscientious commitments, but there is no reason to respect them or afford them special constitutional protection.\textsuperscript{22} His argument hit a nerve based on an increasing societal recognition of the changing shape of religious beliefs and practices in liberal democracies. Though religion had been historically conceived in terms of western Judeo-Christian traditions, it has grown increasingly difficult to define as it shifts away from its past association.\textsuperscript{23} Given the plurality and diversity of religions that exist today, no simple formula seems capable of capturing the multiplicity and dissimilarity of ideas about religion. In addition, there is greater recognition of the existence and rise of ‘unbelief’, i.e. atheism and agnosticism. There is also more awareness of the ways in which individuals prioritize certain aspects of their religion over others. For many, religion is perceived as subjective, personal and cultural rather than objective and obligatory.\textsuperscript{24} This makes religious belief and practice increasingly difficult to distinguish from non-religious belief and practice. Hence it has become challenging to defend religion’s unique status in contradistinction to non-religious conscience; the reasons for protecting religious belief and practice seems to apply just as well to non-religious belief and practice.

\textsuperscript{21} Brian Leiter, \textit{Why Tolerate Religion?} Princeton: Princeton University Press, 2012. Some of these arguments were developed prior to Leiter’s book.

\textsuperscript{22} Ibid, 66-90.

\textsuperscript{23} For more on Christianity as the standard by which other religions are defined and judged, see Talal Asad, \textit{Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam} (Baltimore: Johns Hopkins University Press, 1993).

\textsuperscript{24} See discussions of “lived religion” in Winnifred Fallers Sullivan, \textit{The Impossibility of Religious Freedom}. (Princeton: Princeton University Press, 2011), 5. While I agree with Sullivan about the problematic nature of definitions of religion, it seems to me that no suitable solution has been found to include those neglected aspects of religion given our current legal framework. We cannot move away from explicit protection of religion without harming vulnerable religious belief and practice.
In recent years, a more sophisticated line of argument has developed under the umbrella of liberal egalitarianism. It contends that conscience and religion deserve similar treatment. It has been argued in various ways. One argument says that freedom of religion should be protected within the larger category of conscience. Boucher and Laborde write that “whatever is respectable about religion is not specific to religion but is rather a manifestation of conscience, which can also take a secular form”. 25 Martha Nussbaum makes the argument that, based on the political commitment to conscience, “we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others or comes up against some compelling state interest.” 26 The outcome of this search may or may not be religious, but it nonetheless deserves special protection. Maclure and Taylor likewise situate religion within the auspices of conscience. They argue that all of the core beliefs that allow individuals to structure their moral identity should enjoy special status. Maclure and Taylor claim that religious convictions should be protected as meaning-giving beliefs and commitments, similar to conscience. 27 Convictions of conscience are not reducible to preferences, desires or inclinations, they write, but rather offer a moral orientation to people’s lives, making it possible for people to make moral judgments. They call for equal respect for religious and secular convictions of conscience. 28 A related argument, espoused by

25 Boucher and Laborde, p. 496.
28 Ibid, 89.
Ronald Dworkin, is that religion is part of a category of preferences, commitments, identities and beliefs. Dworkin does not distinguish between religion and other attitudes towards life (including devout materialism). He does not offer exemptions to religious belief and practice; he argues that if the government does so, it risks discriminating between citizens arbitrarily.  

A third argument is that freedom of conscience is distinct from religion. Bruce Ryder claims that the two freedoms are “closely related yet distinct”. Drawing on a case involving a federal inmate who requested a vegetarian diet based on freedom of conscience, Ryder contends that conscience should comprise of comprehensive belief systems that have analogous “significance in the lives of believers as religion in the lives of the devout.” Daniel Weinstock argues that freedom of conscience protects the individual’s ability to reflect critically upon the moral and political issues that arise in her society generally, and in her professional life more specifically, while freedom of religion protects the individual's ability to achieve secure membership in a set of practices and rituals that have as a moral function to inscribe her life in a temporally extended narrative.” Richard Haigh and Peter Bowal contend that conscience is independent from religion; it is “the application of reason, employed about questions of right and wrong, and accompanied by sentiments of approval or condemnation.”

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As is evident from the arguments above, scholars have grappled with the need to ensure fairness and equality in their interpretation of freedom of religion and conscience. But in the meantime, other criticisms have arisen, shifting the bounds of debate. Among the most compelling are those addressed by Benjamin Berger. He argues that law conceives of religion as:

- Individualistic; it prioritizes individual autonomy when adjudicating exemption claims.\(^{34}\) Religion is protected as a personal rather than collective phenomenon. The ends of religion are also conceived in individual terms. The test for determining whether religious freedom has been engaged is sincerity, rather than objective or authoritative religious precepts.

- Choice.\(^{35}\) The value of religion derives from the fact that it is one of various options that an autonomous individual might select. Protection is secured by ensuring the absence of coercion or restraint. Law’s concern is with treating the individual fairly as an autonomous agent. But law also expresses concern with the genuineness of choice in exemption claims, particularly when they concern children.

- Private.\(^{36}\) Religion is perceived primarily as a matter of belief. The Court has argued that the scope for protection of belief is wider than for conduct. When belief is accompanied by conduct such that its presence pushes it closer to the public realm, law is less comfortable protecting it.

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\(^{35}\) Ibid, 78-91.

\(^{36}\) Ibid, 91-98.
Berger’s rendering of law’s conception of religion is compelling in the context of Canadian jurisprudence. But it does not go far enough. It fails to interrogate the universality and neutrality of the law in light of the lingering influence of Protestantism in the Western world. Asad\textsuperscript{37}, Masuzawa\textsuperscript{38}, Casanova\textsuperscript{39}, Sullivan, Taussig-Rubbo\textsuperscript{40} and others have argued that a historical Protestant (or more broadly, Christian) concept of religion became legally entrenched and was perceived to be normative, universal and neutral even while it continued to privilege Protestant, liberal understandings of religion as individual, private and voluntary. They have argued that the law is not autonomous, universal, neutral or rational; instead, the law and legal institutions are premised on a set of majoritarian norms and structures that exclude and disadvantage some members of society. In the context of Canada, their critique of the disjuncture between the legal and political protections of religion and actual lived religion hits the mark, since the legal framework of protections for religion and conscience excludes the practices, traditions and ways of life of Indigenous peoples.\textsuperscript{42}


\textsuperscript{38} Tomoko Masuzawa. \textit{The Invention of World Religions: Or, How European Universalism was Preserved in the Language of Pluralism} (Chicago: University of Chicago Press, 2005).


Liberal theorists have not adequately responded to these criticisms. Berger has admitted defeat, pointing out that, “lived religion [is] simply too unruly to subsist within the imagination of the constitutional rule of law.”

Perhaps the best attempt has been made by Cecile Laborde. She argues that religion is protected as part of a class of ethically salient commitments, which she calls integrity-protecting commitments (IPCs). Laborde explains that her emphasis on integrity is not vulnerable to the critiques of critical religion, which says that the liberal conception of religion is biased towards individualist notions of autonomy or Protestant modes of belief. Laborde insists that her theory does not prioritize individualistic, chosen, or antecedently existing beliefs. As Laborde elaborates:

> Integrity-protecting commitments may or may not be based on beliefs in the Protestant sense; practices may or may not be communal; and there is no assumption that beliefs somehow precede or supervene on practices. Practices are not necessarily mandated by beliefs; rituals often given space to, and embody, the religious life itself…”

Laborde’s integrity-protecting commitments does go some way towards protecting Indigenous spiritual practices, traditions and ways of life. Yet it would not protect them equally. Laborde distinguishes between obligation integrity-protecting commitments (i.e. those that concern conscience) and identity integrity-protecting commitments. She argues that identity IPCs are less salient than obligation IPCs because, “the violation of integrity caused by restriction on culture is weaker and more indirect than that caused by coercing individuals not to act on their

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43 Berger (2015), 104.

44 Laborde (2017), 205.
Hence Indigenous spirituality would not be protected to the same extent as religious conscience.

1.2 MY PROJECT

I have taken on the ambitious project of offering a more complete response to the claims of critical theorists. Reflecting on the historically determined limitations of the liberal state, I explore how the traditional, dominant liberal discourse can stretch its boundaries to better protect non-Protestant religions and non-religious conscience while retaining what is of most value in religion and conscience protection. I focus particularly on the issue of exemptions, and use Canada as my case.

I argue that the dominant interpretation of section 2(a) turns “freedom of conscience and religion” into “freedom of conscience in religion”. Freedom of conscience in religion originates in the Protestant belief that only freely held beliefs lead to salvation. Individuals have the authority and duty to determine what is necessary for themselves to achieve salvation. Hence individual adherence to belief is more important than doctrines and practices upheld due to the authority of God or the Church. In the context of the Charter’s s. 2(a), freedom of conscience in religion entails the privileging of claims on the basis of belief rather than practice. Protection is oriented towards the individual rather than tradition, community or way of life. It also entails the privileging of religious beliefs and practices over non-religious beliefs and practices. Religious claims arising from minority groups that cannot be framed in the context of “freedom of

\[45\] Ibid, 217.
conscience in religion” are less likely to be protected. I rely on case law to demonstrate this privileging. Though religious minorities may win or lose cases, the arguments used to reach a decision tell us what the courts consider most important. I show that religious freedom claims that do not emphasize the use of individual conscience or seem to demonstrate the exercise of conscience in a manner that is considered atypical in a liberal democratic society are given less priority by the courts and experience greater difficulty being recognized as worthy of protection.

This Protestant-tinged understanding of section 2(a) – which is individual-centric, private, belief-driven and emphasizes choice – serves to perpetuate the exclusion and marginalisation of the religious and non-religious other, including religious minorities, Indigenous peoples and non-religious individuals and communities.

I challenge the priority given to beliefs over values. The concepts of ‘conscience’ and ‘religion’ are fluid. They manifest themselves in terms of s. 2(a) in two ways: they concern ‘justifications based on beliefs’ and ‘justifications based on values’. When a Sikh says, “I must allow my hair to grow long in accordance with my religious beliefs”, that’s a justification based on beliefs. Alternatively, an aboriginal person might seek an exemption so that she could engage in the practice of smudging in an indoor space, not due to her belief, but out of a need to adhere to her traditions. Though justifications based on beliefs have traditionally been given priority, I demonstrate that this need not be the case. I argue that the state has a special and equal interest in justifications based on beliefs and justifications based on values when they are reflective of a sense of being. My conception of the sense of being does not privilege autonomy over heteronomy; insist on an explicitly moral reflection; or prioritize religious obligation.
I offer two related reasons for exemptions on the basis of one’s sense of being: first, the liberal democratic state has an interest in ensuring that people are not alienated; second, exemptions can alleviate the unjust burden placed on some members of society due to structural democratic deficits and asymmetrical power differences. But the broadening of space afforded to diverse manifestations of beliefs and values may lead to the abuse of exemptions to escape laws individuals do not wish to follow. It is important to note that not all justifications based on beliefs and values will be considered suitable candidates for exemption claims. If a strong connected cannot be made between the individual’s beliefs or values and his or her sense of being, the justification will not qualify to be considered for an exemption claim. Moreover, I establish a set of criteria to serve as external constraints on those seeking exemptions. The connection between the individual’s sense of being and the belief or value in question is assessed on the basis of whether the belief or value is considered integral to the individual; influences and guides decision-making and is manifested in actions and practice; and is coherent and consistent with the individual’s life.

Next, I propose that exemptions on the basis of freedom of religion and conscience be judged through the lens of advantage/dominance and disadvantage/marginalization. I argue that exemptions should amplify and protect those who are disadvantaged and curtail power. I propose that the Oakes test be abandoned to allow the court to better judge the complex relationship between state action and impact in a holistic, comprehensive manner. The purpose of this assessment is to ensure that if there is an infringement on freedom, the objective and means of state action are outweighed by its impact. The first set of factors concerns impact: a)
How would state action impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized? b) Would an exemption foster new forms of inequalities, either among other minorities or in the wider community? The second set of factors concerns state action: a) Has the state chosen the least burdensome infringement possible on the sense of being? b) Should other options or less drastic measures be considered?

It is not the goal of this assessment to establish permanent categories of individuals, groups or communities which identify them as advantaged or disadvantaged. In this sense, my approach differs from that of David Steinberg, who differentiates minority religions from majority religion, which he defines as ‘mainstream Protestants or Catholics.’ I dispute his classification, first, because it does not include non-religious conscience, but second, and more relevant to this argument, because it is rigid and does not reflect the fluidity of religious manifestations. There is no easy way of demarcating which religions count as ‘minority’ or ‘majority’. If the classifications are inaccurate, they would be unfair towards those who are labeled as members of the ‘majority’. A ranking system might also pit some religions against others as they compete for ‘minority status’. Rather, I argue that individuals, groups or communities shift between categories of advantage or disadvantage. Hence advantage and disadvantage would be determined based on the particular case and circumstance before the judges.

An individual or community could be advantaged in a number of ways. For example, an individual or group whose belief system is part of the cultural fabric of the country, i.e. its holidays are publicly celebrated, its symbols are viewed as non-controversial, et cetera, could be

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considered advantaged. Likewise, one might consider as advantaged an individual or community whose belief system is well-known, because its adherents are a majority in size or influence or they have been in the country for a long time; or individuals or groups who exert power on others, either internally, within a group, or externally, in the larger society. On the other hand, an individual or group might be disadvantaged if its belief system places significant burdens on the ability to exercise autonomy in a way that is not appreciated by the wider society; if its values, practices and traditions are largely unknown, either because its adherents are a minority in size or influence or they are new to the country; or the individual or group is also part of a racial minority. These are not intended to exhaustive categories; they are merely examples.

I take issue with Steinberg’s argument that the government should only grant religious exemptions when the law conflicts with the beliefs of a minority religion.\(^\text{47}\) In some cases, I do hold that the advantaged would have less of a chance of being exempted from a law. This is particularly the circumstance if the claimant would stand to gain additional legitimacy or power through the granting of an exemption that allows her to violate the sense of being of others. But it could be the case that an individual or group is advantaged in one sense and disadvantaged in another. For example, a dominant religious group could continue to be disadvantaged in comparison to the wider non-religious or secular societal context despite being granted an exemption. Thomas Berg would disagree with my argument. He argues that a religious individual or group should still qualify for an exemption even if they are not a ‘minority’.\(^\text{48}\)

\(^{47}\) Ibid, 118.

\(^{48}\) Like Steinberg, Berg only discusses minority religion, leaving out non-religious conscience. Neither his and Steinberg’s approach offers any protection to non-religious conscience.
contends that the protection and equalization of minority faiths should not be the sole criterion for Religion Clause cases (he writes in the context of the United States). I agree with Berg that individuals or groups that are advantaged in some way (or in many ways) are still protected under s 2(a). But exemptions constitute a special category of protections. Though individuals or groups advantaged in relation to the case in question would still be able to request an exemption, they might not receive the same priority as individuals or groups that are disadvantaged.

My approach solves the problem of under- and over-inclusiveness. It is context-specific: in some cases, the religious might exercise power and need less protection than a non-religious; in other cases, the opposite might be true. My approach also deals better with differences in the way different senses of being are treated in the societal or cultural context; some religious beliefs and practices may be treated worse than others and may require more attention. It also recognizes differences between religious beliefs and practices; some may be inherently more vulnerable than others due to their own particularity. And finally, this approach avoids falling into the trap of sameness, because it emphasizes the complexity of religious beliefs and practices.

Nevertheless, it is important to note that an assessment of advantage and disadvantage will not provide ready answers in exemption cases concerning freedom of religion and conscience. The determination of advantage and disadvantage will necessarily be subjective, and may be dependent on a particular context. No framework can ensure that the outcome of religious exemption cases will materialize in a particular way.

My approach entails critically considering and actively working towards overcoming asymmetry and biases that might not be readily apparent in the law. It mitigates the impact of differences in power, status and opportunities on the substance of the s. 2(a) right of 1) minority religious communities (including non-mainstream Christians) that may not prioritize conscience in the same way as the mainstream, 2) Indigenous peoples, and 3) individuals acting on their conscience without connection to religion.

1.3 OUTLINE OF DISSERTATION

My dissertation is organized as follows:

In chapter 2, I demonstrate that the dominant historical and legal narratives concerning freedom of conscience and religion in Canada rest on a concept of religion that stems largely from Protestant Christianity. Protestantism was present before Canada was established as a nation; it has shaped the culture of the country as well as its legal and political institutions. Christianity is embedded in Canadian society because of its formative role in constructing and shaping a society that became Canadian and because remnants of a Christian perspective remain symbolically and actually in institutions, legislation, and other aspects of the Canadian state. This argument is not new; liberal theorists repeat it regularly. Yet they fail to provide evidence for their claims; indeed, the evidence is hard to find. In this chapter, I piece together a plethora of diverse sources to tell the story of Protestant influence on the development of section 2(a), which I suggest has been interpreted as “freedom of conscience in religion” rather than “freedom of conscience and religion”. This Protestant-tinged conception – which is individual, private, belief-driven and
emphasizes choice – serves to perpetuate the exclusion and marginalisation of the religious and non-religious other, including religious minorities, Indigenous peoples and non-religious individuals and communities.

In chapter 3, I explain why ‘freedom of conscience’ in religion is privileged in legal discourse through an analysis of the historical and political interconnectedness of the concepts of conscience and religion. Though this chapter is largely expository, it offers a comprehensive genealogy of conscience, which is lacking in liberal theoretical literature. While liberal theorists have tended to interrogate religion rather than conscience, the complexity and variety of conscience shown in this chapter prove that the failings associated with religion (i.e. its lack of clarity in meaning and its association with Protestantism) are also associated with conscience.50 I argue that the terminology written into the ‘freedom of conscience and religion’ clause in the Charter has Christian roots and remains tied to Protestantism. I show that, due to Protestant influence, conscience and religion were collapsed, one within each other, such that religion was reduced to conscience; religion referred to a personal experience that was private, voluntary, individual and belief-based. This conception of religion crowded out the non-religious conscience. Though religion became less important over time, this Protestant version of conscience was imprinted onto the liberal secular state because of its crucial role in the intellectual development of the concept of toleration. Toleration was essential to the formation of

50 In this sense, I disagree with Patrick Macklem’s claim that, “the extension of the freedom by the Charter to include freedom of conscience will... alleviate the pressure otherwise put on a court to define the meaning of religion” (Patrick Macklem, “Freedom of conscience and religion in Canada”, University of Toronto Faculty Law Review 42 (1984) 64).
the liberal state, and hence ‘conscience in religion’ has preserved its importance even as
toleration has evolved towards freedom of conscience and religion.

A version of conscience that was not linked to religion materialized during the Enlightenment
period and picked up speed thereon after. This non-religious conscience became increasingly
unstable as it became more diverse, individualistic, subjective and divorced from religion.
Though liberal theorists such as Mill and Rawls considered non-religious conscience worthy of
respect and protection, I hypothesize that their theories failed to fully incorporate the non-
religious conscience in a manner that overcame the problem of subjectivity and its threat to order
and stability. Hence, we are left with two existing versions of conscience, each of which is
offered a differing degree of protection. This leaves the non-religious conscience and non-
Protestant religions as outliers in liberal theory.

In chapter 4, I take the historically determined limitations of the liberal state as a given and
explore how the traditional, dominant liberal discourse can stretch its boundaries to better protect
non-Protestant religions and non-religious conscience. I challenge the priority given to beliefs
over values. I argue that the state has a special and equal interest in justifications based on beliefs
and justifications based on values when these arise from and are reflective of a sense of being.
Drawing from recognition-respect theorists, I argue that there are two related reasons for
exemptions. First, a liberal democratic state has an interest in ensuring that people are not
alienated. Second, exemptions may be necessary to alleviate the unjust burden placed on some
members of society due to structural democratic deficits and asymmetrical power differences.
In the second part of the chapter, I propose an alternative understanding of the basis for exemptions using the lens of advantage/dominance and disadvantage/marginalization. I argue that exemptions should amplify and protect those who are disadvantaged and at risk but be granted on a more limited basis to dominant majority groups. I propose that the Oakes test be abandoned to allow the court to better judge the complex relationship between state action and impact. The inquiry would first ask how state action would impact those whose freedom is being infringed. Would state action prioritize those whose sense of being is disadvantaged or marginalized? Judicial analysis would begin with the deliberate choice to see the world from the standpoint of the minority or disadvantaged rather than the reasonable person, since an emphasis on the reasonable person could unintentionally privilege Protestant or majoritarian understandings of the sense of being. It would take the claimant seriously by seeking to appreciate the distinct nature of the person’s sense of being and its manifestations. It would also demonstrate a recognition that rituals, practices and traditions have different meanings across different religious, cultures or worldviews; what appears peripheral in one may not have the same function or value in another. Moreover, caution would be required in making comparisons; one would need to be careful about determining which individuals are identically situated. While comparisons might be helpful at times, exemptions could become dependent on the availability of other exemptions, which might privilege underlying majoritarian assumptions. Rather, comparisons would be considered one component of an assessment. In some cases, comparisons would not even be applicable, with the individual or situation requiring study on its own terms.

The inquiry would, second, ask whether an exemption would foster new forms of inequality, either among other minorities or in the wider community. The aim of this aspect of the
assessment would be to consider the social, political, economic, and legal context independent of the particular law being challenged, in order to protect or advance those who were disadvantaged or marginalized and limit those who were privileged or dominant. To that end, it would be necessary to look not only at the wider context of the individual or group being disadvantaged, but also at those who are seemingly unaffected by the law, and even broader still, at the power and interests that are affected by society. This stage of the inquiry would seek to determine whether an exemption would privilege the claimant over others, creating new patterns of disempowerment and disadvantage.

A short conclusion in chapter 5 rounds out the dissertation. I reassess the questions I began with and determine that I have answered then sufficiently.
CHAPTER 2
FREEDOM OF CONSCIENCE “IN” RELIGION

2.0 INTRODUCTION

This chapter has two parts. In the first part, I demonstrate that the dominant historical and legal narratives concerning freedom of conscience and religion in Canada rest on a concept of religion that stems largely from Protestant Christianity. I show that the Christianity that was historically held and practiced by European settlers played an important role in the founding and development of Canada. Mainline Protestants tolerated and offered concessions to some religious communities, but accommodations were uneven and dependent on the good will of those in power. As Canada became secularized, Protestant churches transformed, ceding institutional power but maintaining cultural influence. Though Canada is now considered secular, remnants of the historical privileges held by Christianity remain. In the second part of this chapter, I argue that section 2(a) has been interpreted as “freedom of conscience in religion” rather than “freedom of conscience and religion”. This Protestant understanding of section 2(a), which is individual, private, belief-driven and emphasizes choice, has served to perpetuate the exclusion and marginalisation of the religious and non-religious other, including religious minorities, Indigenous peoples and non-religious individuals and communities.

The Canadian Charter of Rights and Freedoms, through its entrenchment of protections for freedom of conscience and religion, should conceivably have leveled the playing field for those who ascribe to a religion (and those who do not). It could be argued that the impact of religion
pre-confederation is barely felt in a post-Charter era. The influence of Protestantism and Catholicism has receded considerably in Canadian society. Historian Ogilvie writes that beyond form, Christianity does not have continuing impact on Canadian law and institutions.\textsuperscript{51} Though she overstates the case, it would be inaccurate to mythologize religion as the powerful singular force that defined Canada without considering the impact of the other factors, including the differing languages and cultures of the British and French. Yet religion was an important aspect of people’s social and political lives before the advent of secularism in the West. The divide between Protestantism and Catholicism was considered insurmountable. Hence a focus on Canada’s religious history is not out of place. Moreover, in recent years there has been an increasing awareness of the way in which the founding communities’ religions remain woven into social and cultural life long after societies become secularized and continue to exercise a degree of privilege in comparison with others. This phenomenon is not limited to Canada. Many thinkers have written on the relationship between religion and power. Talal Asad has commented extensively on the Western category of religion, which he says is historically specific and bears the imprint of Christianity.\textsuperscript{52} Saba Mahmood and Peter Danchin write in the context of Egypt and Europe and likewise argue that it is important to recognize the way power shapes freedom of religion. They point out that majoritarian sensibilities, traditions, and customs have become linked with the legal and political order, which leads to the privileging of majority

\textsuperscript{51} Margaret Ogilvie, \textit{Religious Institutions and the Law in Canada} (Scarborough: Thomson Professional Publishing, 1996), 44.

understandings of religion and the marginalization of minority religious communities. Pippa Norris and Ronald Inglehart write that, “even in highly secular societies, the historical legacy of given religions continues to shape worldviews and to define cultural zones”. They demonstrate that this is the case in countries where people are not religious. Hence, in Sweden, though only 5% of the population attends church weekly, they subscribe to a Protestant value system, passed on by the educational system and the media, that is aligned with other historically Protestant European countries. More recently, Winnifred Sullivan has taken up this theme. Sullivan contends that there is a Protestant understanding of religion at play in the courts. She spells “Protestant” with a small “p” to demonstrate that she is not referring to the institution of the church, but instead aims to “describe a set of political ideas and cultural practices that emerged in early modern Europe in and after the Reformation; that is, I refer to ‘protestant’ as opposed to ‘catholic’ models of church/state relations.” Sullivan identifies this modern protestant understanding of religion: it is private, voluntary, individual, textual and believed. She contrasts this understanding of religion with public, coercive, communal, oral and enacted religion, which, though practiced by much of the world, is considered harmful and unworthy of legal protection and hence is excluded from modern public space and closely regulated by law.


55 Ibid, p. 17.


If it is the case that Christian, and more specifically, Protestant understandings of religion are found across Western countries, one needs to then question how the Canadian understanding of religion is culturally specific rather than being merely part of a wider trend that has swept across the West. I will return to this subject later in this chapter. But first, it is necessary to provide a historical overview of the role of religion in the founding and development of Canada.

2.1 RELIGION’S ROLE IN CANADA’S FOUNDING AND DEVELOPMENT

In this section, I advance the argument that though Canada was affected by Christianity’s dominant role, this role was tempered by internal adaptation and some accommodation for minorities. Many historians have written about Christianity’s dominant role in the development of Canadian society.\(^{58}\) David Martin refers to the Catholic and Protestant Churches as two shadow establishments.\(^{59}\) Roger O’Toole refers to Canadian religion historically as a “protracted religious oligopoly”.\(^{60}\) Christie and Gauvreau claim that Christian beliefs and practices have

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\(^{59}\) David Martin, “Canada in Comparative Perspective” in *Rethinking Church, State and Modernity: Canada Between Europe and America*. Ed. David A. Lyon and Marguerite Van Die (Toronto: University of Toronto Press, 2000), 23-44.

\(^{60}\) Roger O’Toole, “Canadian Religion: Heritage and Project” in *Rethinking Church, State and Modernity: Canada Between Europe and America*, Ed. David A. Lyon and Marguerite Van Die (Toronto: University of Toronto Press, 2000), 45.
exerted a degree of influence on Canadian society that is “unparalleled among industrialized nations”. As M.H. Ogilvie writes, “the history of religious institutions and the law in Canada was, until the late twentieth century, the history of Christianity in Canada in its many forms…” Ogilvie explains that the division between Roman Catholic and Protestants was the “major fault-line” along which the state was built. According to Ogilvie, the religious conflicts between Roman Catholics and Protestants were struggles over national identity, with British-Canadian identity rooted in Protestant Christianity and French-Quebecois identity embedded in Roman Catholicism.

A study of the history of religion in Canada bears out these conclusions. The churches played a strong role in the colonialization of Canada and the development of Canadian society. Both Catholics and Protestants settled Canada with the aim of transplanting the Christian society they had left behind in the new land they had come to inhabit. Bramadat and Seljak write that this aim could be viewed in a benevolent or dark way. On the one hand, the traditions and institutions of Christianity provided meaning, purpose and stability in a new world that seemed frightening to newcomers. The Church provided social and communal services. They helped to establish communities and gave individuals a sense of meaning and belonging. Church and state were

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62 Ibid, p. 32.

63 Ibid, p. 33.

64 Bramadat and Seljik (2008), p. 18.
interwoven; leaders from both religion and politics intermingled, with the assumption that the state would defend the interest of the Church and that the Church would inculcate in people the duty to submit to law. It had a darker side as well. These settlers believed that they were bringing what we now know as Canada under the control of a Christian monarch. Their goal was to civilize and Christianize people, and this extended to the Indigenous peoples who had lived on the land long before they arrived but were subsequently forced to give up their traditions and way of life for a new and foreign one.

The first Europeans to come to Canada were French Catholics whose aim was to create a Catholic empire in Canada. They founded the colony of New France in the 16th century. The Catholic Church was legally established in New France and exercised religious monopoly. It established schools, colleges, seminaries, hospitals and charitable institutions. Church and state were intertwined; New France was organized into parishes, and the parish pastor served as the civil administrator alongside a military administrator who handled security and policing. Parish priests collected information for government authorities, and used the pulpit to communicate government decrees to their parishioners. After 1627, a charter allowing only French Roman Catholics to settle in the colony reduced Protestant influence considerably. Protestants faced restrictions in the exercise of their faith and were unable to participate in government.

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65 New France originally comprised Quebec and the Maritime provinces. In 1713, the Maritimes came under British control and in 1755, Britain expelled most of the inhabitants from the Maritimes. Many of them fled to Louisiana but eventually returned and settled in the same region.

66 Bramadat and Seljik (2008), p. 22.


2.2 MANAGING RELIGIOUS DIFFERENCE

Beaman notes that the notion of religious difference and the necessity of managing or accommodating it was central to the colonial project of Canada from the beginning, which she suggests renders Canada distinct in comparison to the United States.\(^69\) This is not so obvious when the French were in power. The Catholic population was relatively homogenous compared to the Protestants that arrived later. But after the French defeat on the Plains of Abraham in 1760, the necessity of managing religious diversity became increasingly important. The British victory marked the beginning of British dominion over Canada. Now that Quebec was part of the British Empire, British Protestants could conceivably work towards the establishment of the Church of England. Yet they also faced the difficult task of how to integrate a large Roman Catholic Francophone population. The Treaty of Paris in 1763 did not clearly indicate what sort of treatment Catholics would receive. It stipulated that Catholics were free to worship "insofar as the laws of Great Britain permit". But very little in the way of religious freedom was allowed in Great Britain. Though the Church of England received privileges that the Roman Catholic Church did not, British governors increasingly gave greater autonomy to the French Catholics for pragmatic reasons. They recognized that Catholics were the majority and that forcing them to convert could lead to rebellion and alliance with the Thirteen Colonies in the south. In 1774, the British government enacted the Quebec Act which modified the status of the Province of Quebec. It was a pragmatic move to win support of the French in a time of political unrest.\(^70\) The


Act revoked the Royal Proclamation of 1763 on French law and allowed for the restoration of French civil law in the Province of Quebec. The Quebec Act also got rid of the Test Oath, which allowed Catholics to hold public positions without having to swear allegiance in contradistinction of their beliefs. Ogilvie writes that these “freedoms granted to the Catholics were unprecedented” at the time. The Catholic religion was officially recognized, and Catholic clergy could collect the tithe and fulfil their priestly duties. With their leading role in education, health care and other social services, the Catholic Church held powerful influence on society despite Protestant political power.

As the plurality and diversity amongst Protestants also increased, the need for accommodation only intensified. During the American War of Independence, Loyalists immigrated north to Canada. More immigrants arrived from England, Ireland and Scotland and settled in Upper Canada. Concerned about growing unrest amongst Protestant denominations in Upper Canada due to the unequal allocation of revenue from clergy reserves, the government relaxed the privileges given to the Church of England, and in 1840 divided clergy reserves among various denominations, though the Church of England and Church of Scotland still received most of it. The persistence of religious pluralism led to voluntarism, i.e. the idea that the state should not support an established church of clergy. Increasingly, people came to believe that support should

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71 Rosalie Jukier and Jose Woehrling “Religion and the Secular State in Canada” in International Center for Law and Religious Studies, 2010, p. 159, note that in other British territories and even in the United States, it took several decades more for Catholics to receive similar treatment.

72 Ogilvie (1996), p. 35.

73 Walsh (1956), p. 102.

be based on voluntary contributions which relied on the conscience of church members. In 1854, the clergy reserves were liquidated altogether. As the notion of an established church was put to rest, the belief that maintaining social order required conformity to specific religious beliefs taught by the established church was abandoned. Social and political stability was not dependent on the church, but rather on outside forces such as material prosperity and progress.

2.3 UNEQUAL TREATMENT OF RELIGION

Non-Mainstream Christians

While the existence of diversity amongst the Protestant denominations led to toleration and the beginnings of the separation of church from state, there were limits to this toleration. Catholics weren’t the only ones to experience intolerance. Non-mainstream Christians were even more disadvantaged, particularly Christian minorities that were communitarian rather than individualistic and perceived of religion as a way of life. William Janzen’s work on Mennonites, Hutterites and Doukhobors describes the treatment of these non-mainstream Christian religious communities, each of which wanted to pursue a way of life that was different from that of the larger society. He provides evidence that the government held to a narrow view of freedom of religion, which meant that people were free to believe and worship but not necessarily to pursue

[75 Marshall, p. 68.]

[76 Ogilvie (1996), p. 42.]

[77 For more on intolerance towards Catholics, see J. R. Miller, “Anti-Catholicism in Canada From the British Conquest to the Great War” in Creed and Culture: The Place of English-Speaking Catholics in Canadian Society, 1750-1930, ed. Terrence Murphy and Gerald Stortz. (Montreal, McGill-Queens University Press, 1993). Page]
an entirely different way of life. Janzen argues that the government did not consider this ‘way of life’ to be included in its early notions of freedom of religion. He claims that the government was concerned with the individual freedom to choose one’s religion or change it. An emphasis on ‘belief and worship’ rather than ‘way of life’ marginalized groups that strove to live in a communal way by holding their land in common; educating their children in their own community in accordance with their religious ideals and values; being exempted from military service; and maintaining autonomy from public social welfare programs.

Mennonites were the first to arrive, fleeing the United States after the American Revolution. They settled in what is now southern Ontario. In the 1870s, more Mennonites arrived from Europe and settled in Manitoba. In the 1920s, another group arrived from Russia. In 1900, Doukhobors emigrated from Europe, settled in Saskatchewan. Hutterites immigrated to Alberta from the United States at the end of the First World War. Later, some Doukhobors moved to uninhabited areas of British Columbia and Hutterites expanded into Saskatchewan. Each of these groups received promises of freedom of religion from the government. These promises came in the form of letters and Orders-in-Council, and included immunity from military service and oath-

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81 Kevin Christiano “Church and State in Institutional Flux” in *Rethinking Church, State and Modernity: Canada Between Europe and America*, ed. David Lyon and Marguerite Van Die (Toronto: University of Toronto Press, 2000), 77.

taking and freedom to educate their children. In addition, the Hutterites were promised the right to hold property in common and to be taxed accordingly. These promises were made to attract settlers to apply their agricultural skills to develop the country in frontier regions. Though they were accommodated somewhat, their freedoms were unstable. For the most part, these groups were not considered particularly threatening to the state, as they were peaceful and lived in relative isolation from the wider society. They were also of benefit to the country – promises were made to them because the government wanted to attract settlers who would live on the land and develop it. However, promises that were initially made were adjusted or revised as Canada developed and its values took shape and became entrenched; over time these groups faced increasing pressure to conform or integrate. Moreover, even amongst these groups, there was a disparity in terms of their treatment. Janzen explains that the Hutterite communal land holding was regarded as part of their religion, though earlier such practices of Doukhobors and the educational practice of both Doukhobors and Mennonites were not considered elements of religion. Moreover, Hutterite leadership was given authority to decide who was a member of their church for the purposes of granting membership in the colony, but during the two world wars, Mennonites were unable to make similar determinations about

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83 Ibid, pp. 27-33.

84 Beaman talks about how these groups slipped between a “normal” and “cult” designation in Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Seattle: University of Washington Press, 2007).


86 For this reason, neither the Mennonites nor Doukhobor communities were able to maintain their own school system despite earlier promises made by government officials. Promises were kept regarding conscientious objection. Janzen suspects this was influenced by longstanding recognition for conscientious objectors in military service. (Janzen (1981), p. 686.)
membership in order to claim military exemptions.\textsuperscript{87} Doukhobors were treated worse than the Mennonites and Hutterites because they were less subdued and less willing to adapt to governmental expectations.\textsuperscript{88} They also did not bring about the advantages the government had anticipated when it had initially promised them religious freedom. The land that they had held with the aim of cultivation was repossessed by the government in 1907. They also struggled to educate their children outside the state school system.\textsuperscript{89} On the other hand, Hutterites accepted much of the government’s curriculum. Their schools were officially in the public system. Their land holdings were not as large as those of the Doukhobors. Hence, they were perceived as less of a threat than the Doukhobors were to the political and social order, and were treated accordingly.\textsuperscript{90}

Of all the denominations, Jehovah’s Witnesses were least likely to be accommodated by the state, as they were even less willing to adapt than the Doukhobors. Jehovah’s Witnesses had been in Canada since the 1880s, but church growth in Canada did not begin until the 1930s. Though Christian, their beliefs about military service, proselytization and blood transfusions set them apart from the mainstream and made them the objects of persecution.\textsuperscript{91} During the two world wars, Jehovah’s Witnesses refused to salute the flag, sing the national anthem or recite the

\textsuperscript{87} Ibid, p. 681.

\textsuperscript{88} Ibid, p. 671.

\textsuperscript{89} Ibid, p. 681.

\textsuperscript{90} Ibid. p. 682.

oath of allegiance. In response to their perceived disloyalty, children were expelled from school, tried as juvenile delinquents and placed in foster homes. The state did not consider Jehovah’s Witnesses a religious organization. The right to conscientious objection existed only for “any organized religious denomination”; hence men of military service age were denied repeated requests for exemption. Those who did not serve when conscripted were sent to prison or work camps. In the First World War, a Jehovah’s Witness leader published a book disparaging militarism and arguing that it violated Christian values. This book and all other books published by Watchtower were banned in 1918. Their troubles continued in the Second World War. Their literature was outlawed under the War Measures Act. They were considered an illegal organization from 1940-1945, during which church property was seized and homes raided. Hundreds of Witnesses were imprisoned.

