

THE MEANING OF 'FREEDOM OF CONSCIENCE' IN THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS:
A POLYVOCAL CULTURAL ANALYSIS

by

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Abstract

This thesis examines the meaning of freedom of conscience and religion in s. 2 (a) of the *Canadian Charter of Rights and Freedoms*. Set within a polyvocal cultural heuristic, the thesis uses the voices of dramatists, historians, judges, legal theorists and ordinary people to illustrate and document the development and evolution of the meaning of conscience. In particular, the thesis focuses on whether 'freedom of conscience and religion' is one integrated right or whether the notions of 'conscience' and 'religion' are separable, such that it is possible to argue a non-religious, secular claim to conscience on constitutional grounds.

Claims of conscience typically arise when the action of the state, for example through legislation, places an individual in the position where his/her unconditionally important beliefs or principles are threatened or offended. Under these circumstances state action may be perceived by individuals as coercive and may create a personal dilemma of significant gravity. The right to freedom of conscience confers upon the individual not to be coerced by state action.

Since the *Charter of Rights and Freedoms* confers the right to freedom of conscience and religion upon 'everyone', this language must by definition extend to those whose conscience is religiously informed as well as to those whose conscience is secular and ethically grounded. Hence both religiously informed claims and secular, ethical claims must be eligible to receive constitutional recognition. The thesis concludes by articulating the elements of a test to enable judicial recognition

of a valid claim to conscience on secular, ethical grounds within the framework of a pluralist and multicultural society.

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Chapter I: The Claim of Conscience

This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not be false to any man.
Polonius in *Hamlet*

This thesis is about conscience, its character and meaning. In particular, the thesis addresses the meaning, for contemporary Canadian society, of 'freedom of conscience' in the *Canadian Charter of Rights and Freedoms* which provides in s. 2 (a) that everyone is entitled to a number of fundamental freedoms including *freedom of conscience and religion*.¹

The notion of conscience is, of course, not new and at its heart represents an affirmation of the self — the individual — in the present moment and often in conflict with the state. Conscience is deeply embedded in the western tradition, originating in the pre-modern eras of classical Greece and Rome, and extending into the medieval eras. The advent of the Reformation, particularly in England, saw the idea of conscience continuing its linkage with religion but the end of the seventeenth century witnessed a shift in focus to religious toleration which dominated the ensuing centuries, especially following the birth and rise of modernism. With the current interest in post-modernism, the interpretation of 'freedom of conscience and religion' requires re-definition and new understanding and it is to this challenge that this thesis is directed. Central to a post-modern understanding of 'conscience' is the

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter the *Charter*].

recognition of the imperatives of *difference* and *accommodation* within the framework of an increasingly secular and multicultural society.

Appreciating and proposing a broader definition of ‘conscience’ within the framework of the *Charter*, rests on the recognition that the notion of conscience with its associated conflicts, its connection to religion, its centrality in law, and its need to accommodate difference, all imply the central *cultural* character of the inquiry. This thesis proceeds from this premise. Quintessentially, the thesis is about the *meaning* of ‘freedom of conscience’ both in historical and contemporary perspective. To clarify this meaning, the thesis uses a variety of culturally relevant heuristic approaches—what I call a ‘polyvocal’ cultural analysis because it uses a variety of ‘voices’ to explore the question.

A ‘polyvocal’ cultural approach to understanding freedom of conscience relies on the appreciation of voices from different traditions to provide perspectives upon and draw meaning from human experience in matters of conscience. Some voices are those of dramatists; others are those of theologians, philosophers and historians; yet others are the voices of judges in superior and Supreme Courts; still others are legal scholars and policy analysts. This thesis draws on these several and diverse voices to illuminate the idea of conscience and its connection to religion; they collectively provide a polyvocal context or set of perspectives through which to examine the meaning of ‘freedom of conscience and religion’ in the *Charter*.

This approach is heuristically similar to *bricolage* in qualitative research methods.² *Bricolage* places the investigator/researcher in the role of *bricoleur* – a

² N. K. Denzin & Y. S. Lincoln, “Introduction: Entering the Field of Qualitative Research” in Denzin & Lincoln, eds. *Handbook of Qualitative Research* (Thousand Oaks, Ca.: Sage, 1994) at 2-3.

“Jack of all trades or a kind of professional do-it-yourself person.”³ Using multiple perspectives to investigate a question enables the *bricoleur* to create a *bricolage* which is

...a complex, dense, reflexive, collage-like creation that represents the researcher’s images, understandings, and interpretations of the world or the phenomenon under analysis.⁴

The *bricolage* presented here relies on *dramatic* examples to illustrate and illuminate the claim of conscience; it reviews the development and evolution of the relation between conscience and religion from an *historical* perspective; it examines Canadian judicial decisions and *judicial* reasoning in the landmark case of *R v. Big M Drug Mart*⁵ to elucidate legal thought; it briefly reviews the U.S. experience in analogous cases; and it *proposes* a broader interpretation of ‘freedom of conscience’ as a result—one that recognizes the role of cultural pluralism and secularism in an explicitly multicultural society.

The Thesis Stated

There is, perhaps, no more archetypal conflict than that between the individual who stands against the state on grounds of a deeply held personal position and the state which demands compliance with its duly enacted will. History and literature are replete with such examples of the individual caught at the moment of full-fledged tension with the state — Socrates, Antigone and Thomas More — are three prominent examples. Central to such conflicts are claims of individual, moral, and religious autonomy, on the one hand, and the requirement imposed through the

³ C. Levi-Stauss, *The Savage Mind*, 2nd ed. (Chicago: University of Chicago Press, 1966) at 17; cited in Denzin & Lincoln, *ibid*.

⁴ Denzin & Lincoln, *supra* note 2 at 3.

⁵ [1985] 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295 [hereinafter *Big M*].

authority of the state for civic and citizen obedience on the other. Frequently these conflicts are couched as claims of conscience and religious freedom juxtaposed with the civic necessity for order and legal compliance. And, at least historically and dramatically, these conflicts — contrasting categorically held positions on both sides, often result in the death of the individual, ultimately powerless against the awesome power of the state.

It is, of course, exactly this imbalance of power that the *Charter* was intended to rectify by establishing and protecting the rights of individuals in Canada with countervailing constitutional force. While admittedly vulnerable to criticism⁶ and requiring extensive judicial interpretation in its application, the *Charter* nevertheless expresses a commitment to balance the potentially overweening power of the state by entrenching (in its distinctively limited way) the individual rights *inter alia* of Canadians, residents and (in some instances) visitors to Canada. And it is through s. 2(a) that the *Charter* confers on ‘everyone’ the fundamental freedom of conscience and religion. While at first glance such a right may seem self-evidently desirable, the language of the right and the meaning to be attributed to it in application are problematic, as evidenced by the following quotations:

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.”
Justice Dickson in *R. v. Big M Drug Mart*⁷

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

⁶ See, for example, the critique offered by A.C. Hutchinson, *Waiting for Coraf* (Toronto: University of Toronto Press, 1995).

⁷ *Big M*, *supra* note 5 at 361.

“religion” should not be treated as tautologous if capable of independent, although related, meaning.

Justice Wilson in *R. v. Morgentaler*⁸

The quotations from Dickson, J. (as he then was) and Wilson, J. at first glance appear to encapsulate an important jurisprudential dilemma with respect to s. 2(a) of the *Charter*, namely, is “freedom of conscience and religion” an integrated, unitary concept as Dickson, J. suggests or as Wilson, J. suggests, are the notions of “conscience” and “religion” related but separable components of the right? And, further, if the right is an integrated concept, what does this mean in practice? If related but separable, what is the character of the relation and under what conditions can the notions be separated? This apparent dilemma and the questions provoked by it serve as the starting points for this thesis. Put straightforwardly, is it possible for a person to seek redress against state action on the grounds of a non-theistic moral position, thereby invoking the right on the grounds of “conscience” alone, or must a claim under s. 2(a) be “religiously grounded” as an essential prerequisite for it to be justiciable?

I argue in this thesis that the right to freedom of conscience and religion must be understood by placing its evolution and inclusion in western human rights jurisprudence in its appropriate historical, social and cultural context. Such contextual appreciation requires understanding of four main historical influences. The first is the pre-modern origin of conscience in its Greek roots and its subsequent incorporation into a religious, Judaeo-Christian world-view. The second is appreciation of the impact of the Reformation with its associated differentiation of dissenting Protestant sects and the recognition of toleration as the bedrock of

⁸ [1988] 44 D.L.R. (4th) at 496.

conscience and religious freedom in the early modern era. The third is recognition that the commitment to religious toleration served as a prelude and foundation to the rise of modernism and the concomitant effect of the Enlightenment upon Western thought. And the fourth is the recognition that in the modern era, the notion of 'conscience' has evolved as a result of the erosion of religious faith and the increasing secularization and pluralism of many western societies including Canada, thereby permitting a more obviously secular application and interpretation grounded in a personal moral ethic.

Consequently, I argue that the right to freedom of conscience and religion is not exclusively and inseparably an integrated concept but should rather be construed as consisting of two notions that are related in some situations but that logically and legally require separation in other cases. Further, I argue that while many religiously grounded claims often invoke the notion of conscience, claims to conscience from a non-theistic, moral position should be separately admissible and valid thus demonstrating that religious belief is not a necessary condition to sustain a claim to conscience under s. 2(a).