While they were perceived as unpatriotic in the rest of Canada, they were persecuted most vehemently in Quebec. Quebec with its strong Roman Catholic roots and the Jehovah’s Witnesses’ animosity towards the Church and active proselytizing led to inevitable tension. Kaplan writes that the aim of the Catholic Church in Quebec was to “make Quebec’s political life conform to the Roman Catholic concept in which truth is Catholicism”, and the federal

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94 Ibid, p. 18.
95 Ibid, p. 29.
96 Kaplan (1990), p. 67.
government placated the Church in an attempt to gain its support for the war effort. Even after
the Second World War, Maurice Duplessis, the premier of Quebec, waged, “war without mercy”
against them. They were prosecuted for their evangelical activities, and over 1500 people were
arrested. Duplessis fought and lost several court cases that centered on his harsh policies.

**INDIGENOUS PEOPLES**

The influence of Christianity significantly altered the lifestyles of Indigenous peoples. Indigenous peoples lived in what we now call Canada for thousands of years before the arrival of
the first Europeans. They had their own communities and participated in their own distinctive
cultural and spiritual traditions. Traditionally many Indigenous peoples did not separate

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97 Ibid, p. 62.

government); Saumer v. Quebec [1953] 2 S.C.R. 299, 106 C.C.C. 289 (which declared police censorship to be illegal); Chaput v. Romain, [1955] S.C.R. 834, 114 C.C.C. 170 (which affirmed the right to religious assembly);
Land v. Benoit, [1959] S.C.R. 321, 17 D.L.R 369 (which condemned the police for false arrest and malicious prosecution of a minister); and Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. 689 (which established the rule of law and condemned the Quebec premier for abuse of discretion in the exercise of his office). Kaplan makes the case that their efforts to fight against their discriminatory treatment helped define and entrench religious freedom in the Canadian Constitution. (pp. 270-271).


religion or spirituality from the rest of life. When missionaries arrived, their aim was to convert and assimilate the First Nations.\textsuperscript{101} Some Indigenous peoples were made to transition from a nomadic lifestyle to one of agriculture. When this project failed, they were encouraged to settle on reserves. These reserves were negotiated by numerous treaties. Thousands of acres of land were sold to colonists, with the proceeds used to finance the administration of these reserves. In the process, Indigenous peoples were displaced; their relationship with the land was disrupted; and their access to sacred sites was lost.

In 1867, the British North America Act gave the federal government responsibility for the affairs of the Indigenous peoples and their lands. With this legislation, the Canadian government adopted the paternalistic traditions of the British administration. The Indian Act was adopted in 1876 with the goal of ‘civilizing’ Indigenous peoples, considered wards of the state, through protection, education, assimilation and conversion to Christianity. Indigenous individuals were prevented from testifying and having their cases heard in court. Alcohol consumption was banned. There were restrictions on eligibility to vote in band elections. There were further restrictions on hunting and fishing areas. Over a period of decades, the Indian Act became increasingly restrictive; it criminalized common cultural and religious practices of the First Nations, including dances, potlaches and ceremonial rituals; these prohibitions remained in effect until the 1950s.\textsuperscript{102}


From 1849 to 1996, the federal government funded church-operated residential schools that aimed to Christianize First Nations children. 132 of these schools operated across Canada, run by the Catholic, United, Anglican and Presbyterian churches. More than 15000 children attended residential schools in this period. Children were forcibly removed from their homes and taught the same subjects as Canadian children in an attempt to diminish the influence of family and community and assimilate them into Canadian culture and religion. They were forbidden from speaking their ancestral languages or practicing religious rituals. This led to a loss of culture, spirituality and community.

The historical intolerance and discrimination experienced by non-mainstream Christians and Indigenous peoples demonstrate that political and legal recognition and protection of religion was limited to Christian elements in other groups and communities and was only minimally expanded. These communities’ struggles to be accommodated and integrated into largely Christian structures of power was perceived to have been overcome with secularization and the advent of the Charter era. As I will demonstrate later in this chapter, s. 2(a) has been construed such that these groups continue to experience marginalization and exclusion.

2.4 DESECULARIZATION OF CANADA

Canada secularized gradually. When the British North America Act, or Constitution Act, was enacted in Canada in 1867, there was no mention of an established church. The Constitution did

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not protect state religion and did not offer financial support for churches. However, the new entity was called the “Dominion of Canada”, which in part reflects its Christian foundations.\textsuperscript{104} Most of Canada’s inhabitants were Christians; hence Canadian culture remained Christian. Social institutions were organized on religious lines. Education remained Christian, with explicit protection in the Act given to the funding of Roman Catholic and Protestant schools in the provinces in which they were minorities.\textsuperscript{105} The churches came to be perceived as co-extensive with the modern state. Bramadat and Seljak have argued that mainstream Protestant churches (Anglicans, Presbyterians and the United Church of Canada) along with the Roman Catholic Church formed a plural establishment, in contrast with the United States’ wall of separation between Church and state, which lasted until the 1960s.\textsuperscript{106} The government formally recognized a limited number of mainstream denominations and supported their work. In turn, the churches aided the state as it expanded its control over the country. According to Christie and Gauvreau, the churches also helped steer the policies of the modern state and functioned as one of the most important vehicles by which values were infused into public institutions and the private lives of Canadians.\textsuperscript{107} Political leaders did not have the capacity to help the vulnerable segments of the population, so churches offered a range of services for the poor and needy. They founded universities and hospitals. There were shared initiatives between the government and the

\textsuperscript{104} The name “Dominion of Canada” is taken from Psalm 72:8 (“He shall have dominion from sea to sea and from river unto the ends of the earth”. So too is the motto of Canada and its coat of arms.

\textsuperscript{105} S. 93 (2) of the Constitution Act, 1867: In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: All the Powers, Privileges and Duties that the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec.

\textsuperscript{106} Bramadat and Seljak (2008), p. 11.

\textsuperscript{107} Christie and Gauvreau (which one), p. 15.
churches, including the residential school system for Indigenous peoples. There were laws protecting the Lord’s Day. Laws and popular attitudes towards marriage, abortion and sexuality continued to be influenced by Christianity.\textsuperscript{108} The assumption was that Christian values were the values that Canadians shared collectively.\textsuperscript{109}

Historians studying secularization in Canada have noted that the late nineteenth and early twentieth centuries were the beginning of the decline of the church.\textsuperscript{110} David B. Marshall and Ramsay Cook, proponents of the secularization thesis, have both argued that Protestant religious leaders, while seeking to adapt to the rapidly changing times, instead lent greater credence to secular movements and gradually faded into irrelevance.\textsuperscript{111} In the early part of the twentieth century, political and economic modernization created new realms of secular activity. Bramadat and Seljak point out that by the 1920s, the powers of the state had rapidly expanded, and provincial and federal governments had begun to constrain the powers of the churches and to


\textsuperscript{109} Ibid, p. 327.

\textsuperscript{110} Secularization is a contested term, but in this chapter it refers to the process whereby the mainstream Protestant churches withdrew their authority and ceded control of Canadian society. Use of the term secularization in the context of Canada need not mean the complete decline of religion. Shiner has offered a list of six different understandings of secularization, including a) decline of religion, where previously accepted religious symbols, doctrines and institutions lose their social significance; b) increasing conformity with the world, whereby religion becomes oriented towards matters of this world over those of the next; c) disengagement with the social world, where religions give up functions and loses its social influence, withdrawing to a separate or private sphere; d) transposition of religious beliefs and institutions, where things which were once seen as grounded in divine power are considered human creation and responsibility; e) desacralization of the world, where scientific and rational explanations overtake faith and sacred meaning; and f) movement from sacred to secular society, where religion loses its central place in society and shares the marketplace with competing ideas and worldviews (Alan Shiner, “The Concept of Secularization in Empirical Research” in \textit{Journal for the Scientific Study of Religion} (6) (1966) : 207-220.

take over areas of social service.\textsuperscript{112} In response to increasing competition, mainstream Protestant religious leaders undertook a series of innovations in their practices to draw the population back into church involvement.\textsuperscript{113} One such innovation was the Social Gospel. Churches became the primary lobby group for a wide range of legislation concerning temperance, the creation of foster homes, and the reformation of child labour laws.\textsuperscript{114} The Cooperative Federation of Canada, a precursor to the New Democrats, was developed out of social gospel principles. It introduced universal health care, family allowance and old age pensions.

There is disagreement among historians about the impact of changes like this one. Michael Gauvreau argues that despite facing conflict within and criticism from without, mainstream Protestantism remained flexible and adaptable and was thus able to adopt new techniques, such as social evangelism, to retain authority and relevance.\textsuperscript{115} Gauvreau contends that the churches were not merely victims of secularization. Rather, the churches were active in enhancing their social relevance and authority. In contrast, Ramsay Cook saw the social gospel as the failure to properly engage with the intellectual challenge and historical criticism of the Bible. Rather than grapple with theology to address troubling doctrinal concerns confronting the church, religious leaders sought to transform Christianity into a social religion concerned with the living conditions of Canadians. In Cook’s view, this shift in beliefs and values was an important aspect


\textsuperscript{113} Marshall (1985), p. 11.


\textsuperscript{115} Michael Gauvreau, The Evangelical Church: College and Creed in English Canada from the Great Revival to the Great Depression (Montreal, McGill-Queen’s University Press,1991), 5-6.
of the process of secularization. Other institutions became better equipped to perform the social roles once fulfilled by the church, and this left the church without a relevant place in the lives of Canadians.

By the 1940s, the earlier emphasis on social Christianity was slowly being scaled back. Christie and Gauvreau describe the Protestant and Catholic churches’ response as the modern state expanded further after the Depression and their roles in the public sphere narrowed. The churches shifted focus from social to personal evangelism.\textsuperscript{116} Increasingly, there was a sense that the best way to bring about the Kingdom of God on earth wasn’t through direct management of the social sphere by the church, but rather by sending forth Christian individuals into a secular world.\textsuperscript{117} This was the case amongst both Protestants and Catholics, who were concerned about the modern Canadian state, which was rapidly expanding in the aftermath of the wars.\textsuperscript{118} In large part, the churches’ individuation and privatization was a response to public pressure to liberalize. Christie and Gauvreau explain that the churches were grappling with the sexual revolution and popular appeal of women’s rights. Women were searching for greater satisfaction in their private lives. They increasingly wanted to enter the workforce, which necessitated rethinking by the church authorities on marriage, birth control, sexuality and family life. For example, in the 1950s, the Catholic Church felt compelled to reevaluate the value of marriage; earlier, the Church had allowed for a limited form of birth control, which suggested that marriage had other

\textsuperscript{116} \textit{Christian Churches}, 177.

\textsuperscript{117} \textit{Christian Churches}, 177.

\textsuperscript{118} \textit{Christian Churches}, 181.
purposes besides procreation.\textsuperscript{119} Around the same time, the United Church revised its understanding of sex within marriage, which was now viewed as sacramental rather than sinful.\textsuperscript{120} It also increasingly came to accept contraception and abortion and moderated its view of homosexuality.\textsuperscript{121} Christie and Gauvreau admit that the privileging of the personal conscience over the institution, rather than being a solution, created internal rifts. There was no consensus within the churches about whether the church as an institution should play a role in institutions like labour unions, government, businesses and social movements, or whether social reform should be through the actions of Christian individuals interacting with others in the classroom and workplace. This rift between the centrality of the individual and the older traditional centrality of the hierarchy or authority saw members leave the Catholic Church and the divisions between conservative and progressive Protestants intensified. Moreover, this shift towards personal conscience diminished the relevance of the churches. Once notions of sexual morality evolved, other social codes and conventions were also up for consideration. This made it difficult for the churches to retain their influence. By 1965, the churches were on a steady decline, and non-institutional forms of Christianity were gaining significantly as Canadians increasingly sought to live according to their personal religious beliefs and values.\textsuperscript{122}

\textsuperscript{119} Christian Churches, 195.
\textsuperscript{120} Christian Churches, 197.
\textsuperscript{122} Christian Churches, 199.
There is a sharp difference in the historical timeline of secularization amongst Protestants and Catholics.\textsuperscript{123} The Catholic church continued to exercise authority in the fields of education, health services and welfare until the Quiet Revolution.\textsuperscript{124} By contrast, in the 1840s, Protestant Canada had already experienced the beginnings of the separation of church and state as a result of existing pluralism and dissent within Protestantism. Marshall contends that diversity was present in 19\textsuperscript{th} century Canada, as different denominations, albeit all of them part of the Protestant mainstream, found themselves interacting in a vibrant but fluid religious environment in which many early communities lacked a church or permanently stationed clergymen.\textsuperscript{125} Amongst Catholics, religious diversity wasn’t as significant. Moreover, because religion was considered integral to identity, religion resisted secularization. Marshall explains that after the rebellions of 1837-8, amid fear of assimilation, the Catholic church was increasingly seen as crucial to French Canadian survival. It was the religion of a minority struggling to maintain its identity. Thus, there was a devotional revolution in Catholicism which led to the renewal of religious life and strengthening of the Church’s role.

Marshall points out that Catholicism was better able to withstand modernity than Protestantism, which relies heavily on the Word of God in the Bible as the ultimate and only source of authority and doctrine. When the Bible came under question in the age of modern science and Darwinism, Protestantism became vulnerable because it was so dependent on the Scriptures. In contrast,

\textsuperscript{123} David Lyon “Introduction” in Rethinking Church, State, and Modernity: Canada Between Europe and America. (Toronto: University of Toronto Press, 2000), 5.

\textsuperscript{124} Marshall (1985), 65.

\textsuperscript{125} Ibid, 64.
modernism did not threaten lay devotional life within Catholicism as directly. As Marshall argues, “those very elements of Catholicism that Protestantism had rejected or was highly critical of – the authority of Church Fathers, emphasis on the Eucharist instead of the Word, attention to traditional Latin liturgy, the veneration of saints and relics, Marian devotion – were the very things that allowed Catholicism to better withstand the secularizing pressures that so affected Protestants.” Marshall claims that the attempt to adapt fostered a faith removed from a sense of mystery and the supernatural. Without a strong religious narrative at play in every aspect of daily life, religion diminished in importance.

Given the paucity of Canadian historical studies on the subject, it is not clear whether there was something unique to Canada itself that characterized its secularization. It is important to note too that there is little consensus on the genesis of secularization more generally, much less in Canada. Despite the lack of clarity concerning secularization, what is clear is that even as Christianity exercised power and influence in the Canadian state, it experienced pressure. Both Protestant and Catholic leadership struggled to adapt to remain relevant in response to popular pressure, the demands of the state, and the rapidly changing times. However, the strategies the leadership adopted to address the needs of their age were all unsuccessful in staving off institutional secularization. Between 1960 and 1982, the state rapidly disentangled itself from

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126 Ibid, 11.


Christianity. The state abandoned most aspects of the Christian moral code that existed in the law (e.g. divorce and criminal code reforms in 1967), which led the way for the establishment of the Charter in 1982. In Quebec, the Catholic church retained its responsibility for social services until 1959. Between 1960 and 1970, the state took over the direct management of public education from the Catholic Church and de-confessionalized hospitals and social services. Though we may not know the exact contours of secularization, and though in Canada there is no explicit affirmation of the strict separation of church of state or secularism in the Constitution, the courts have interpreted the Constitution as if it were secular. For example, in Rodriguez v. British Columbia (Attorney General), former Chief Justice Antonio Lamer argued that "the Charter has established the essentially secular nature of Canadian society.\(^{129}\) In Chamberlain v. Surrey School District No. 36, the Supreme Court offered a definition of secularism in the Canadian context. The court noted that, “secularism does not rule out…any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community.\(^{130}\) Hence secularism does not mean the exclusion of religion; rather, it entails an equality amongst all religions and non-religions.\(^{131}\)

2.5 PERSISTING CHRISTIAN IMPACT ON SOCIETY


\(^{130}\) Chamberlain v. Surrey School District No. 36, supra note 83 at para. 19.

\(^{131}\) See Ian Benson, who has written extensively on the need to define secularism in a manner that does not preclude religion. Ian Benson, “Notes Towards a (Re)Definition of the “Secular”” in University of British Columbia Law Review (33) (2000): 519.
Nevertheless, elements of Christianity remain embedded in Canadian society. The preamble of the Constitution reads: “Whereas Canada is founded on principles that recognize the Supremacy of God and the rule of law…”\textsuperscript{132} The national anthem includes reference to God: “God keep our land glorious and free!” The French version of the anthem is even more explicitly Christian: “Car ton bras sait porter l' épée, Il sait porter la croix!” which translates: “For your arm knows how to wield the sword; Your arm knows how to carry the cross!” The official title of Canada’s head of state is Elizabeth the Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.” The phrase “D. G. Regina”, or “dei Gratia”, which means, “Queen by the Grace of God” still appears on many Canadian coins. Some provincial and municipal governments open sessions of legislature or council with Christian prayer and require an oath to God in the courtroom. 21 pieces of federal legislation refer to “God”, 17 to “religion”, 4 to “Christian” and 1 to the “Bible”. Eleven pieces of legislation require the swearing of an oath to God.\textsuperscript{133}

One might counter that all the above are mere symbolic references to Christianity, remnants of the past. But Christian holy days like Christmas, Good Friday and Easter are still statutory holidays. The work week is still organized around the Christian Gregorian calendar (and day of rest). Many of the existing social services in Canada are now state-funded secular versions of what were originally Christian initiatives. In fact, churches continue to operate some healthcare


\textsuperscript{133} Religion and Ethnicity in Canada, 172.
and social services organizations which adhere to Christian values (e.g. St. Michael’s Hospital does not perform abortions). State support for Roman Catholic separate schools remains, though education is a provincial jurisdiction, so funding varies from province to province. Ontario’s funding scheme for schools is guaranteed by the Constitution Act, 1982 and provides funding for the public system (which was Protestant until the 1960s) and a separate Roman Catholic school system. No other forms of schools, religious or otherwise, receive provincial support. In Saskatchewan, Alberta and the North West Territories, provincial charters also provide funding for Roman Catholic schools. Manitoba’s Catholic schools were suppressed for a while but are now funded in concordance with its provincial charter. In Nova Scotia, New Brunswick and Prince Edward Island, though separate schools are not mandated, political compromises and administrative arrangements have made funding possible. The government of British Columbia funds Roman Catholic schools, like all other private schools, up to 60% of the amount that public schools receive.

Moreover, one cannot ignore the fact that Christianity still has a demographic advantage, though it has diminished in recent years. Canadian censuses show that two-thirds of Canadians continue to identify as Catholic or Protestant. This percentage has dropped significantly over the last four decades, with the percentage of Catholics dropping from 47% to 39% and the percentage of Protestants falling from 41% to 27%. The number of Canadians belonging to other religions is growing, but not significantly, from 4% in 1981 to 11% as of 2011. But the number of Canadians who do not identify with any religion has been rising rapidly, from 4% in 1971 to 24% in 2011.

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2.6 NEUTRALITY AND UNDOING CHRISTIAN PRIVILEGE

Several Supreme Court rulings have reflected a concern with undoing Christian privilege. The Court has demonstrated a receptiveness to the claims of religious minorities or outsiders and an interest in ensuring that majoritarian religious views are not privileged by the state or imposed on minority believers, particularly in early Charter cases. In these cases, the Supreme Court has argued that what appears to be neutral may not have a neutral impact upon the protection of religious freedom; hence, section 2(a) can be violated by the indirect effects of facially neutral law.

Ryder points out that the Canadian conception of neutrality between religions is more expansive and robust than its American counterpart.\textsuperscript{135} He differentiates between two kinds of neutrality: neutrality between religions and neutrality towards religion. But though the Canadian conception of neutrality is wider than that of the United States, it has not been completely effective at removing Christian privilege, especially in the sense of compelling government to adjust their laws or policies to eliminate imbalances in terms of religious freedom. Moreover, it has not managed to protect the religious freedoms of all equally.

Richard Moon reminds us that the state cannot act in a completely neutral way.\textsuperscript{136} It must make laws, which, even though secular in intent, may favour some religions over others. Moreover, in

\textsuperscript{135} Bruce Ryder (2005), 173.

a society in which a significant portion of the population is Christian, the state may find it
difficult to ignore their widely followed (religious) practices. Moon notes that if Christmas is a
day that most Canadians consider a holiday, then it makes no sense for the state to select another
holiday merely to avoid the perception that Christianity is being favoured. The state cannot
establish laws that have a religious purpose, but if community life has been shaped by religious
practices, or practices with religious roots, then the state cannot ignore religion when making
public policy or remove all traces of religion from the law or civic sphere.

Nevertheless, even if we acknowledge that it is not coherent to speak of any position as being
philosophically or religiously neutral, the state remains subject to a duty to avoid laws or policies
that have the purpose or effect of interfering with the exercise of religious freedom of all of its
citizens, and not just the majority. Failing to provide positive protection for individuals from
minority religions or no religions will result in a de facto favoring of majority religions which are
culturally entrenched.

An examination of case law below will demonstrate the struggle Moon has described above. The
Charter was instrumental in reducing the residual effects of historic religions and morals in the
Canadian public sphere. The Supreme Court has deemed many laws unconstitutional that
reflected Christianity, but in two significant cases, Edward Books and Adler, the level of access
and support individuals from majority religions receive from the state is not the same as that
received from individuals from minority religions or no religion. Hence remnants of Christian
privilege remain.
Sunday closing

In **R. v. Big M Drug Mart**\(^{137}\), the Supreme Court struck down the Lord’s Day Act. The legislation criminalized the sale of goods or merchandise on Sundays and prevented individuals from working. Though the law did not require that anyone worship or rest on this day, the Court ruled that it compelled sabbatical observance. In his decision, Chief Justice Dickson wrote that freedom requires the absence of coercion, and maintained that coercion includes, “indirect forms of control which determine or limit alternative courses of conduct available to others”. He wrote that the Charter safeguards religious minorities from the threat of “the tyranny of the majority”.\(^{138}\) The Lord’s Day Act coerces the observance of the religious institution of the Christian Sabbath, which is contrary to the spirit of the Charter and violates the dignity of non-Christians:

To the extent that it binds all to a sectarian Christian ideal, the *Lord’s Day Act* works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the


\(^{138}\) *Big M*, at para 96.
legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.\textsuperscript{139}

The court maintained that though the law’s effects were secular, it had a religious purpose and coercive religious effect in imposing a religious viewpoint on those who did not share that view. It further differentiated its understanding of s. 2(a) from earlier understandings of freedom of conscience and religion: protecting this right did not require identical treatment of all religions; a commitment to the principle of equality might necessitate differentiation in treatment. This early Charter case made a strong argument for the protection of minority religion against majority morality.

However, in \textbf{R. v. Edward Books and Art}\textsuperscript{140}, another case concerning the constitutionality of Sunday closing laws, the Supreme Court ruled that the Ontario Retail Business Holiday Act violated section 2(a) but could be upheld as a reasonable limit under section 1 of the Charter. The provincial law was worded differently than its federal counterpart, stating only that the province aimed for a common pause day. More significantly, the provincial government, unlike the federal government, had jurisdiction to regulate intra provincial trade of business. Dickson argued that the legislation was not a “surreptitious attempt to encourage religious worship.”\textsuperscript{141} Rather, the Court held that the purpose of the law was to establish a uniform holiday and day of rest for workers, which was a legitimate secular purpose. The court considered the possibility that the selection of Sunday would

\textsuperscript{139} \textit{Big M}, at para 337.

\textsuperscript{140} \textit{R v Edwards Books and Art Ltd [1986]} 2 S.C.R. 713.

\textsuperscript{141} \textit{Big M}, at 744.
have the effect of benefiting those who attend church on that day. Dickson noted that this would privilege the majority religious preference and discriminate against the minority, particularly those who observed Saturday as the Sabbath and would find it costly to close on Saturdays and Sundays. The Court admitted that even though the law did not intend to favour or support Christian religious practices, in effect it did just that. Though Dickson argued that the law violated section 2, he accepted that the law was a reasonable limit; it did not impose a substantial burden on minority religious believers because exceptions, albeit narrow and restricted, existed in the law for small stores employing less than eight workers that closed on Saturdays. Dickson wrote:

Section 2(a) does not require the legislature to eliminate every miniscule state-imposed cost associated with the practiced of religion…the purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs…legislative or administrative action which increases the cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial.  

Despite the limited restriction, which did not apply to all stores, the Court found that the restriction limited freedom in an inconsequential way and hence was justified. The ruling deferred to the state, and left in place legislation that, according to the Court’s earlier ruling, would seem to impose a burden on religious minorities who do not worship on Sundays. 

Religion in public schools

142 Big M, at 759.

143 British Columbia and Saskatchewan soon overturned their provincial Sunday closing laws on the grounds that there were insufficient exemptions provided for those who did not observe Sunday.
In *Zylberberg v Sudbury Board of Education (1988)*\(^{144}\), the Ontario Court of Appeal declared state-sponsored prayer and religious instruction a violation of s. 2(a). The law stipulated reciting scripture and the Lord’s Prayer and Bible readings at the opening or closing of each day in the public school system. The Court ruled that forcing students to participate in devotionals or mark themselves as outsiders by choosing not to participate constituted a violation of s. 2(a). The ruling established that majoritarian religious indoctrination and coercive religious practices were not acceptable within a diverse public school system.

In *Canadian Civil Liberties Association v Ontario (1990)*, parents complained that school regulations required two periods of religious instruction every week. The curriculum including other religions as well, but the emphasis was on inculcating Christian values. Although the school allowed students to be exempted, the Court ruled that:

> State-authorized religious indoctrination amounts to an imposition of majoritarian religious beliefs on minorities…teaching Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the classroom. It creates a direct burden on religious minorities who do not adhere to majoritarian beliefs.\(^{145}\)

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\(^{144}\) Zylberberg v Sudbury Board of Education [1988], 52 DLR (4\(^{th}\)) 577.

\(^{145}\) *Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990), 71 O.R., at para 23-24.
Both programs were defended because parents could exempt their children from participation. In both cases, the Ontario Court of Appeal held that the exemptions did not protect religious freedom because the schools were promoting Christianity, and non-Christian students would feel pressured to conform to the majority’s beliefs. This concern for minority religious beliefs goes beyond earlier rulings in Big M Drug Mart and Edwards, as the Court acknowledged that exemptions are not sufficient. In Zylberberg, the Court wrote that, “the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant group.”\textsuperscript{146} The Court ruled that exemptions have a “chilling effect” on religious choice, as it requires students to separate themselves from their peers, thus discouraging them from exercising freedom of religion. Likewise, in Canadian Civil Liberties Association, the Court noted that the state cannot use peer pressure to promote a particular religious viewpoint because s. 2(a) protects non-believers from having to conform with the religious practices of the majority.

In \textit{Chamberlain v Surrey School District No 26}, a public school board banned the use of books depicting same-sex relationships out of concern that K-1 students were too young to be exposed to such content and that parents’ religious sensibilities would be offended. Chief Justice McLachlin quoted expensively from the Court of Appeal decision, which noted that public schools must recognize and respect the diversity of Canadian society, which includes “adherents of non-Christian religions and persons of no religious conviction”.\textsuperscript{147} The case is significant because the decision redefines “strictly secular and non-sectarian” in the School Act to now extend to other belief

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\item \textsuperscript{146} Ibid, at para 592.
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systems beyond the “Christian context of various denominations and sects”. Public schools are obliged to consider religious and non-religious beliefs when making decisions about what to teach.

Prayer in City Council

In Freitag v. Penetanguishene (Town)\(^\text{148}\), a resident of the city claimed that he felt pressured to stand and recite the prayer while attending city council meetings, even though there was no explicit coercion. The Court examined the purpose of starting these meetings with a recitation of the Lord’s Prayer and found that it was “to impose a specifically Christian moral tone on the deliberations of the Town Council”. It ruled that this violated s. 2(a). The Court expressed concern that those attending public meetings be free from any pressure to conform to the religious practices of the majority. The Court was concerned with ensuring that public space is not exclusionary and does not create an impression that non-Christians are not equally worthy members of the political community.

In Mouvement laïque v. Saguenay\(^\text{149}\), the Supreme Court ruled that the municipal council could not open or close its meetings with group prayer. At the start and end of each meeting, the mayor would recite a prayer after making the sign of the cross while saying, “in the name of the Father, the Son and the Holy Spirit”. The court pointed out that this practice created a preferential space for those with religious beliefs and resulted in distinction, exclusion and preference based on religion.\(^\text{150}\) It further ruled that the state’s duty of neutrality required that state authorities not hinder

\(^{148}\) Freitag v. Penetanguishene (Town) 2013 HRTO 893.

\(^{149}\) Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3

\(^{150}\) Ibid, at para 120.
or favour any particular belief, and that includes non-belief, even under the guise of cultural or historical heritage. The court expressed concern that even if the prayer was non-denominational – and it had not been established that it was – it nevertheless excluded non-believers. The ruling aimed to preserve freedom from religion.

**Marriage**

In *Reference Re Same-sex Marriage*, questions were put to the Supreme Court regarding the constitutional validity or proposed same-sex marriage legislation, in which marriage would be defined as “the lawful union of two persons to the exclusion of all others”. the Court was concerned with undoing Christian bias in the definition of marriage in common law. The Court referred to a definition of marriage which had been articulated in 1866: “…marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”151 This understanding of the nature of marriage was entrenched in common law with the establishment of the Constitution Act, 1867.

The Court noted that:

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The reference to “Christendom” is telling. 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.\textsuperscript{152}

The Court ruled that the definition of marriage could evolve to reflect the changing times.

**Equalizing funding for religious schooling**

In *Adler v. Ontario (1996)*\textsuperscript{153}, parents challenged the lack of financial support for their children’s private religious schools. Ontario funds Roman Catholic schools but does not provide funding for other religions. A group of religious minorities appealed to the Supreme Court to advance religious equality in the realm of education. They made the case that they felt compelled to send their children to schools consistent with their religious worldview. This created an unfair financial burden. They argued that the lack of equal funding violated s 2(a) and 15(1). The Supreme Court ruled that the funding of Roman Catholic schools was required by section 93(1) of the Constitution, and that s. 29 of the Charter exempts all rights guaranteed under the Constitution from being challenged. But religious minorities were not asking for the withdrawal of funding to Catholic schools; rather, they were seeking equal funding for all religions. The Court ruled that the Charter did not create a constitutional obligation to extend funding to religious schools. Justice Iacobucci wrote that the provinces are free to fund private religious schools if they choose, but the state was not required to equalize the funding of religious


schooling. Yet the state was willing to fund secular schools in addition to Catholic schools. This case demonstrates that the positive obligation to religious freedom is not guaranteed. The Court in effect granted Catholic students greater rights to education than students from minority religious groups. Our discussion of religious neutrality above led to the conclusion that Canadian governments must remain neutral between religions. They may extend support to religion so long as they do so in an even-handed manner. But in Adler, the Court fell short of supporting religion equally; the privilege afforded to a dominant religious grouping was left unchecked for constitutional reasons. One could argue that historically Catholics were a minority group; however, they are no longer disadvantaged compared to minority religious groups in the field of education. The goal of passing on tradition and religion of minority religious groups is left to be achieved through private education, perceived as a choice rather than an obligation, while Catholic education is financially supported by the state.

2.7 CONTESTING LAW’S NEUTRALITY: “FREEDOM OF CONSCIENCE IN RELIGION”

A wide range of scholars in the field of political theory have recently begun to interrogate the universality and neutrality of law and the hegemonic influence of the Protestant establishment in the Western world, drawing from the works of Asad and Masuzawa among others.\textsuperscript{154} They contend that a historical Protestant (or more broadly, Christian) concept of religion became legally entrenched and was perceived to be normative, universal and neutral even while it

continued to privilege Protestant, liberal understandings of religion as individual, private and voluntary. The better beliefs and practices are at conforming to this norm, the more likely they are to be recognized and protected. Among these thinkers are Sullivan and Taussig-Rubbo, both of whom contest the notion that law is autonomous, universal, secular, neutral and rational.\textsuperscript{155} They argue that concepts like secularism, religion and the law have been destabilised in academic discourse recently, and that an ostensibly religiously neutral modernity privileges certain types of religion over others. Jose Casanova advances the argument that secularism is not neutral and suffers from a deep-rooted liberal bias for Protestant subjective forms of religion and for a differentiation of the public and private spheres.\textsuperscript{156}

Beaman and Berger write more specifically in the context of Canada. Beaman offers an extended critique of Canadian religious hegemony, which she says creates boundaries of religious normalcy around particular beliefs and practices. According to Beaman, mainstream Protestantism and Catholicism determine what constitutes normal religion. Beaman interrogates Sullivan’s argument about the privilege of Protestant understandings of religion in the context of Canada, pointing out that Sullivan’s thesis is slightly weaker in Canada than it is in the United States.\textsuperscript{157} She gives a number of reasons for this difference. The embeddedness of Roman Catholicism in Canada’s social structure has resulted in a recognition of the multifaceted nature


of the category of religion. Moreover, the recognition of group rights, including a recognition for multiculturalism, means that there is space for alternative religious discourses. The Supreme Court has also increasingly emphasized the subjectivity of religious freedom, which has allowed for interpretations of religion in ways that are in keeping with the way that individuals understand and practice it in their daily lives. In other words, the scope for religious freedom is wider in Canada than it is in the United States. Beaman proposes instead that there is a Protestant/Catholic/First Nations spirituality tripartite in Canada. The historically strong presence of Roman Catholicism, Beaman says, combined with the spiritualties of Indigenous, makes narrower, belief-based conceptualizations of religion less palatable in Canada. Beaman’s argument here is perhaps too optimistic, as Roman Catholic influence is marginal; Indigenous influence even less so. She does not detail what precisely she means about Roman Catholic influence, but one could argue there are two elements of this influence, both of them minimal: first, Catholics forced Protestants to be accommodating well before confederation, and second, Catholics have exerted (and continue to exert) cultural influence in Canada. However, outside Quebec, influence is minimal in the conception of law beyond educational provisions made for Catholics.

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158 Beaman argues that the religious hegemony in Canada looks slightly different than in the United States, where Roman Catholicism has been “somewhat marginalized”. She uses the term Protestant/Roman Catholic hegemony. She notes that the term “Christian hegemony” is problematic because there are several marginalized Christian groups in Canada. See Lor Beaman, “The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada” in Journal for the Scientific Study of Religion, 42 (3) (2003) : 313.


Berger argues that law shapes religion in its own ideological image and likeness. He makes the case that Canadian constitutional law’s image of religion is composed of three elements: First, it is individual. Religion is portrayed as a personal connection between the individual and the object of his or her spiritual attention. Relatedly, religion is an expression of personal autonomy, which entails the right of the individual to make choices and his or her spiritual life. Third, religion is a private matter, and hence is bound by preference rather than reason. Berger’s argument is convincing, as it is in line with court decisions. The courts have themselves linked freedom of religion with the Protestant tradition. In *R. v Big M Drug Mart*, Chief Justice Dickson pointed to the historical context of freedom of religion, claiming that “the origins of the demand for religious freedom can be found in the religious struggles of post-Reformation Europe” Dickson argued that “even among those who shared the basic beliefs of the ascendant religion”, there was an increasing opposition to the notion that belief could be coerced. There was a sense that compelling belief or practice “dishonoured the God that had planted [conscience] in His creatures.” Dickson claims that this is the basis of the concepts of freedom of conscience and religion that make up s. 2(a). Where Berger’s analysis weakens is that he leaves out the ‘conscience’ aspect of s.2 in his analysis, and it is here that I wish to intervene.

In what follows, I demonstrate that Canadian law protects “freedom of conscience in religion” rather than “freedom of conscience and religion”. Freedom of conscience in religion entails the privileging of claims on the basis of belief rather than practice stemming from tradition, community or way of life. It also entails the privileging of religious beliefs and practices over non-religious beliefs and practices. I will turn to case law to demonstrate this privileging, as it is an important indicator of a society’s treatment of religion. Though religious minorities may win
or lose cases, the arguments that are employed to reach a decision tell us what the courts consider most important. I will show that claims that cannot establish the use of conscience in religion are given less of a priority by the courts. Claims that concern the protection of conscience outside religion are also less likely to be recognized. I will explore the theme of “freedom of conscience in religion” by looking at three groupings: 1) minority religious communities (including non-mainstream Christians) that may not prioritize conscience in the same way as the mainstream, 2) Indigenous peoples, and 3) individuals acting on their conscience without connection to religion. Because space is limited, I have confined my analysis to the most significant Supreme Court judgements dealing with section 2(a).

2.8 MINORITY RELIGIOUS CLAIMS

In Syndicat Northcrest v. Amselem, the Court emphasized the importance of belief in the protection of religion. This is perhaps the most contentious case for those who dispute the need for exemptions for religion, as the Court extended the individualistic reasoning introduced in R. v Big M Drug Mart by ruling that a belief or practice may be protected under s. 2(a) even if it not considered obligatory by the individual or deemed an established or widely held part of the religion. The Court ruled that a condominium association had violated Orthodox Jewish residents’ freedom of religion by denying them the possibility of constructing succahs on their balconies in accordance with the building’s by-laws, which the co-owners had signed.¹⁶¹ Though

¹⁶¹ This case involved a condominium association, not a governmental organization. Hence, the Charter of Rights and Freedom was not applicable. Instead, the case was tried under the Quebec Charter of Human Rights of Freedoms. However, the Court held that the principles stemming from the case are applicable under the Charter as well.
the construction of a succah was not considered a religious obligation, the Court did not want to concern itself with debating whether the belief or practice in question counted as religious doctrine; instead, they were more interested in the spiritual significance of these beliefs or practices for the individual.

Justice Iacobucci, writing for the majority, offered a broad definition of religion. He wrote:

…Religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.¹⁶²

This definition suggests that the law’s protection of religion is oriented towards the individual. Religious beliefs are ‘freely and deeply held’ and define and fulfil the individual. On the other hand, religious practices stem from beliefs and are of secondary importance. The individual in this determination is ‘free’. This definition of religion divorces community or communal religious standards from the individual believer; religion may be protected even if it is not part of the commonly accepted body of religious beliefs. The definition offered here also implies a wider scope of protection than was previously imagined based on court rulings. An individual need not prove that his or belief or practice is accepted within a particular community or according to a belief system or religious authority. Moreover, beliefs and practices can be protected if they have religious significance to the individual even if he or she does not consider

¹⁶² Amselem, at para. 39.
it objectively obligatory. Beaman argues that this conception of religion is subjective; the Court is primarily concerned with the sincerity of the individual’s belief.\(^\text{163}\) Moon contends that if religion does not require objective obligation or moral necessity, then it is difficult for the law to take it seriously.\(^\text{164}\) Yet, as Weinstock has shown, though an interpretation may be idiosyncratic and not tied to an objective, communal or institutional religious precept, it will still have a personal, subjective relationship to religion.\(^\text{165}\) Moreover, while an individual is not required to prove objective criterion, he or she is not prevented from doing so. In any case, Amselem exemplifies the notion of “freedom of conscience in religion” by prioritizing personal belief and stripping religion of its communal or institutional elements.