Presuppositions

The analysis presented in this thesis rests upon four related yet distinguishable presuppositions about the law. While I realize that these presuppositions may be debatable and indeed are debated in the legal literature, they serve as grounding assumptions for the analysis offered in this thesis.

The first presupposition is that law is expressly a cultural institution. As such law embodies and expresses in its various forms—constitutional provisions, statutes, case decisions--the shared attitudes and understandings of people in society, the

norms and values that define the cultural assumptions of a people.⁹ While specific constitutional and other legal provisions may have similarities and parallels in other legal regimes, the constitution of a nation like Canada is, nevertheless, unique and thereby distinguishes Canada as a nation endorsing a specific array of values, expressed through the Constitution Act, 1982, including therein the *Charter*. As Smith and Weisstub observe:

Cultures have critical moments in history when their values are constitutionally structured according to a legal design. The Magna Carta and the American Constitution are both examples of such an historical birth. These constitutional statements embody the most foundational values that the society commits itself to at the time. When this is accomplished in law it means that the society undertakes to harness its energies to ensure that these values are protected and that the future of the society is shaped by them. The constitutional document then serves as monitor of the society's conduct.¹⁰

The patriation of Canada's constitutional authority in 1982 and the inclusion of the *Charter* in that authority is an example of the constitutional structuring of values in a legal design. One such value is the commitment to freedom of conscience and religion in s. 2(a).

The second presupposition derives from the first, namely, that the centerpiece of the law is the judicial opinion; this is arguably more true in the common law tradition than in civil law systems. In particular, those judicial decisions that break new jurisprudential ground often become the center of legal study, social commentary and social change; they are akin to the case of trouble so powerfully characterized by Llewellyn and Hoebel in their seminal work on the legal system of the Cheyenne.

⁹ D. R. Roberts, "Why Culture Matters to Law: The Difference Politics Makes" in A. Sarat & T.R. Kearns, eds., *Cultural Pluralism, Identity Politics and the Law* (Ann Arbor: University of Michigan Press, 1999) 85-110.

¹⁰ J.C. Smith & D.M. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983), vii-viii.

The case of trouble, again, is the case of doubt, or is that in which discipline has failed, or is that in which unruly personality is breaking through into new paths of action or leadership, or is that in which an ancient institution is being tried against emergent forces. It is the case of trouble which makes, breaks, twists, or flatly establishes a rule, an institution, an authority. Not all such cases do so. There are also petty rows, the routine of law stuff which exists among primitives as well as among moderns. For all that, if there be a portion of a society's life in which tensions of the culture come to expression, in which the play of variant urge can be felt and seen, in which emergent power-patterns, ancient views of justice tangle in the open, that portion of the life will concentrate in the case of trouble or disturbance. Not only the making of new law and the effect of old, but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict.¹¹

Three powerful and recent examples of such decisions in Canada are the cases from British Columbia¹², Ontario¹³, and Quebec¹⁴ declaring the heterosexual exclusivity in the common law definition of marriage to be unconstitutional on the grounds that it denies same-sex couples the freedom to marry thereby denying such couples equality under s. 15 of the *Charter*. These decisions challenge the traditional definition of marriage and have already had the effect of mobilizing those in the society on both sides of the issue.

The jurisprudential significance of cases like these arises at the moment when such a judicial opinion is enunciated because it is the "... moment when the law is made real, a moment when the welter of statutes and precedents and maxims and other materials of the past are brought to bear with force and clarity upon an actual dispute."¹⁵ Mediated through the lens of existing law and tempered in the crucible of contemporary social pressures, the judicial opinion both reflects the past and shapes

¹¹ K. N. Llewellyn & E. A. Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941) 28-29.

¹² *EGALE Canada Inc. v. Canada (Attorney General)* [2003] B.C.J. No. 994; [2003 B.C.J. No. 1582]; 2003 BCCA 406 (B.C.C.A.).

¹³ *Halpern v Canada (Attorney General)* [2003] O.J. No. 2268; 60 O.R. (3rd) 321 (Ont. C.A.).

¹⁴ *Hendricks v. Québec (Procureur general)* [2002] J.Q. no 3816 (C.S.), *aff'd sub nom. La Ligue Catholique Pour Les Droits De L'homme v. Hendricks* [2004] J.Q. no. 2593.

¹⁵ J. B. White, *Justice as Translation*, (Chicago: University of Chicago Press, 1990) at 90.

the present and the future. In this way "...a judicial opinion is an important cultural document. It does more than resolve the problem in a particular case; it gives voice to, and even helps to create the kinds of relations that shape our everyday lives."¹⁶

The third presupposition is that the process of judicial decision-making, usually referred to as adjudication, necessarily involves the use of language to attribute, define, and establish judicial meaning. Such work is intrinsically linguistic and interpretive; it involves the examination of the clauses of a constitutional document like the *Charter* in the context of a particular case with its distinctive facts and presented legal issues. Judicial interpretation requires attention to governing precedents where such exist, to the use and applicability of received language and inevitably privileges some interpretations, meanings and understandings over others. In Canada, constitutional interpretation and application places the responsibility for such interpretation on 'courts of competent jurisdiction' and ultimately the Supreme Court of Canada.

The fourth presupposition arises from the challenge to interpret and apply a constitutional document in changing social conditions. This task is all the more important when precedents do not exist, when received language is minimal and when the judiciary has to create reasoning *de nouveau*. As a result, the Canadian Supreme Court is often placed in the position of interpreting and applying the *Charter* to instant cases in the absence of established precedents. Since values are themselves often in flux and must adapt to changing societal demands, the Court must be sensitive not just to the way the *Charter* reflects its founding values but also

¹⁶ M. Moran, "Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" (1994) 6 Wisconsin L. Rev. at 1475-6.

to societal changes that challenge the established and historic interpretations of these constitutionally established values.

The Supreme Court recognized this role and responsibility in *Hunter v. Southam*¹⁷ where the Court affirmed the ‘purposive approach’ to constitutional interpretation but it did so mindful of the imagery of the Constitution as a “...living tree capable of growth and expansion...”¹⁸ Such a conception, endorsing a broad and generous approach to constitutional interpretation, placed the Court in the position of interpreting and extending constitutional reasoning to new cases and new circumstances. This approach is explicitly contextual in character. The judiciary attributes meaning and significance not just to the facts and legal issues in the case but also to the social context whence the case arises and the emerging social norms evident in that context. So, for example, when interpreting s. 2 (a) of the *Charter* the Court is mindful of the historic circumstances that gave rise to ‘freedom of conscience and religion’ in a dominantly religious society at the time. Radical shifts in religiosity and the rise of secularism create conditions under which such a right may need to be broadened in its application to admit new and different positions, providing such interpretations and applications recognize the fundamental right of the individual to freedom of conscience — of whatever character — subject to the reasonable limits set out in s.1. and compatible with the requirements of the multicultural affirmation clause in s. 27 of the *Charter*.

The process of judicial interpretation is not, however, simply the ascertaining of the meaning of language separate from the facts of a case. As Scheppele points out

¹⁷ [1984] 2 S.C.R. 145.

¹⁸ *Re s. 24 of BNA Act; Edwards v. A.G. Can.*, [1930] 1 DLR 98 at pp. 106-7.

in her discussion of legal interpretation and of the way facts and rules are mutually constitutive:

Legal texts, then, are not the only things that judges interpret when they make decisions. Legal texts are generally interpreted to determine their implications for a specific empirical instance. The question that judges routinely ask is not, What does this (legal) text mean? But rather, What does this (legal) text mean for this case? And that question introduces the social text to be interpreted with the legal text.¹⁹

Scheppele's point reinforces the fourth presupposition, namely, that the social context of the legal decision requires judicial interpretation of the weighting to be attached to changing social conditions. Judges, in Scheppele's view, blend facts and rules into a coherent story with a normative ending. This constitutes an interpretation.

As long as judges still have the flexibility to characterize the facts of cases, a theory of interpretation of legal texts alone will fail to provide determinate answers. Law does not live by doctrine alone. Legal rules and legal facts are mutually constituting. Legal descriptions always reflect legal judgment, just as legal texts always operate from a particular strategy of framing facts.²⁰

Organization of the Thesis

Accordingly, and following this chapter, chapter II 'sets the stage' for the subsequent analysis of conscience by exploring the dramatic instances of Socrates, Antigone and Thomas More in their archetypal conflicts with the state. Chapter III offers an interpretive, historical perspective drawn from secondary sources on the development of the relation between conscience and religion beginning in the pre-modern era, and continuing into the early and later modern eras with the integration

¹⁹ K.L.Scheppele, *Legal Secrets* (Chicago: University of Chicago Press, 1988) at 87.

²⁰ K.L.Scheppele, "Facing Facts in Legal Interpretation" in R. Post, ed. *Law and the Order of Culture* (Berkeley: University of California Press, 1991) at 60.

of conscience and freedom of religion -- a relation that was confirmed in the rise of modernism and the impact of the Enlightenment. In conclusion, the chapter reviews briefly the historical development of human rights in the English common law tradition; a development that culminates in the institutionalization of human rights in international law following the Second World War.