Likewise, in \textit{Multani v. Commission Scolaire Marguerite-Bourgeoys}, the Court ruled that the decision by the school to prevent a Sikh student from wearing a kirpan violated s. 2(a) and could not be justified under s. 1. Justice Charron quoted Amselem extensively to show that the policy violated ‘freedom of conscience and religion’, arguing that the student had shown that “he sincerely believes that his faith requires him at all times to wear a kirpan made of metal”.\(^\text{166}\) Evidence was introduced to show that there is a system of strict dress code of religious significance, known as the Five Ks. One element of this dress code is the kirpan. The fact that there was a dress code made it easy for the courts to show “consistency of the belief with his or

\(^{163}\) Beaman argues that this definition supports a subjective reading of religion. See “Is Religious Freedom Impossible in Canada? p. 266. Later in this chapter, I will show that blurring the distinction between the subjective and objective reduces the difference between religion and conscience claims.

\(^{164}\) Moon,


\(^{166}\) \textit{Multani}, at para. 36.
her other current religious practices”. Moreover, even though other Sikhs accept that the kirpan could be a replica made of a material other than metal, the Court decided that this had little effect on the validity of the case, since different people can practice the same religion in different ways. Once again, the Court conceived of this case in terms of the primacy of belief. Had Multani argued that his kirpan must be worn in accordance with community practice or tradition, it does not appear that his religious claim would have been protected by s. 2(a).

It is worth noting that in both Multani and Amselem, limited exemptions were carved out. Critics have pointed to cases like these to demonstrate the privilege religion enjoys. But neither Amselem or Multani changed laws. Rather than questioning the public norm, the courts created a limited space for religious practice at the margins of the law, requiring the parties in question to compromise in a minor way. In Amselem, Justice Iacobucci noted that though the condominium bylaws restricted any construction on balconies, the bylaws also stipulated that residents could seek an exemption from the condominium association in special circumstances. He also pointed out that residents had already agreed to build their succahs such that they would not block fire escape routes. Moreover, he argued that only a small number of succahs would be built for a limited period (annual nine-day festival). And though he did not find the concern with aesthetic appearance important, he stated that the association could also require that the succahs blend in as much as possible with the building. Though this case seems unprecedented in its broadening effect on freedom of religion, the practical allowance for the Jewish owners in question was narrow in scope, as the construction of the succah was subject to strict limitations. In Multani, the school had argued that the kirpan was a threat to the safety of the school, as it violated its

167 Multani, at para. 35.
policy prohibiting students from carrying weapons and other dangerous objects. Justice Charron accepted the claimant’s argument that the kirpan was a religious symbol and not a weapon for Sikhs. She noted that it was unrealistic to expect that a school could ban all safety risks, which could include pens and scissors. She also observed that there was no record of a Sikh student in Canada ever using his kirpan for danger in a public school. Moreover, unlike in an airplane, where a ban on the kirpan might be justified, because the individual in question would be unknown to authorities, the school could judge, based on its past relationship and interactions with its students, whether a particular student would risk violent behaviour. Justice Charron noted that the kirpan could be sewed into a student’s clothing, thus eliminating the risk that it would fall out unexpectedly or be used as a weapon by its owner or another child.\textsuperscript{168} After making all these stipulations, the Court ruled that the kirpan should be removed from the school’s banned list weapons. Hence, though this might seem to be a victory won for religious freedom, the exemption that was permitted was restricted.

Religious claims arising from minority groups that cannot be framed in the context of “freedom of conscience in religion” are less likely to be protected. For example, religious freedom claims that do not emphasize the use of individual conscience or seem to demonstrate the exercise of conscience in a manner that is considered atypical in a liberal society experience greater difficulty being recognized as worthy of protection. Jehovah’s Witnesses’ refusal to receive blood transfusions would fall under this category. There have been several related cases concerning Jehovah’s Witnesses who were under the age of majority but old enough to speak for

\textsuperscript{168} The stipulation that the kirpan be sewed into the student’s clothing had already been agreed to by the child’s family and the school administration, but the proposed compromise was subsequently rejected by authorities.
themselves and assert their conscientious and religious rights. The courts found that the claimants had exercised a conscience that was compromised, due to age and religious beliefs. A.C, who was fifteen at the time of treatment, was taken into the custody of child welfare authorities and received court-ordered transfusion. The Supreme Court ruled that the legislative authorization of treatment over the individual’s sincere religious objections was an infringement of her right to religious freedom, but that this infringement was justified, as a) the objective of ensuring the health and safety and of preserving the lives of vulnerable minors was pressing and substantial and b) the means of allowing the court to take into account the maturity and decision-making capacity of minors before ruling on enforced medical treatment was a proportionate limit on the right.169 The judgement did not challenge the age-based rule for consent or refusal, even though there are several provinces that allow capable patients of any age to determine their own treatment without state intervention. In another case, B.H., a sixteen year old, was diagnosed with leukemia and refused blood transfusion treatment.170 The trial judge ruled that she was not a mature minor because she not did understand on an experiential level what it is to die and further, she had lived a sheltered religious life and did not have the opportunity to challenge her own religious beliefs. At the provincial court, the judge ruled that B.H’s ability to make decisions regarding her health was declining as the trial wore on. B.H. appealed to the Supreme Court of Canada and leave to appeal was refused. Her case demonstrates that the law’s


construction of conscience and capacity for consent is exclusionary towards individuals and groups considered outside the mainstream.\textsuperscript{171}

\textit{Alberta v Hutterian Brethren of Wilson Colony} concerned a minority group claim which was not protected, even though it did not entail the violation of any other Charter right and did not seem to compromise the law’s purpose in a substantial way.\textsuperscript{172} The collective element of the claim was downplayed, and the decision instead emphasized the individual capacity to choose. Members of the Hutterian Brethren of Wilson wanted to be exempted from being photographed for their drivers’ licences and included in a facial recognition data bank in Alberta. Colony members objected on the grounds that the Second Commandment forbid them from making photographic images. The law had granted an exemption to those who had a religious objection to having their photo taken or had a temporary medical condition that changed their appearance. Over half of all exemptions were granted to Hutterites. But this exemption and issuance of non-photo licences was revoked when the law was revised in 2003. The new licensing system was concerned with identity theft and fraud. All registered motorists would now have to take a digital photograph, which would be inserted into the province’s facial recognition database. Colony members challenged the new requirement. They were concerned that members would not be able to obtain drivers’ licences, which would limit the colony’s ability to carry on commercial activities that were necessary for it to be able to maintain its collective way of life.


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Though the Court recognized that the photo requirement violated infringed individual Hutterites’ religious freedom, it argued that the violation was justified under s. 1. Chief Justice McLachlin’s judgment showed considerable deference to the government, noting that, “a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the Charter”.\textsuperscript{173} Section 1 of the Charter allows the state to enact laws that violate Charter rights. The Supreme Court developed the “Oakes test” in 1986, the purpose of which was to determine whether a restriction on a Charter right was justified in pursuit of public interest or with the aim of protecting another right. The court was required to identify the pressing and substantial state objective (step 1) and then assess the law’s proportionality in light of this objective by analyzing the rational connection between the law and the state’s objective, determining whether the law only minimally impairs the right in question while attempting to achieve its objective (step 2), and then assessing whether the effects of the law were proportional to the harms of the right being infringed (step 3).\textsuperscript{174} In a departure from past rulings, the Court emphasized a section of the Oakes test that had been largely ignored. The Court had in previous cases emphasized the second step, which required an assessment of minimal impairment, and had not focused considerable attention on the third step.

\textsuperscript{173} Hutterian Brethren, at paragraph 39-40.

In *Hutterian Brethren*, the Court diminished the role of minimal impairment. After determining that the goal of protecting the integrity of the licensing system was of pressing and substantial importance, and that the law was rationally connected to that goal, McLachlin argued that the legislation was a minimal impairment of the colony members’ religious freedom, as the alternatives offered would not satisfy the goal of preventing identity theft. She dismissed the option of non-photo licenses specially marked so that they could not be used for the purpose of identification. She insisted that the only way to reduce the risk of forgery was through a universal photo requirement. She also contested the Hutterites’ claim that few would seek out the exemption and hence an exemption would not unduly affect the government’s objective. She pointed out that an exemption for an undetermined number of religious objectors would undermine the effectiveness of the system. The third step of the Oakes test was magnified in her judgment. She determined that the benefits of the legislation outweighed its harms. It was here that McLachlin considered the collective aspects of the case for the first time. The essential claim, she noted, was individual. But “community impact” could be considered at the proportionality stage. She argued that Colony members were not compelled to have their photos taken and that they could exercise their choice to hire outsiders to drive for them. Even though she noted that doing so would mean sacrificing the Colony’s self-sufficiency, she argued that the availability of this choice would not seriously violate their right to religious freedom.

Justice Abella’s dissent is worth noting. She was concerned that the collective needs of the colony had not been engaged sufficiently by the Court. She described how important self-sufficiency was to the Hutterite Colony. Their livelihood allowed them to remain independent and apart from the surrounding world. She pointed out that their religious freedom was not just minimally impaired, as the negative effects of the legislation severely outweighed its positive
Adding 250 photographs of Hutterites was only marginally useful to the prevention of identity theft. But suggesting that Colony members could use third party transportation “failed to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community.” Forcing colony members to choose being communal self-sufficiency and driving illegally amounted to state coercion. Justice LeBel separately cautioned about the need to protect not just belief but “communities of faith…that share…a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations.

Little was mentioned in the majority decision of the history of Hutterites in the country, their unique way of life, and the promises made to them concerning the preservation of their traditions. The individualistic, choice-driven paradigm seemed to capture only a portion of the impact that would be felt by the community. The decision included the collective needs of the colony only when judging the proportionality of the legislation in question and not when determining whether religious freedom had been infringed. If only individual rights are deemed to be at stake, the infringement may appear minimal. But if the Court had considered the communal weight of the infringement, rather than emphasizing the individual claim by itself, it might have shifted the balance towards the community whose ability to sustain a communal life would be threatened.

175 *Hutterian Brethren*, at para 146.

176 *Hutterian Brethren*, at para 167.

177 *Hutterian Brethren*, at para 163.

178 *Hutterian Brethren*, at para 183.
2.9 Indigenous Peoples

Indigenous spiritualties are not likely to be fully protected under s. 2(a) of the Charter. The focus on the individual conscience prejudices the law against the spiritual experiences of Indigenous peoples. Moreover, the significance of choice in the Canadian courts’ understanding of religion is dissonant with Indigenous spirituality. Borrows describes the Anishinabek\(^\text{179}\) regard for the Earth, which is considered sacred. The Earth is regarded with “great awe, respect and wonder”.\(^\text{180}\) While plants, animals and humans die, the Earth lives on. The Anishinabek consider the Earth a living entity which has thoughts and feelings, can exercise agency by making choices, and is related to humans at the deepest generative level of existence. Human beings are to strive to live in community with the Earth, and they have mutual obligations and entitlements that must be respected for this community to thrive. Human beings are required to consult with the Earth’s Creator and seek the Earth’s consent before important decisions are made. They listen to the Creator and/or Earth through ceremonies, or they may seek to understand the Earth’s requirements by observing interactions with wind, water, fire and other beings.\(^\text{181}\) Furthermore, land is considered animate or living. This means that it has agency and must be respected when used. It would be wrong to use the land without its consent and participation, which would be

\(^{179}\) ‘Anishinabek’ refers to an expansive group of tribes in Canada and the United States. There have been other tribes beyond this group living in Canada historically, but there isn’t sufficient literature available to describe their beliefs and practices.


\(^{181}\) Ibid, 162-164.
akin to enslavement and could lead to great calamites for the Earth and her people. Land does not belong to a person or people; it is held in trust for sustenance and for future generations. As Borrows explains, a kind of “ownership” can occur if conducted in accordance with Indigenous principles. The pipe ceremony is a “certification-like process” which acknowledges the Earth’s legal personality and demonstrates thankfulness for existence and prayers or thanksgiving for the Earth.\(^{182}\)

**Ktunaxa Nation v. British Columbia** was the first opportunity for the Supreme Court to consider whether state use of Indigenous sacred sites could be considered an infringement of freedom of religion. The Indigenous group claimed that the land the government had approved for development of a ski resort was considered sacred. The land is known by the Ktunaxa as Qat’muk. They argued that their spiritual beliefs and practices depend on the fate of Qat’muk, as it an area of spiritual significance where the Grizzly Bear Spirit resides. Ktunaxa nation maintain that building the resort would result in the departure of the Grizzly Bear Spirit, depriving them of the spiritual guidance they rely on and the significance of their rituals. As Beaman explains, this concept of land is starkly opposed to the Christian model, which advocates for humanity’s dominance over nature. She insists that one cannot apply the category of the colonizer to understand the Indigenous relationship to land.\(^{183}\) Indigenous sacred sites are not just places where religion is practiced. Instead, they are often understood to form part of the very fabric of the people at issue and to be home to members of the community even after they have passed away or are no longer physically there. Marc Fonda has pointed out that Indigenous peoples do

\(^{182}\) Ibid, 165.

not have “a conceptual separation between sacred and secular, or between culture, language and identity, or between spirituality and the land” as do most European cultures. There is no distinction between the sacred and secular, or between the civilized and uncivilized. This makes the legal protection of religion particularly complicated for Indigenous peoples.

In the past, most challenges have proceeded under section 35 of the Constitution or specific statutes. These challenges have largely failed. Natasha Bakht, writing before the decision was handed out, argued that claims framed under freedom of religion may stand a greater chance of success. Bakht claims that section 2(a) is “broad enough to incorporate an understanding of protected religious practice that is generous and expansive”. The courts have demonstrated an interest in the subjective religious beliefs of claimants, which could bode well for Indigenous peoples, whose spiritual beliefs and practices differ substantially from what most people view as religious. And yet, both the trial judge and British Columbia Court of Appeal found that freedom of religion was not violated in Ktunaxa Nation v BC. While the trial judge and Court of Appeal found that they had demonstrated a sincere belief that had a clear nexus with religion, there was little attempt beyond an explication of belief to try to understand or explain Ktunaxa


185 Yet I would argue that Aboriginal spiritualities should be recognized under s. 2(a), not treaty rights.

186 I would add to Bakht’s argument that unlike s. 35 of the Charter, which did not create rights but rather constitutionally affirmed existing rights and required proof that Indigenous beliefs and practices were integral to the distinctive culture prior to European contact to receive constitutional protection, there is no such emphasis on the past in Amselem. The Court ruled, “it is inappropriate for courts to rigorously study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held”. Amselem, at para 53. Hence, while s. 35 is inadequate to protect the spirituality of Indigenous peoples, s. 2 (a) of the Charter holds slightly more promise.
spirituality. The court wrote that the resort would result in “the loss of meaning produced by the alleged desecration of a sacred site”, but little else was said about what that meant.

The Supreme Court ruled that the claim did not fall within the scope of s. 2(a), since the second part of section had not been met. To establish an infringement on the right to freedom of religion, the claimant had to demonstrate 1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and 2) state action interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. The first part was undisputed: the Ktunaxa sincerely believed in the existence and importance of the Grizzly Bear Spirit, and they believed development would drive the spirit away from Qat’muk. Though the belief was recent (2004), the court held that all sincere religious beliefs and practices, whether or old new, were protected.

The second part of s. 2(a) dealt with the question of whether state action interfere with the ability of a person to act in accordance with his or her religious beliefs or practices. The court argued that s. 2(a) protects only freedom to hold a religious belief or to manifest that belief. It argued that the appellants did not seek protection for freedom to believe in Grizzly Bear Spirit or to pursue practices related to it; rather, they sought protection for Grizzly Bear Spirit itself and the subjective spiritual meaning they derived from it. But the state’s duty was not to protect the object of beliefs or the spiritual focal point of worship.

The court ruled that their claim went beyond the scope of s. 2(a). Moreover, the decision stated that extending s. 2(a) would put deeply held personal beliefs under judicial scrutiny, requiring
the state and its courts to assess the content and merits of religious beliefs. In this case, the courts would have to determine how a spirit was to be protected. They referred to *Amselem*, in which the court concluded that the state was in no position to be the arbiter of religious dogma, and that the court should refrain from interpreting or determining the content of a subjective understanding of belief or practice. Entangling the courts in religious affairs would violate the principles underlying section 2(a).

Justice Moldaver, in a concurring opinion, offered a more nuanced approach. He argued that where a person’s religious belief no longer provided spiritual fulfillment, or where the person’s religious practice no longer allowed him or her to foster a connection with the divine, that person was unable to act in accordance with his or her religious beliefs or practices, as they had lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her. The state interferes with an individual’s ability to act in accordance with religious beliefs or practices if the spiritual significance of the individual’s beliefs or practices is diminished by state action. In this case, state conduct rendered the Ktunaxa’s sincerely held religious belief devoid of religious significance.

Moldaver explained that in many indigenous religions, individuals find spiritual fulfillment through their connection to the physical world, and specifically, to land. Land was not just “the site of spiritual practices” in the sense of a church, mosque or holy site. Land itself could be considered sacred, since it was where the divine manifests itself. Moreover, unlike in the Judeo-Christian faiths, where the divine was considered to be supernatural, the spiritual realm in the
Indigenous context was inextricably linked to the physical world. State action that impacted land could sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance. The Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. Songs, rituals, and ceremonies that were geographically specific and associated with Grizzly Bear Spirit would become meaningless. Hence the impact of state development of land would be significantly greater that it would be Judeo-Christian faiths, whose beliefs and practices are better understood and better protected by the law.

The majority decision seemed to reflect a lack of understanding or empathy for a community whose practices and beliefs do not look like our Christian-centric understanding of religion. Borrows makes the point that Indigenous spirituality is alien to Western law, politics and religion, as it lacks the outward forms of other religions. Drawing on Berger’s work, Borrows argues that s. 2(a) “would likely be unproductive for Anishinabek people because it would stretch the law beyond its cultural context.”187

Bakht claims that under the Charter, a freedom of religion claim would need to be justified under section 1, which would require detailed analysis that could be of advantage to the rights of Indigenous peoples. She writes, “it will be difficult for the government to justify such an infringement in the absence of an urgent, overriding public purpose.” This seems overly optimistic, particularly in light of the reasoning in Ktunaxa. The Court has often deferred to the government even while administering the Oakes Test. Beaman writes that the approach of the Supreme Court to religious freedom has been to give it as broad an interpretation as possible, and

then to restrict its protection using section 1.\(^{188}\) According to Beaman, “section 1 can be and has been used to preserve a religious hegemony that remains largely unexamined by the Supreme Court in its deliberations on the meaning of freedom of religion”.\(^{189}\) Beaman argues that religion that doesn’t look like mainstream Christianity or is unfamiliar to Canadians is perceived as harmful and limitations on its exercise are justified.\(^{190}\) In Hutterian Brethren, the colony was seeking an exemption from an administrative law. It was a minimal request for adjustment. Yet the exemption was not granted. For Indigenous peoples, the stakes are higher because their spirituality is all-pervasive; to make a claim, Indigenous peoples would have to represent their traditions according to prevailing conceptions of what counts as religion. Moreover, an exemption will not suffice; rather a drastic rethinking of the way in which land is used and developed is required, which would impact the social, political and economic lives of other Canadians. It would require not just a thorough understanding of Indigenous spirituality, but also an appreciation of the law’s distribution of land and the systemic advantages suffered by Indigenous peoples, none of which would be understood in the context of individual conscience. As Beaman and Fonda have argued, it is much harder to imagine the law protecting Indigenous rights in a manner that is in keeping with their integrated, communal, land-based way of life.

### 2.10 NON-RELIGIOUS OTHER


\(^{190}\) *Ibid*, p. 68.
Freedom of conscience is listed in addition to religion in the Charter, suggesting that Canada recognizes a distinction between conscience and religion, and that conscience could offer protection for non-religious beliefs or practices.\textsuperscript{191} The term ‘conscience’ made a new appearance in the Charter; it did not appear in the Bill of Rights or the United States Constitution, which was a source of inspiration for the Charter. Conscience is also listed first, suggesting that it is not just independent of religion, but is also a primary or at least very important value. In actual fact, however, the ‘conscience’ aspect of s.2(a) of the Charter remains largely undescribed. The Supreme Court has rarely engaged freedom of conscience as distinct from religion. Since there hasn’t been a ‘conscience’ challenge that does not involve religion as well, our understanding of this freedom can be gleaned only through passing comments made by judges or in minority judgments. Conscience is given very little attention in adjudication, not because the courts are actively rejecting non-religious beliefs or practices, but rather because it seems as if s.2(a) cases easily fall within the ambit of religion and hence do not require being judged on the basis of conscience.

From the limited comments made about freedom of conscience, we learn that there is ambiguity about what conscience means. Though conscience and religion are perceived as similar, or as stemming from the same root, there is lack of clarity about conscience. The clearest indication of this ambiguity can be found in \textit{R. v Big M Drug Mart}, when Chief Justice Dickson uses the words ‘conscience’ and ‘religion’ interchangeably, almost as if they were the same concept. At times, he appears to interpret conscience as an element of religion, and not as a standalone value:

\textsuperscript{191} Early on, Peter Hogg writes of freedom of conscience: “It is perhaps designed to protect systems of belief such as atheism or agnosticism, or possibly even quasi-religious cults, which might not be characterized as "religions".” Peter Hogg, \textit{Canada Act 1982 Annotated}, Toronto, Carswell, 1982, p. 15.
Attempts to compel belief or practice denied the reality of individual conscience and *dished 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”. [Bold mine]^{192}

Here conscience is described as a God-given quality. Later, Dickson suggests that conscience, and not religion, is the central value:

> What unites enunciated freedoms in the American First Amendment, s. 2(a) of the Charter and in the provisions of other human rights documents in which they are associated is the **notion of the centrality of individual conscience** and the inappropriateness of governmental intervention to compel or to constrain its manifestation.^{193}

It is not clear, based on Dickson’s comments, whether conscience stems from religion or vice versa. In the next paragraph, he writes that religion is “prototypical” and “paradigmatic” of conscientiously held beliefs and manifestations:

> 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

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^{192} *R v Big M Drug Mart*, at para 120.

^{193} *Big M*, at para 121.
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.¹⁹⁴

Here Dickson recognizes that there should be space for the protection of non-religious beliefs and values that are based on conscience. However, he does not extrapolate further. This is perhaps expected, as the case was easily judged on the basis of freedom of religion, and there was no need to discuss conscience at greater length. But it does not resolve the lack of clarity concerning the term ‘conscience’.

Several other cases include reference to conscience. In R. v. Videoflicks Ltd., a number of businesses were guilty of operating a business on Sunday in contravention of Ontario’s Retail Business Holidays Act.¹⁹⁵ While making the argument that some religious acts may be secular for some but religious for others, Justice Walter Tarnopolsky writes that the same reasoning would apply to freedom of conscience, except that freedom of conscience would not have the same relationship to beliefs or creed that religion would. He describes the circumstances in which freedom of conscience would be protected:

¹⁹⁴ Big M, at para 123.

¹⁹⁵ The case was appealed to the Supreme Court and became known as R v Edwards Books and Art Ltd [1986] 2 S.C.R. 713. At the Supreme Court level, conscience did not feature prominently in the decision.
The freedom protected in s. 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions. While freedom of conscience necessarily includes the right not to have a religious basis for one's conduct, it does not follow 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. Rather, to make such an objection one would have to demonstrate, based upon genuine beliefs and regular observance, that one holds as a sacrosanct day of rest a day other than Sunday and is thereby forced to close one's business on that day as well as on the enforced holiday. No appellant informed this Court of any such fundamental belief based upon conscience rather than religion.”

Just as in the case of a freedom of religion claim, Tarnopolsky makes the argument that a freedom of conscience claim would have to demonstrate harm or impact on the individual claimant. The judgment continues:

In my view, where one claims exemption on grounds of religion or conscience to a particular government regulation or requirement, one must be prepared to show that the objection is based upon a sincerely held belief based upon a life-style required by one's

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196 R v Videoflicks Ltd., (1984), 48 O.R (2d) 395 at para 120.
conscience and religion. Otherwise, s. 2(a) of the Charter might become a limitless excuse for avoiding all unwanted legal obligations.197

Here Tarnopolsky offers a more detailed description of the conscience that is to be protected under the Charter. It requires “a set of beliefs” and isn’t merely a judgment in the spur of the moment. Tarnopolsky sees a resemblance between conscience and religion, at least in a way that would warrant protection, but his argument that conscience needs to be informed by “a lifestyle” suggests a further narrowing of scope in terms of protection.

The single Supreme Court case considering freedom of conscience at some length is R v Morgentaler. Even so, the majority decided the case without reference to conscience, relying instead on s.7 of the Charter. 198 Yet Justice Wilson proffers a concurring opinion that gives a clearer picture of non-religious conscience. She contends that the decision about whether to terminate a pregnancy stems from conscience, which she stresses is individually held. She writes:

I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state…Indeed, s. 2(a) makes it clear that this freedom belongs to each of us individually. It seems to me, therefore, that in a free and democratic society “freedom of conscience and religion” should be broadly construed to

197 Videoflicks, at para 120.
extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity".

Referring to Dickson’s comments in *R. v Big M Drug Mart*, Justice Wilson writes:

The Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such protected by the Charter. But I do not think he 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). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God ..." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.

Justice Wilson in these two statements above claims an equal space for claims based on conscience that are unrelated to religion under s. 2(a).
A few other cases are worth mentioning. In *Hutterian Brethren*, Justice McLachlin, writing for the majority, quotes Abella’s dissenting opinion citing a European Court of Human Rights judgment\(^{199}\) which states:

“... 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, sceptics and the unconcerned. The pluralism is indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”\(^{200}\)

McLachlin agrees with Abella that s.2(a) also includes atheists, agnostics, sceptics and the unconcerned.\(^{201}\) As in Morgentaler, her comment suggests that a non-religious conscience deserves similar protection as its religious counterpart.

In *Amselem*, Justice Iacobucci, writing the majority judgment, determined that freedom of religion protects religious practices irrespective of whether they are in conformity with an established religious group or system or are regarded as a religious obligation by the


\(^{200}\) *Hutterian Brethren*, at para 128.

\(^{201}\) *Hutterian Brethren*, at para 90.
individual. It was also deemed unnecessary for lifelong consistency to be present within the individual. The issue of essence to the court was the determination of whether or not the individual requesting an exemption of special protection was sincere in his or her belief. This decision expanded the definition of religion to the extent that it resembles non-religious conscience. Yet the majority wrote that protections are guaranteed “to beliefs, convictions and practices rooted in religion” distinct from “secular, socially based on conscientiously held” beliefs and practices.

Roach v. Canada and Maurice v. Canada are two lower court decisions that appear to recognize the independent significance of protecting practices that are grounded in non-religious belief systems. Roach applied for Canadian citizenship but sought an exemption from swearing allegiance to the Queen as required in the citizenship ceremony. He sought a declaration from the court that he was entitled to become a citizen without taking the oath or affirmation in its current form. He argued that the oath was a violation of his right to freedom of conscience under the Charter (among other rights violations). While the majority found no Charter violations, Justice Linden said the following about freedom of conscience:

202 Amselem, at para 39.

203 Amselem, at para 39.

204 Roach v Canada (Minister of State for Multiculturalism and Citizenship), [1994] 2 FC 406.

205 Likewise, McAteer v. Canada (Attorney General) [2014] ONCA 578 concerned a group of individuals who refused to pledge allegiance to the Queen to acquire citizenship. They argued that this violated freedom of conscience, among other freedoms. The Supreme Court refused to hear the case, but the Ontario Court of Appeal denied that s. 2(a) of the Charter had been violated. It noted that pledging allegiance was symbolic of loyalty to the state. Moreover, it determined that it was not conscience, but expression, that was violated.
It seems, therefore, that **freedom of conscience is broader than freedom of religion.** The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting **views based on strongly held moral ideas of right and wrong**, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, *conscience' and 'religion' have related meanings in that they both describe the location of profound moral and ethical beliefs*, as distinguished from political or other beliefs which are protected by paragraph 2(b).

In Maurice v. Canada206, a federal inmate received vegetarian meals until he renounced his religious beliefs, at which point, Correctional Services Canada denied him the vegetarian meals. Maurice argued that his freedom of conscience had been violated. Justice Campbell decided in his favour. He wrote:

> Thus, while the CSC has recognized its legal duty to facilitate the religious freedoms outlined in the Charter, freedom of conscience has effectively been ignored. Section 2(a) of the Charter affords the fundamental freedom of both religion and conscience, yet by the CSC's policy, inmates with conscientiously held beliefs may be denied expression of their "conscience". In my opinion the CSC's approach is inconsistent. The

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CSC cannot incorporate s.2(a) of the Charter in a piecemeal manner; both freedoms must be recognized.\textsuperscript{207}

According to Justice Campbell, vegetarianism qualified as conscientious in this case.\textsuperscript{208} This case is unique because it looks at freedom of conscience alone without combining it with religion. Several commentators have dampened hopes that freedom of conscience could be afforded greater protection. Richard Moon has argued that the legal protection given to religion is greater than that given to non-religious conscience. Moon argues that it is unlikely that the Canadian courts will extend protection to a belief or practice that an individual might consider important or valuable without it having some connection to moral duty. Moon argues that what makes religion unique is that it connects individuals to cultural communities such that individuals have deeply-rooted cultural identities.\textsuperscript{209} However, evidence suggests that the courts do not demonstrate a deep concern for cultural community or identity in their decision-making; it is the individual that is of paramount concern to them.

Mary Ann Waldron discusses R. v Latimer and Rodriguez v A.G. for British Columbia. She argues that both cases could have been considered acts of conscience but weren’t; in Latimer, the courts focused on s. 7 (security of the person) and s. 12 (cruel and unusual punishment), and in

\textsuperscript{207} Maurice, at para 8.

\textsuperscript{208} Maurice, at para 9.

Rodriguez, the courts focused on s. 7 and s. 15. She does not find this surprising, writing that, “if a robust protection for freedom of religion is often worrisome, robust protection for freedom of conscience is more so. Perhaps it is not surprising that the courts and lawyers have simply preferred in general to avoid the issue.” She argues that protection of conscience, more than any other right, has the “capacity to undermine the rights of others and product apparent conflicts with them”. She says that unlike religion, conscience is “all-pervasive”. Similarly, Bruce Ryder makes the argument that if conscience were defined broadly, freedom of conscience “would become freedom to disregard all laws with which we disagree.” He proposes that freedom of conscience be protected when it has analogous significance to those affected as religion does on its adherents.

David Brown suggests that pessimism concerning the Court’s protection of conscience is misplaced. Though he agrees with Ryder that not all beliefs or opinions should be considered matters of conscience, he proposes that the Court would “apply a similar approach to interpreting the scope of freedom of conscience as it did to freedom of religion in Amselem.” Though he does not spell out what this entails, it appears that conscience would be judged on the basis of sincere, subjective belief. Yet it seems reasonable to expect that the Court would be much more


212 Ibid, p. 223.


cautious about claims of conscience because it is foreign terrain. The more conscience appears as religion, the greater the chance it has of protection. Based on the comments of justices above, it seems conscience might also have a narrower scope of protection than religion. Unplanned, spur-of-the-moment conscientious acts might not count. Those making claims of conscience would also have to be tested to ensure that they were not just escaping a legal obligation that is binding on others.

2.11 CONCLUSION

In this chapter, I have shown that the perception that the Charter era is an equalizer that gives all manifestations of the religious and non-religious other a similar chance to flourish or perish is inaccurate. Christianity, and particularly Protestantism, was present before Canada was established as a nation, and hence shaped the culture of the country as well as its legal and political institutions. Christianity is embedded in Canadian society because of its formative role in constructing and shaping a society that became Canadian and because remnants of a Christian perspective remain symbolically and actually in institutions, legislation, and other aspects of the Canadian state. The historical power wielded by Protestantism in Canada is important in understanding the way s. 2(a) has been interpreted as “freedom of conscience in religion”. Law’s understanding of religion is individualistic, private, belief-driven, and emphasizes choice. This privileges those who perceive of religion in a ‘protestant’ manner and excludes and marginalises the religious and non-religious other, including religious minorities, Indigenous peoples, and non-religious communities and individuals whose conscientious beliefs are not tied to religion. The further individuals or communities are from mainstream Christianity, the more likely their
beliefs and practices are to not be protected. Moreover, the beliefs and practices of the religious and non-religious other are more likely to be perceived as conflicting with other values important to the state than the mainstream.

There are reasons to temper our pessimism. First, Canada is a relatively young country. The Charter is thirty-five years old and has not built up an extensive body of cases in which one could easily detect a clear pattern of adjudication. Furthermore, those in power were forced to cope with internal religious difference at an early stage in the development of the country – even before confederation. These accommodations were uneven and bestowed more power on some communities over others, but they required creativity, flexibility and pragmatism. There was a willingness to entrench these accommodations in the British North America Act and the Charter. These historical trends suggest a potential openness towards inclusion of the other.

Second, while it is difficult to escape the broader hegemonic framework of the law itself, there remains some space to maneuver. The space for the protection of freedom of conscience and religion is not the same for all minority religious communities; Indigenous peoples face the greatest difficulty being recognized in the structure of religious freedom. But even as a specific set of values are the foundation of the legal system and are deployed in the language and justifications used by judges, these values can clash with each other in ways that make it difficult to predict the outcome of a case. For example, the British Columbia College of Teachers refused to certify Trinity Western University’s teacher training program on the grounds that the school requirement that all students sign a code of conduct that prohibited certain practices, including homosexual behaviour, was discriminatory, and could engender teachers in the public school
system who did not adhere to the principles of equality and non-discrimination.\textsuperscript{215} The Court distinguished between belief and practice. It argued that there was no evidence that religious belief would lead to discriminatory conduct in public schools. Berger concludes that the court associates religion with the realm of the private, and with belief rather than practice.\textsuperscript{216} Certainly this was the crux of the argument made by the majority, who wrote: “the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them”.\textsuperscript{217} According to the majority, a teacher may hold views about homosexuality that betray the principle of equality, but if he or she does not act on them in the public sphere, the right to equality has not been breached. But the case could very well have been decided another way if the Court had considered other values just as relevant. For example, the Court could have decided that there was harm to the freedom of conscience and religion of individual students attending the teaching program who had to sign the contract against their will. Alternatively, the Court could just as easily have argued, as they did in Chamberlain, that the public school system must be neutral and secular, and that the state has an interest in ensuring that teachers do not violate that important value. This is not to suggest that Berger’s analysis is incorrect. Rather, it is to point out that the legal system retains some flexibility despite its cultural bias. Even if it is not possible to eradicate the power structures that

\textsuperscript{215} I have not included this case as a minority religious community alongside Amselem or Hutterian Brethren. The school could arguably be considered part of (or closer to) the mainstream. It operates on evangelical Protestant principles and has a student body consisting of Christians of all denominations. Another reason I have not included it is that the case involves competing Charter rights, while Amselem and Hutterian Brethren concern the violation of relatively minor administrative law.

\textsuperscript{216} Benjamin Berger, Law’s Religion: Religious Difference and the Claims of Constitutionalism (Toronto: University of Toronto Press, 2015), 93-94.

\textsuperscript{217} Trinity Western University v British Columbia College of Teachers [2001] 1 S. C. R. 772, 2001 SCC 31 st para 36.
created the privileges for certain individuals and communities over others, it may be possible to enlarge the field of access for the marginalized or disadvantaged and narrow it for the privileged within existing systems of power by reinterpreting the wording and meaning of section 2(a).
CHAPTER 3

A SHORT HISTORY OF “FREEDOM OF CONSCIENCE ‘IN’ RELIGION”

3.0 Introduction

In chapter 2, I demonstrated that freedom of conscience and religion in the law is designed to protect a particular category of religious belief, i.e. ‘freedom of conscience in religion’, which crowds out individuals and groups that do not conceive of their religious beliefs and practices in an individualistic, belief-driven, voluntary and private manner. It also marginalizes those who exercise conscience divorced from a religious context, since conscience is afforded little meaning when distinguished from religion.

In this chapter, I explain why ‘freedom of conscience’ in religion is privileged in legal discourse through an analysis of the historical and political interconnectedness of the concepts of conscience and religion.

In part 1, I demonstrate that the manner in which conscience and religion were conceptualized historically stems from Christian, and in particular, Protestant thinkers. I argue that the terminology written into the ‘freedom of conscience and religion’ clause in the Charter has Christian roots and remains tied to Protestantism. I show that, due to Protestant influence, conscience and religion were collapsed within each other, such that religion referred to a
personal experience that was private, voluntary, individual and belief-based. This conception of religion crowded out the non-religious conscience.

In part 2, I show that this Protestant\textsuperscript{218} version of conscience and religion was imprinted onto the liberal secular state. Though religion became less important over time, this Protestant version of conscience managed to retain its relevance because of its crucial role in the intellectual development of the concept of toleration. Toleration was essential to the formation of the liberal state, and hence ‘conscience in religion’ has preserved its importance even as toleration has evolved towards the enactment of freedom of conscience and religion provisions.

In part 3, I show that a version of conscience that was not linked to religion materialized during the Enlightenment period and picked up speed thereon after. This non-religious conscience became increasingly unstable as it became more diverse, individualistic, subjective and divorced from religion. Though liberal theorists such as Mill and Rawls considered non-religious conscience worthy of respect and protection, I hypothesize that their theories failed to fully incorporate the non-religious conscience in a manner that overcame the problem of subjectivity and its threat to order and stability. Hence non-religious conscience and non-Protestant religions remain outliers in liberal theory (and history).

3.1.1: Part 1: HISTORICAL CONSCIENCE STEMS FROM CHRISTIANITY

Introduction

\textsuperscript{218} I will use the term ‘Protestant’ loosely. Though many differences exist between Protestant denominations, both historically and presently, I make reference to certain broad common tenets that are considered mainstream now, i.e. one is saved by choosing to believe in Christ; one can interpret the Bible according to individual conscience, et cetera.
The connection between ‘freedom of conscience and religion’ and Christianity may seem obvious. Yet though the academic literature makes extensive reference to the law’s Protestant origins, little attention has been devoted to providing a detailed history or comprehensive account of the ideas and theories that informed the institutional protection of freedom of conscience and religion. Many political theorists assume that our understanding of conscience and religion stems from Protestant thought without explaining the contours, or recognizing that conscience has origins that are not just religious (and vice versa). This section aims to map out an intellectual history of the way we currently understand freedom of conscience and religion.

### 3.1.2: Pre-Christian References to Conscience

Though this chapter will make the case that contemporary legal conceptions of conscience trace their historical trajectory to Christianity, it is important to note at the outset that conscience is not inextricably tied to Christianity. The idea of conscience predated Christianity. The ancient Greeks conceived of *syneidesis*, which referred to ‘consciousness’ or ‘being witness of oneself’. *Syneidesis* was implanted in an individual and thought to function as a feeling of remorse or guilt or a consciousness of having done wrong. It was characterized by an

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219 Notable exceptions include Chapman, Spinner-Halev, and Micah Schwartzman, all of whom will be discussed later in this chapter.


individual’s obedience to something beyond the self and a powerlessness to change the past. Likewise, the Romans discussed conscientia extensively, and their ideas are believed to have informed early Christian conceptions of conscience. Among the Roman Stoics, Cicero shifted the emphasis towards a concept of conscientia that was active and forward-oriented. Cicero saw conscience as a normative source of moral action which was received from immortal gods and implanted in the mind. Conscience was inalienable and “the best counsellor of all”. In his Letters to Atticus, Cicero wrote, “in all one’s life one ought not to stray a nail’s breadth from the straight path of conscience”. Later Stoics, such as Seneca, saw conscience as an inner witness or judge of an individual’s choices or judgments. Their understanding of conscience rendered the individual more active, as the individual had the ability to choose to follow or ignore conscience. Conscience was already linked to the individual and possessed many of the characteristics considered inherent to it in pre-Christian times.

3.1.3: Early Christian Conscience

Though the concept of conscience pre-dated Christianity, and though it is possible to conceive of conscience beyond Christianity, modern conceptions of conscience are deeply tied to Christianity. Conscience became an important part of the Christian worldview early on, and

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222 Robert K. Vischer, Conscience and the Common Good: Reclaiming the Space between Person and State (Cambridge: Cambridge University Press, 2010), 49.

223 Anders Schinkel, Conscience and Conscientious Convictions (Amsterdam: Amsterdam University Press, 2005), 155.


225 Moreover, conscience is also considered important to Catholics, and to non-Christian religious traditions as well. Unfortunately, this chapter will not be able to address religious conscience in a non-Protestant context.
many intellectual developments concerning conscience arose in the context of Christianity. In early Christianity, St. Paul’s Epistles played an important role in the evolution of modern understandings of conscience. There are thirty-three mentions of conscience (written as syneidesis) in the New Testament, nearly all of which are Pauline. Some broad observations can be made about Paul’s reference to ‘conscience’:

First, Paul’s conscience was forward-oriented. In the Epistles, Paul refers to conscience as ‘good’ (1 Timothy 1:5, 1 Timothy 1:19, Acts 23:1) and ‘clear’ (1 Timothy 3:9) when it guides towards good action. It is ‘seared’ and ‘corrupted’ (1 Timothy 4:2, Titus 1:15) when it leads in the wrong direction. These ideas were not entirely new; they drew on the words of Cicero and other Roman Stoics. Like them, Paul conceived of a conscience that went beyond the passive role of producing a feeling of guilt after a wrongful act had been committed. Yet it is in New Testament references to conscience that its moral sense became dominant. Conscience could serve as internal monitor, moral guide and judge before an act had been committed.

Paul also showed deference towards the individual, subjective exercise of conscience. He instructed Christians to honour the consciences of others, even if the judgments of these consciences were incorrect and had misperceived the objective truth or moral knowledge derived

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227 The term conscience (written as syneidesis) is mentioned only three times in the Old Testament (in Ecclesiastes 10:20; Wisdom 17:10; and Sirach 42:18), though the word ‘heart’ is used in a similar manner (see Job 27:6). The ‘heart’ referred to the inward part of the person, and was seen as the source of thoughts, feelings, judgments and actions. Likewise, in the Gospels, ‘conscience’ is not mentioned, but ‘heart’ seems to serve a similar function, in that it guides and inspires thoughts and actions. It is in the Epistles, and especially in the letters of Paul, that the word ‘syneidesis’, or conscience, is used repeatedly.

from divine revelation. In 1 Corinthians, he wrote about dietary laws, advising the Corinthians that though no food was unclean or forbidden and anything sold in the market set before them at a non-believer’s house could be eaten, the Corinthians should avoid harming others by eating what they deemed unclean:

> Whatever is sold in the butcher shop, eat, asking no question for the sake of conscience, for “the earth is the Lord’s, and its fullness”. But if one of those who don’t believe invites you to a meal, and you are inclined to go, eat whatever is set before you, asking no questions for the sake of conscience. But if anyone says to you, “This was offered to the idols,” don’t eat it for the sake of the one who told you, and for the sake of conscience. For “the earth is the Lord’s, and all its fullness.” Conscience, I say, not your own, but the other’s conscience.\(^{229}\)

Paul advised the Corinthians to appreciate those who were still struggling with the concept of monotheism, and for whom false gods persisted in their consciousness. Paul explained that their consciences were weak, unlike those with a more firmly entrenched understanding of conscience that understood a person could not be defiled by food. He advises the latter to be aware of the impact of their actions on their neighbours’ weak consciences. In these passages, Paul also demonstrates an emphasis on judgments stemming from individual conscience over a strict following of the law. The same act could have been perceived in different ways depending on the conscience of the individual: objectively, those who had eaten meal sacrificed to idols had done nothing wrong; yet some still suffered the pain of conscience and were deserving of respect.

\(^{229}\) 1 Corinthians 8:7-9.
Third, conscience had a nexus with religion; the exercise of conscience depended in part on an individual’s relationship with God. In Romans, Paul insisted that even when Gentiles had no law, (natural) law was “written on their hearts, whilst their conscience also bears witness”.\textsuperscript{230} Conscience was also described as, “the law in our mind”.\textsuperscript{231} This descriptions were interpreted to mean ‘natural law’.\textsuperscript{232} There was difference of opinion about where it was situated – in the mind (through reason), in the heart, or in the conscience – but it was understood that this law was innate. Moreover, unlike the Romans, who considered natural law as stemming from nature, Paul and the Fathers thought that God was the source of this natural law.\textsuperscript{233} Paul emphasized that conscience was linked to a source of knowledge outside the person. Conscience was considered a ‘witness’, which suggests that it was not the sole originator of judgments.\textsuperscript{234} Conscience did not dictate right or wrong; rather, it was responding to or witnessing whatever value system the person possesses. Hence, conscience required guidance. The Fathers conceived of natural law as functioning well only if aided by the Holy Spirit through baptism and faith. This is what Paul called a spiritual law or law of faith. Though conscience was an inward capacity placed in human beings by God, and while it was essential to the realization of true spirituality, Paul insisted that conscience was fallible. In his view, a rightly formed conscience connected to objective truth in

\textsuperscript{230} Romans 2:12-16.

\textsuperscript{231} Romans 7:23.

\textsuperscript{232} Origen, an early Church father, made this argument. His commentary can be found in Schinkel (2005). p. 166.

\textsuperscript{233} Mika Ojakangas, \textit{The Voice of Conscience: A Political Genealogy of Western Ethical Experience} (New York: Bloomsbury, 2013), 37-38.

\textsuperscript{234} For conscience as ‘witness’, see Rom 2:15, 9:1, 2 Cor 1:12, 4:2, 5:11.
the form of divine revelation. Conscience could be wrong if it is disconnected from this objective, external truth; it required the help of the Spirit and faith to function in a virtuous manner.

Over the past few decades, scholars have pointed out that much of the way we conceptualize Paul’s understanding of conscience stems from the interpretations of later thinkers, namely Augustine and Luther. Krister Stendhal has argued that Augustine and Luther have read into Paul’s intent what was not actually there.\(^2\) Paul had not intended for his argument about justification to answer the question: How am I to find a gracious God?\(^3\) Hence his emphasis wasn’t on the individual conscience. Stendhal wrote that Paul was concerned with advocating for the right of Gentile converts to be considered part of the community of God. Paul’s arguments about justification by faith had not arisen from any sort of struggle with a Jewish interpretation of the law; his writings were not directed against Judaism. Moreover, unlike Augustine, Paul did not appear to have personal difficulties obeying the law.\(^4\)

Despite Stendhal’s worthy note of caution, one cannot deny that there was a shift with Paul. Most notably, there was a privileging of the internal realm of individual conscience in Paul’s work on justification. Conscience was seen as the arbitrator of justification; it was where the

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\(^3\) P. 131.

\(^4\) P. 130
workings of grace could be felt rather than in the world where law governed action.\textsuperscript{238} The ritual component of social life was perceived as less important. Salvation was opened up to those who had not submitted to the law. Moreover, repentance moved from being collective to being primarily individual, and from being a continual effort, repeated over the course of a lifetime, to what was a changed state of being. These distinctions in Paul’s thinking between inward and outward; between morality and law; and between outward purity and inward morality remain significant aspects of our understanding of conscience today.

3.1.4: Augustine

Augustine could be regarded as a bridge between the Church and the Protestant reformers who claimed to be inspired by him.\textsuperscript{239} Augustine offered a version of the self which was both individualistic, in the sense that it was removed from the limits of the law and societal expectations, and heteronomous, in the sense that a close personal relationship persisted between God and human beings in the conscience, which imposed normative and binding limits. Augustine advocated \textit{sole grace} (by grace alone), which denied a human capacity for good apart from grace.\textsuperscript{240} According to Augustine, Adam’s first sin had depraved human beings and

\textsuperscript{238} Adam B. Seligman, \textit{Modernity’s Wager: Authority, the Self and Transcendence} (Princeton: Princeton University Press, 2000), 93.

\textsuperscript{239} Although it is popularly held that Augustine played an important role in the development of conscience, there is scholarly debate about his contribution. Manfred Svensson (“Augustine on Moral Conscience,” \textit{The Heythrop Journal}, VIII (2010), pp. 42-54) has identified two major camps: “While some have claimed that ‘the doctrine as traditionally understood owes its origin in the largest measure to Augustine (E. Fortin),’ 6 and that ‘he gave to the human conscience the respected role it has today (M. Clark),’ 7 others have defended the view that he did not develop anything resembling a theory of conscience, and that his only contribution lies in having stressed the importance of the right intention more than earlier authors (H. Chadwick).”

rendered them unable to perform good. Human beings were hence completely dependent on God’s grace.\textsuperscript{241} Salvation by grace took place within conscience, as God made those who had sinned righteous by pouring love for God into their hearts. This grace encouraged and transformed the individual and inspired conscience so that it was able to differentiate right from wrong and serve as a witness of natural law.\textsuperscript{242}

Augustine’s conscience entailed objective moral autonomy from law or society. Morality existed in the inner life of individuals. Human beings possessed within themselves, independent of any external source, an infallible, objective means (what could be considered natural or eternal law) by which they could discriminate between right and wrong.\textsuperscript{243} Augustine conceived of conscience as ‘the voice of God’, ‘the only relevant witness’, and ‘the law written in our hearts, with the presence of the Holy Spirit himself’.\textsuperscript{244} Conscience according to him was illuminated by the Holy Spirit.\textsuperscript{245} When human beings listened to their consciences, they were hearing the voice of God informing them of right and wrong. This message was received by human beings intuitively. It was impossible to ignore conscience. Neither could one fail to realize that by disregarding conscience one was acting in a manner contrary to what one knew to be right.


\textsuperscript{242} McGrath (1998), p. 48-49.


\textsuperscript{244} Svenson (2010), p. 42.

\textsuperscript{245} Svenson (2010), p. 45.
One’s actions were to be judged by the standards of conscience rather than conventional justice or public opinion. Conscience did not simply apply to actions that the law allowed or prohibited; it concerned all of man’s innermost thoughts and desires. Augustine pointed out that there would be instances when the righteous man needed to be content with the “sole witness and consolation of a good conscience”. Yet he insisted that a Christian should not succumb to feelings of shame because others had incorrectly deemed him or her to have done wrong, for doing so would demonstrate that the individual had attached greater importance to the appearance of good than to its reality. It was enough that his own conscience could testify to his moral integrity; the genuinely virtuous person would be more concerned with avoiding that which could offend his conscience. Moreover, Augustine points out that it was not enough to perform just deeds; one was also required to perform them for the right reasons. Augustine’s conception of conscience set the stage for the emergence of a new doctrine of self in relation to God and society during the Protestant Reformation, where religion concerned a subjective, personal quest for salvation and private, individual assent to doctrine.

3.1.5: Martin Luther

Luther transformed Augustine’s understanding of grace, and with it, his concept of conscience changed too. Though the concept of conscience was an important and oft-debated aspect of Christian theology before the Protestant Revolution, conceptions of conscience changed considerably with the Reformation and Protestant thinking, as conscience and religion became

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more deeply intertwined in Western thought. Martin Luther connected the two by narrowing the scope of religion until it became nearly synonymous with conscience. Though Luther was not the first Christian to discuss conscience, and though his conception of conscience was not the sharp historical break it is often idealized to be, it had some notable features that set it apart from previous teachings. Below I will highlight key elements to Luther’s conscience, some of which overlap:

3.1.5(a) Interior virtue and belief over external conduct

Luther’s understanding of conscience emphasized judgment and belief over action. Luther was interested in a conscience oriented towards internal virtues rather than external acts. Reflecting on the end of Romans 1:17, which read, “He who through faith is righteous shall live,” Luther concluded that the verse was discussing the righteousness that God gives freely to those who believe the Gospel.247 According to Luther, the Christian was “free from all laws and is not subject unto any creature either within or without.”248 The sinner was justified (declared righteous) by God through faith in Jesus, not through their works or by observing the law. Hence righteousness was passive, not active. For Luther, the human will was enslaved to sin and could do nothing to gain salvation; it relied solely on divine grace. In response to criticism that he was denying freedom of the will, which made moral actions useless and hence advocated lawlessness, Luther explained that the moral law of Moses, the Ten Commandments, was to be


248 Luther, Galatians, 5.14, p.53.
observed. But while good works and charity were important, it was faith which made an action good. Hence, we see in Luther’s work an understanding of sincerity and a strong inner conviction of faith without which action is meritless.

3.1.5(b) Individualism and self-reliance

The notion of conscience has always related to the individual. Even in early Greek sources, the pain of conscience was thought to be experienced by the individual who has done wrong. However, this individual authority was tempered. In Paul’s Letters to the Corinthians, he exhorted the Corinthians to have consideration for those who had weak consciences, stressing that the exercise of individual conscience should have regard for its impact on others. Likewise, Augustine pointed out the damaging effect of original sin on the ability of the individual to act appropriately; since original sin had led to ignorance and a tendency to sin, it was necessary for the individual to belong to the Church to be able to exercise conscience appropriately.

Luther made conscience even more individualistic, distanced from formal authority or external judgement, and focused on the subjective. For Luther, repentance could not be relied upon, and neither was it sufficient without trust in God’s mercy. Human salvation depended on God’s grace, which required an immediate and direct relationship between the individual Christian believer and the savior Christ. Luther downplayed the mediating role of the Church and priesthood in absolving sin of the believer. Because it was the individual’s faith in God that brought him remission, the priest himself would not know an individual’s degree of repentance or faith. The priest could not forgive; his role was relegated to proclaiming that an individual’s sins were forgiven. Moreover, the priest could not influence God, since God’s absolution rested
on the sinner’s faith in God’s promise. In fact, Luther argued that the clergy was not superior to the laypeople; the Pope did no more than a priest, and in the absence of a priest, any devout Christian who could tell a sinner that he or she was forgiven would suffice. Hence the distinction between priests and laity became blurred as the priest or Pope’s role was reduced to that of a counselor and advisor rather than an authority responsible for remission.

Luther’s ideas also undermined the authority of the Church. He criticized the Church for frightening people into making regular confessions, and for producing a terrified or wretched conscience through practices such as the selling of indulgences. He contrasted these practices he deemed morally and spiritually corrupt with God’s remission, which created a joyful conscience. Luther also condemned other church teachings and practices, including the mass and sacramental system. He argued that the penitential system did not have scriptural basis. Moreover, he wrote that the rules and methods of confession were taught by ‘torturers’. He believed it was impossible to confess all of one’s mortal sins once a year. Rather, he held that confessions should be brief and some sins (venial sins in particular) were best confessed to God. Once salvation was granted through the workings of grace internal to the individual, organized religion with its hierarchy and institutions became increasingly unimportant. For Luther, every true Christian believer was a priest, and the sole religious authority binding on Christians was the word of God in the Bible. The most important relationship was that between the individual and God; the individual had sufficient guide in the Scripture and his own conscience.

3.1.5(c): Fallibility
Luther possessed a pessimistic understanding of human beings as sinners who did not know true righteousness, since both the fall and the devil had contributed to the corruption of reason and conscience.\textsuperscript{249} Though conscience required obedience because the individual believed it to be true, this did not mean that it was objectively true. Acting according to one’s conscience was not enough, for conscience without faith was unreliable.\textsuperscript{250} Luther did not believe human beings could achieve knowledge of God, or what God was asking of them, by their own efforts: reason was unable to recognize the inborn knowledge of good and evil and conscience needed to be grounded in the Word of God in the Scriptures to achieve certainty.\textsuperscript{251} Hence, while he emphasized individual interpretation of the Bible, he did not grant individuals their own authority on religious matters.

Moreover, Luther’s version of conscience emphasized the development of self-awareness. Conscience revealed to the individual their sinfulness and damnation.\textsuperscript{252} A guilty conscience prepared human beings for faith, by serving as the means by which they could judge themselves and realize their need for the grace of God. It was hence the first step on the path towards faith. By consciously accepting that one was a sinner, one could detach oneself from the guilty conscience and become righteous. In other words, conscience became liberated from law and sin through faith in Christ and the forgiveness of sins. Though Luther still held that remnants of sin

\begin{itemize}
\item \textsuperscript{249} Martin Luther, \textit{Disputation Against Scholastic Theology}, in \textit{Luther’s Works}, volume 31, par 9, p. 9.
\item \textsuperscript{250} Luther, \textit{Disputation Against Scholastic Theology}, in \textit{Luther’s Works}, volume 31, par 21, p. 10. See also Edward G. Andrew, \textit{Conscience and its Critics} (Toronto: University of Toronto Press, 2012) p. 16.
\item \textsuperscript{251} Luther, \textit{Sermons on the Gospel of John 6-8}, in \textit{Luther’s Works}, vol. 23, pp. 65-66.
\item \textsuperscript{252} Martin Luther, \textit{The Freedom of a Christian}, in \textit{Luther’s Works}, volume 31, pp. 346-7.
\end{itemize}
remained due to the sinful nature of human beings, these sins were no longer counted, because the individual had faith in the grace of God.\textsuperscript{253}

\textbf{3.1.6: John Calvin}

Calvin’s conception of conscience was similar to Luther’s.\textsuperscript{254} Calvin defined conscience as, “…a sense of divine judgment, as a witness joined to them, which does not allow [individuals] to hide their sins from being accused before the Judge’s tribunal.”\textsuperscript{255} For Calvin, conscience was the “innate power to judge between good and evil;” it was the seat of moral self-evaluation and judgement.\textsuperscript{256} Yet conscience was not the purview of the inner being only; rather, Calvin characterized conscience as a relationship between God and the human being. Conscience was “a certain mean between God and man…[an] awareness which hales man before God’s judgment”.\textsuperscript{257} Conscience fostered a relationship between the individual and God that was different than the relationship between the individual and other human beings or the Church.

\textsuperscript{253} Luther, Galatians, 2.16, p. 133.


\textsuperscript{256} Calvin, 2.2.22.

\textsuperscript{257} Calvin 3.19.15.
Yet conscience was reliant on God’s grace. God had ordained spiritual law, or law of conscience, to be followed by people in the heavenly kingdom. This law was innate, and synonymous with natural law, since it was written in the hearts and consciences of people. It could also be found in the Scriptures and in the Ten Commandments.\textsuperscript{258} True obedience and worship entailed that one followed this law perfectly. Yet Calvin argued that human beings were not capable of obeying the law due to original sin, and the law critiqued and condemned conscience for this failure.\textsuperscript{259} Calvin explained that justification was based on God’s mercy alone; God through grace liberated conscience from its condemned state by granting spiritual freedom to those in the heavenly kingdom. Believers were freed from the requirement to earn salvation by obedience to the law; they could be made righteous and gain salvation through faith and grace. Moreover, believers exercised liberty of conscience, in the sense that they were free to follow the commandments of the law without fear of its condemnation when they sinned.\textsuperscript{260}

Like Luther, Calvin critiqued the system of canon law by which the Church had come to govern spiritual life. He argued that the Church had “pass[ed] the bounds of God’s Word;” contrary to what the Church preached, the power of judging Scripture did not depend on it.\textsuperscript{261} He insisted that the Church needed to respect the freedom of conscience of Christian believers. While the Church could make rules concerning the outward forum, it was not authorized to impose laws on

\begin{itemize}
\item \textsuperscript{258} Calvin I.24.
\item \textsuperscript{259} Calvin 2.7.4.
\item \textsuperscript{260} Calvin 3.19.5, 1.33.
\item \textsuperscript{261} Calvin I.7.2
\end{itemize}
consciences in adiaphora (indifferent things). Doing so tyrannized and confused conscience. Calvin bypassed the confessional and penitential structures of institutional church by deinstitutionalizing conscience and removing it from its traditional role as a church-approved means to self-reformation and good works.

3.1.7: Conclusion to Part 1

The point of the historical trajectory offered thus far is to show how the Christian conscience was, from the time of St. Paul, characterized by individualism. The Church had freed the individual from Jewish law and its social community and had given individual conscience a significant degree of autonomy within the secular sphere. However, this individualism of conscience was institutionalised, since sinners required the Church for salvation and divine grace. During the Protestant Reformation, Luther, Calvin and other thinkers rendered the individual religiously autonomous. In both Luther and Calvin’s thought, religion became a personal path towards salvation. It required private, individual adherence to doctrine and commitment to the church. Rituals and other institutionalized forms of religion were perceived as less important. The religious sphere was also considered distinct from the secular. Protestantism established the doctrines of sola scriptura (scripture alone), i.e. the individual conscience had the authority to communicate with God and to interpret the scripture; and sola fide (faith alone), i.e. individual faith dictates one’s state of salvation and place in the afterlife, which made the religious conscience increasingly subjective and individualistic. Hence, though there was more to conscience than its religious connection, Christianity – and in particular, Protestantism, played a vital part in its development.
3.2: Part 2: Impact of ‘Conscience in Religion’ on the Development of Toleration

Introduction

In this section, I will demonstrate that a Protestant conceptualization of conscience and religion played a crucial role in the historical development of toleration, a fundamental liberal value that evolved into the political and legal freedom of conscience and religion. Many political theorists begin their accounts about freedom of conscience and religion with reference to toleration, but few have delved into sufficient historical detail to explain the relationship between religious conscience and the intellectual development of toleration. The most detailed treatments of the relationship between conscience and toleration can be found in the works of Jeff Spinner-Halev, Nathan S. Chapman and Noah Feldman, but neither of these are as thorough as they could be.\(^{262}\) This section will attempt to remedy this gap in conceptual knowledge, demonstrating that discussions about conscience and religion played a fundamental role in the historical development of toleration.

\(^{262}\) Spinner-Halev offers a ‘broad-strokes’ version of Protestantism’s influence on religious toleration, which, though useful, skims over complex historical details. See Jeff Spinner-Halev. "Hinduism, Christianity, and Liberal Religious Toleration." Political Theory (33, no. 1) (2005). Feldman’s particular focus was on Locke’s theory of religious toleration and its impact on the Founding Generation, so he was disinterested in offering a comprehensive history or looking at the influence of Locke’s contemporaries. See Noah Feldman. “The Intellectual Origins of the Establishment Clause” New York University Law Review (77, no. 2) (2002). Chapman focused on the historical impact of Locke’s theory on the colonial charters and the First Amendment. He argued that there are strands of Christian thought that promote fidelity to conscience even when it may be at odds with revealed truth. The tradition, therefore, supplies grounds for respecting conscience per se—whether religious or not. See Nathan S. Chapman, “Disentangling Conscience and Religion”, University of Illinois Law Review (issue No) (2013). I will discuss his theory at length later in this chapter.
Toleration arose from the need to mediate between diverse varieties of religious conscience. Though Protestant thought did not immediately lead to toleration – in fact, early Protestant history was rife with conflict and violence – it birthed a diversity of churches and sects, not just between Catholics and Protestants, but also within Protestantism itself, and the existence of clashing forms of conscience led to civil conflict and religious war. The need for the protection of ‘conscience in religion’ figured prominently in discussions concerning toleration. ‘Conscience in religion’ arose from the Protestant belief in a personal quest for salvation, which required a private, voluntary faith commitment. Religion entailed a personal assent to doctrine, and required an individual commitment to church and other institutionalized forms of collective identity. This sphere of personal choice and commitment needed to be separated from the secular realm. Hence toleration assumed a particular shape in the liberal state: it prioritized ‘conscience in religion’, an assumption that persists in contemporary legal practice.

In this section, I will somewhat elide conscience and religion. I will do so because, as alluded to above, conceptions of religion after the Reformation took on a particular form which made the individual person and inner conscience the most fundamental aspects of it. Religion became interiorized. Rather than emphasizing priesthood or the church, religion concerned individual conviction and a personal relationship with God.\textsuperscript{263} As Winnifred Fallers Sullivan argues,

\footnotesize
\begin{quote}
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religion was positioned as essentially private, individual, chosen, and belief- and text-based. I want to show how that process materialized in the political realm.

### 3.2.1: Clashes of ‘Conscience in Religion’ Created a Need for Toleration

Contrary to popular conceptions about the role of Protestantism, the advent of Protestantism did not immediately lead to toleration. The increasing emphasis on conscience amongst Protestant thinkers fostered intolerance initially. Luther differentiated between the spiritual and material realms and between religious and political freedom of conscience. He warned that religious freedom could not be extended to politics; freedom of conscience did not free a person from subjection to government and laws. Moreover, the role of government was limited. He wrote: “For over the soul God can and will let no one rule but Himself. Therefore, where temporal power presumes to prescribe laws for the soul it encroaches upon God’s government and only misleads and destroys the souls…Furthermore, every man is responsible for his own faith, and he must see to it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me.”

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267 *Secular Authority: To What Extent It Should Be Obeyed* (1523)
Though government’s role was limited to preserving civil peace, and not to restricting conscience, Luther advocated for martyrdom rather than rebellion in the face of unjust laws, which would be decided individually and subjectively. Furthermore, Luther did not offer a conception of toleration. Until about 1525, during the years when he and his followers were condemned as heretics and threatened with persecution, he argued that the Church could not compel conscience, and he advocated for mildness towards heresy, calling for preaching and persuasion rather than force towards Catholicism. Later, his view of dissent became much harsher. Luther argued that Christian society and the church went together, with individual subjects adhering to the religion of their ruler or migrating. He considered it the duty of rulers and public authority to suppress Catholic Mass as a blasphemous crime. His advice to German princes who became Protestant was that they compel their subjects to submit to religious instruction and allow them to hear only authorized preachers. For Luther, this policy did not infringe on freedom, because no one was forced to believe, but merely required to listen to the word of God. Luther was also intolerant towards other Protestants. He condemned as blasphemy the position of Swiss theologian Zwingli, who was the spiritual leader of the Reformation in Zurich. He was also intolerant of Spiritualists, Anabaptists, Antinomians, and other sects to which the Reformation gave birth.

Calvin was arguably more intolerant as Luther. He maintained that heretics should be punished and killed. He was disinterested in mediation or reconciliation of differences between

268 Zagorin (2003), 73.
269 Ibid, 76.
Catholics and Protestants. He considered Catholicism a false, idolatrous religion; it could not be tolerated in the Protestant state. Protestants who continued to attend Catholic services for fear of their lives were labeled hypocrites and traitors to Christ. Calvin was hostile to sects such as Spiritualists and Anabaptists, whom he condemned for being libertines and fanatics. He explained that the Church had authority to exercise jurisdiction over sinners by admonishing, censuring and excommunicating offenders. Offenders included those who had violated morals and adhered to false doctrines. For Calvin, even tyrants had to be obeyed. Calvin, 4.20. Christian rulers were God’s deputies on earth; they were responsible for supporting and taking care of religion and church, which entailed suppression of idolatry, sacrilege and blasphemy. Calvin argued that God desired men’s aid in sustaining religion, and that Christ’s coming did not abolish the duty of judges and political authorities to punish evildoers. Ordinary people could not claim to have the ability to judge their rulers, or the right to overthrow the government. Calvin offered one recourse to resistance, pointing out that the office of the king is divinely instituted, and therefore the king can only be set aside by those near to him in office. Through these arguments, Calvin offered a justification for the repression of heterodoxy and religious dissent by ecclesiastical and political authority.

It was not just the founders of the Reformation who were intolerant; Zagorin explains that none of the Protestant churches were tolerant or acknowledged freedom to dissent. Protestants had adopted the form of rule that existed under the Catholic Church, with regions designated as Catholic or Protestant and absolutist confessional states organized around a single official

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271 Calvin, 4.20.

272 Calvin offered one recourse to resistance, pointing out that the office of the king is divinely instituted, and therefore the king can only be set aside by those near to him in office.

273 Zagorin (2003), 82.
church. The state was considered the guardian of religion. Rulers were responsible for promoting religion, which was perceived to be public, and for eliminating threats to religion, i.e. heresy. Subjects were expected to conform without regard for individual conscience for the sake of the preservation of political unity and peace. When a city or principality became Protestant through the action of its prince, Protestant denominations aligned with the state sought to impose their beliefs on society by persecuting heresy and suppressing dissent. As a result, Catholic beliefs and practices were forcefully suppressed. Yet, as Zagorin points out, both those who had been persecuted and those who were persecuting had intolerant beliefs. The Catholic church also had a policy of repression against heresy. Both sides were responsible for religious massacres, the most infamous of which was the religious civil war in France and the Netherlands rebellion. But there were many other wars between and among Christian denominations in Austria, Bohemia, Demark, Germany, Ireland, Scotland, Switzerland, England and Belgium.

Efforts made towards religious coexistence had limited impact and staying power. Two agreements are noteworthy. First, the Peace of Augsburg (1555) established *cuius regio eius religio* (the religion of the ruler would be that of the ruled). This treaty was as much about the development of state sovereignty as it was about religion. It authorized the coexistence in the Holy Roman Empire of both Catholic and Lutheran states and required that individual subjects

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274 Zagorin (2003), 88. Simultaneously, the Catholic Church intensified its persecution against heresy, which took thousands of lives.

275 Ibid, 35.

276 Ibid, 87-90.

277 Kamen (1967), 129.
conform to the religion of their prince or emigrate. It had limitations: it excluded Calvinists and Anabaptists, leaving these communities at risk of charges of heresy; and only one religious denomination was permitted in each state. Frequent violations of the conditions and local conflicts undermined the treaty until, in 1618, the Thirty Years War ended the treaty. Second, in France, the Edict of Nantes in 1598 was aimed at ending the civil war against French Catholics and Protestants (called Huguenots), which had lasted over thirty years. The royal decree was intended to be valid in perpetuity. It granted a measure of legal toleration to the Protestant minority, which was permitted to have its own churches and freedom of worship in designated places. It was also granted political and military privileges in exchange for religious liberties. The Edict reflected political expediency; it stemmed from a realization that the two sides could not meet, and that there was no hope of convincing one another. Yet neither side appear to have internalized religious toleration. During the second half of the century, Louis XIV’s government imposed new restrictions on Protestants and became increasingly repressive towards them. In 1681, the Edict was revoked, persecution intensified, and many Protestants were forced to emigrate.

These two attempts at religious coexistence arising out of the need for the protection of religious conscience were unstable, and neither lasted very long. It took a long period of war, strife and persecution before a solution to the problem of order was found, in the form of the separation of church and state and, more gradually, policies concerning toleration.

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278 Ibid, 195.

279 Zagorin (2003), 92.
3.2.2: CONSCIENCE IN RELIGION AS THEORETICAL BASIS FOR THE DEVELOPMENT OF TOLERATION

Across Europe, various thinkers gradually came to espouse toleration. Political theorists such as Feldman, Chapman and Schwartzman have tended to aggrandize Locke’s influence in the development of toleration.280 It is true that Locke’s writings inspired American revolutionaries and were integrated in the US Declaration of Independence as well as the system of government adopted in the US Constitution. Locke’s principles could also be found in the Declaration of Rights of Man and Citizen in France.281 Yet, though Locke’s Protestant assumptions about the importance of individual conscience greatly impacted the development of liberal democracy, several notable contemporaries made their own compelling arguments in favour of freedom of conscience and religion in the Western world, including Sebastian Castellio, Baruch Spinoza, Roger Williams, and Pierre Bayle. Locke’s version of toleration was somewhat limited compared to some of his contemporaries; his arguments were not as inclusive or skeptical as that of Spinoza or Bayle. Writing in the sixteenth and seventeenth century, these thinkers’ works were aimed at a Christian audience; they argued that persecution was contrary to the mind of Christ and did harm to Christianity. Moreover, they conceived of toleration as a way to protect the sanctity of religious conscience in a time of significant doctrinal differences. It is possible to weave together three recurring threads in these philosophers’ arguments in favour of toleration:


281 Locke was influential through the first half of the eighteenth century and then rapidly lost influence, particularly in France as intellectuals came to regard the English as conservative.
First, individual conscience was given primacy, not just in religion, but also in each theory of toleration:

- Williams’ primary concern was with the cause of conscience. Conscience was the essence and foundation of religion, and hence religious freedom was primarily about freedom of conscience. He pointed out that conscience was the voice of God; through conscience, an individual communicated with God on spiritual matters. In his commentary on *Bloody Tenet*, Edward J. Eberle explained that for Williams, violating conscience was sacrilegious, since it entailed ‘violating God’s work and man’s dignity’. Williams referred to the forcing and persecution of conscience as “spiritual and soule rape”. He advocated for a guarantee of conscience for all. He argued that consciences are equal and alike in their subjective conviction of truth; an individual might hold a belief that he or she sincerely believes to be true, though others might call it heresy. Hence each person’s exercise of conscience should be tolerated. He extended his principle of toleration to Catholics and “Jews, Turks, Papists, Protestants, and pagans”, on the basis that all of them exercised conscience.

- Bayle more strongly than any of the others developed his case for toleration on the basis of conscience. According to Bayle, conscience was the voice and Law of God within

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283 Ibid, 294.

284 Ibid, 295.

an individual; hence obedience to one’s conscience was obligatory and could not be
violated, since it entailed violating the Law of God. Individuals possessed a right to
freedom of conscience because they had a duty to obey their consciences. This was true
of all people, whether heretical or not.

Moreover, these philosophers argued that respect for conscientiously held beliefs took
precedence over (one’s own conception of) truth. Individuals were to be respected even if their
beliefs were considered wrong. There was a broad range of beliefs and practices subject to
conscience, since there was no clear way of determining which beliefs and practices led to
salvation. Hence leeway was necessary to enable individuals to follow their consciences:

- Castellio argued against the theory and practice of heresy, pointing out that every sect
views other sects as heretical.²⁸⁶ He accepted denominational and theological differences
among Christians as inevitable. The Bible contained obscurities that had been debated for
over a thousand years without resolution; hence dissent was inevitable and
understandable. He lamented those Christians who were concerned with these obscurities,
none of which needed to be known for salvation by faith or self-betterment.²⁸⁷ Castellio
wanted to shift focus to the religious truths that were generally agreed upon and which all
Christians accepted as essential to their salvation; the rest, he argued, should be left to the
judgement of Christ and God alone.

²⁸⁶ Zagorin (2003), 120.
²⁸⁷ Ibid, 113.
• Williams observed that the fundamentals of religion were not clear, and that many disputes concerning the church, worship, minister, and who was truly religious could not be decided authoritatively. Hence the only way to avoid conflict was to leave each person’s conscience free to decide for itself. 288

• Bayle insisted that an erring conscience has the same rights as an enlightened conscience. 289 Truth was inaccessible; even ecclesiastical authority and Protestant theologians were unable to know God’s will and objective religious truth with certainty. Since there is no rational or authoritative way to determine the truth, the contents of conscience became less important than the formal obligation to follow it. God was concerned not with whether the outcome of conscience was in error or not, but rather the extent to which the person was sincere and true to the dictates of his or her conscience. Only by following what the conscience took to be true could one act morally; otherwise, Bayle insisted, not a single virtuous act would be possible. As a result, conscience became binding: “conscience, whether true or errant, always obliges”. A person who acted contrary to their conscience was guilty of sin for transgressing the law of God.

• Spinoza held that there was very little that was contained in religion that was required by God. It did not matter if people believed in free will, predestination or the afterlife. 290 There was no moral obligation to hold correct beliefs. Spinoza defended individual freedom to interpret the Scriptures.


289 Marta García-Alonso (2017), 337.

290 Theological-Political Treatise, 7, 116–7.
Finally, the state could not coerce for three reasons: a) it was ineffective in changing belief, and b) only faith based on inner conviction was pleasing to God, and hence led to salvation, and c) it operated in a different realm than religion:

- Castellio explained that force is impossible to change conscience. He argued that persecution was contrary to the spirit of Christ, which prohibited force and violence in religion and emphasized charity and love. Moreover, persecution had a much greater impact on the godly than on others. He argued that political authority should be wary of harming people due to their faith, since matters of belief and conscience were above the reach of the sword or power. Castellio differentiated the spiritual and secular realms. The civil magistrate had no authority over spiritual offenses; rather, its business was to protect people against injustice.