Chapter IV reviews the legal development of freedom of conscience and religion in Canada. It reviews the pre-*Charter* Canadian provisions in Canadian jurisprudence, the pre-*Charter* judicial decisions addressing the notion of freedom of religion as well as the language and legislative history of s. 2 (a) in the development of the *Charter*. The chapter then analyses the foundational s. 2 (a) Canadian case *R. v. Big M. Drug Mart* and the reasoning used by Chief Justice Dickson in attributing meaning to the language of the right to freedom of conscience and religion in this definitive case; this analysis is followed by a review of the subsequent *Charter* based decisions in this arena. The second part of the chapter reviews the experience of the United States in grappling with these issues in that nation's distinctive constitutional context. The third part engages a discussion of the issues raised by these cases for the meaning of 'freedom of conscience and religion.'

Finally, the thesis concludes in Chapter V by considering the impact of a secular and pluralist society on our understanding of freedom of conscience and religion. The chapter reviews the value intuitions at work in Canadian society and collates these into a backdrop for considering how the Supreme Court might evaluate a claim to freedom of conscience absent the religious component. The Supreme Court would need some kind of judicial test by which to evaluate the claim. The chapter briefly describes the features of a judicial test, proposes two hypothetical

scenarios involving putative claims to freedom of conscience, outlines a proposed judicial test and applies the test to the hypothetical scenarios.

Chapter II: Setting the Stage: Drama and Conscience

All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances,
And one man in his time plays many parts,
His acts being seven ages.
Jacques in *As You Like It*

Dramatic representation of the conflicts between the individual and the state in human experience is a well-established tradition. Here excerpts from Plato's *Crito*, Anouilh's *Antigone*, and Bolt's *A Man for All Seasons*²¹ highlight the conflicts and illustrate the tensions evident in these dramatic portrayals. They also serve as literary heuristics to identify and characterize the personal existential and legal dilemma faced by the protagonist in each case. As such, these dramatic representations exemplify and foreshadow the challenge to law that claims of conscience make.

These dramatic excerpts variously display the tension in the conflicts between the individual and the state as represented by the protagonists in each drama. Central to the tension is the political authority of the state to make and enforce laws for the common good contrasted with the challenge of the individual to preserve his/her personal autonomy as an independent moral agent. In short the tension is between the authority of the state and the autonomy of the individual.

Each of these cases reflects the individual caught at the moment of full-fledged tension with the state. Each individual invokes the grounds of personal justification for independent action whether the grounds are reason in the case of Socrates, family and tribal values in the case of Antigone or faith in the law as a

²¹I. Edman, ed. *The Works of Plato* (New York: Modern Library, 1956); J. Anouilh, *Antigone* (London: Methuen, 1957); R. Bolt, *A Man for All Seasons* (New York: Vintage, 1966).

precursor to a 'modern bourgeois' view of law in the case of More. Each is juxtaposed with the authority and power of the state in the crucible of conflict. In each case the motive of the protagonist differs. Socrates sustains his sense of moral correctness by honouring his *duty* to the state. Antigone sustains her sense of familial duty by disobeying Creon's edict. More refuses to betray his sense of personal integrity and duty to his conscience lest "...his conscience sentences his soul".²² Yet in each case the protagonist, dramatically portrayed, shows a real person confronting real issues in a concrete situation—each is heroic, courageous and willing to accept the consequences of his/her action; and each displays the quintessential moral basis of the claim to conscience.

Socrates and His Sense of Duty

Plato's *Crito* recounts the interchange between Socrates and his friend Crito who visits Socrates on the day before his death to try to persuade him to escape Athens and so avoid the hemlock. The conversation is brief but pointed. Crito offers various prudential arguments to persuade Socrates to escape including reassuring him that there are friends willing both to help him and to risk the anger of Athens in so doing; in addition, he appeals to Socrates' paternal instincts and responsibilities towards his children. None of these arguments move Socrates. Instead Socrates shifts the conversation, the dialogue, to his obligation to obey the law and his relationship as a citizen to the state of Athens.

Soc. Then I will go on to the next point, which may be put in the form of a question: — Ought a man to do what he admits to be right, or ought he to betray the right?

Cr. He ought to do what he thinks right.

²² S. Chen, Personal communication, November 2003.

Soc. But if this is true, what is the application? In leaving the prison against the will of the Athenians, do I wrong any? or rather do I not wrong those whom I ought least to wrong? Do I not desert the principles which were acknowledged by us to be just — what do you say?

Cr. I cannot tell, Socrates; for I do not know.