- Likewise, though Spinoza believed in obedience to government and law as a moral duty, he reasoned that “it is impossible to deprive men of the freedom to say what they think”, since minds could not be easily controlled. Moreover, no one was able to transfer their natural right or faculty to reason freely and form their own judgments. Hence it would be tyrannical for the state to exert power over this freedom. Spinoza explained that “freedom can be granted to everyone without infringing the right and authority of the

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291 Zagorin (2003), 119.
292 Ibid.
293 Ibid, 185.
sovereign” – a right and authority that pertained also to religious matters. He pointed out that the state’s only responsibility was to ensure that justice prevails, which meant it did not need to concern itself with beliefs.

- Williams reasoned that persecution of conscience was an un-Christian, irreligious act. Persecution harmed conscience itself and had the most severe impact on those who were the most religious. Williams pointed out that a policy of persecution was counter-effective in changing a deluded conscience, since it ‘hardened’ consciences and led to civil dissension. Only God could show people the truth; force would lead to hypocrisy. He also took the farthest step of all the theorists mentioned when he offered a secularized conception of political order, calling for the complete separation of churches and religion from the state. People were required to be obedient to the state in civil matters but not in matters concerning worship or faith. He defended his position on religious grounds, arguing that Christ had ordained a distinction between the civil-political and matters of personal belief belonging to the realm of conscience, and that a separation would preserve the purity of religion. He also used secular arguments, pointing

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296 Eberle (2005), 296.

297 Ibid, 300-301.

298 Ibid.

299 Eberle wrote that Williams’ proposal for the separation of religion and state was “most likely the first recorded practice of the idea in the western world”. Eberle (2005), 312. See also Zagorin, 201.
out that this separation would allow the government to focus on its main role, which was ensuring civil peace.\textsuperscript{300}

- For Bayle, the sovereign’s job was limited to the external forum.\textsuperscript{301} As long as individuals were respectful of laws that preserved peace and order and did not impose their religion on others by use of force, their freedom of conscience would be left disturbed.\textsuperscript{302} Bayle made a religious argument, arguing that God would be pleased with external actions of adoration only to the extent that they came from a sincere state of mind and will. He insisted that the biggest wrong that could be committed was to force a person to act against conscience.\textsuperscript{303} This meant forcing a person into a state of sin, for it entailed causing a person to act contrary to what he believed was the voice of God. Since to act against the law of God was to show hatred and contempt of God, a command to act against conscience was the same as commanding hatred and contempt of God. Neither God nor people themselves could authorize this right over conscience.\textsuperscript{304}

As is evident in the philosophers’ writings above, early arguments in favour of toleration relied on a broad Protestant conception of ‘conscience in religion’. Their justifications relied on the perception of religion as a personal quest for salvation. Hence emphasis was on the protection of

\begin{flushright}
\textsuperscript{300} Ibid, 313.
\textsuperscript{301} Zagorin (2003), 277.
\textsuperscript{302} Bayle went as far as to declared laws against the conscience as null. See M. García-Alonso (2017), 343.
\textsuperscript{303} See Bican Sahin, \textit{Toleration: The Liberal Virtue} (Lexington Books, 2010), 69-81.
\textsuperscript{304} M. García-Alonso (2017), 343.
\end{flushright}
private, individual, internal and voluntary belief which flourished in a sphere removed from the
state and other institutional forms of power.

3.2.3: John Locke

Given Locke’s influence in the Western world, it would be remiss if this chapter did not attend to
his view of conscience and religion and its impact on toleration. Like his contemporaries,
Locke’s arguments were largely rooted in Protestant Christianity, and the impact of his writings
has meant that the legal protection of freedom of conscience and religion retains a strong
religious element.

Locke’s understanding of toleration was something he came to gradually. In earlier works, Locke
appeared to be concerned with the stability of government and maintenance of its authority and
power.\textsuperscript{305} He feared that the claim of freedom of conscience was being abused to create
disorder.\textsuperscript{306} He was of the view that political authority should have power over all things,
including modes of worship deemed ‘indifferent’.\textsuperscript{307} ‘Indifferent things’ was a theological term
referring to that which was thought to be neither forbidden nor commanded in the Scripture.
There was difference of opinion about what was included in this category, but for Locke,
‘indifferent things’ was interpreted widely and consisted of rites and ceremonies, ecclesiastical

\textsuperscript{305} Two Tracts on Government (1660) and Essay Concerning Toleration (1667)

\textsuperscript{306} His worry about disorder appears quite early in First Tract on Government. See 6-8.

\textsuperscript{307} John Locke, Two Tracts in Locke: Political Essays, edited by M. Goldie (Cambridge: Cambridge University
organization, food, clothing and other aspects of external worship and observance. Indifferent things were considered neither morally good nor evil; they were unnecessary for salvation and hence subject to individual conscience. Locke argued that when human beings placed themselves under government for the sake of peace and security, they had to set aside their natural freedom. The magistrate had the right and power to make laws and command what any subject could lawfully do. Locke insisted that the magistrate’s authority must extend to all things, indifferent or not, if peace and security were to exist. He warned against the danger of allowing people to follow their individual conscience in individual things, and was concerned that they would apply their conscience to civil matters as well. Locke insisted that though the magistrate could not compel private conscience, it could affect outward conformity in external practice for public order. Locke’s distinction is similar to that of Hobbes, who had argued in the Leviathan that while internal faith was exempt from human jurisdiction, words and actions were within sovereign authority.

Later, Locke significantly altered his earlier views, beginning with An Essay Concerning Toleration. Using arguments dependent on religion and reason, he expanded the space given to individual conscience and created a separation between the state and religious belief and practice. Locke differentiated between speculative opinions, indifferent things and societal virtues and vices. Speculative opinions deserved full toleration. He conceived of a wide range

308 Locke, Two Tracts, 71.


of beliefs and practices that fell into this category, including belief in the Trinity, purgatory, transubstantiation, and Christ’s personal reign on earth.\textsuperscript{311} These opinions and actions had “an absolute and universal right to toleration”.\textsuperscript{312} John Marshall has noted that what counted as speculative opinions for Locke was quite radical. In particular, he pointed to Locke’s inclusion of the Trinity as speculative opinion.\textsuperscript{313} He also noted that Locke had revised the doctrines on original sin, the atonement, and the resurrection.\textsuperscript{314} According to Locke, God was not overly prescriptive, and hence there was no clear truth that could be discerned. Moreover, the necessary beliefs that Christians were required to hold was limited; much of what had historically preoccupied theologians was speculation. He argued that religious opinions should be removed from government interference because they were harmless; they did not entail actions pertaining to others, and did not affect or injure society.\textsuperscript{315} Finally, he noted the limits of political authority; he argued that political authority had neither the right nor expertise to decide doctrinal orthodoxy or adjudicate religious debates of any kind.\textsuperscript{316} These matters concerned an individual’s relationship to God, which was based on subjective understanding that was unresponsive to

\textsuperscript{311} Ibid, 137.

\textsuperscript{312} Ibid, 176.


\textsuperscript{314} Ibid, 111.

\textsuperscript{315} In a later version of his \textit{Essay}, and in his \textit{Letters Concerning Toleration}, Locke revised his understanding of things indifferent, arguing that in matters of religion nothing was indifferent. His ideas reflected a consideration of religious practices from within the subjective standpoint of the individuals who believed in them; for these individuals, nothing could be indifferent. While he maintained his understanding that the magistrate had power to regulate things indifferent, he also held that this authority should not encompass religion and worship, because the concepts of indifference did not apply to these categories. Locke thus broadened the scope of religious tolerance.

\textsuperscript{316} \textit{Essay concerning Toleration}, 178.
compulsion and could only be changed by the inward constraint of the spirit. One could already see the prioritization of belief over practice in Locke’s argument. Belief was private, subjective and individual, and seemed to have little impact on the actions of the individual or the outside world.

Locke held that the two other categories also deserved toleration but were subject to limits determined by the magistrate. ‘Indifferent things’ were religious practices that affected society; they were not the magistrate’s business so long as they did not disturb peace and stability. Locke’s classification of religious practices as ‘indifferent things’ contributed to the narrowing of their field of influence; they could no longer be considered reasons for disrupting peace or security. Nevertheless, this was a marked shift from his earlier argument that the magistrate had authority over all indifferent things. Now he argued that restrictions could be imposed only if the magistrate had determined that the opinion or action, whether it was religious or not, disturbed the peace and security of people. Locke explained that though the magistrate could not compel subjects to believe or disbelieve, and while it should not legislate on indifferent things, human beings could respond to violations of their consciences by doing what their consciences led them to do while submitting to the magistrate’s punishment. Hence, though Locke did not include a right to overthrow the magistrate who had violated conscience, his view had shifted from absolute obedience to passive disobedience. As for general moral virtues and vices, Loke held that they should not be legislated by the magistrate, since the magistrate was unconcerned with

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317 Ibid, 140.
318 Ibid, 180-81.
moral virtues and vices. Yet, if these moral virtues or vices threatened to disturb peace and stability, the magistrate could legislate against them.

Locke’s *Letter concerning Toleration* advanced his theory of toleration further. Locke’s writing made a case for toleration in the realm of worship and speculative theology using a combination of religious premises and reason. Locke made two religious arguments which were not present in earlier works. First, he argued that toleration was a Christian duty. According to Locke, religious intolerance or persecution as a means of helping people achieve salvation was incompatible with the spirit and teaching of Christ. He argued that toleration was a Christian duty and the “chief distinguishing mark of a true church”. He rebuked the practice of persecution among Christians and condemned the fact that people were being persecuted for minor differences which did not pose a threat to their eternal state. Second, Locke insisted that religion demands faith and inward sincerity. Freedom of conscience was required to be religious. For Locke, “faith only, and inward sincerity, are the things that procured acceptance with God.” Human beings could not be forced to be saved; they had to be “left to their own consciences.” God demanded faith and inward sincerity rather than outward appearance.

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319 Ibid, 143.

320 Ibid, 151.


322 Ibid, 7.

323 Ibid, 37.

324 Ibid.
fact, outward conformity of belief and worship was hypocrisy and contempt of God, and prevented the individual from being saved, since faith was required for salvation.\textsuperscript{325} Locke explained that religion was concerned with the future life and care of the soul, which was a matter between the individual and God alone.

In many ways, Locke’s arguments were a rewording of those made in his Essay. He retained the boundary he had set between the state and religion, differentiating between the jurisdiction of civil government and religion.\textsuperscript{326} For him, "there is absolutely no such thing, under the Gospel, as a Christian commonwealth."\textsuperscript{327} Locke explained that the state has its origin in the consent of the people. It was for the protection of worldly goods and rights that the state had been authorized. The jurisdiction of the state was not the salvation of souls, but rather the preservation and advancement of life, liberty and property.\textsuperscript{328} Hence the contractual relationship set limits on the magistrate’s power. Moreover, Locke pointed out that it was irrational for people to consent to a government that enforced a particular religious point of view, since this point of view could prove incompatible with the outcome of individual conscience. If a government decided to impose its opinion on its citizens, that decision would leave in a precarious situation those who believed the government’s path was wrong and would not lead to salvation, since the consequences of following a certain path would be borne by the individual, not by the government.

\textsuperscript{325} Ibid, 38.
\textsuperscript{326} Ibid, 24.
\textsuperscript{327} Ibid, 42.
\textsuperscript{328} Ibid, 3.
Locke added that political power was limited. Government could force individuals to conform to outward practices but would not be able to control their minds or inner self. Religion was the purview of the individual, who could not be compelled by the state using outward force to adopt or reject specific beliefs. Moreover, government was not fit to be the arbiter of truth. Locke argued, “neither the right not the art of ruling does necessarily carry along with it the certain knowledge of other things, and least of all true religion”. He added, “the one only narrow way which leads to Heaven is not better known to the Magistrate than to private persons, and therefore I cannot safely take him for my guide, who may probably be as ignorant of the way as my self, and who certainly is less concerned for my salvation than I myself am.” Hence individuals could not be reasonably expected to abandon care of their own salvation to another.

In *An Essay Concerning Toleration*, Locke had proposed passive disobedience. In *Letters Concerning Toleration*, Locke was now willing to consider more active resistance to government overreach. If the magistrate exceeded his authority, individuals were “not obligated by that law, against their consciences” and each should prioritize “care for [their] own soul”. Locke suggested that such individuals would “resist the magistrate’s force with force, and…defend their natural rights…with arms as well as they can”.

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329 Ibid, 16. Moreover, the church was a voluntary association within civil society; it was no different than any other private association.

330 Ibid, 28.

331 Ibid, 28.


333 Ibid, 161.
A recurring thread in his works was his intolerance towards Catholics and atheists. Locke argued that the state was only permitted to interfere when religious beliefs led to disorder or anarchy. For this reason, he argued that Catholics had no right to toleration because they pledged allegiance to a foreign sovereign (pope). Their beliefs could undermine the authority of government, as they could not be relied upon to remain neutral if the government was at war with the Catholic Church. Likewise, Muslims were politically tied to the mufti of Constantinople, and were also unworthy of tolerance. Locke also restricted atheists. He wrote, “Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all.”

Because atheists did not believe in God, they lacked the basis on which a societal moral system can be built. For Locke, it is only possible to be moral by believing in God, who was the foundation of morality. As long as human beings possessed fear of God (in any manifestation) to whom pledges were to be made based on a consciousness of one’s moral obligations, they could be trusted to keep their promises, oaths and covenants.

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336 Ibid, 54.
Given Locke’s political influence, there has been much debate about whether Locke’s toleration makes sense without its religious elements. Some have tried to make the case that his political theory has secular liberal foundations and could be understood without reference to religion. This group includes Ronald Beiner,337 Nathan S. Chapman,338 Ryan Pevnek339 and Michael Zuckert.340 Others contend that Locke’s works were steeped in the religious views that were present at the time. John Dunn, John Marshall, Jeremy Waldron and Micah Schwartzman are part of this group of thinkers. John Dunn’s reading of Locke adopted a pessimistic attitude

337 Ronald Beiner, “Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke” San Diego Law Review 47 (No. 4, Fall 2010): 1107-1124. Beiner argues that Locke was more concerned with the problem of how to think freely than with how to believe freely, and that arguments concerning religious conscience were secondary to those concerning intellectual conscience. But Locke’s central concern does seem to be protection of religious conscience. Even if, as Beiner argues, “the logic of his argument extends further”, Locke does not seem interested in non-Protestant or non-religious forms of conscience. Beiner suggests that the idea of religious conscience seems parasitical on the more fundamental idea of intellectual conscience, but the opposite seems more in line with Locke’s Letters.

338 Nathan S. Chapman (2013), 1465. Chapman points out that Christianity supports a notion of conscience that is separate, though interrelated with, religious obligations, and that is worthy of respect in its own right, whether religious or nonreligious. He points out that there is a tension between conscience’s fallibility and the importance of following conscience. While this is true, it does not necessarily suggest a division between religious obligation/truth and conscience. Rather, Christian theology maybe that the individual conscience exercises a degree of freedom to choose, and hence, it must be separate from religious obligation/truth.

339 Ryan Pevnick, “The Lockean Case for Religious Tolerance: The Social Contract and the Irrationality of Persecution”, Political Studies (57, no. 4) (2009). Pevnick contends that Locke offers strong non-religious arguments stemming from his social contract theory in favour of toleration: granting the magistrate power over religious matters jeopardizes the government’s ability to provide public goods and encourages disorder. Moreover, granting the magistrate additional power is risky for all citizens. These arguments, however, are not as strong as their religious counterparts; the goals suggested could be achieved through Hobbesian means. Pevnick himself admits that there are ‘inherent limits’ to his non-religious arguments, and that they could justify toleration in some cases but not others.

340 Michael P. Zuckert, “Locke: Religion: Equality”, The Review of Politics (67, No. 3) (2005): 419-431. In Straussian fashion, Zuckert claims that Locke writes deceptively, and that he is not actually a theist or a Christian natural law thinker. Zuckert makes the argument that Locke develops a two-track argument; one theistic while the other appeals to self-ownership, which is the moral basis for individual rights. He maintains that Locke’s argument can be detached from its Christian trappings to establish a theoretical basis for equality without appeal to religion. Zuckert claims that Locke’s notion of the self posits itself as a possessor of rights, and that its very claim for itself as a self contains a logical claim of exclusivity in relation to others. But this argument from logic cannot be located in Locke’s writings.
towards the realization of liberal and democratic principles without theistic foundations.\textsuperscript{341} John Marshall pointed out that many of the arguments for toleration were grounded in religion and aimed at putting forward a specific interpretation of Christianity.\textsuperscript{342} Jeremy Waldron argued that Locke’s works only make sense in light of a particular account of a relation between man and God; stripped of its religious content, Locke’s conception of equality is unintelligible.\textsuperscript{343} Micah Schwartzman wrote that Locke’s case for toleration could not be understood or made coherent except in relation to its religious content.\textsuperscript{344}

Jakob De Roover’s moderate approach seems to fit Locke’s political philosophy best. He contends that the two readings are compatible.\textsuperscript{345} Locke’s understanding of toleration has theological foundations but has also given shape to secular liberalism. He argues that the liberal model of toleration is a secularization of the theology of Christian liberty and its division of society into a temporal political kingdom and the spiritual kingdom of Christ. The liberal model results from an internal Christian dynamic of secularization, which reproduces theological ideas in the guise of secularism rather than freeing political thought from religion.


\textsuperscript{344} Micah Schwartzman (2005), 682.

Locke’s theory was steeped in theological principles, even if his detractors might have argued, legitimately, that he was not an orthodox Christian. Locke also included non-religious arguments, though these arguments are considerably weaker and not as well-argued as his religious ones. Yet Locke promoted a specific understanding of conscience and religion, earlier referred to as ‘conscience in religion’, which has become integral to our understanding of toleration. It was based on the Protestant belief that individuals have the authority and duty to determine what is necessary for themselves to achieve eternal salvation. Coercing people into religious beliefs was contrary to Christianity and ineffective, since only freely held beliefs led to salvation. Individual adherence to belief was more important than doctrines and practices that were upheld due to the authority of God or the Church. In Locke’s writings, one could see the prioritization of belief over practice. Belief was private and subjective and seemed to have limited impact on the actions of the individual or the outside world. Religious practices and ceremonies were considered matters of indifference. Moreover, Locke conceived of toleration as pertaining to individual beliefs and practices rather than communal ones. Locke’s separation between the secular and the religious also arose from an understanding of a private individual whose beliefs had little influence on public affairs. This notion of ‘conscience in religion’ has become imprinted on the liberal state such that it is difficult to conceive of other conceptions of conscience or religion, much less protect them. But it is no longer considered religious; it has been stripped of its theological justifications. This raises the question of whether toleration (and

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346 See Jeremy Waldron, atheism claims.

347 In fact, Locke warned that the church did not exist in order to gain ecclesiastical authority or exercise compulsive power; rather it was a voluntary society of people joining together freely in order to worship God. See Letters, p. 30
eventually, freedom of conscience and religion) would take on a different shape and have
different parameters if liberal theory had conceived of conscience without religion, or religion
without conscience.

3.3: PART 3: CHANGING DEFINITION AND CONCEPTION OF CONSCIENCE
AFTER THE REFORMATION

Yet the religious origins of ‘freedom of conscience and religion’ are only part of the story. The
development of conscience, religion and toleration was intellectually messy, and in attempting to
craft a story, one risks offering an essentialist reading of liberal history as Protestant. In the
following section, I will demonstrate that Locke’s version of conscience in religion is not the
only conception of conscience that holds sway in Western discourse. From the late seventeenth
century onwards, two broad versions of conscience existed side by side: a conscience that
became increasingly disassociated from religion competed with an explicitly Protestant Christian
conscience for influence in the political and social realm.

Earlier in this chapter, I wrote about conscience up until the time of the Reformation. After the
Reformation, conscience underwent profound transformation. It took on diverse shades of
meaning, form and significance: it was the voice of God; it was instinct; it was infallible; it was
untrustworthy; it was a function of the superego; its development required education; social
influences marred it; it was based on reason; it stemmed from emotion. In the eighteenth century,
nature, reason and emotion became more significant as anchors of conscience than God. Yet
reference to God did not easily dissipate even amongst those who unmoored conscience from
religion. As conscience changed shape and became increasingly amorphous, subjective and abstract, and as it began to operate without the support of institutional religion or ‘God’, philosophers in the Enlightenment period and beyond could no longer rely on the notion that conscience bore an objective relationship with concepts such as ‘truth’ or ‘morality’. Form took precedence over content; conscience was considered important because it arose from the individual. This shift rendered the category of ‘non-religious conscience’ increasingly difficult to conceptualize or judge. In comparison, the religious conscience was more distinct, familiar and could be more readily recognized. In this section, I illustrate the unprecedented diversity in manifestations of conscience by looking at the works of key figures over time. I intend to show how the shifting meanings associated with conscience made it increasingly difficult to grasp.

3.3.1: Hobbes and Locke

This process began with Hobbes, and was followed closely by Locke. Though aspects of conscience had been critiqued before, it was Thomas Hobbes (1588-1679) and John Locke (1632-1704) who launched the first widescale critiques of the concept of conscience. Both these philosophers undermined the popular religious opinion of the time that held conscience in high esteem. They were concerned that the term had been abused and though occupying a lofty position, instead reflected individuals’ private opinions or judgements in moral matters. Conscience to them was subjective and fallible.

348 Michel Montaigne had earlier argued that conscience is simply a reflection of custom or habit and an expression of the norms of one’s context or community. See Michel Montaigne, ‘On Habit,’ in The Complete Essays of Montaigne, trans. D. Frame (Stanford: Stanford University Press, 1958), 1.23, 83.
Hobbes was concerned that those who spoke of ‘my conscience’ were using the word improperly, and merely meant ‘my opinions’. He wrote:

“Men, vehemently in love with their own new opinions, (though never so absurd,) and obstinately bent to maintain them, gave those their opinions also that reverenced name of Conscience, as if they would have it seem unlawful, to change or speak against them; and so pretend to know they are true, when they know at most, but that they think so.”349

Hobbes was troubled by the misuse of the word ‘conscience’ by people of various religious denominations. The development of Protestant casuistry meant that Protestant ministers were now instructing their congregations on their erring consciences.350 This led to a situation in which both Roman Catholics and Protestants actively proclaimed the superiority and sanctity of their own consciences to the detriment of others, whose consciences were considered false. Likewise, the various Protestant denominations each claimed to know the true conscience, denouncing other people’s consciences as false. Hobbes rebuked them for their views, arguing:

“…[W]hatsoever a man does against his conscience is sin; and it dependeth on the presumption of making himself judge of good and evil. For a man’s conscience and his

judgement is the same thing; and as the judgement, so also the conscience may be erroneous.”

Hobbes was particularly concerned that this use of conscience rendered each person a judge of good and evil. For Hobbes, allowing each person the liberty of following conscience, given their diversity, led to anarchy and the destruction of civil society – in effect, a war of all against all. Hobbes proposed that individual conscience be stripped of its authority and replaced by the authority of ‘public conscience’, which was civil law. In the civil state, the only conscience that mattered was that of the sovereign, exercised through law. Law was the determinant of good and evil in the commonwealth. All citizens were obliged to obey the sovereign, even if their own private consciences disagreed; one could not exercise one’s own judgement in moral matters if it led to illegal action.

Hobbes argued that the law in the commonwealth was the public conscience by which people had agreed to be bound. They were to obey the laws of the sovereign where it concerned outward acts and practices of religion. Hobbes appears to restrict conscience, limiting it to belief and not action. He insisted that the sovereign could not interfere with belief. Even if the sovereign were to command a person to say that they do not believe in Jesus Christ, they could do so, for “profession with the tongue is but an external thing”. It was not possible for the sovereign to persecute one’s inner beliefs, for not only would it be ineffective ( “As for the inward thought

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352 Ibid, 198.
353 Ibid, 308.
and belief of men, which human governors can take no notice of (for God only knoweth the heart), they are not voluntary, nor the effect of the laws, but of the unrevealed will and of the power of God, and consequently fall not under obligation.")\textsuperscript{354}, but it was also undiscourable by the sovereign and hence could not be displaced.\textsuperscript{355} It was not the job of the sovereign to prosecute people for their opinions so long as their actions were not illegal. He insisted that human laws did not apply to the realm of an individual’s conscience; hence obedience to God and sovereign could clash. His theory distinguished between private and public morality. For Hobbes, individual conscience was private; people could be tried and punished for their deeds, but not their thoughts or intentions.

\textbf{Locke}

Locke appeared to say contradictory things about conscience.\textsuperscript{356} As noted earlier, conscience played an important part in some of his political writings, and was considered inviolable. Yet other references to conscience were Hobbesian. Locke diminished the authority and objectivity of conscience in his early writings. For example, in \textit{An Essay concerning Human Understanding}, Locke rejected the notion of conscience as an internal monitor. He argued that human beings do not have innate notions of good and evil.\textsuperscript{357} Like Hobbes, he held that conscience is mere

\begin{flushright}
\textsuperscript{354} Ibid, 197.
\textsuperscript{355} Ibid, 249.
\textsuperscript{356} See Sorabji (2014), chapter 8. See also Anders Schinkel (205), 211.
\textsuperscript{357} John Locke, \textit{An Essay Concerning Human Understanding} (London: Thomas Bassett, 1690), Book 2, chapter 3, paragraph 3.
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subjective opinion or judgment.\textsuperscript{358} and reliant upon one’s upbringing and societal context. Conscience did not originate from within: it was not “written on their hearts.” Rather, it was produced through “education, company and customs of their country”.\textsuperscript{359} Since it is not innate, the conduct of conscience was to be regulated not through internal monitoring but rather through public opinion and social censure.\textsuperscript{360}

\textbf{3.3.2: Enlightenment thinkers}

Though Hobbes and Locke set the stage for critiques of conscience, conscience evolved even further in the eighteenth century, taking on a diversity of meanings and significances, with philosophers placing increasing emphasis on reason and feeling and denying that God had direct involvement in the exercise of conscience.\textsuperscript{361} I will showcase the varieties of conscience by looking at the writings of a selection of thinkers from that period.

\textbf{Third Earl of Shaftesbury (1671-1713)}

In the first half of the eighteenth century, the Third Earl of Shaftesbury treated conscience as a faculty engaged in examination of the self. Conscience existed in all human beings, even those who were accustomed to committing wrong. For Shaftesbury, conscience could be understood in

\textsuperscript{358} Ibid, Book 1, chapter 3, paragraph 8.

\textsuperscript{359} Ibid, Essay Concerning Human Understanding, II. xxvii. 12.

\textsuperscript{360} Ibid, Essay Concerning Human Understanding, II. xxvii. 12.

either a moral or religious sense. The moral aspect of conscience was given precedence, for it was through one’s moral “sense” of right and wrong that the religious conscience was developed. This moral sense was natural, innate and not reliant on knowledge of God. It was amenable to judgment and correction through reasoning. It was through this moral sense that one could approve or disapprove of one’s actions. The religious sense of conscience was derived from and dependant on moral conscience to operate. When one was already aware of having committed wrongdoing, one experienced fear of God’s disapproval. However, God was not the main motivating force in Shaftesbury’s theory; for him, the prime motivation of human beings was to do good for its own sake. He wrote:

[Conscience] has its force however from the apprehended moral deformity and odiousness of any act, with respect purely to the divine presence, and the natural veneration due to such a supposed being. For in such a preference, the shame of villainy or vice must have its force, independently of that further apprehension of such a being, and his dispensation of particular rewards or punishments in a future state.  

This ‘supposed being’, or God, had a reduce role as a spectator in this process of self-assessment. Shaftesbury’s understanding of conscience set aside traditional Christian concerns such as original sin, grace and salvation. God was not entirely excluded from his analysis; God was still

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362 Anthony Ashley Cooper, Earl of Shaftesbury. *Characteristics of Men, Manners, Opinions, Times*. (Cambridge University Press, 1999), 249.

363 Ibid, 209.
deserving of veneration and respect, but was considered of little consequence to one’s moral reasoning.

Joseph Butler (1692–1752)

Butler was one of the most prominent thinkers on conscience in England in the eighteenth century. In contrast to theologians of the Middle Ages who had popularized the idea that conscience was the ‘voice of God within’, Butler’s understanding of conscience gave God an indirect role. Conscience was a faculty assigned to us by “the Author of our nature” to discern right from wrong. Yet conscience did not rely on God for its functioning.

Butler differentiated between two categories: a) appetites, instincts and inclinations, which have the potential to lead human beings to good or bad and b) conscience. Conscience according to Butler was a ‘particular kind of reflection’ which possesses supreme moral authority to preside over and regulate feelings and inclinations (though it did not always possess the power to do so if the natural hierarchy or principles within a person were out of order) to lead towards what one morally ought to do. For Butler, it was reflective conscience (and not the law of the heart, as dispositions can incline towards good or bad) that made people a law unto themselves, a


365 Ibid, Sermon 2, 49.

366 Ibid, Sermon 2, 51.
reinterpretation of Paul’s Romans 2:14.\textsuperscript{367} Moreover, it was reason rather than inspiration that determined moral and ethical decisions; revelation merely confirmed what the free conscience dictated. Through exercising one’s powers of rational choice, one demonstrated reverence for God.

**Adam Smith**

Smith, like Butler, gave God an indirect role. Although God was mentioned frequently, Smith’s version of conscience was independent of religious sanction. He claimed that God had intended conscience as an imagined impartial spectator of one’s conscience. Yet it was not God or innate reason that provides the basis for judgment. Neither was it the individual himself or herself who was to judge personal conduct, for Smith insisted that, “man alone cannot reflect upon his behaviour.” Rather, it was society that served as a “mirror”.

But this notion of conscience did not blindly rely on the opinions of others, as Locke had surmised. It aimed towards a degree of objectivity. Smith wrote, “we endeavour to examine our own conduct as we imagine any other fair or impartial spectator would examine it.”\textsuperscript{368} Smith was concerned not with the real spectators around a person, but by an imagined impartial spectator. He wrote:

\textsuperscript{367} Romans 2:14: “For even when the Gentiles, which have not the law, do by nature the things contained in the law, these having not the law, are a law unto themselves.”

I divide myself, as it were, into two persons; and...I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined and judged of. The first is the spectator, whose sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation, and by considering how it would appear to me...The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion.\footnote{369}

He pointed out that this process of conceiving of an impartial spectator occurs in stages. In the beginning, one would imagine actual people and considers how one must appear to them by considering how these people would appear if they had committed the same acts.\footnote{370} At the second stage, one encountered the impartial imagined human spectator, whom Smith referred to as vicegerent of God, tasked with prescribing rules that should be regarded as the commands and laws of God.\footnote{371} The imagined spectator was honest and fair and allowed an individual to properly judge himself or herself as admirable or blameworthy, since for Smith it was more important that the individual believe himself or herself to be admirable or blameworthy, and not others. Ultimately, Smith felt that a person of constancy and firmness would almost become merged with his or her imagined impartial spectator.\footnote{372} Smith’s account weakened the ties

\footnote{369} Ibid, 3.1.2.  
\footnote{370} Ibid, 3.1.5.  
\footnote{371} Ibid, 3.2.3.  
\footnote{372} Ibid, Theory of Moral Sentiments, 3.2.9.
between religion and conscience; it was the judgment of social consensus that was to correct individual behaviour.

Jean-Jacques Rousseau (1712–1778)

In 1762, Rousseau wrote Emile, in which he emphasized what is commonly referred to today as “the inner voice”, similar to Kant. He wrote, “there is in the depths of souls…an innate principle of justice and virtue according to which, in spite of our own maxims, we judge our actions and those of others as good or bad. It is to this principle that I give the name conscience.” He added, “one need only consult with oneself, and what one feels to be right is right and what one feels to be wrong is wrong.” He considered acts of conscience as motivating sentiments of approval or disapproval, not judgments of reason, by which human beings recognize good or evil in relation to themselves. These sentiments were reliable because they were innate, suited to one’s nature and given by “whatever may be the cause of our being.” While Rousseau accepted that reason teaches human beings good and evil, he argued that it was conscience and sentiments that impel human beings to love good and hate evil. Conscience was independent of reason and stood above it, correcting it when it goes astray.

373 Rousseau’s rendering of the Savoyard vicar as his mouthpiece in book 4 has been the subject of controversy amongst political theorists. The vicar at one point portrays a slightly different version of conscience as a principle by which good or evil actions can be judged. Yet he reverts to the version of conscience promulgated by Rousseau elsewhere in Emile. The vicar’s conscience has similarities to the Christian conscience, but the vicar is portrayed as a Deist. By way of the vicar Rousseau is able to eliminate complicated discussions of grace and casuistry from conscience.


375 Ibid, 305.

376 Ibid, 235.
While reason could lead human beings astray, conscience did not deceive, and was thus the true guide of human beings. The authority of conscience was such that transgressing it would lead to guilt.

Rousseau argued that human nature was inherently receptive to morality, if only one took the time to rely on one’s own moral counsel. He cautioned against the dangers of social life, which made it difficult “to remain good”. For him, conscience was all that was necessary to be good. Conscience was a retreat into oneself and a means by which an individual could escape the corrupting influence of society. When human beings followed their consciences, they were their “own master” and could not be turned away from the right way. Rousseau’s understanding of conscience marked a turn towards subjectivism and individualism.

Kant

Kant’s understanding of conscience is complex and difficult to bring together coherently. However, in his most mature work, the nature and task of conscience became narrowed. Conscience for Kant was not a moral sense of right or wrong or the source of moral norms. Kant gave conscience a role that was different than judgment. But unlike Rousseau, he did not believe conscience was infallible; in fact, he did not believe that conscience was a concept to

377 Ibid, 489.

which reliability is relevant.\textsuperscript{379} Kant differentiated conscience from practical reason, which was subject to error. For Kant, the reason conscience was not liable to error was that it was ‘not directed to an object but merely to the subject’.\textsuperscript{380} In the \textit{Metaphysics of Morals}, Kant referred to conscience as ‘consciousness of an internal court of the human being’\textsuperscript{381}. Conscience’s aim was not to foster self-awareness that one’s actions are objectively wrong, but rather to ensure that one was making a proper effort to guide oneself by one’s deepest moral beliefs.\textsuperscript{382} Conscience served as an “inner judge”, scrutinizing the person to determine whether the individual had contravened his or her own (reason-based) judgment about what is morally right and whether the individual had failed to exercise due care and diligence in forming the particular moral opinions on which he or she had acted.\textsuperscript{383} Hence conscience was concerned with conscientiousness, internal consistency, sincerity and good faith in moral judgment rather than moral truth. This is close to the understanding of conscience that is protected in the Charter.

In Kant’s description of conscience in \textit{the Metaphysics of Morals}, he offered an interpretation of God as subjective rather than objective. Kant was concerned that one’s own conscience could not judge oneself objectively and effectively. He proposed that assessments of conscience, though

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\textsuperscript{380} Ibid, 500.

\textsuperscript{381} Ibid, 538

\textsuperscript{382} Ibid, 530.

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arising from the person himself or herself, should be considered as if it had come from the vantage of another person:

“For all duties of a man’s conscience will, accordingly, have to think of someone other than himself...as the judge of his action, if conscience is not to be in contradiction with itself.”

To avoid this contradiction, Kant proposed that one presuppose a doubled self, i.e. the presence of an alien person who would serve as an inner judge or prosecutor within the self. This alien would be thought of as an ideal person, capable of scrutinizing and judging the person as a whole and imposing obligations and requiring accountability. Hence this omnipotent moral ‘other person’ could only be thought of as God. Kant explained that practical reason created for itself the idea of God as a subjective principle, in the sense that human beings were not required to assume the objective independent existence of God as an entity outside themselves. Rather, conscience should be considered the subjective principle of being accountable to God for all of one’s actions. The authority of conscience depended on human beings conceiving of their lawgiving reason as an inner God.

Mill (1806-1873)

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384 Metaphysics of Morals, 560.
385 Ibid, 561.
386 Ibid.
Mill emphasized the subjectivity and individuality of conscience by connecting it with emotion. He described the essence of conscience as:

“...A feeling in our own mind; a pain, more or less intense, attendant on violation of duty, which in properly cultivated moral nature rises, in the more serious cases, into shrinking from it as an impossibility. This feeling, when disinterested and connecting itself with the pure idea of duty, and not with some particular form of it, or with and of the merely accessory circumstances, is the essence of conscience.”

Mill differentiated between internal and external sanctions. One’s internal sanction was the inner voice of conscience. Acting in accordance with one’s conscience created good feelings; violating one’s conscience created bad feelings. For Mill, it was not belief that was the source of moral authority or the motivating factor for moral behaviour; what moved an individual to act morally was subjective internal ‘feeling’. This subjective, self-directed feeling fostered a sense of duty, but Mill insisted that it need not be objective or rational. Moreover, it was acquired, not innate, and socially constructed, not God-given. The content largely depended on education, environment and social opinion, but they also stemmed from within and required continuous self-assessment. External sanctions consisted of peer pressure or religious beliefs. They tended towards customary, socially dominant morality. Under the pressure of external sanctions, individuals could form artificial moral feelings, but these were weak, since they were imposed


388 Ibid, 37.

389 Ibid, 53.
rather than naturally cultivated from within. Internal sanctions provided the strongest motivation towards morality; one’s sense of morality was dependent on subjective feeling that existed in one’s own mind.

3.3.4: 19th and 20th Centuries

It is clear from these accounts of conscience in the Enlightenment period that as conscience was gradually uncoupled from religion, it was also becoming increasingly diverse and subjective. In the nineteenth and twentieth centuries, this trend persisted. There were limited discussions of conscience in this period. However, the more conscience was secularized, the more it was discredited. Conscience was considered a burden that human beings had invented and imposed upon themselves. Moreover, arguments in favour of an ‘enlightened social consensus’ gave way to a conscience dependent on the dictates of overbearing and false external influences, thus rendering conscience subject to prejudice and unnecessary inhibition.