Soc. Then consider the matter in this way: — Imagine that I am about to play truant (you may call the proceeding by any name which you like), and the laws and the government come and interrogate me: "Tell us, Socrates," they say, "what are you about? are you not going by an act of yours to overturn us — the laws, and the whole State, as far as in you lies? Do you imagine that a State can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?" What will be our answer, Crito, to these and the like words? Any one, and especially a rhetorician, will have a good deal to say on behalf of the law which requires a sentence to be carried out. He will argue that this law should not be set aside; and shall we reply, "Yes; but the State has injured us and given an unjust sentence." Suppose I say that?

Cr. Very good, Socrates.

Soc. "And was that our agreement with you?" the law would answer; "or were you to abide by the sentence of the State?"²³

Subsequently, Socrates invokes the arguments on the part of the State respecting the benefits he has received from the state and the obligations these place upon him.

Such benefits include the place and fact of his birth resulting from the state-sanctioned marriage of his parents, his nurture and education through the state, his state identity and citizenship, and the obligations of allegiance, loyalty and obedience to the state created by these benefits. Socrates rhetorically poses the issue like this:

Soc. . . . Has a philosopher like you failed to discover that our country is more to be valued and higher and holier far than mother or father or any ancestor, and more to be regarded in the eyes of the gods and of men of understanding? also to be soothed, and gently and reverently entreated when angry, even more than a father, and either to be persuaded, or if not persuaded, to be obeyed? And when we are punished by her, whether with imprisonment or stripes, the punishment is to be endured in silence; and if she lead us to wounds or death in battle, thither we follow as is right; neither may any one yield or retreat or leave his rank, but whether in battle or in a court of law, or in any other place, he must do what his city

²³*The Works of Plato, supra* note 20 at 100-101.

and his country order him; or he must change their view of what is just: and if he may do no violence to his father or mother, much less may he do violence to his country." What answer shall we make to this, Crito? Do the laws speak truly, or do they not?

Cr. I think that they do.

Soc. Then the laws will say: "Consider, Socrates, if we are speaking truly that in your present attempt you are going to do us an injury. For, having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good which we had to give, we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us[sic] laws will forbid him or interfere with him. Any one who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, retaining his property. *But he who has experience of the manner in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him. And he who disobeys us is, as we maintain, thrice wrong; first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands; and he neither obeys them nor convinces us that our commands are unjust; and we do not rudely impose them, but give him the alternative of obeying or convincing us; — that is what we offer, and he does neither.* (italics mine)²⁴

What do these excerpts from the *Crito* reveal about the claim of conscience?

In the *Crito*, Socrates clearly raises the fundamental question of individual submission to the laws — laws emanating from the duly constituted sovereign power — the Athenian city- state. He recognizes his civic obligation to obey the laws — even unjust laws, though he has the opportunity and responsibility to persuade the State to change the laws. If he decides to remain in the state and accept the benefits the state affords, then he explicitly recognizes the creation of an implied contract to obey what the state commands and argues that he who disobeys is wrong in three respects: he offends against the state and his parents, against the state as the source

²⁴*Ibid.* at 101-102.

of his education and against his agreement to obedience or to argue for change. So Socrates' decision to obey is because he accepts the law; he accepts the reasons he has rhetorically adduced and he accepts as worthy the obligation he owes the state to preserve its quintessential character. Socrates, in the polis of Athens, is situated within an ordered world, replete with deities, government, laws and social and political expectations akin to a natural law view of the universe. Plato advances a view of a natural order, an ordered universe, one that defines the context for and constructs meaning for Socrates' decision.

Antigone's Commitment to Bury Her Brother

Anouilh's *Antigone*, modeled on Sophocles' *Antigone*, raises similar issues. The death of Oedipus leaves his sons Eteocles and Polynices to rule Thebes in alternate years. They quarrel, fight and kill each other in battle. Their uncle, Creon, becomes ruler and declares that one brother, Eteocles will be buried with full honours, but the body of Polynices — the rebel — will be left outside the city to rot, with the penalty of death for whomever may try to bury him. Ismene and Antigone are the sisters of Polynices and Eteocles; Antigone (over the prudential advice of her sister), resolves to bury her brother's body; she is caught and brought before Creon.

Creon. Why did you try to bury your brother?

Antigone: I owed it to him.

Creon. I had forbidden it.

Antigone: I owed it to him. Those who are not buried wander eternally and find no rest. If my brother were alive, and he came home weary after a long day's hunting, I should kneel down and unlace his boots, I should fetch him food and drink, I should see that his bed was ready for him. Polynices is home from the hunt. I owe it to him to unlock the house of the dead in which my father and my mother are waiting to welcome him. Polynices has earned his rest.

Creon. Polynices was a rebel and a traitor, and you know it.

Antigone. He was my brother.

Creon. You heard my edict. It was proclaimed throughout Thebes. You read my edict. It was posted up on the city walls.

Antigone. Of course I did.

Creon. You knew the punishment I decreed for any person who attempted to give him burial.

Antigone. Yes, I knew the punishment.

Creon. Did you by any chance act on the assumption that a daughter of Oedipus, a daughter of Oedipus' stubborn pride, was above the law?

Antigone. No, I did not act on that assumption.

Creon. Because if you had acted on that assumption, Antigone, you would have been deeply wrong. Nobody has a more sacred obligation to obey the law than those who make the law. You are a daughter of law-makers, a daughter of kings, Antigone. You must observe the law.

Antigone. Had I been a scullery maid washing my dishes when that law was read aloud to me, I should have scrubbed the greasy water from my arms and gone out in my apron to bury my brother.

Creon. What nonsense! If you had been a scullery maid, there would have been no doubt in your mind about the seriousness of that edict. You would have known that it meant death; and you would have been satisfied to weep for your brother in your kitchen. But you! You thought that because you come of the royal line, because you were my niece and were going to marry my son, I shouldn't dare have you killed.

Antigone. You are mistaken. Quite the contrary. I never doubted for an instant that you would have me put to death.

*A pause, as Creon stares fixedly at her.*²⁵

This excerpt displays the elemental confrontation of wills and integrities at play in the conflict. Antigone's commitment to bury her brother Polynices attests to her personal integrity reflected in the moral imperative she feels — "I owed it to him"

²⁵*Antigone*, *supra* note 20 at 41-42.

she asserts. Such is an unconditional affirmation of her personal duty to her brother.... "He was my brother." Yet Antigone's commitment to her brother is at root a familial and gendered notion. She is the traditional hearth-minder of the family; as the older sister, absent mother, she takes it upon herself to attend to the men of her family in a prototypically gendered fashion. She *must* bury her brother to enable his soul to enter the house of the dead. So her opposition to Creon arises both from her devotion to familial belief and from her opposition to his patriarchal authority.

Set against her principled resolve is the will and power of Creon as the sovereign, the ruler, whose decision to leave Polynices to rot sets the stage for the inevitable clash of wills. Despite Creon's argument that those of royal blood have a particular responsibility to obey the law — in the interests presumably of preserving the State — Antigone resists and repudiates the suggestion that because she is of the royal house, she thought herself above the law: "You are mistaken...." she says "I never doubted for one instant that you would have me put to death." Antigone, thus, clearly appears to understand the unconditional character of resistance and its consequence.

Thomas More's Refusal to Take the Oath

Robert Bolt's play, *A Man for All Seasons*, captures the conflict between Henry VIII and Sir Thomas More who is placed, by the Act of Succession, in the position of having to take an oath under the Act affirming *inter alia* that Henry's marriage to Catherine of Aragon was unlawful, contrary to canon law because the Pope erred in issuing the dispensation to permit the marriage in the first place. More refuses to take the oath both because of his devout Catholicism but also and more importantly because of his commitment as a lawyer to the law; he places his trust in the law and takes refuge in silence. Arrested and imprisoned, nevertheless, in the

Tower of London, More is visited by his wife — Alice, his daughter — Margaret, and his son-in-law — Roper. Margaret adopts a prudential stance and tries to persuade her father to take the oath publicly while inwardly retaining his independence....

Roper. Yes . . . Meg's under oath to persuade you.

More (Coldly). That was silly Meg. How did you come to do that?

Margaret. I wanted to!

More. You want me to swear to the Act of Succession?

Margaret. "God more regards the thoughts of the heart than the words of the mouth." Or so you've always told me.

More. Yes.

Margaret. Then say the words of the oath and in your heart think otherwise.

More. What is an oath then but words we say to God?

Margaret. That's very neat.

More. Do you mean it isn't true?

Margaret. No, it's true.

More. Then it's a poor argument to call it "neat," Meg. When a man takes an oath, Meg, he's holding his own self in his own hands. Like water. (*He cups his hands*) And if he opens his fingers *then* — he needn't hope to find himself again. Some men aren't capable of this, but I'd be loathe [*sic*] to think your father one of them.

Margaret. In any State that was half good, you would be raised up high, not here, for what you've done already. It's not your fault the State's three-quarters bad. Then if you elect to suffer for it, you elect yourself a hero.

More. That's very neat. But look now . . . If we lived in a State where virtue was profitable, common sense would make us good, and greed would make us saintly. And we'd live like animals or angels in the happy land that *needs* no heroes. But since in fact we see that avarice, anger, envy, pride, sloth, lust and stupidity commonly profit far beyond humility, chastity, fortitude, justice and thought, and have to choose, to be human at

all . . . why then perhaps we *must* stand fast a little — even at the risk of being heroes.