Friedrich Nietzsche (1844–1900)

Nietzsche turned conscience into something that was negative. While previous thinkers had considered conscience’s engendering of guilt a positive thing, Nietzsche saw it as self-castigation. Conscience was not the voice of God in man. Rather, it was ‘the instinct of cruelty’ that turns inwards upon the self after it cannot be discharged externally due to religious and societal constraints. Human beings had a fundamental drive to express power and experience
pleasure by inflicting pain.\textsuperscript{390} But they faced restrictions in civilized society.\textsuperscript{391} Hence they turned this drive against themselves. Bad conscience or feelings of guilt were ‘invented’ as a form of self-inflicted punishment since the more natural outlet of the desire for cruelty had been blocked.\textsuperscript{392}

**Sigmund Freud (1856–1939)**

Freud saw conscience as a function of a person’s “superego” that originates in the need for parental approval. He wrote:

> The superego is an agency which has been inferred by us, and conscience is a function which we ascribe, among other functions, to that agency. This function consists in keeping a watch over the actions and intentions of the ego and judging them, in exercising a censorship. The sense of guilt, the harshness of the superego, is thus the same thing as the severity of the conscience.\textsuperscript{393}


\textsuperscript{391} Ibid, II, 16.

\textsuperscript{392} He offers a second version of conscience, which he says can be found at the culmination and highest point of a long history. This is the conscience of the sovereign individual who has broken loose from the morality of custom and become an autonomous individual beyond morality. Several writers have attempted to link the two versions of conscience by proposing that one would have to experience a bad conscience before creating the conditions required to produce it in others. This is not relevant to this discussion, but worth pointing out for the sake of accuracy.

Freud was interested in how a poorly developed conscience could result in illness. Conscience was not innate; the desire to repress Oedipal feelings led the ego to create the superego. The superego was separated from the rest of the personality in early childhood and was the internalization of external parental authority. Its role was to observe the ego, give it orders, judge it and threaten it with punishment. Conscience’s particular role within the superego was to judge and threaten. Those who failed to live up to the excessive demands of the superego experienced torment and punishment, which generated a sense of inescapable guilt. Freud felt that guilt arising from the conscience could be considered not just a consequence of a wrongful act, as was conventionally thought, but also an incentive. Those who experienced guilt then committed a crime in order to provide an objective counterpart to their feelings. In his analysis, conscience led to the committing of crime rather than reparation or resolution of transgression.

Freud’s version of conscience contributed to the modern tendency to view conscience as individualistic; the content of a person’s conscience was of interest to the person but of little relevance to others except where it conflicted with the law or societal norms. Freud’s conscience also reflected negatively on God; morality, which was commonly thought to have divine origin, functioned in patients as mere periodic phenomenon. He pointed out that God had done uneven and careless work, since the majority had little conscience.

3.3.5: Modern Conscience

The following three philosophers further associate conscience with individuality:

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Heidegger (1889-1976)

For Heidegger, the call of conscience is silent and inarticulate.\textsuperscript{395} It did not possess ethical content or put a person up for trial according to norms or public standards; neither did it entail an inner voice that issued judgments and commanded on moral grounds.\textsuperscript{396} Conscience was not God talking to a person, but rather, the person talking to himself or herself. It was \textit{Dasein} calling one away from inauthenticity towards oneself; it was the uncanny experience of an alien voice in one’s head that pulled one out of the mundane business and everyday chatter of this world (which Heidegger dismissed as the realm of \textit{das Man}, and which distracted the self from its true orientation and concern: Being-toward-death.

One needed to heed this inner call which proclaimed \textit{Dasein} guilty (in the sense of being inauthentic) and break away from following the crowd. Heidegger explained that one responded by wanting to have a conscience and by choosing to understand oneself in one’s potentiality for being. Heidegger’s conception of conscience emphasized authenticity and autonomy; it entailed a call to think for oneself, separated from the public realm, and heed the inarticulable inner voice or feeling to live for oneself. It was this call of conscience that Heidegger considered the


\textsuperscript{396} Ibid, 328–9, 332, 334.
fundamental prerequisite of morality, since an exit from conformity created the possibility for the
emergence of authentic responsibility in defining moral truth.397

**Hannah Arendt (1906-1975)**

Arendt was concerned with how ordinary men with banal motives could commit terrible evil.
She concluded that it was thoughtlessness (and its attendant conformity,), not strong will, that led
to evil.398 For Arendt, conscience did not give prescriptions or offer insight into moral truth. It
was not the capacity by which human beings adhered to their own moral code, or a sense of guilt
or shame attributed with committing wrong. Rather, it was a silent inner dialogue that takes place
between the self and itself, which Arendt called ‘thinking’. Conscience was a by-product or ‘side
effect’ of thinking.399 In thinking, one returned to oneself. One was concerned not about whether
the action is right or wrong, but rather about the consistency and integrity of the self. Whatever
one did in the external world, one needed to grapple with whether the action was true to oneself,
and whether one could live with oneself if the action (which defines oneself) was carried out.400
Hence thinking entailed an internal harmonization of a divided self. Arendt explained that
conscience was only marginally operative in normal situations; it was in emergency or existential

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397 For discussions of Heidegger’s conscience as moral, see Mika Ojakangas, *The Voice of Conscience*, p. 21. Also

398 For a greater explication of the relationship between evil and conscience in Arendt’s thought, see Vetlesen, Arne


400 Ibid, 186.
situations that conscience acted, when conventional laws and customs were incapable of preventing evil.  

**Gilbert Ryle (1900-1976)**

Ryle’s discussion of conscience reflected a modern understanding that conscience can only have personal authority. For Ryle, the dictates of conscience applied only to the one exercising conscience. He argued, “we limit the verdicts of conscience to judgments about the rightness and wrongness of the acts only of the owner of that conscience.” Ryle explained that conscience is the application by an individual of moral convictions he or she holds. These moral convictions had an effect on one’s own volitions, emotions and behavior, in the sense that it influenced an individual to behave in accordance with it and to feel guilty and remorseful if they did not. Hence conscience could only operate as a personal, private monitor. Ryle also held that conscience was a form of scrupulousness, and individuals could only be scrupulous about their own behavior.

**3.3.6: Conclusion to this Section**

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401 Ibid, 192.


403 Ibid, 196.

404 Ibid, 197.

405 Ibid, 191.
As can be observed from this historical accounting of conscience, the relationship between conscience and religion has gradually slipped away. ‘Conscience’ as a concept began to lose its cohesion, both in terms of form and substance, as it became increasingly subjective, diverse and disconnected from external morality. In the modern period, philosophers showed diminished interest in the nature or content of conscience. They were concerned with the personality of consciousness exercising this conscience. Conceptions of conscience shifted from referring to an external normative standard for one’s actions to a call to be authentic to one’s identity as an autonomous moral agent. Conscience became about moral authenticity. This latter conception of conscience opens a space for conscience which does not refer to religion. If conscience was a call to be authentic to one’s identity as an autonomous moral agent, and did not rely on external moral norms, then surely conscience would be protected despite its lack of connection with religion.

3.3.7: Secularization of Toleration

While Locke did not reject, or even minimize, the religious basis for his arguments, later, toleration would be secularized, beginning with Enlightenment thinkers. In the nineteenth century, John Stuart Mill harkened a new, more expansive notion of toleration which was no longer focused on the mediation of religious differences. Mill’s On Liberty defended freedom rather than toleration. It is important to note that toleration need not elide into freedom of conscience. It is possible to argue in favour of toleration without reference to conscience. Yet, in both theory and practice, freedom of conscience has served as an extension of toleration; it is in
part due the increasing focus on the sanctity of individual conscience that conceptions of
toleration have evolved towards conceptions of freedom of conscience. Hence it is not out of
place to discuss early understandings of freedom of conscience and religion as well.

Mill’s freedom was defended on the basis of utilitarianism: “Actions are right in proportion as
they tend to promote happiness; wrong as they tend to produce the reverse of happiness.” Mill
required that restrictions on individual autonomy and initiative imposed by the state be justified,
with the burden of proof on those arguing against liberty:

The only purpose for which power can be rightfully exercised over any member of a
civilized community, against his will, is to prevent harm to others. His own good, either
physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or
forbear because it will be better for him to do so, because it will make him happier,
because, in the opinion of others, to do so would be wise, or even right.\textsuperscript{406}

Political or social power could only be exerted legitimately to prevent harm done to another.\textsuperscript{407}
Mill added two arguments to show that moral autonomy is essential to human flourishing: first,
the free expression of opinions – even false ones – fostered learning, since it enabled truth to
emerge more clearly and allowed individuals to achieve a degree of certainty in their opinions by
being able to assess them against contradictory or disproving opinions.\textsuperscript{408} Second, it cultivated


\textsuperscript{407} Ibid, 9.

\textsuperscript{408} Ibid, 38.
individuality and originality. For Mill, it was important that people have leeway to choose their own path and meaning in life, not because it possessed objective value, but rather because it was “his own mode”. Mill was particularly concerned about protecting the minority from the minority, and he insisted that conscience, as an aspect of consciousness, must operate independent of the tyranny of societal opinion, customs, religious authority and state policy. Based on his understanding of consciousness, he extended protection from thought, feeling, opinion and sentiment to expression and action, so long as no harm was done to others.

Though the principal concern in Mill’s work was not conscience, Mill put forth a conception of conscience that was individual-centric, disassociated from religion, and more concerned with free choice than moral duty or obligation. As noted earlier, Mill’s conscience had little to do with anything external: the contents of a free conscience did not stem from the church, state or popular opinion. Mill did not have a strong interest in religious liberty; he lumped religion in with ‘old moralisms and superstitions,’ which impeded flourishing. His theory extended religious liberty to protect political and social opinions as well. For him, ‘whatever crushes individuality is despotism, by whatever name it may be called, whether it professes to be enforcing the will of God or the injunctions of men’. Conscience was a matter for the individual alone, who had to battle a tyranny of collective opinion and despotism of custom. Since Mill’s conscience was characterized by individuality and exception, and since the rights of conscience protected fringe or minority unpopular opinions, his work offered support for dissenters who had views that most

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409 Ibid, 67.

410 Ibid, 11.
people were united against, such as belief in God or the afterlife, and suggested a space for the protection for conscientious objection.

Mill’s enlargement of the scope of toleration occurred alongside the development of the non-religious conscience. Yet the greater subjectivity and individuality of this conscience compared to the Protestant ‘conscience in religion’ made it vulnerable to criticism. Though this conscience had a new source of legitimacy in Mill’s theory, because it was associated with individuality and autonomy, the grounds for moral conversation and engagement became shakier. Just as ‘conscience in religion’ had once been perceived as a challenge amongst early political theorists, conscience separated from religion was now perceived as inaccessible by anyone other than the one who exercised it; if conscience was not objective and did not lay claim to the truth, it was not clear what authority it had and why it was deserving of toleration. Moreover, though the protections originally given to ‘conscience in religion’ was aimed at avoiding lawlessness and disorder, its subjectivity and individuality had historically been perceived as dangerous. This was reflected in the writings of Hobbes and (early) Locke, both of whom considered conscience a threat to the stability of the political order and advocated for its repression in the political realm. As noted earlier, the problem of order was also addressed in Locke’s later works, wherein he argued that Catholicism and atheism should not be protected. This problem became more pressing as conceptions of non-religious conscience multiplied, increasing the possibility that individuals with moral objections to a law could seek exemptions; there was a fear that the law would lose its force and society would descend into social and political anarchy.
Mill did not offer easy solutions. His theory gave conscience wide breadth, since conscience aligned with his interest in personal autonomy (the capacity to be one’s own person, to decide for oneself and to pursue a course of action in one’s life that could be considered one’s own, regardless of any particular moral content). Mill tilted the balance of protection in favour of non-religious conscience, since it was non-religious conscience that was most disconnected from external norms or authority. But it was not just that he understood conscience to be subjective and individualistic, or that he approved of conscientious objection without tackling the problem of order. His freedom had less of a normative anchoring or grounding in natural rights than Locke’s did. Mill did not appeal to abstract right in order to justify his harm principle. Rather, he supported freedom so long as it caused little or no harm to others in order to promote “utility in the largest sense, grounded in the permanent interests of man as a progressive being.”411 Without an objective foundation for his harm principle, freedom for conscience and religion became increasingly subjective and difficult to justify.

Rawls attempted to incorporate the diversity of comprehensive doctrines into society in a way that protected equality while retaining order and stability. Rawls’ understanding of conscience and religion could be characterized as ‘religion in conscience’. While Locke’s writing had religious underpinnings, Rawls gave religion a secondary place.412 Rawls’ basic liberties included liberty of conscience. But what this conscience meant was vague. Rawls did not give

411 Ibid, 53.

412 Brian Leiter makes this argument, writing, “The argument depends only on the thought that persons in the “original position” know that they will have certain convictions about how they must act in certain circumstances – convictions rooted in reasons central to the integrity of their lives.” See Brian Leiter, Why Tolerate Religion? (Princeton: Princeton University Press, 2013), 1–3.
special status to freedom of religion; rather, he seems to collapse religion into conscience, writing that liberty of conscience included, “religion, morality and philosophy”. Rawls did not distinguish between religion, morality and philosophy. Chapman explains that there is a reason behind Rawls not interrogating conscience more deeply, and for lumping “religion, morality and philosophy” into the broader category of ‘conscience: though protections for conscience was necessary to convince those who held competing comprehensive doctrines to enter into a social contract, the contents of comprehensive doctrines were unimportant, since they were non-negotiable commitments that were inaccessible to others, and could not be considered public reasons. Nevertheless, Rawls’ understanding of conscience seemed to encompass any strongly held belief, which he characterized as “binding absolutely”. His use of such language privileged one kind of conscience while excluding many other voluntarist versions which allowed for individual freedom. Furthermore, he did not offer arguments for protecting religious beliefs and practices that did not have a nexus with conscience, and his rendering of religion as an aspect of conscience suggested that religious beliefs and practices based on culture, community, or custom were not worthy of the same respect and would not receive the same sort of protection. In the absence of a clear conception of conscience and religion, the foundations for their legal protection appear shaky.

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413 Chapman (2013), 1474.

414 ‘An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfilment of them for the sake of greater means of promoting his other interests’.
Koppelman contends that there is a second stage wherein religious considerations would be taken into account.\textsuperscript{415} Once the basic principles, including liberty of conscience, were in place, a second round of deliberation created a constitution. At this stage, the parties would be aware of the particularities of their society, including the beliefs and interests that people would generally have. This was necessary because the constitution needed to reflect those particularities. However, people would not know their own conceptions of the good. Koppelman argues that at this constitutional stage, it was possible for the parties institutionalizing liberty of conscience to take into account the forms of belief and conduct that were likely to be important to those living in the society. Perhaps religion would be singled out for protection. But this line of reasoning does not really solve the problem, since it turns out that the content and particularities of the conscience being protected are rather important after all. Perhaps religion would be protected at the constitutional stage, but perhaps not. Perhaps too other forms of morality or philosophy would be protected. Moreover, religious practice would still be secondary, given that it did not automatically follow from protection of conscience that practice was worthy of respect. While liberty of conscience was protected, it is not clear what that category entailed and how it would be protected in any particular society.

The role of comprehensive doctrines and hence, religious and non-religious conscience, diminished further as the scope of public reason became enlarged. While at first Rawls had made the case that comprehensive doctrines had a place only when the constitution and matters of basic justice were being decided, his account of public reason placed those with comprehensive

doctrines at a systematic disadvantage in the public square, since they were precluded from bringing their convictions to bear on fundamental political questions. They needed to constrain themselves, referring to political values or accessible forms of reasoning instead:

“...when constitutional essentials and questions of basic justice are at stake, citizens are to be ready to justify to one another their political actions by reference to the public political conception of justice, and so by conceptions and principles, values and ideals that they sincerely believe other citizens may reasonably be expected to endorse. The thought is that citizens, finding themselves living together in political society, and exercising the coercive power of government over one another, should, at least on fundamental political questions, justify their opinions and deeds by reference to what they may suppose others could accept consistent with their freedom and equality.”

Andrew Murphy has argued that Rawls’ insistence on the use of public reason forced individuals with non-mainstream comprehensive doctrines to choose between several solutions, all of which were unsatisfactory. Changing their comprehensive doctrines to fit the conditions of publicity or dissembling, by manufacturing a public justification and disguising their true motives, ran counter to the historical development of liberty of conscience, which moved away from asking people to hide their true beliefs and judgments. Taking action through civil disobedience to

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change the parameters of public debate such that the minority opinion would eventually become accepted would run contrary to Rawls’ concern for stability. Temporarily violating the rules of public reason by putting forward arguments that advance comprehensive doctrines and then following up the violation with sufficient public reasons — what Rawls refers to as a ‘proviso’ — misrepresented the nature of moral reasoning and comprehensive doctrines themselves. In other words, Andrew argues that those with comprehensive doctrines are forced to jump through an additional hurdle to be treated as an equal within political liberalism. He suggests that Rawls’s liberalism at best splits comprehensive doctrines between belief and action and at worst promotes repression and self-censorship which renders comprehensive doctrines meaningless.

Rawls offered relatively little space to discussions of conscientious objection. In *A Theory of Justice*, Rawls argued for a right to conscientious objection, which he defined as “noncompliance ... not necessarily based on political principles; it may be founded on religious or other principles at variance with the constitutional order.” Yet Rawls did not write extensively about religiously based conscientious objection. When offering a justification of conscientious objection, his single example concerned military conscription. He explained that the objector could cite political reasons to refrain from war, since these reasons would be in line with the same theory of justice that underlined the constitution and guided its interpretation. He did not elaborate on the role of moral or religious reasons in his example, though he also did not prohibit their use. It is worth noting also that Rawls placed strict parameters around civil disobedience,

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420 Ibid, 331.
insisting that it could not be based on principles stemming from personal morality or religious doctrines; it had to be ‘guided and justified by political principles’. 421 422 In Political Liberalism, Rawls did not discuss conscientious objection or civil disobedience at all. His limited discussion of conscientious objection and civil disobedience suggests that Rawls hesitantly allows a space for the exercise of conscience at the parameters of the law, and that when conscience poses a threat to order, it will not be tolerated.

3.3.8: Conclusion to this Section

Mill’s theory privileged a non-religious conscience over a religious conscience. Rawls considered the religious conscience derivative of the larger category of freedom of conscience. But neither of them had a sufficient theory of freedom capable of dealing with both the religious and non-religious conscience; Mill offered wide protections for conscience without attending to the problem of order. Rawls limited his protections of religious and non-religious conscience in the interests of societal stability. Moreover, neither seemed interested in non-Protestant forms of religion. Neither Mill nor Rawls’ theories appear sturdy enough to meaningfully protect both non-Protestant religion and non-religious conscience.

3.4: Conclusion

421 Ibid, 321.

The historical trajectory of ‘conscience in religion’ helps to explain the legal unfolding of ‘freedom of conscience and religion’ in the Charter. There are two coexisting versions of conscience, each of which are offered differing degrees of protection:

The older version of conscience – which is not the earliest version of conscience, since the ancient Greeks and Romans conceived of conscience without a clear relationship with God – has persisted. Because of its relevance to discussions of toleration, the Protestant version of ‘conscience in religion’ has been imprinted onto the liberal state, such that religion is reduced to conscience, with the emphasis on personal choice; individual adherence to doctrine; private relationship with God; voluntary commitment to church; and a differentiation of the religious sphere from its secular counterpart. This is not surprising; as Will Kymlicka has argued, “liberalism and toleration are closely related, both historically and conceptually. The development of religious tolerance was one of the historical roots of liberalism.”\(^{423}\) Toleration gradually evolved into freedom of conscience and religion in the liberal state. While it may seem as if ‘freedom of conscience and religion’ in the law is now a secular, universal and neutral notion, it was constructed and shaped on the basis of a specific account of conscience and religion. Without the presence of the theological conceptions that form the underpinnings of toleration (and eventually freedom), political philosophers have been struggling to construct secular foundations and arguments for freedom of conscience and religion.\(^{424}\)


\(^{424}\) See chapter 1 for some of the most recent engagements with the subject.
In the meantime, we are left with a problem. The remnants of Protestantism have made liberalism more tolerant towards Protestants than non-Protestants (Catholics), and more tolerant towards those who were religious than those who were atheist or pagan. The law protects non-Protestant religion best when it is conceived as matter of individual conscience and privatized practice. The law also protects non-religious conscience best when it conforms closely to its religious counterpart. In the following chapter, I explore how the traditional, dominant discourse of liberalism can stretch its boundaries, imagination and understanding to be more inclusive both towards non-Protestant religions and non-religious conscience.
CHAPTER 4
WEIGHING ‘IMPACT’ ON THE SENSE OF BEING

4.0 INTRODUCTION

In chapter 3, I argued that the construction of the category of ‘freedom of conscience and religion’ in the Charter represents and reproduces historical inequalities. Its Protestant roots have made liberalism more tolerant towards Protestants than non-Protestants, and more tolerant towards those who are religious than those who are atheist or pagan. The law protects non-Protestant religion best when it is conceived as a matter of individual conscience and privatized practice. The law also protects non-religious conscience best when it conforms closely to its religious counterpart. In this chapter, I engage critical theory in dialogue with liberal egalitarianism to consider how the traditional, dominant liberal discourse can stretch its boundaries to better protect non-Protestant religions and non-religious conscience. I craft a two-step approach:

First, I reinterpret ‘freedom of conscience and religion’ to better protect both non-Protestant religions and non-religious conscience. I argue that the concepts of ‘conscience’ and ‘religion’ are fluid. They manifest themselves in terms of s. 2(a) in two ways: they concern ‘justifications based on beliefs’ and ‘justifications based on values’. These justifications have equivalent status. Though justifications based on beliefs have traditionally been given priority, I demonstrate that this need not be the case. I argue that the state has a special (and equal) interest in justifications based on beliefs and justifications based on values when they reflect a sense of being. Drawing
on various versions of recognition theory, I propose two related reasons for exemptions: first, the liberal democratic state has an interest in ensuring that people are not alienated; second, exemptions can alleviate the unjust burden placed on some members of society due to structural democratic deficits and asymmetrical power differences. It is not the case that all justifications based on beliefs and all justifications based on values will be considered suitable candidates for exemption claims. In the case that a strong connection cannot be made between the individual’s beliefs or values and his or her sense of being, the justification will not qualify to be considered for an exemption claim.

In the second part of the chapter, I demonstrate how greater consideration can be conferred on the conscience and religion claims of those who are marginalized or disadvantaged. I use the terms marginalized/disadvantaged and privileged/dominant to suggest an unequal relationship between human beings in a shared society and a relationship of responsibility between the state to help right the imbalance. I propose that the Oakes test be set aside to allow the court to better judge the complex relationship between state action and impact in a holistic, comprehensive manner. The first set of factors concerns impact: a) How would state action impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized? b) Would an exemption foster new forms of inequalities, either among other minorities or in the wider community? The second set of factors concerns state action: a) Has the state chosen the least burdensome infringement possible on the sense of being? b) Should a narrower objective or less drastic measures be considered?
I recognize that there are significant challenges to my theory, and in the final section of the chapter, I consider some of them. The first broad set of challenges arise from an underlying theme in this paper: the relationship between autonomy and equality, and in particular the criticisms stemming from a conception of autonomy and equality as competitors in a zero-sum game. This first set of challenges concerns: a) the extent to which group identity might infringe on the autonomy of individual members; b) whether the state should intervene to protect choices; and c) whether the framework will impose burdens on the autonomy of those considered privileged or dominant. A second set of challenges reflects practical but equally important considerations: a) a concern about judicial overreach; b) a concern with usurping the role of section 15 of the Charter; and c) a concern that positions of advantage and disadvantage may change over time.

4.1 INCORPORATING CRITICAL THEORY

This chapter takes seriously the arguments made by critical theorists. Critical scholarship emerged out of a movement known as ‘legal realism’ in the 1920s and 1930s, which critiqued the notion that law was an autonomous system of rules and principles; it sought to incorporate extra-legal material gleaned from the social sciences in an effort to resolve cases. Legal realism was followed by the law and society movement of the late 1960s and critical race and feminist scholarship in the 1980s. Critical theory retains some of the critiques of old, including


its interest in considering the social, cultural and political to provide a contextual understanding of the operation and impact of law in a society. Critical theory is skeptical of the liberal conception of the rule of law. Law is a product of society, critical theorists argue, and cannot be considered completely neutral, objective, rational or unaffected in content or form by societal and cultural forces that wield power in law and legal institutions. Critical theorists point out that the law is complicit in reproducing exclusion. They argue for the necessity of subverting the notions of objectivity and neutrality in order to create space for the perspectives of those who are considered ‘other’. They suggest change while operating within the realm of the existing law. Critical theory has been criticized for being cynical, nihilistic and antirational, among other things. Even if it does not offer any ready solutions, its emphasis on revealing coercive and hidden assumptions and power disparities is helpful in thinking through patterns of inequality in the law.

4.2 EXPANDING ‘FREEDOM OF RELIGION AND CONSCIENCE’


With the arguments of critical theorists in mind, I turn towards liberal egalitarianism, which holds that religion need not be singled out in the liberal state. Instead, the state protects religion as one of the ways in which citizens live a life they deem good. The theory is egalitarian in the sense that it considers religious and nonreligious individuals and groups on the same terms rather than singling out religion-based claims for special protection. There are various ways in which the state might consider religious and non-religious individuals and groups on the same terms. Dworkin, for example, rejects exemptions on the basis that distinctions cannot be drawn between religious and non-religious ethical views. Likewise, Brian Leiter critiques the special status of religion. Religion should not be the only ground for exemptions, Leiter argues; secular conscience should be accommodated as well. Later, he changes his mind, arguing that neither religion nor conscience should be exempted. Contrary to Dworkin and Leiter’s claims, I will argue that freedom of religion and conscience deserve unique consideration by the state.

Is it possible to respond to the criticisms of critical theorists within a liberal egalitarian framework? I attempt to do so. Critical theorists have frowned on the Protestant-tinged understanding of section 2(a). They have argued that it emphasizes the priority of belief as a state of mind over practices and traditions; it is private; it is focused on the individual rather than a collective; and it prioritizes choice. This conception of section 2(a) contributes to the exclusion and marginalisation of religious minorities, Indigenous peoples and non-religious individuals and communities.

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I attempt to include ‘the other’ while preserving the integrity and value of s. 2(a). I begin from a recognition that the protected categories of ‘freedom of conscience’ and ‘freedom of religion’ lack discrete boundaries. This opens up the possibility that they can be reimagined for the purpose of making the law more egalitarian. My suggestion is not a conceptual leap. In chapter 2, I argued that the legal system often groups conscience and religion together or refers to one as derivative of the other. In chapter 3, I showed that conscience and religion have been largely undifferentiated historically, with discussions of conscience taking place within the context of religion (and eventually freedom of religion). To a great extent, they remain undifferentiated today, with religious beliefs and practices seeming to fit into both categories. Further, the plurality and diversity of religions that exist today, the rise of atheism and agnosticism, and the fact that religion can be subjective, personal and cultural makes it difficult to consider religion uniquely important. At the same time, the concept of conscience has become increasingly vague and ambiguous as its relationship to religion grows remote; there is no single correct version of conscience that is agreed upon amongst theorists. Neither category, ‘religion’ or ‘conscience’, is adequate to cover the array of beliefs, practices and worldviews that are deserving of additional protection, including non-religious conscience and non-Protestant religious practices. I argue that the concepts of ‘conscience’ and ‘religion’ are fluid. They manifest themselves in terms of s. 2(a) in two ways: they concern justifications based on beliefs and justifications based on values.

An individual might justify a request for an exemption based on his or her beliefs. One might imagine an individual saying the following: “I (should/must/cannot/ought not to) do a certain action because I believe x.” To a large extent, one could conceive of an individual offering reasons on the basis of religious beliefs. I cannot shake hands, a Muslim might say, because I
believe it is wrong to touch the opposite sex in accordance with my religious beliefs. An individual could also offer reasons that do not contain a religious component. A laboratory technician could refuse to perform tests on animals without citing religious beliefs; perhaps she could argue that she believes in the rights of animals and is concerned with their wellbeing.

An individual might justify a request for an exemption based on his or her values. In this case, one might imagine an individual saying the following: “I (should/must/cannot/ought not to) do a certain action because of my values.” Values could stem from an individual’s way of life or cultural context. An indigenous person might seek an exemption so that she could engage in the practice of smudging in an indoor space, not due to her belief but out of a need to adhere to her traditions. A religious individual might likewise seek an exemption based on adherence to practices (having a nexus with religion) for social or cultural reasons.

Note that I emphasize the individual justifying a request on the basis of belief or values. I do so because I do not want to claim that belief and value are objectively significant; they are important because one could imagine that an individual with a view towards the law would use those words to explain the need for an exemption. Moreover, these two ‘justifications’ do not make mention of conscience or religion at all. This is intentional, given the fuzziness of each concept and the difficulty in constructing a meaningful and discrete definition for the purposes of the law. Finally, ‘values’ and ‘beliefs’ are very close in meaning; my use of these terms is intentional to highlight their comparable worth.

4.3 Sense of Being
I argue that the state has a special (and equal) interest in both kinds of justifications for exemptions because they arise from and are reflective of a sense of being. This sense of being differentiates freedom of conscience and religion from every other freedom protected in the Charter, which reflects doing rather than being. Many liberal theorists have discussed this relationship to ‘being’ using other terms: autonomy, integrity\textsuperscript{433}, self-determination\textsuperscript{434}, dignity\textsuperscript{435} – or a combination of some or all of the above. All of these terms have some approximation to a sense of being, but I find them insufficient.

‘Autonomy’ is not inclusive enough. Lucas Swayne lists four central components of autonomy: (a) unforced choices; (b) considered choosing; (c) an attitude promoting modifications or changes to one’s ends, attachments, beliefs, and interests, as appropriate; and (d) a self-reflective disposition.\textsuperscript{436} At the very least, (c) would not be reflected in justifications for exemptions based on one’s values. ‘Integrity’ has been used by Bou-Habib and Laborde. Laborde defines it as, “an ideal of congruence between one’s ethical commitments and one’s actions. It expresses an ideal


\textsuperscript{436} Lucas Swayne, “Heteronomous Citizenship: Civic Virtue and the Chains of Autonomy” \textit{Educational Philosophy and Theory} 42.1 (2010): 74.
of “fidelity to those projects and principles that are constitutive of one’s identity.” She adds that integrity “is a formal relation one has to oneself, or between parts or aspects of one’s self” and it has an ethical content, in the broad sense that it relates to normative evaluations of the good, bad, just and unjust.” Integrity suggests a strong cohesiveness and continuity. This would be reflected in my sense of being, but as I will demonstrate later in this chapter, integrity is only one aspect of sense of being; there are other aspects that it does not capture. ‘Self-determination’ is a term employed by Alan Patten. He writes that self-determination is an aspect of autonomy, a concept which I have critiqued briefly above and will critique more extensively below. He also refers to self-determination as a person’s ‘conception of the good’. This term would not contradict justifications on the basis of belief or values, but would tend to reflect only an aspect of the person rather than his or her entirety. Finally, dignity is an ambiguous concept with a religious history. None of these terms is an improvement on the sense of being.

My conception of the sense of being draws broadly from the works of Heidegger and Arendt. Heidegger’s human being retains normative priority over his or her social context but cannot be perceived as stripped of his or her social context. Heidegger explains that Dasein is ‘thrown’ into

437 Laborde (2017), 203.

438 Patten (2014), 100, 109, 132.

439 Denise Reaume, “Discrimination and Dignity”, Louisiana Law Review 63 (2003): 646. Summarizing arguments against the use of dignity, Reaume points out that, “Dignity is said to be vague to the point of vacuous and, therefore, too easily usable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament.”

a particular social world, which he calls das Man or “the They”. 441 Conscience calls Dasein out of the ream of ‘the They’ to its potentiality, for-Being-its-self, through the realization that it is not ‘at home’ within or completely determined by ‘the They’. 442 In other words, conscience calls Dasein to recognize that he or she is the author of his or her own life – or, to use liberal terminology, to live life from the inside. But the possibilities or paths available to Dasein are particular; they are guided and limited by larger contextual frameworks of normativity. 443 Hence the human being is not absolutely free or independent of the social world; he or she is free to act within the range of communally given possibilities open to him or her but does not have a choice between all possible ends. Heidegger’s conception of Dasein blurs the traditional liberal boundaries between autonomy and heteronomy. Dasein cannot be considered completely autonomous, since it is not abstracted from its social context. At the same time, Dasein makes choices and does not adopt ends that are alien to the person.

Other liberal theorists have made similar arguments. Kymlicka argues that one’s context could give meaning to individual autonomy; the context of culture could allow individuals to configure their lives according to their own standards. 444 Taylor argues that to make normative judgments, we depend on, “commitments and identifications which provide the frame or horizon within which [we] can try to determine from case to case what is good, or valuable, or what ought to be

442 Ibid, p. 312-313.
done, or what to endorse or oppose.” 445 In another work, he refers to this frame or horizon as a background “moral space”, without which one would be ‘at sea’, ‘morally disoriented’. 446 Following from the arguments of these theorists, my conception of the sense of being does not prioritize autonomy over heteronomy. It accepts that human beings are susceptible to both internal and external forces beyond their control, in contrast to liberal writings, which have traditionally put forward an atomistic, independent individual. This individual is found most recognizably in the works of Rousseau, for whom judgment stems from within and is corrupted through social pressure and engagement with the world. For Locke, individuals transfer sovereignty to the state but retain autonomy. Though the state has monopoly over force, it cannot unduly interfere with the freedom of individuals. Kant holds that autonomy is not the freedom to pursue one’s ends, but rather the ability of the individual to act based on objective and universally valid principles of conduct that are chosen by the self on the basis of rationality. In contrast, heteronomy entails acting based on what he considers an external agency or system, including social or political context, historical circumstances and traditions. Rawls is famously criticized for requiring those who are forming a social contract to act as ‘unencumbered selves’, 447 separated from their contexts and from that which gives their lives meaning and purpose. Yet it is not just the cultural context that shapes our lives; power defines and limits the contours of autonomy. 448 Foucault argues that although the subject constitutes itself, through


practices of the self, “these practices are nevertheless not something invented by the individual himself.” Rather, he explains, “they are models that he finds in his culture and are proposed, suggested, imposed upon him by his culture, his society and his social group.” At an intuitive level, it is not difficult to understand Foucault’s point of the difficulty of being autonomous in a society when one is constantly exposed to normalizing mainstream discourses. He further argues that prevailing power relations penetrate even the interiority of our selves. People are ‘infantilized’ by agencies such as governments, schools, the media and economic institutions that wield power over people’s lives and treat them as if they are incapable of thinking and acting as autonomous beings. Foucault claims that individuals are subtly influenced such that they control their own behaviour (i.e. they are constituted by discursive mechanisms as ‘docile bodies’) in line with what is required of them. He argues that liberal institutions dominate individuals through a rights-based discourse that separates and atomizes individuals. What appears to be an autonomous choice is an internalization of social and political norms. In other words, according to Foucault, we are less free than we think we are.

My conception of the sense of being does not look with suspicion at justifications on the basis of religious belief, since deference to God or a religious text, as examples, would not be considered ‘alien forces’, as in Kant’s theory. Moreover, justifications based on values would likewise not be considered less important than justifications based on beliefs.

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449 Michel Foucault, 2003, 34.


451 Ibid.
Arendt’s theory of conscience offers up a second significant aspect of the sense of being: the notion of being true to oneself. For Arendt, conscience does not give prescriptions or offer insight into moral truth. It is not the capacity by which human beings adhered to their own moral code’ neither is it a sense of guilt or shame attributed with committing wrong. Rather, it is a silent inner dialogue that takes place between the self and itself, which Arendt calls ‘thinking’. Conscience is a by-product or ‘side effect’ of thinking. In thinking, one is returned to oneself, since one is one’s own partner in dialogue. ‘Thinking’ is not concerned directly with whether an action is right or wrong, but rather about consistency and integrity of the self. Whatever one does in the external world, Arendt explains, one still needs to grapple with whether the action is true to oneself, and whether one could live with oneself if the action (which defined oneself) was carried out. If one’s actions were in contradiction to oneself, it meant one became one’s own adversary. Hence thinking entailed an internal harmonization of a divided self. This conception of the self, wherein one determines that one cannot live with oneself if one commits a particular action, is what I judge to be an integral aspect of the sense of being. The sense of being involves the individual’s own views about how he or she sees themselves. It is profoundly subjective; it is a first personal perspective. It cannot be generalized, i.e. what one could not live with others possibly could. Here there are echoes of other thinkers, e.g. Charles Taylor, who discussed the notion of being ‘authentic’ or true to self. This entails not just following an internal voice telling oneself to do the right thing, but rather, being oneself. Hence the sense of being concerns the

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453 Ibid, 186.
individual’s conception of himself or herself. Moreover, since it doesn’t insist on an explicitly moral reflection, it offers space for judgements justified on the basis of values.

Lastly my conception of the sense of being does not prioritize religious obligation. In this respect, my sense of being is differentiated from Cecile Laborde’s integrity protecting commitments. Laborde proposes two kinds of IPCs: obligation-IPCs and identity-IPCs. In one sense, Laborde expands the conception of obligation IPCs. She makes the argument that obligation IPCs need not be traditionally religious in content; they could include secular conscientious objection as well. Moreover, they do not need to be tied narrowly to conscientious duty; they could include cultural and communal practices if these were experienced as obligatory by the claimant. In this sense, conscience would not have to be rooted in obligation; nor would conscience be exclusive to Protestant-type religion beliefs and practices. However, she then argues that obligation IPCs have greater salience than identity-IPCs because they pose a severe threat to integrity, since they coerce people to act against what they feel they are obligated to do so.

Laborde recognizes that not all religious claims are obligation-IPCs, because religion does not merely concern obligation. People engage in religious practice “out of habit, adherence to custom or happy religious enthusiasm” rather than a sense of obligation or fear of divine punishment. Laborde recognizes that the non-obligatory dimensions of religion may still be

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455 Ibid.

456 Ibid, 216.
central to one’s integrity. She calls these identity IPCs. Here, religion looks a lot like culture, in the sense of meaning-giving, integrity-protecting cultural commitments. Laborde admits that a person’s integrity may be threatened if they are prevented from acting on these commitments. However, she insists that identity-IPCs are less salient than obligation-IPCs, because the violation of integrity caused by a restriction on culture is weaker and more indirect than that caused by coercing individuals to act against their sense of obligation.\(^{457}\) In other words, a law that burdens non-liberal practice infringes integrity only indirectly. Though she makes space for claims on the basis of identity, her argument is skewed towards conscience claims, which she calls “obligation integrity-protecting commitments”.

I would contend that obligation is the wrong value to point out. Obligation can arise from identity or culture too. This is particularly the case because of the sort of distinctions Laborde makes about obligation: obligation could be perceived rather than actual.\(^{458}\) One could experience a sense of obligation due to custom or group expectations. Hence obligation would not be the best way to distinguish the first value from the second. Rather, both senses of being could be accompanied by a kind of obligation. Furthermore, unlike Laborde and other liberal theorists who have consistently claimed that the first feature should be considered paramount\(^{459}\), I argue that neither feature should be considered superior to the other based on the value that is

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\(^{457}\) Ibid, 217.

\(^{458}\) Ibid, 223.

\(^{459}\) Even Patten differentiates religion from culture, arguing that religion is simply more important to people than culture (Patten, 287), which is why a political community can expect immigrants to compromise on maintaining some cultural practices or even their language if the cost of maintaining them is too high, but not their religion: “In general, liberals think that religion is potentially so important to people that they ought to enjoy core religious liberties even at considerable cost to others. By contrast...the claim that the liberal principle of neutrality supports a fairly robust set of cultural and linguistic rights is not yet an all-things-considered judgment “(Patten, 287).
protected by freedom of conscience and religion. For this reason, religious conscience need not be prioritized over other manifestations of religion or conscience.

The implication of my approach to freedom of conscience and religion is greater space for diverse manifestations of judgments on the basis of belief and conscience, particularly those that the law disadvantages or burdens more than others. The features I have proposed are inclusive; they allow for greater consideration of non-religious conscience and non-Protestant religious practices. Moreover, an emphasis on sense of being means that one does not have to insist of defining and categorizing ‘conscience’ and ‘belief’ or even ‘justifications on the basis of belief’ and ‘justifications on the basis of values’; instead, one could judge whether one’s sense of being was violated.

But this comes with a risk; broadening the categories of freedom of conscience and religion may lead to the abuse of exemptions and protections to escape laws individuals do not wish to follow. I am convinced by Francois Boucher’s argument that this risk is exaggerated, given the costs of making a claim and the fact that fewer individuals in modern, post-secular societies embrace ways of life that would require exemptions or protections. But additionally, to be considered for an exemption, the claimant would still need to fulfil some requirements. The Supreme Court in *Amselem* indicated that an individual would have to demonstrate that:

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1) “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”;

2) “he or she is sincere in his or her belief”; and

3) “the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.”

In modifying these requirements to fit my conception of sense of being, I have two considerations in mind: first, it is necessary to avoid anything that prioritizes Protestant forms of conscience, and second, it is necessary to ensure that there are some criteria that can serve as an external constraint on the sense of being while still retaining what is subjectively important. I propose the following:

1) The individual offers a justification based on belief or value that concerns his or her sense of being;

2) The connection between the individual’s sense of being and the belief or value in question is assessed on the basis of whether the belief or value:
   a) is considered integral to the individual;

461 Amselem
b) influences and guides decision-making and is manifested in actions and practice; and

c) is coherent and consistent with the individual’s life.

3) The law in question violates the individual’s sense of being in a manner that is more than trivial or insubstantial.\(^{462}\)

To explain further: in order to show that the belief or action concerns the individual’s sense of being, the belief or value would have to be assessed on the basis of whether it:

**Is considered integral to the individual**

This condition ensures that the belief or value in question is not just an inclination, preference or desire; it is an integral aspect of the individual’s sense of being. It concerns that which the individual cares deeply about and takes seriously, i.e. he or she identifies with it and endorses it. If an individual abides by a practice that he or she does not think is valuable, then it is not part of the individual’s sense of being. The belief or value must give meaning to the individual’s life, such that the individual could not imagine life without it, or his/her life would be significantly altered in a negative way without it.

**Influences and guides decision-making and is manifested in actions and practice**

\(^{462}\) Individuals would not need to show: adherence to beliefs/practices/traditions over an extended period of a lifetime; that their beliefs/practices/traditions were part of a comprehensive system; commitment has a non-negotiable character (Patten (2014) disagrees, 133-135); obligatory (William Galston disagrees in “Religion, Conscience and the Case for Accommodation”, *San Diego Law Review* 51 (2014) 1059); must pass a test of reasonableness (Jonathan Quong disagrees in “Cultural Exemptions, Expensive Tastes and Equal Opportunities”, *Journal of Applied Philosophy* 23 (2006) 58).
This condition requires that the belief or value serve as an organizing principle in the individual’s life, such that he or she has built his or her life around it. The belief or value should be implicated in the individual’s deliberations and manifest itself in his/her actions and practices. An individual who believes he must pray five times a day must demonstrate that he does so to the best of his ability, and that this belief structures his day in some manner. If this belief or value is not a referent in the individual’s life, then one would question whether it is an aspect of the sense of being.

Is coherent and consistent with the individual’s life

This condition requires that the belief or value in question be consistent with the individual’s conduct and life journey. If an individual claims to be a vegetarian but eats bacon on a regular basis, then one would question whether vegetarianism is an aspect of her sense of being. A belief or value that connects with the sense of being is expected to endure for some time, and will not suddenly pop up on a single occasion. This does not mean that an individual cannot change his or her values or beliefs over time, or that there may be a conflict between values or between beliefs that result in one of them being compromised. There may be reasons for individuals to behave inconsistently.

4.4 GROUNDING EXEMPTIONS
At this point in my analysis, it is necessary to ask what would justify an individual’s right to act on the basis of belief or value even though the law prohibits him or her from doing so. If all citizens have their own senses of being, this does not explain why exemptions are necessary. Rather, it would suggest the opposite; that all persons should be equally and universally protected. It would seem to be the case that exemptions privilege some senses of being over others and are hence unjust. Moreover, an argument could be made that there is no need for exemptions. The law does not arise from and neither is it imposed by a foreign entity. All citizens in a liberal democracy are afforded the right to participate in the decision-making process. Theoretically, then, they should all be subject to the same rules. All citizens are expected to respect and abide by the law even when they do not feel they should or can. The law demands that we obey even when the rule in question does not make sense to us or does not seem to apply in our situation, and even in circumstances in which it would likely disadvantage us to obey. Consider, for example, tax law. A citizen may object strongly to paying taxes, especially when it supports projects that does not benefit him or her. But in most cases, the law would not excuse him or her. It is important to point out that exemptions are not new to the law. As Eugene Volokh has noted, “virtually all laws, including those widely seen as aiming at quite serious harms, contain many secular exceptions.”

Eisgruber and Sager make a similar observation. There is an appreciation within the law itself for cases that warrant special consideration.

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Exemptions on the basis of some senses of self can be justified through the lens of recognition and respect. Here I do not rely on any complete version of recognition theory. Rather, I cobble together bits and pieces of a number of theories which, taken together, seem most convincing and best suited to justify exemptions. To reflect the universal/unique dichotomy of the sense of being, I enlist the theories of Darwall and Carter on the one hand and Taylor and Galeotti on the other.

Darwall and Carter trace their argument about respect back to the broad Kantian notion of the person as an end in itself who cannot be used merely as a means. Darwall and Carter subscribe to Kant’s notion of a person without its moral aspect or its emphasis on autonomy.\(^{465}\) In a liberal democracy, citizens are treated with respect not out of esteem or as a reward for good conduct, but because they are persons. Darwall argues that, ‘to say that persons are such are entitled to respect is to say that they are entitled to have other persons take seriously and weigh appropriately the fact that they are persons in deliberating what to do.'\(^{466}\) He differentiates between ‘recognition respect’ and ‘appraisal respect’. The former recognizes someone as a person who possesses dignity and authority and is worthy of respect, irrespective of whatever he or she does; the latter evaluates someone based on excellence or merit and determines that they

\(^{465}\) For Kant, a person is ‘exalted above any price’ and ‘possesses a dignity by which he exacts respect for himself by all other rational beings in the world.’ (\emph{The Moral Law: Kant’s Groundwork of the Metaphysics of Morals}, trans. H. J. Paton (New York: Barnes and Noble, 1967) 96.) The dignity of a person lies in the ability to reflectively choose or endorse his or her own ends while respecting other persons’ equal ability and freedom to do the same. In other words, a person is able to autonomously choose and revise her own form of life and is able to do so under the constraints imposed by a moral law to which everyone is equally subject and author. According to Kant, to treat someone as autonomous means treating him or her as a person. Hence the state protects autonomy in the sense that it is something all persons possess.

are deserving of respect. With ‘recognition respect’, a person is respected even if their achievements are not deemed worthy of respect. To show equal respect means to respect the moral worth of people whether or not they exercise this capacity. Ian Carter proposes opacity respect, which stipulates that all persons should be considered as equally capable of moral agency.\textsuperscript{467} He argues that in political interactions and social arrangements, members of society should view one another as agents. Respect for human dignity requires that differences among people be ignored and that the quality of rational agency capacity not be judged or measured provided it exceeds a basic threshold.\textsuperscript{468} All normal human beings possess agency capacity that exceeds this basic threshold; hence all have equal moral rights. The quality of one’s agency capacity has little effect on the treatment owed to a person or treatment that the person owes to others. Carter explains that threshold agency combined with opacity respect is the basis for treating all equally for the purposes of determining moral entitlements.

While Carter insists that opacity respect is necessary for treating people as agents, and hence as equals, Taylor and Galeotti argue that treating people justly does not require abstraction from all of their cultural and religious particularities. Taylor, one of the earliest writers on recognition, notes that equal recognition could be understood as the politics of equal dignity or the politics of difference. The first treats all individuals universally and equally out of recognition of their common citizenship. The second recognizes the uniqueness of each individual. Taylor is in favour of the politics of difference. He claims that equal dignity is often reliant on the perspective of the dominant culture, which forces minority groups to give up their uniqueness in

\textsuperscript{467} Ian Carter, "Respect and the Basis of Equality," \textit{Ethics} 121. 3 (2011).

\textsuperscript{468} Carter (2011), 541.
the interests of conforming. If they cannot conform, they are treated as inferior. Taylor points
out that the politics of difference also includes an element of universality, since everyone has an
identity which is peculiar to each.

Like Taylor, Galeotti argues that respect should be offered to people in light of a recognition of
their differences and cultures. Recognition of others as one’s equal could take two forms. It
could be a “generalizing act”, which sees the common humanity behind the individual, or it
could be an “individualizing act”, which sees the person in the individual. Recognition as a
generalizing act comes about by abstracting from the individual, and hence dispensing of his or
her special traits. Galeotti explains that this is problematic for those who are not white, male,
Christian and educated. Such individuals encounter difficulty being regarded as fully ‘persons’
and given due respect. In order to be recognized as equals, members of these groups have to
brace their characteristics so that their common humanity can be perceived at the expense of
their self-respect and a disregard of their integral self. On the other hand, an individualizing act
of recognition captures the second-personal nature of respect, since one is able to recognize the
other as a person “neither despite, nor in virtue of, but given their identity”.

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472 Ibid, 445.

473 Ibid, 446
I argue that recognition based on abstraction and recognition based on difference are simultaneously important. Together, they capture the sense of being: it is both universal and distinct, and hence, to be adequately protected, it requires recognition that reflects both these features. It is in the recognition of universality or sameness that we can respect the worth of each human being. And it is in the recognition of the differences among social identities that we can locate the perpetuation of privilege and disadvantage and begin the work of righting the balance.

The harm of misrecognition is best described in the work of Nancy Fraser.⁴⁷⁴ In this respect, Fraser improves upon other recognition theories, which claim that people are dependent on societal esteem for their sense of worth.⁴⁷⁵⁴⁷⁶ Instead, Fraser grounds recognition claims in the requirement of justice demanding equality in the participation of all people. Fraser explains that, “some individuals and groups are denied the status of full partners in social interaction simply as a consequence of institutionalized patterns of cultural value in whose construction they have not equally participated and which disparage their distinctive characteristics or the distinctive characteristics assigned to them”.⁴⁷⁷ Hence, recognition is not necessary to protect those who are

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⁴⁷⁵ I disagree with the reasons for recognition offered by Taylor and theorists, including Alan Patten and Axel Honneth, all of whom argue that people are reliant on societal esteem for their self-respect and self-worth. This theory seems to depend on psychology and does not have empirical basis.


disadvantaged; rather, recognition is required in order to ensure that all members of society can equally participate in society. In other words, recognition is necessary for the society to function properly as a democracy. A valid recognition claim is one in which individuals can show that institutionalized patterns of cultural value deny them the necessary conditions for equal participation.

Drawing from Fraser’s work, I argue that there are two related reasons for exemptions. First, a liberal democratic state has an interest in ensuring that people are not alienated. Those most likely to be alienated are those whose senses of being are violated by the law. Second, exemptions may be necessary to alleviate the unjust burden placed on some members of society due to structural democratic deficits and asymmetrical power differences. The political processes of representation, participation and deliberation are imperfect. Moreover, the law may unintentionally reflect the cultural and religious mores and worldview of the majority, privileging majoritarian senses of being. At the same time, the law may indirectly disregard or limit the senses of being of individuals who are members of disadvantaged and marginalized groups. In this sense, a seemingly neutral, universal institution, policy or law can have varying impact across persons due to their unique sense of being.

Those who are recognized as advantaged in some ways will still be protected under freedom of religion and conscience. I take issue with David Steinberg’s argument that government should only grant religious exemptions when the law conflicts with the beliefs of a minority religion; members of “popular religions” would have to seek relief from conflicts in the law through the democratic decision-making process, either by getting the law repealed or by obtaining an
exemption to the law that is not tied to religion.\textsuperscript{478} My criticism is with the inflexibility in his argument. In some cases, I hold that the advantaged will have less of a chance of being exempted from a law. This is particularly the circumstance if the claimant gains additional legitimacy or power through the granting of an exemption that allows it to violate the sense of being of others. But it could be the case that an individual or group is advantaged in one sense and disadvantaged in another. For example, a dominant religious group may continue to be disadvantaged in comparison to the wider non-religious or secular societal context.

Thomas Berg disagrees that there should be any circumstance in which a religious individual or group should not qualify for an exemption on the basis that they are not a ‘minority’. He contends that the protection and equalization of minority faiths should not be the sole criterion for Religion Clause cases. Writing in the context of the United States, he states:

The First Amendment guarantees free exercise of religion, with no qualification limiting the freedom to minority faiths; nor is there any indication that the Establishment Clause becomes inapplicable if a minority faith is established. Under any plausible constitutional interpretation, majority faiths have rights to practice and spread their beliefs in certain basic ways (even though there are, of course, many questions about the outer scope of religious freedom). Such basic rights are protected even when they have effects that members of minority faiths regard as negative.\textsuperscript{479}

I agree with Berg that individuals or groups that are advantaged in some way (or in many ways) are still protected under freedom of religion and conscience. But exemptions constitute a particular category of protections that are not guaranteed in every case. Though individuals or groups that are advantaged in relation to the case in question would still be able to request an exemption, they would not receive the same priority as individuals or groups that are disadvantaged. In some circumstances, since they already experience protection because their beliefs and values are shared on the societal/cultural level, they may not need an exemption in the same way that an individual or group that is marginalized does.

4.5 IMPACT AND NEUTRALITY

Many liberal theorists have made similar arguments about the need to mitigate uneven impact on the disadvantaged and protect minority individuals and groups. Eisgruber and Sager point out that the principles of equality and non-discrimination necessitate exemptions for religious minorities, who are often treated less favourably by policymakers than more mainstream concerns.480 Nussbaum claims that, “majority thinking is usually not malevolent, but it is often obtuse, oblivious to the burden such rules [public holidays, days of rest, et cetera] impose on religious minorities.”481 Quong argues that members of minority groups may experience restricted opportunities; exemptions would offer them, “the same opportunity as that enjoyed by the majority of citizens to combine their (reasonable) cultural or religious pursuit with basic civic

opportunities like employment or education." Kymlicka explains that sometimes laws and institutions are biased in favor of the majority’s religion.

Yet their arguments raise questions about why disparate impact should matter. Standard liberal accounts of neutrality do not provide a proper justification for eradicating residual disadvantage because they are not fully sensitive and responsive to difference or the asymmetries among people or groups. In fact, liberal theorists should conceivably be accepting of unequal effects if the laws are neutrally justified. Liberal democratic legal and political systems are not set up to deal with situations where unanticipated, unintended residual inequality and disadvantage arise from the application of seemingly neutrally justified laws. Inequality of outcome only violates neutrality of effect or consequence, which liberal egalitarians are reluctant to endorse.

Three versions of neutrality have been proposed within liberal theory, two of which (justification and aim) are often lumped together. Most liberal theorists are reluctant to accept anything other than justification or aim. For them, the state should limit its reasoning to treating others fairly and leave questions about conceptions of the good to the private domain. As Bruce Ackerman has put it, “no reason is a good reason if it requires the power holder to assert: a) that his

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482 Quong (2006), 62.


conception of the good is better than that asserted by any of his fellow citizens, or b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens. Conceptions of the good are thus excluded as reasons for political action. Neutrality is defended as a principle of intention and procedure rather than outcome.

This is reflected most clearly in the work of Rawls, who stipulates that the basic institutions and public policy are not designed to favour or disfavour any particular comprehensive doctrine. In Rawls’ original position, where the parties agree on principles and then establish a constitution and the institutions for cooperation between citizens, persons operate behind a veil of ignorance, unaware of their relative positions in society. In this hypothetical situation, differences are ignored on principle; each person is treated equally and impersonally. For Rawls, this procedure is important to allow for persons to choose the principles of justice that will govern society. The selected principles are neutral and do not favour or disfavour any conception of the good; Since no one would desire that their own conception of the good is disadvantage, and since this desire is shared by all, no advantages or disadvantages will be attached to any view. Each person has an equal right to basic liberties, and eventual social and economic inequalities are to be tolerated only if they are of the greatest benefit of the least advantaged and attached to offices and positions that are open to all.

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486 Ackerman (1980), 11.


488 Ibid, 12.

489 Ibid, 302.
Yet, though the principles of justice are intended to have an equal effect (through equal liberty and equal treatment) on all reasonable conceptions of the good, there is no guarantee that they will. From a liberal perspective, all conceptions of the good are perceived as equally different. Yet in practice, some conceptions of the good are privileged based on their congruence with the cultural norms of society and as a consequence enjoy greater freedom. Moreover, some conceptions of the good are associated with the majority and are perceived as normal; others are associated with minority groups and perceived as different. Rawlsian neutrality ignores the disadvantages and privileges attached to differing and clashing positions held by individuals in a society and accumulated over lengthy period of time. Hence it does little to guarantee the fair treatment of all.\footnote{Rawls does offer a solution: distributive compensation for those who are at a disadvantage. Yet the exclusion of some from full citizenship cannot be remedied by equalizing the distribution of resources and opportunities for all. Self ‘different’ and hence marginalized and politically sidelined cannot be solved by an equal share of basic goods.}

Moreover, being entitled to or possessing rights in a formal sense does not imply having the capacity to function as a full citizen.\footnote{See Sen (1999) on capabilities.} A neutral attitude towards those differences may strengthen oppression and vulnerability rather than neutralize them. Hence neutrality of justification or aim is blind to difference and does not appear to be the most suitable concept to address the residual inequality and disadvantage faced by some individuals and groups. It does not alleviate the burden faced by minorities, and in fact may exacerbate or further it unknowingly.

Alan Patten has attempted to bridge the divide between neutrality of justification and neutrality of effects by introducing his own version of neutrality, which he calls neutrality of treatment.\footnote{Patten (2014), 112.}
He argues that the state violates neutrality of treatment when, relative to an appropriate baseline, its policies are more accommodating of some conceptions of the good than others.\textsuperscript{493} To maintain neutrality, when the state pursues a policy that is accommodating (or unaccommodating) of some particular conception of the good relative to the appropriate baseline, it should adopt an equivalent policy of assistance of hindrance for rival conceptions of the good.\textsuperscript{494} Neutrality of treatment means the state's policies must be equally accommodating of rival conceptions of the good to ensure fair opportunity for self-determination.

Like many liberal egalitarians, Patten is concerned that his theory could be classified as neutrality of effects. He explains that neutrality of effects is concerned with the success or failure of particular conceptions of the good; it aims to equalize across outputs of the policy process. Patten insists that neutrality of treatment is different from neutrality of effects. His version of neutrality is concerned with, “the direct effect that a policy has on making a conception of a good more or less realizable.”\textsuperscript{495} Patten argues that neutrality of treatment, “does not look at the further, indirect effects that arise because of the way in which people react to that relative treatment. Neutrality of effects, by contrast, looks at the whole range of effects that have implications for realizability...”\textsuperscript{496} Yet, though Patten is not concerned with indirect effects, he is still concerned with facilitating a certain effect, i.e. fair opportunity for self-determination. Moreover, if, as Patten argues, neutrality is violated when policies accommodate certain

\textsuperscript{493} Ibid, 115.
\textsuperscript{494} Ibid, 112.
\textsuperscript{495} Ibid, 116.
\textsuperscript{496} Ibid.
conceptions of the good more than others, and neutrality is not concerned with the indirect
effects of otherwise neutral policies, then it would seem on the basis of his argument that
individuals from minority groups are treated fairly, in that they have a fair opportunity to develop
and realize their conception of the good. Hence, if Patten’s line of reasoning was followed to its
logical end, there would be no reason for the state to offer exemptions.

It would be unrealistic to expect that institutions, laws or policies could have an equal or similar
consequence on every conception of the good, particularly when people’s capabilities or
preferences are different. Yet though neutrality of effects is overly ambitious and impractical, it
is also true that seemingly neutral standards often reflect the interests and experiences of
privileged groups whose worldview is so dominant that it has become invisible. ‘Neutral’ rules
and treatment may produce or perpetuate the inequality experienced by individuals from
marginalized or vulnerable groups in society while improving the circumstances of the privileged
and dominant. It would seem then that a concern with impact, effect and outcome is necessary to
undergird protections and exemptions that concern the fundamental matter of one’s sense of
being.

4.6 EXEMPTIONS UNDOING POWER IMBALANCE

Earlier in this chapter, I had argued that the grounds for protecting freedom of conscience and
religion are more pronounced in the case of those who are disadvantaged or marginalized on the
basis that their sense of being is at greater risk. In this section, I demonstrate how greater
consideration can be conferred on the conscience and religion claims of those who are marginalized or disadvantaged.

I propose that the Oakes test be set side to allow the court to better judge the complex relationship between state action and impact in a holistic, comprehensive manner. The first set of factors concerns impact: a) How would state action impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized? b) Would an exemption foster new forms of inequalities, either among other minorities or in the wider community? The second set of factors concerns state action: a) Has the state chosen the least burdensome infringement possible on the sense of being? b) Should a narrower objective or less drastic measures be considered?

The Oakes Test

Section 1 of the Charter establishes limits on rights and freedoms set out in the Charter. It reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 is engaged only after the courts have determined that freedom of conscience and religion has been infringed. The onus of proof is on the state actor infringing the claimant’s freedom.
The Supreme Court has established a test for determining what counts as a reasonable limit. The test was first used in *R. v. Oakes*. It consists of two parts:

1) The state action must have as its objective a pressing and substantial concern in a free and democratic society; and

2) There must be proportionality between the objective and the state action in question. This second part of the test consists of three subtests:
   a) state action must be rationally connected to the objective (rational connection);
   b) state action must impair as little as possible the right or freedom in question (minimal impairment); and
   c) there must be proportionality between the effects of the measure and the objective (proportionality).

Since the Oakes test was established, many legal theorists have critiqued the test as well as judgments reliant on it. Lori Beaman argues that although there are some instances where the Supreme Court has employed the Oakes test well, in others it has relied on a cursory examination. In fact, the Supreme Court has itself pointed out that a full-blown analysis of section 1 is not always necessary. Beaman compares the analysis of section 1 in *Ross v. New Brunswick School District No. 15* and *B.H*. In *Ross*, the court considered both “specific and general contexts”.497 The court noted that Ross’ anti-Semitic pamphlets caused harm by creating a poisoned atmosphere at school. The court also recognized the disadvantaged position of Jews

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497 Beaman, 64.
in society and the history of their treatment through reference to the Holocaust. In contrast, in B. H., the court’s section 1 analysis was perfunctory. The court determined that medical treatment was necessary to save her life and was thus a reasonable limitation on her religious freedom. The court offered scarce elaboration on the process used to justify infringement of her religious freedom. The court did not explore alternative medical treatment or demonstrate an awareness that the treatment offered was a chance rather than a certainty. It did not consider the broader harm that might be visited upon her person if she was forced to endure medical treatment she did not want. The court also did not make reference to her as a member of a religious minority group, and hence did not consider broader social harm. Though Beaman recognizes that section 1 can and has been used to preserve a religious hegemony, she suggests that the court may be able to avoid a negative outcome by engaging in a more serious section 1 analysis.

Others have pointed out that the last step of the test should be prioritized. They argue that if the purpose of section 1 is to determine whether the good of the legislative objective outweighs the bad of the rights infringement, the court should reject any approach which requires it to strike the balance after having weighed only one side of the scales. Peter Hogg writes that the requirement of a pressing and substantial government objective in the first step leaves little work for balancing in the last step. By the time the court gets to the final stage, Norman Siebrasse

498 Beaman, 65.


argues, it has already made up its mind. If the court has determined that the government is pursuing a pressing and substantial objective by the least intrusive means possible, then at the final stage, “to conclude that the legislation fails…is to say that the government is constitutionally forbidden from using the least intrusive means possible to achieve an objective which is of pressing and substantial importance in a free and democratic society. The result is that this third step becomes the effects test under another name. But certainly laws that use the least intrusive means possible may nevertheless incur unjustified effects which need to be interrogated. Moreover, if ‘effects’ are rolled into the third step, emphasis may remain on state action, diverting important analysis of the effects of the infringement on the individual or community in question.

In Hutterian Brethren, the court reoriented its analysis to focus extensively on the final step. It offered a more deferential approach towards the minimal impairment test, explaining that if the applicant proposed a less impairing alternative that involved limiting or qualifying the government’s pressing and substantial objective, the court should determine that no less drastic means are available and proceed to the final stage of the test. No means that would not allow the objective to be realized to its fullest extent would be considered a reasonable alternative. Yet, at the fourth stage, the court deemed that the impact on religious freedom was outweighed by the objective of the legislation (to minimize risk of fraud to citizens as a whole).

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502 Hutterian Brethren, para. 197.
In light of this judgment, Benjamin Berger expresses concern that by the time the court arrives at the balancing stage, “the government will find itself in the arguably enviable position of holding up its pressing, substantial and well-tailored public-oriented objective for comparison with the impacts…on an idiosyncratic and foreign belief.” He does not appear hopeful that the court will engage in serious engagement with the actual significance of the belief or practice with which the legislation interferes.

I contend that the notion of a ‘test’ should be reconsidered. The purpose of the test is to ensure that the objective and means of state action is outweighed by the effects of an infringement on a freedom. If it cannot be determined that the good achieved by the law is on balance greater than the harm caused, then a s. 1 analysis will fail. But this requires, not a test, necessarily, but a subjective judgment of complex factors. I agree with Richard Moon that “no single generic test for limits on rights” will sufficiently address the rights protected by the Charter. In the case of section 2(a), the court should more directly weigh the legislation’s means and goals with its effects on freedom of religion. Unlike in the Oakes test, the order of steps in the assessment would have little bearing on the outcome. The assessment would be holistic and comprehensive, rather than focusing on a specific part one by one. A section 1 assessment would consider the following factors:


Effect

1) How would the state impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized?

   a) Is the first-person perspective prioritized?
   b) Is the comparison or baseline of judgment appropriate?
   c) What is the wider context of marginalization or privilege of the sense of being of the individual? Would this context be affected positively or negatively by an exemption?

2) Would an exemption foster new forms of inequalities, either among other minorities or in the wider community?

STATE ACTION

1. Has the state chosen the least burdensome infringement possible on the sense of being? Should a narrower objective or less drastic measures be considered?

4.7 FACTORS IN SECTION 1 ANALYSIS:

1) How would the state impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized?

The first question focuses on the freedom being infringed. The aim is to determine the degree to which the claimant’s sense of being is compromised by state action.
a) Is the first-person perspective prioritized?

We begin with the assumption that the claimant has a point of view that is different from and irreducible to any other perspective. Here we rely on perspective scholarship, which is concerned with groups that have historically been excluded or unrepresented in the law. Perspective theorists argue that law as an institution (i.e. procedures, structures, dominant conceptions and norms) was constructed at a time when certain groups were systematically excluded from participation. The absence of these groups has made contemporary legal analysis and legal institutions faulty or incomplete. Kimberle Crenshaw critiques the concept of ‘perspectivelessness’ in the context of race.\(^{505}\) Though perspectivelessness claims to be neutral, she argues that it ignores patterns of inequality and masks the law’s complicity in perpetuating and reproducing structural racial inequality. Martha Fineman has likewise argued that when women’s lives and experiences were subject to the law, they were translated into law by men. Social and cultural institutions that women occupied exclusively, such as motherhood, were “defined, controlled and given legal content by men.”\(^{506}\) Men crafted legal definitions of the family; these concepts and categories have not been easily dismantled. Iris Young has pointed out that one cannot fully understand the experience of others by imagining oneself in their place. Rather, one tends to project one’s own perspective onto others. She calls this symmetrical


reciprocity. She advocates for asymmetrical reciprocity, which entails that those in dominant positions consider the other without taking on their perspective. An assessment in line with Young and other perspective theorists’ arguments would entail recognition that one’s knowledge of marginalized groups is partial and socially situated and could potentially lead to practices that further disadvantage or marginalize.

Martha Minow has pointed out that members of the legal profession, including judges, are fallible, and that, “one predictable form of fallibility is one's bias toward people who are different.” Those judging would be perceived as learners of the reality and knowledge of marginalized individuals. An inquiry at this level would begin with a deliberate choice to see the world from the standpoint of the minority or disadvantaged rather than the vantage point of the reasonable person, which might unintentionally privilege Protestant or majoritarian understandings of the sense of being. It would take the claimant seriously by seeking to appreciate the distinct nature of the person’s sense of being and its manifestations. It would also demonstrate a recognition that rituals, practices or traditions have different meanings across different religions, cultures or worldviews; what appears to be peripheral or unnecessary in one may not have the same function or value in another.

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This would entail an in-depth inquiry into the person’s sense of being. The court has expressed concern with ‘interrogating religion’ or placing religious beliefs or practices under judicial scrutiny, which would give the state the power to assess the contents and merits of religious beliefs. They have relied on *Amselem*, which concluded that the state was in no position to be the arbiter of religious drama, and that the courts should refrain from interpreting or determining the content of a subjective understanding of belief or practice. Inquiry into profoundly personal beliefs would entangle the court in religious affairs and would be inconsistent with the principles underlying freedom of religion. Yet, as Diane Goodman has pointed out, people generally know little about marginalized individuals and communities, and what they do know is often inaccurate or limited. The disadvantages experienced by those whose are less typical or known are rarely discussed.  

This suggests that by not interrogating claims that are unfamiliar, judgments will be made with only a surface understanding of the context of religion or conscience, which serves to disadvantage those senses of being that are less typical or known. On the other hand, more mainstream religion and conscience claims are more likely to be widely understood.

**Is the comparison or baseline of judgment appropriate?**

Caution would be required in making comparisons; one would need to be careful about determining which individuals are identically situated and which individuals should be treated identically. For example, in Quebec (as in France), some politicians have made comparisons between the headscarf worn by Muslim women and the cross worn by Catholics. Yet there is a

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differentiation between the two articles of clothing. Moreover, there is a differentiation between
the social location of the individuals wearing the articles of clothing. The analogies made may
reflect the mindset of the one privileged to do the analogizing. In this case, when the French
government designated both the headscarf and the cross as ostentatious symbols, it seemingly
failed to recognize that it was imposing a cultural and religious framework that was not neutral.
While many Christians may consider the cross a religious symbol and wear it as a sign of their
religion, the headscarf (and one could include in this category the turban, kippah, et cetera)
would be better considered religious practices rather than symbols or signs. Preventing people
from wearing articles of clothing they consider elements of religious practices would be asking
them to go against what they believe is required or preferred within their religion. Hence the
significance of these items of clothing cannot be compared.

Some liberal theorists have offered suggestions on how to make comparisons. Eisgruber and
Sager have proposed equal regard: when the state has accommodated serious mainstream
religious or secular interests, it should provide equivalent accommodation for the comparably
serious interests of minority religious groups or individuals. They offer some examples. Two
Muslim police officers sought an exemption from the police force regulation that required them
to be clean-shaven on the grounds that their religious beliefs required them to grow a beard.
Since there was an exemption in place for officers who suffered from a health condition
(folliculitis), equal regard required that the special religious needs of officers be accommodated
as well. Likewise, if a basketball association prohibited headgear on safety grounds, but made an
exception for corrective glasses that were strapped on, there would be no reason to treat

\[^{511}\text{Eisgruber and Sager (2007), 90.}\]
Eisgruber and Sager argue that these “secular needs are plainly analogous to a religious one”. They then discussed the case of a Jehovah’s witness who quit his job because he claimed that his religion prevented him from participating in making equipment for war. Eisgruber and Sager claim that the state should have treated his “religious “allergy” to tank-building” in the same way that it would have dealt with a physical allergy. But comparing religious beliefs and practices to health needs only accommodates the obligatory aspect of religion. It does not accommodate those parts of religion that count as choices. Eisgruber and Sager acknowledge that interpersonal comparisons are complicated, and suggest that if there were no ready-made comparisons, then one could imagine a hypothetical one, or analogies could be looked for further afield. Yet, while comparisons may be useful, there is risk in relying on them too heavily. Not only are comparisons fraught with difficulty, but exemptions may become dependent on the availability of other exemptions, which may have underlying majoritarian assumptions. Rather, comparisons should be considered one component of the assessment. In some cases, comparisons may not be application, with the individual or situation requiring study on its own terms.

What is the wider context of marginalization or privilege of the sense of being of the individual? Would this context be affected positively or negatively by an exemption?

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512 Ibid, 91.
513 Ibid, 98.
514 Ibid, 105.
515 Minow (1989), 5.
This section of the assessment would consider the social, political, economic and legal context independent of the particular law being challenged. The rationale for this section is that the law cannot operate in isolation from its societal context and conditions. If the law has the effect of mirroring the patterns of social, economic and institutional relations, then it may exacerbate inequalities and hierarchies. We are all differently situated within economic and institutional relationships, and these relationships structure our options and create opportunities. Hence it will be necessary to look beyond individual inequalities and discrimination to adopt a more structural perspective. Moreover, one’s dominance or disadvantage is interconnected. It is also cumulative; the impact may be more significant and profound that the isolated advantages or disadvantages might suggest. Individuals’ other social identities and status will affect the degree or experience of privilege or disadvantage. In taking into consideration context, an assessment would inquire about the following:

- Historical injustice towards the group to which the individual belongs.
- Degree to which the individuals’ group is a minority.
- Socio-economic status of the group to which the individual belongs. This includes levels of poverty, income, health, employment, and education.

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- Political integration of the group to which the individual belongs. This includes the degree that the group to which the individual belongs is able to participate in the political life of the society and their ability to influence public decision-making. It also assesses whether elected officials are interested in addressing their needs, or whether they are vulnerable to having their needs and interests overlooked.

- Prejudice and intolerance of the majority towards the minority group. This may include representations in media. It may also include hate crimes and verbal/physical violence by individuals of the majority against those of the minority group which can foster vulnerability amongst those who are the target.

Parts of this assessment would be subjective, but not all of it would. It may be possible to rely on statistical information, for example, to fill in the claimant’s contextual picture. Not all the factors listed above would be present in every case; it is not necessary that all of them be proven. Moreover, some groups may be disadvantaged in some respects but privileged in others. For example, a group may have been historically advantaged, but is now in a situation where it is disadvantaged due to changing social structures. Or a minority group may be dominant in a particular society due to historical or political reasons; minority status may not always be an indicator of marginalization and disadvantage. Nevertheless, these factors tend to be interconnected and work together to contribute towards disadvantage and marginalization. For example, prejudice and discrimination may diminish employment prospects, which could affect the socio-economic status of individuals in the group. Lack of political power may make it difficult to obtain legislative protection, which could lead to greater marginalization and exclusion from the political community.
This stage of the inquiry would go a step further to assess the potential effect or impact of the exemption (or lack thereof) on the individual sense of being. For example, preventing Indigenous peoples from accessing land could lead not just to the loss of religious ritual, but also a sense of isolation and estrangement from the political community. Preventing individuals from wearing articles of clothing that they consider an integral part of their sense of being in their places of employment could lead to diminished or inferior employment opportunities, which would decrease their ability to achieve financial autonomy. Hence exemptions could exacerbate disadvantage and contribute to the further subordination of the group. The more likely an individual is to be affected by the legislation, the stronger the case for offering an exemption.

Would an exemption foster new forms of inequalities, either among other minorities or in the wider community?

The aim of this aspect of the assessment is to protect or advance those who are from disadvantaged or marginalized groups and limit those who are from privileged or dominant groups. To that end, it is necessary to look not only at the individual or group being disadvantaged, but also at those who are seemingly unaffected by the law and even broader still, at the power and interests that are affected within society. This stage would seek to determine whether the exemption would privilege the claimant over others, or enhance the authority and power of the claimant over those who are marginalized, creating new patterns of disempowerment and disadvantage. This leaves room to address the possibility of a minority group, culture or community dominating the individual, particularly if an exemption elevates
some beliefs and interpretations over others. While the balance will be weighted towards the
disadvantaged, whose position will be advanced, they cannot be permitted to abuse their power,
impose harm on others, or foster further inequalities.

Has the state chosen the least burdensome infringement possible on the sense of being?
Should a narrower objective or less drastic measures be considered?

This section of the assessment considers the possibility that there might be other options
available to the government that affect the claimant in a less significant manner. It requires the
government to justify its choice and reconsider its objective and means.

4.8 CASE STUDIES

I will assess three cases retroactively through my analytical framework:

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),

The Ktunaxa claimed that development would drive Grizzly Bear Spirit, central to Ktunaxa
beliefs and practices, from Qat’muk, their traditional territory. The Ktunaxa believed that
Qat’muk was a place of spiritual significance and home to grizzly bears and the Grizzly Bear
Spirit, their principle spirit. They relied on Grizzly Bear Spirit for the basis of their beliefs, the
meaningfulness of their practices, and the vitality of their community. The court argued that s.
2(a) protects freedom to hold a religious belief or to manifest that belief. It argued that the
appellants did not seek protection for freedom to believe in Grizzly Bear Spirit or to pursue practices related to it; rather, they sought protection for Grizzly Bear Spirit itself and the subjective spiritual meaning they derived from it. The state’s duty was not to protect the object of beliefs or the spiritual focal point of worship. The court ruled that the claim did not fall within the scope of s. 2(a) since the claimant could not demonstrate that state action interferes, in a manner that is non-trivial or not insubstantial, with the ability to act in accordance with that practice or belief. Since the claim did not fall within the scope of s. 2(a), the court did not need to assess whether the decision represented a proportional balance between freedom of religion and other considerations.

How would the state impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized?

The court was reluctant to engage in an in-depth analysis, citing *Amselem*, wherein it concluded that the state was not in position to be the arbiter of religious dogma. Yet it seemed to judge from the standpoint of a majoritarian understanding of religion. It narrowly focused on religious beliefs and practices as the object of protection without appreciation of the different form of the Ktunaxa’s spiritual way of life. The majority decision was unable to consider the claims of the Ktunaxa with the seriousness with which the community held it. The Ktunaxa were concerned that state action that impacted land could sever their connection to the divine, rendering their beliefs and practices devoid of spiritual significance. They argued that they would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. The judgment stated that it was not clear that development would interfere with the freedom of the Ktunaxa to believe in
Grizzly Bear Spirit or manifest that belief despite the loss of the land on which Grizzly Bear Spirit resided.

The court seemed to rely on an implicit baseline understanding of religion that perceived of land as removed or separate from religious belief or practice and comparable to a holy site or church. Yet, for the Ktunaxa, land was considered sacred, since it was where the divine manifests itself (unlike in monotheistic religions, where the divine is considered supernatural and transcendental). The spiritual realm in the Indigenous context was inextricably tied to the physical world. Hence the impact of state development of land would be significantly greater that it would be for other religions whose beliefs and practices were better understood and protected by the law. Justice Moldaver, in a concurring opinion, offered a more nuanced approach. He argued that where a person’s religious belief no longer provided spiritual fulfillment, or where the person’s religious practice no longer allowed him or her to foster a connection with the divine, that person was unable to act in accordance with his or her religious beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her. The state interferes with an individual’s ability to act in accordance with religious beliefs or practices if the spiritual significance of the individual’s beliefs or practices is diminished by state action. In this case, state conduct rendered the Ktunaxa’s sincerely held religious belief devoid of religious significance. Without a full awareness of the specificity of the Ktunaxa expression of religion and conscience, the court was unable to find that there had been an infringement.
Assessment of the wider context was not included in the court judgment. Like other Indigenous peoples, the Ktunaxa have experienced suffering at the hands of the state. Their land was divided due to the border divisions. They were displaced against their will; their relationship with the land was ruptured; and their access to sacred sites was lost. Moreover, their freedom was restricted, their practices were criminalized, and their communal structures were disrupted. These practices continued until relatively recently, leading to a loss of culture, spirituality and community. Indigenous peoples continue to experience marginalization and exclusion. They also continue to experience assimilation. By all statistical measures, Indigenous peoples are disadvantaged, experiencing poorer health, lower levels of education and employment, greater poverty, et cetera. Hence their sense of being is at significant risk. But it is not just material investment that is lacking; cultural recognition and the restoration of self-respect is necessary.

A ski resort could have a positive economic effect on the Ktunaxa. On the other hand, it could be detrimental to their social cohesion. Migration of Indigenous and non-Indigenous individuals and groups in and out of the region could lead to social instability. New workers in the region could put pressure on the cultural identity and social norms of the Ktunaxa. Local Indigenous language could be lost with increased contact with English speaking workers. If construction caused environmental damage, this could affect the ability of the Ktunaxa to participate in

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hunting, trapping and fishing. All of these pressures could create or amplify social problems such as substance abuse.

**Would an exemption foster new forms of inequalities, either among other minorities or in the wider community?**

Being able to prevent the development of a resort on Qat’muk would give the Ktunaxa more power over state land use and potentially set a precedent for other cases. This could tilt the balance of power between the state and Indigenous communities. It would also seem to impose an excessive burden on the larger community. In conflicts over land use, a combination of negotiation, compensation and power sharing seems to be a better option in order to ensure Indigenous peoples are treated justly and new inequalities are not created.

**Has the state chosen the least burdensome infringement possible on the sense of being? Should a narrower objective or less drastic measures be considered?**

In this case, though the reasoning of the decision was less than satisfactory, the government engaged in extensive consultation and negotiation with the Ktunaxa, offering them a measure of control and financial incentives.

**Alberta v. Hutterian Brethren of Wilson Colony**
Members of the Hutterian Brethren of Wilson Colony sought an exemption from being photographed for their drivers’ licences and included in a facial recognition data bank in Alberta. Colony members objected on the grounds that the Second Commandment forbade them from making photographic images. Though the Court acknowledged that the photo requirement violated infringed individual Hutterites’ religious freedom, it argued that the violation was justified under s. 1.

**How would the state impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized?**

The court did not seem to recognize the collective needs of the colony and the burden the infringement on freedom of conscience and religion would impose upon its members. Chief Justice McLachlin argued that Colony members were not compelled to have their photos taken. They could exercise their choice to hire outsiders to drive for them. She argued that the availability of this choice would not seriously violate their right to religious freedom. McLachlin determined that the legislation was a minimal impairment of the colony members’ religious freedom, as the alternatives offered would not satisfy the goal of preventing identity theft.

Justice Abella’s dissent is worth noting. She was concerned that the collective needs of the colony had not been engaged sufficiently by the Court. She described how important self-sufficiency was to the Hutterite Colony. Their livelihood allowed them to remain independent and apart from the surrounding world. Suggesting that Colony members could use third party transportation “failed to appreciate the significance of their self-sufficiency to the autonomous
integrity of their religious community.”  

Forcing colony members to choose being communal self-sufficiency and driving illegally amounted to state coercion.  

Justice LeBel separately cautioned about the need to protect not just belief but “communities of faith…that share…a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations.”  

The court judged the case as if it concerned the individual capacity to choose. The collective element of the claim was downplayed. Yet the individualistic, choice-driven paradigm seemed to capture only a portion of the impact that would be felt by the community. The decision included the collective needs of the colony only when judging the proportionality of the legislation in question and not when determining whether religious freedom had been infringed. If only individual rights are deemed to be at stake, the infringement may appear minimal. But if the Court had considered the communal weight of the infringement, rather than emphasizing the individual claim by itself, it might have shifted the balance towards the community whose ability to sustain a communal life would be threatened.  

Moreover, the law had granted an exemption to those who had a religious objection to having their photo taken or had a temporary medical condition that changed their appearance. Over half of all exemptions were granted to Hutterites. But this exemption and issuance of non-photo licences was revoked when the law was revised in 2003. The court did not engage in a

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520 Hutterian Brethren, at para 167.
521 Hutterian Brethren, at para 163.
522 Hutterian Brethren, para 183.
comparison or differentiation between the previous accommodation and the new law. Hence it is not clear why a curtailing of the exemption was justified.

Little was mentioned in the majority decision of the history of Hutterites in the country or their unique way of life. The Hutterites, one of three major Christian Anabaptist groups, suffered historical discrimination in Canada.523 Facing religious persecution in Europe, the first Hutterites fled to Canada, establishing colonies in 1918. The government promised them freedom of worship and exemption from military service in exchange for developing the land. Despite these political assurances, their refusal to serve in the world wars led to a public backlash. The government stripped the community of its exemption and temporarily halted their immigration. It also attempted to assimilate them. Public opinion was turned against them; they were accused of taking over land and not contributing to the community. Though two discriminatory laws were passed in Alberta that targeted their ability to buy land, the Alberta Supreme Court and Supreme Court of Canada refused to recognize the violation on their freedom of religion. in the 1970s, new human rights legislation was passed, the two laws were repealed and the attitude towards Hutterites gradually changed. The failure to recognize their sense of being through the protection of their freedom of religion could lead to feelings of alienation and exclusion, reminiscent of the discrimination they had experienced in the past.

The Hutterite have a communal way of life. Each colony operates as an independent economic unit and is reliant on agriculture to be self-sufficient. It is a highly organized community. Each colony has an executive, which decides important matters. Each person within the colony has his or her own responsibility. The Hutterites have retained their religious beliefs and customs, run their own colony schools, and maintain their ancestral German dialect. Requiring them to take photographs, which violates their sense of being, would force them to hire outsiders to work for them or eschew driving, either of which would undermine their self-sufficiency.

**Would an exemption foster new forms of inequalities, either among other minorities or in the wider community?**

No. The exemptions were minimal and would have little effect on others. Only about 250 Hutterites require this exemption.

**Has the state chosen the least burdensome infringement possible on the sense of being?**

**Should a narrower objective or less drastic measures be considered?**

Chief Justice McLachlin’s judgment showed considerable deference to the government, noting that, “a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the Charter”. She dismissed the option of non-photo licenses specially marked so that they could not be used for the purpose of identification. She insisted that the only way to reduce the

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524 *Hutterian Brethren*, para. 39-40.
risk of forgery was through a universal photo requirement. Hence she determined that the benefits of the legislation outweighed its harms.

**Trinity Western v Law Society of Upper Canada**

Trinity Western University, an evangelical Christian postsecondary institution, planned to open a law school. The Law Society, which regulates the legal profession in Canada, denied accreditation to TWU’s law school because of its mandatory Covenant. TWU requires that students and faculty adhere to a code of conduct for the duration of their registration in the school, even when they are off-campus. The Covenant prohibits a number of religiously immoral behaviours, including, “sexual intimacy that violates the sacredness of marriage between a man and a woman”. TWU and a student (who would have attended the proposed law school) claimed that the decision of LSUC violated s. 2(a) of the Charter.

**How would the state impact those whose freedom is infringed? Would state action prioritize those whose sense of being is disadvantaged or marginalized?**

In some respects, yes. The code of morality included in the Covenant is not foreign or strange, since it aligns with a traditional understanding of marriage still held by many Canadians and protected by law not too long ago. At the same time, the court prioritized equality rights over religious freedom in the interests of protecting LGBTQ rights.

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525 *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.
The majority also noted that the limitation on religious freedom was of minor significance because the covenant was not absolutely required in order to study law in a Christian environment which is governed by religious rules of conduct. Moreover, it noted that studying law in an environment infused with religious belief was preferred but not necessary. The use of the language “not necessary” and “not absolutely required” suggests a curtailment of the protection offered to TWU since the majority was, unlike in Amselem, prioritizing obligation over preference.

Finally, the court did not place much importance on the collective element of religion or the desire to establish a religious community with shared standards and goals that are different from the rest of society. This appeared to be of central importance to TWU.

TWU is the largest independent Christian university in Canada, established in 1957. It is also an evangelical organization. It received full membership in the Association of Universities and Colleges of Canada (AUCC) in 1984, and in 1985, the British Columbia legislature established TWU as a university. It exercises privilege and experiences marginalization simultaneously. It is privileged in the sense that it wields power and influence over Christian students and in the wider society. It is marginalized in the sense that the wider societal context does not look kindly upon religion as a collective force.

A ruling in its favour would allow it to exercise greater power and influence. It would violate the sense of being of LGBTQ students who may have registered or want to register in the proposed law school. While not formally prohibited from attending TWU, they would only be able to sign
the Covenant at considerable personal cost. Hence they are less likely to study law at TWU and would miss out on the possibility of attending law school. A ruling against TWU would give administrative bodies the power to determine what counts as religious freedom. This could lead to a curtailment of religious freedom.

**Would an exemption foster new forms of inequalities, either among other minorities or in the wider community?**

As noted above, an exemption would grant TWU greater disciplinary authority over members.

**Has the government chosen the least burdensome infringement possible on the sense of being?**

No. The Supreme Court determined that the LSUC decision was to be judged on the basis of a lower standard (reasonable accommodation) because it was an administrative decision. As a regulatory body, the LSUC was entitled to use broad reasons in determining whether to accredit the law school, including ‘equal access to the legal profession’, ‘diversity within the bar’ and ‘preventing harm to LGBTQ students’. Yet judicial deference to administrative law on constitutional matters could grant decision-making bodies extensive power to determine the boundaries of freedom of conscience and religion.

4.9 CHALLENGES
I will now address two broad sets of challenges to my analytic approach. The second set of challenges reflect practical considerations: a) a concern about judicial overreach; b) a concern with usurping the role of section 15 of the Charter; and c) a concern about the possibility that the roles and positions of individuals will change, thus making the disadvantaged advantaged, and vice versa. I will broach these concerns after addressing the first broad set of challenges.

**First Set of Challenges: Autonomy v. Equality**

The first broad set of challenges arises from a conception of autonomy and equality as competitors in a zero-sum game. This first set of challenges concern: a) the extent to which group identity might infringe on the autonomy of individual members; b) whether the state should intervene to protect choices; and c) whether the framework will impose burdens on the autonomy of those who are considered privileged or dominant.

Before looking at each challenge in greater detail, it is worth elaborating on this dissertation’s emphasis on equality. The differences between formal and substantive equality have been discussed extensively.\(^{526}\) Formal equality focuses on the formal way that the law treats individuals and groups; inequality results when the government fails to treat people as equally free.\(^{527}\) Hence formal equality emphasizes the sameness of a law or policy for individuals and groups who share similar characteristics; individuals who are alike are to be treated alike. Martha

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Fineman has explained that for feminists, the initial adherence to a concept of equality was necessary to take the first steps to change the law and legal institutions. But merely opening the door wasn’t enough to empower women. They also had to account for the underlying conditions that created the exclusion in the first place. In other words, they needed to critique the presumed neutrality of institutions, which were designed with men in mind and were reflective of male experiences and concerns.

Although it can remedy blatant forms of inequality, formal equality is blind to the unique subjective experiences and social and political conditions of different groups. It is also ignorant of the subtle inequalities between individuals from dominant or privileged groups or identities and individuals from vulnerable or marginalized groups or identities. It fails to recognize the reality that seemingly neutral standards often reflect the interests and experiences of privileged groups whose worldview is so dominant that it has become invisible and only appears to be neutral. Hence seemingly neutral rules and treatment on the basis of formal equality may produce or perpetuate the inequality experienced by individuals from marginalized or vulnerable groups in society while improving the circumstances of the privileged and dominant.

On the other hand, a substantive understanding of equality does not focus on whether people have been treated in an identical manner. It is concerned with the impact, effect and outcome


of state instruments on individuals and groups rather than on the treatment itself. In fact, unequal
treatment may be necessary to achieve equality for those who are disadvantaged. Substantive
equality recognizes the structural and systemic reasons that explain why individuals do not have
equal opportunities. It considers differences in power, status and opportunities between
individuals or groups of individuals. It considers individuals’ personal characteristics, history,
and circumstances. It also takes into consideration social, political and economic context. It
considers whether people have been discriminated in the past or continue to face discrimination
in the present; the effects of historical discrimination may persist despite a formal, legal
cessation and continue to have negative consequences for the individuals and groups who are the
target. Substantive equality focuses on those who have suffered disempowerment and
disadvantage; it is remedial and strives to overcome the effects of inequality and the greater
structural reasons for the disempowerment and disadvantages faced by some individuals and
groups.

Where does that leave autonomy? Liberalism adopts the view that the individual is best able to
flourish when left to exercise free choice. Hence, individuals are protected in their individuality
from encroachment by others, including the state. State involvement can serve to undermine their
self-sufficiency and independence and compromise or constrain the options and choices
available to them. This privileging of autonomy is the source of the negative conception of
liberty. Freedom is secured when individuals are left alone to choose freely. State action that
impairs this autonomy must be guarded against. The resulting desire for state restraint leaves the
state with limited options to overcome inequality.

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Would group identity infringe on the autonomy of individual members?

My approach would entail consideration of the group or communal context in which the claimant is situated. Liberal theorists have traditionally been cautious of group identity out of concern for preserving the autonomy of individual members. They have argued that external legal protections could lead to internal restrictions for group members.\footnote{Kymlicka (1995), 99; Parekh (2002) 198.} Moreover, judging individuals according to their group identity could lead to a lack of consideration of the individual sense of being. Yet, if there are wider structural inequalities, religious and cultural groups to which individuals belong may render them advantaged or disadvantaged in a way that has little to do with their individual abilities. Individuals are influenced by the social standing, external perceptions and treatment of the minority groups or communities to which they belong. Even if an individual does not identify with certain attributes of the group, he or she may bear certain characteristics which are perceived as associating him or her with the group against his or her will. Even if the group itself does not recognize those attributes as its own, these attributes may be perceived externally as collective marks of identity, and the individual may be identified with them and marked off as different. For example, Muslims are often looked upon with distrust.\footnote{Martha Nussbaum has written convincingly of the way in which “the fear of Muslims” in Europe and the United States has manifested itself in law. See Martha Nussbaum. \textit{The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age} (Cambridge: Belknap Press, 2012) 4-13.} Their religious identity is often associated with terrorism and disloyalty the West. Some Canadians fear that Muslims might take over, or that Canada might become Islamicized.\footnote{Environics Research Group, \textit{Survey of Canadian Muslims}. 2007. https://www.environicsinstitute.org/projects/project-details/survey-of-canadian-muslims}
Even if individual Muslims choose to detach or disassociate themselves from their religious identity, they may not be able to do so if the majority culture continues to view them as Muslims with all of the identity’s negative connotations. Hence elective aspects of minority identity may be construed as if they were ascriptive. An individual’s choice may be constrained, not due to his or her own desire, or because of anything the group does, but rather because of external forces associating the individual with a minority collective identity that is perceived as different.

Because intolerance and other asymmetries in social standing experienced by members of minority groups are connected to their collective identity, a focus on the individual alone will not suffice. Perceiving different conceptions of the good neutrally in the public sphere misses the asymmetry between them. It also neglects the reality that some differences are markers of minority collective identity to which disadvantages and burdens are attached, and alongside those, lead to a reduced capability among members to exercise the full range of individual rights. Disregard of collective identity and its impact on the individual fails to counter disadvantage and asymmetry in a comprehensive manner.

At the same time, exemptions which grant groups greater power or privilege would be mediated by the courts. My theory would aim to prevent dominant forces from overpowering smaller, more marginalized ones in the interest of preserving the sense of being of the most vulnerable. This would include cultural or religious group authorities that seek to impose their interpretations and norms on others. Moreover, my approach would not adopt a static understanding of religion. Killmister has proposed that group-membership be considered context dependent: which individuals are members of which group will shift and change according to the perspective from
which we are looking. An individual could be a member of a group for some purposes, but not others. Likewise, Iris Young considers group identification as “ambiguous, relational, shifting” and lacking clear borders that bind people to them in all circumstances. My approach recognizes that individuals might belong to many groups at the same time, and that only some of these group identities might be relevant to a particular case or context.

Should the state intervene to protect choices?

Another challenge concerns choice or autonomy. Liberal egalitarians tend to emphasize personal responsibility; the state should only intervene to offer protection for things that people cannot control rather than those that people choose. Dworkin distinguishes between brute luck and option luck. Justice requires that people are compensated for preferences that result in brute luck but not option luck. Option luck consists of people’s choices, for which they bear responsibility. On the other hand, brute luck is luck over which one does not have control and for which no one is responsible (e.g. a physical disability). Dworkin insists that individuals should not be compensated for the outcome of their actions and choices, since they need to take responsibility for their preferences. He suggests thinking about a hypothetical auction in which

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537 Anderson coined the term ‘luck egalitarianism’ to refer to the emphasis on redressing inequality arising due to luck. 1999. See her critique of luck egalitarianism in Elizabeth Anderson, ‘What is the point of equality?’, Ethics, 109 (1999), 287–338. Young has also offered a critique. See Iris Marion Young, ‘Equality of whom?’, Journal of Political Philosophy, 9 (2001), 1–18.

all are given the same purchasing power to bid on what they deem valuable resources. The price of each resource corresponds with its attractiveness to other people, i.e. the more people desire a resource, the more its price increases. Hence the resources that most people desire most require the largest amount. The auction ends when all are satisfied with the bundle of resources they possess. All people are satisfied when they do not envy others, i.e. they know they could not have obtained a better bundle of resources with the amount they were given. At this point, Dworkin argues, people are responsible for their choices and can use these resources as they see fit. However, they must suffer the consequences of their preferences. Those who make bad choices will not be compensated if they have a deficit in goods. For Dworkin, so long as individuals have an equal starting point, they must live with their choices.

Though Dworkin’s theory has to do with just distribution, it has been used to reflect on cultural and minority rights as well. Kymlicka uses Dworkin’s framework to distinguish between national minorities and polyethnic groups. According to Kymlicka, an individual who is Indigenous did not choose to be born in a country in which he or she is a minority. Hence it would be unjust to expect him or her to bear the costs of assimilating into the majority culture. On the other hand, those who immigrate presumably choose to move to a society in which they are considered a minority. Hence they do not possess the same kinds of rights as members of national minorities. Dworkin’s theory can also be analogized to exemptions on the basis of


540 Quong has critiqued Kymlicka’s argument, pointing out that if immigration is chosen, then a theory of multicultural justice based on luck egalitarianism should not care about easing the costs of integration for immigrants. See Jonathan Quong, 2006.
freedom of conscience and religion.\textsuperscript{541,542} If one’s sense of being was not choice-driven, then exemptions might be justified. On the other hand, if it was revisable, then it could be perceived as an expensive taste.\textsuperscript{543} Moreover, if the individual identified with moral consciousness and belonging such that the individual did not regret having them, then this would not count as an exemption worth accommodating.\textsuperscript{544}

Yet the demarcation between brute luck and option luck is not so clear. Exemption claims on the basis of religion and conscience could fit into the category of option luck, brute luck, or both. Consider a Sikh man wearing a kirpan. This religious practice could be considered a matter of faith, in which case, his beliefs would be perceived as chosen and he would be considered autonomous. On the other hand, his wearing of the kirpan may not be ‘chosen’, in the sense that he is following a way of life passed on through generations which inculcates within him a dress code that is not easily changed. We can think about this blurring between brute and option luck by comparing religion to race. Race has historically been understood as a function of biology. In this sense, it would fit in the category of brute luck. Yet race is now considered a social construct.\textsuperscript{545} Racial categories can be fluid; the way one perceives oneself racially can change


\textsuperscript{542} Barry has a similar perspective to Dworkin. He argues against the claim that religion is involuntary and unchosen. See Brian Barry, \textit{Culture and Equality} (Cambridge: Harvard University Press, 2001) 35-38.


\textsuperscript{544} Dworkin, 81–2.

over time and space. Likewise, religion is often considered chosen and changeable, i.e. a matter of belief or identity and hence different from race. It has also, in some contexts, been perceived as fixed; historically, religious differences were racialized, with non-Christians occupying categories of the alien ‘other’, and this has persisted to some extent in the West. The categories are interrelated, historically and contextually, as they were constructed and perpetuated by state actions and employed as tools of hierarchy and exclusion. Both race and religion could fit in the categories of brute luck and option luck.

Amartya Sen has critiqued the disregard for option luck on another front, pointing out that some individuals will require more than others to achieve the same range of capabilities. He writes, “differences in age, gender, special talents, disability, proneness to illness, and so on can make two different persons have quite divergent opportunities of quality of life even when they share exactly the same commodity bundle.” What some would consider a luxury may be necessary for others. For example, members of a minority religious group may find it difficult to raise their children without private religious schooling, which requires additional resources compared to those who feel comfortable with the majoritarian culture found in public schools. Sen critiques the focus on income or level or resources as a constraint on individual pursuits. One may have material means but still find oneself deprived of agency and empowerment. He points out that there may be social or political constraints that make it impossible for individuals to pursue the

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outcomes they choose. Unequal distribution or opportunities doesn’t have to do solely with individual preferences, choices or luck; rather, it has to do with impact of social relations and structures, which are forces beyond the individual.

If people make choices based on what they believe are the resources and outcomes available to them, then this suggests that the exercise of individual choice and autonomy may be more constrained than they are imagined to be. Diana Majury argues that an individualist focus is blind to inequality that is socially and politically imposed. She points out that, “there is no unqualified choice and the extent to which such choice is assumed is the extent to which equality is similarly assumed and inequality thereby rendered invisible and unchallengeable.” This opens the door for a more in-depth examination of the context in which people exercise choice and the systemic factors that may limit the person’s ability to choose his or her circumstances.

This is also reason to caution against idealizing the autonomy found amongst members identifying with the majoritarian culture in a society. Although in some sense people ‘choose’ their ways of life, in many cases, they are constrained by their life circumstances, such as the place in which they were born and the school they are able to afford. They may also be constrained by choices made in the past, the consequences of which they did not fully understand or anticipate. Many people who identify with the majoritarian culture do not regularly engage in deep reflection or deliberate, conscientious choosing. This does not mean that the choice or autonomy aspect of religion should be disregarded. My argument is merely that choice should

not be held to such standard that very few people, religious or not, could achieve it. Moreover, even if people ‘choose’, this does not mean, contrary to the luck egalitarian argument, that their choices should not be protected.

**Would burdens be imposed on the autonomy of the privileged?**

My analytic approach may require that others, particularly those who were previously advantaged, take on the burdens that come with accommodating the requests of a claimant. This problem is described by Leiter, who uses the example of mandatory military service. If some are exempted from service, then the burden will fall on those who cannot establish a claim based on sense of being. Yet this redistribution of disadvantages may be necessary to ensure that the law calibrates its protection of the marginalized and disadvantaged and reduces the advantage of individuals who are members of dominant and privileged groups and who may have reaped the benefits of their place in society. Yet, even whilst serving the larger goal of achieving equality, it is important to note that claimants would still be subject to a section 1 analysis, which would weigh the burdens of exemptions imposed on the rest of society.

**Second set of challenges: Practicality**

**Concern about Judicial Overreach**

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Practical application of the analytic framework would entail extensive judicial inquiry, which would give the state an active role in interpreting exemption claims. The problem is that there is no objective standard for judging advantage or disadvantage. Moreover, it is difficult to weigh advantage and disadvantage in cases where the claimant is able to infringe on the rights of others, thus introducing further power imbalances and vulnerabilities. Likewise, it is difficult to judge advantage and disadvantage in the circumstance in which those from different groups with varying degrees of advantage or disadvantage join together seeking an exemption. The role envisioned by this thesis and applied by way of the analytic framework is wider than is generally accepted in liberal theory. Yet this role is necessary if the state is to accept responsibility for inequalities and unjustified privileges due to its position as the ultimate societal authority. Judicial protection is necessary because the decision-making system is biased in favour of majoritarian interests. As Douglas Laycock has argued, “legislators cannot afford to protect any group that is seriously unpopular with voters.” Since all governments display these tendencies, voters have limited options; minority groups are often unable to protect themselves in the political sphere. Moreover, the legislature, with its emphasis on electoral politics, partisanship and public opinion, favours short term solutions over long term ones and is unable to carefully consider complex arguments concerning controversial subjects. Jeremy Waldron, a leading critic of an expanded judicial role, argues that the answers to complex policy questions

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aren’t clear. Yet, complex situations cannot be fully addressed in a political milieu, particularly when they concern minority or disadvantaged individuals or groups, Judges are freed from the need to make political calculations in a majoritarian legislature; they are able to consider complex arguments in making decisions concerning exemptions. Some might want to argue that those in a minority position could persuade others of their views in an effort to form a new majority. Yet the political system does not offer effective recourse against perpetual political powerlessness due to the ignorance, apathy or prejudices of the majority. Moreover, it offers no assurances that minorities will be protected. There is no guarantee that those in the minority would be able to change the opinions of those involved in deliberation, particularly when the case concerns unpopular individuals or ideas. Even if a minority group was eventually able to convince others, members would suffer in the interim by being forced to conform to a law that they considered a violation of their sense of being.

The court does have its limitations. Though there have been some efforts to ensure that the judiciary consists of qualified individuals who are representative of the Canadian population, there is no gender parity; race parity is even further behind. Moreover, access to the courts is expensive and time-consuming. Judges cannot collect or analyse legislative facts, and neither can they rely on government bureaucracy to help them make decisions. Yet they can rely on expert witness, interveners, government reports, statistics, historical information and published reports. Moreover, the Canadian courts are particularly well-placed to make subjective assessments. The Canadian judiciary is non-elected. Appointments are made by the prime


554 Macfarlane, 133-159.
minister with cabinet consultation. Since 2016, a non-partisan, seven-member advisory board has offered a short-list of candidates for appointment to the Supreme Court; the prime minister appoints new justices based on this list. The judiciary is also perceived as non-partisan. There is an emphasis on collegiality and consensus-based decisions over strategic and attitudinal decisions. Although identifiable voting blocs do form occasionally, they are not common. Moreover, unanimous judgments are on the rise. Judges have advocated hearing fewer cases, which suggests a disinterest in influencing public policy. It is important to note, moreover, that the adjudicative process is focused on the claimant rather than whole categories of people. Hence, the results will be piecemeal. To some extent, one could also argue that the judges’ role is passive, since they can only judge the parties before them. With the guidelines set out in this dissertation, judges will be better placed to make evidence-based decisions relating to minorities in cases concerning senses of being.

**Concern that Positions of Disadvantage and Dominance are not Static**

Another challenge is that the patterns of inequality may change in our evolving society. Determining advantage or disadvantage may pose a challenge, since it is not a fixed or static identity or category. People may occupy positions of both advantage or privilege and disadvantage or marginalization. There may be hierarchies among privileged individuals or groups. Moreover, at different historical moments, one’s disadvantage may assume greater or lesser significance within the wider legal or political context. Flexibility would need to be built into the contextual enquiry, allowing consideration of changing social structures, which may

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555 Macfarlane, 101-132.
create new vulnerable groups in need of constitutional protection or new dominant or privileged
groups. Individual characteristics, statuses and positions are products of their time and place;
they are shaped in distinct political, cultural and social contexts which are subject to change.
Andrew Shorten has argued that if the justification of an exemption is conditional on the social
standing of the affected group, comparative to others in society, then if that standing were to
improve, the justification for an exemption would weaken.\textsuperscript{556} Yet, he continues, the question of
whether or not religious individuals should be permitted to ride motorcycles of work on
buildings without protective headgear, or to eat animals that have not been stunned before
slaughter, is independent of whether they are marginalized. The rationale for an exemption
should remain even if the group claiming it is no longer oppressed. In response, I would argue
that it takes time for the social standing and positions of groups to change, particularly when they
have developed and solidified over a period of time. As for the two examples he has cited –
religious clothing and food – there is no sign that any of these will become part of the norm in
Western societies anytime soon. In the meantime, it is possible to roughly approximate the
closeness or distance of religious beliefs and practices to the structural norm of Protestant
religious conscience, and the differential implications of this closeness or distance on the lives of
those seeking exemptions or protections.

\textbf{Concern about Usurping the Role of Section 15}

\textsuperscript{556} Shorten (2010).
Lastly, this analysis may seem to overtake (or overlap with) the role of s. 15 of the Charter, which protects equality. Scant attention has been paid to the distinction between the two. Section 2(a) of the Charter aims to differentiate; claimants arguing on the basis of freedom of conscience and religion seek exemptions or protections on the basis of their moral consciousness or belonging. Section 15, on the other hand, aims to include. Its purpose is to ensure that the law avoids treating individuals according to irrelevant personal characteristics listed as prohibited grounds of discrimination. Compared to section 2(a), section 15 is also limited in scope, since it solely concerns the constitutionality of government-provided benefits and services.

Yet there is reason to consider this question more careful. First, the two sections have operated in tandem. For example, in Adler v Ontario, where the claimant was seeking state funding for private religious schooling equivalent to that provided for Catholic schooling, the claimant argued that both sections were infringed. It is possible for religious freedom and equality to be violated simultaneously. Second, my analytic framework narrows the gap between the two. I propose a substantive conception of equality, as was articulated by the court in its first s. 15 case. Justice McIntyre, in a unanimous decision, wrote, “[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.” In later cases, the court has at times disagreed on the baseline for judgment and has retreated from its emphasis on substantive freedom, treating equality in a narrow sense, as a non-discrimination mandate. Hence the purpose of s. 15

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protections remain vague and has not proven a sufficient tool to overturn persistent forms of subordination and domination.

4.10 CONCLUSION

The purpose of this chapter was to improve upon the Protestant-tinged understanding of section 2(a), which has served to perpetuate the exclusion and marginalisation of the religious and non-religious other. I have argued that exemptions should amplify and protect those who are disadvantaged and curtail power, i.e. non-Protestant religions and non-religious conscience. First, I reinterpreted ‘freedom of conscience and religion’ to better protect both non-Protestant religions and non-religious conscience. I argued that the concepts of ‘conscience’ and ‘religion’ are fluid. They manifest themselves in terms of s. 2(a) in two ways: they concern ‘judgments based on beliefs’ and ‘judgments based on values’. These judgments have equivalent status. Though judgments based on beliefs have traditionally been given priority, I have demonstrated that this need not be the case. I argued that the state has a special (and equal) interest in judgments based on beliefs and judgments based on values when they are reflective of a sense of being. Drawing on various versions of recognition theory, I proposed two related reasons for exemptions: first, the liberal democratic state has an interest in ensuring that people are not alienated; second, exemptions can alleviate the unjust burden placed on some members of society due to structural democratic deficits and asymmetrical power differences.

In the second part of the chapter, I demonstrated how greater consideration could be conferred on the conscience and religion claims of those who are marginalized or disadvantaged. I constructed an analytic framework to overcome dominance and marginalization and engender equality holistically. I proposed that the courts consider advantage and disadvantage and engage in an analysis of impact and effect when applying the section 1 test to exemption claims to assess whether Charter violations can be justified. The courts would seek to determine whether the claimant’s sense of being would be further disadvantaged as a result of the way that the law is framed by assessing the effects of the wider social, political, economic and legal context on the claimant and considering pre-existing disadvantage.

In the final section of the chapter, I considered challenges to my theory. The first broad set of challenges arose from an underlying theme in this paper: the relationship between autonomy and equality, and in particular the criticisms stemming from a conception of autonomy and equality as competitors in a zero-sum game. This set of challenges concerned: a) the extent to which group identity might infringe on the autonomy of individual members; b) whether the state should intervene to protect choices; and c) whether the framework will impose burdens on the autonomy of those who are considered privileged or dominant. A second set of challenges reflected practical considerations: a) a concern about judicial overreach; b) a concern with usurping the role of section 15 of the Charter; and c) a concern about the possibility that the roles and positions of individuals will change, thus making the disadvantaged advantaged and the advantaged disadvantaged.
In sum, this chapter demonstrates that though the challenges are many, the law can be employed to overcome constructed differences and assist in the project of fashioning an egalitarian society. In order to do so, it would require embracing substantive equality, adopting non-neutral measures and cementing a commitment towards those who are least advantaged.
CHAPTER 5:
CONCLUSION

In this dissertation, I have shown that the historical power wielded by Protestantism in Canada is important in understanding the way s. 2(a) has been interpreted. I have focused particularly on the issue of exemptions. I have questioned whether the current dominant understanding freedom of religion and conscience (shaped as it is by a Protestant dominated past) can deal fairly with marginalized, minority, and non-Christian perspectives, beliefs, and ways of life.

My dissertation made three major arguments. First, the dominant interpretation of section 2(a) turns “freedom of conscience and religion” into “freedom of conscience in religion.” The collapsing of conscience into religion, alongside the understanding of religion as individualistic, private, belief-driven and chosen, restricts and narrows what and who receive exemptions.

My second argument challenges the priority given to beliefs over values. I reinterpreted ‘freedom of conscience and religion’ on the basis that the concepts of ‘conscience’ and ‘religion’ are fluid. They manifest themselves in terms of s. 2(a) in two ways: they concern ‘justifications based on beliefs’ and ‘justifications based on values’. Though justifications based on beliefs have traditionally been given priority, I demonstrate that this need not be the case. I have argued that the state has a special and equal interest in justifications based on beliefs and justifications based on values when these reflect a person’s ‘sense of being.’ My conception of a ‘sense of being’ introduces a moral argument for why “religion” and “conscience” should be protected that is not tied to narrow Christian-dominated views.
Third, I proposed an alternative understanding of the basis for exemptions that looks at these questions through the lens of advantage/dominance and disadvantage/marginalization. I argued that exemptions should amplify and protect those who are disadvantaged and at risk but be granted on a more limited basis to dominant/powerful majority groups. I proposed that the Oakes test be abandoned to allow the court to better judge infringements on freedom on the basis of impact.

My approach draws on and reaches beyond the traditional liberal vocabulary, relying on substantive equality to right the asymmetries between advantaged and disadvantaged senses of being. It would be unrealistic to expect that institutions, laws or policies could have an equal or similar consequence on every person, particularly when people’s capabilities or preferences are different. Yet though neutrality of effects is overly ambitious and impractical, it is also true that seemingly neutral standards often reflect the interests and experiences of privileged groups whose worldview is so dominant that it has become invisible. ‘Neutral’ rules and treatment may produce or perpetuate the inequality experienced by individuals from marginalized or vulnerable groups in society while improving the circumstances of the privileged and dominant. A concern with impact, effect and outcome is necessary to undergird protections and exemptions that concern the fundamental matter of one’s sense of being.

As noted in the previous chapter, the solutions I have suggested are not simple or straightforward; they would require a reinterpretation of freedom of conscience and religion and a reorientation in terms of its adjudication. Certainly, there is much work that remains to be done
to ensure that the theory proposed is grounded and practically implementable. Nevertheless, it seems to me that the minor adjustments that liberal theorists have proposed to accommodate the other miss the mark because they do not disturb the existing distribution of power among and between individuals and groups. My approach better responds to the arguments made by critical theorists while retaining what is of most value in religion and conscience: protection of the sense of being. More importantly, it succeeds in its task of including religious minorities, Indigenous peoples, and non-religious communities and individuals whose conscientious beliefs are not tied to religion.
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