Margaret. (Emotionally) But in reason! Haven't you done as much as God can reasonably *want*?

More. Well . . . finally . . . it isn't a matter of reason; finally it's a matter of love.²⁶

Later at trial More's silence is challenged by his accuser, Thomas Cromwell, who has risen to the position of King's Secretary. He tries to distinguish forms of 'silence' to contrast More's silence:

Cromwell. Consider, now, the circumstances of the prisoner's silence. The oath was put to good and faithful subjects up and down the country and they had declared His Grace's title to be just and good. And when it came to the prisoner he refused. He calls this silence. Yet is there a man in this court, is there a man in this country who does not *know* Sir Thomas More's opinion of the King's title? Of course not! But how can that be? Because this silence betokened — nay, this silence *was* not silence at all but most eloquent denial.

More. (With some of the academic's impatience for a shoddy line of reasoning) Not so, Master Secretary, the maxim is "qui tacet consentire." *(Turns to COMMON MAN)* The maxim of the law is *(Very carefully)* "Silence gives consent." If, therefore, you wish to construe what my silence "betokened," you must construe that I consented, not that I denied.

Cromwell. Is that what the world in fact construes from it? Do you pretend that is what you *wish* the world to construe from it?

More. The world must construe according to its wits. This Court must construe according to the law.

Cromwell. I put it to the Court that the prisoner is perverting the law — making smoky what should be a clear light to discover to the Court his own wrongdoing! *(Cromwell's official indignation is slipping into genuine anger and More responds)*

More. The law is not a "light" for you or any man to see by; the law is not an instrument of any kind. *(To the FOREMAN)* The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely. *(Earnestly addressing him)* In matters of conscience —

²⁶A *Man for All Seasons*, *supra* note 20 at 81.

Cromwell. (Smiling bitterly) The conscience, the conscience . . .

More. (Turning) The word is not familiar to you?

Cromwell. By God, too familiar! I am very used to hear it in the mouths of criminals!

More. I am used to hear bad men misuse the name of God, yet God exists.
(Turning back) In matters of conscience, the loyal subject is more bounden to be loyal to his conscience than to any other thing.²⁷

In *A Man for All Seasons* Robert Bolt places Margaret, More's daughter, in the prudential role of trying to persuade More to take the oath and in his "heart think otherwise." Such is impossible for More because it requires him to compromise his devout Catholicism and hence his integrity, his very sense of self, viz.

When a man takes an oath, Meg, he's holding his own self in his hands. Like water. And if he opens his fingers *then* — he needn't hope to find himself again.

For More to take an oath invokes a transcendental commitment that extends outside and beyond the moment. Subsequently More affirms his understanding of the law:

The law is not a "light" for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely. In matters of conscience . . . , the loyal subject is more bounden to be loyal to his conscience than to any other thing.

In addition to his profound confidence in the rule of law (sadly misplaced by the manipulation of his enemies) More affirms a categorical imperative — the implicit notion of duty to self as a fundamental value to protect, and the suggestion that law has a moral force and significance that transcends the particular. At the same time More foreshadows the 'modern man': perhaps he is a precursor of the revolution of 1688 in England and ultimately the reform movement of 1832.

²⁷*Ibid.* at 88-89.

Heuristic Utility of Drama for Law

The heuristic utility of these selections from the *Crito*, *Antigone* and *A Man for All Seasons* in explicating the claim of conscience, arises not only from the *prima facie* content and relevance of the story captured in the drama and its obvious relevance to law and to the individual's obligation to obey the law but from the more extensive significance of drama for law. Such significance is articulated well by James Boyd White in his scholarship.²⁸ In his discussion of the points of contact between Athenian tragic drama and Supreme Court decisions in the United States, White argues that both the drama and the judicial decision enable "...our capacity for claiming meaning for experience..." wherein "...our deepest dignity lies."²⁹ He identifies three features that the drama and the judicial opinion share.

The first is that they both bring the remote and the distant into the circle of immediate attention. The dramatic dialogue and the judicial opinion both occur in a public arena, one where the listeners are engaged by the structure and the rules of performance; both invoke a distinctive sense of time and both function to create shared public meaning from the facts and events that make up the presented story.

As White notes

...when the bright light of attention is focused on what we have not seen, or not seen clearly, it almost always reveals a complexity and richness of significance that we had missed, thus putting in question, among other things, our own prior habits of mind and imagination.³⁰

²⁸ J. B. White, *Justice as Translation* (Chicago: University of Chicago Press, 1990); *The Edge of Meaning* (Chicago: University of Chicago Press, 2001).

²⁹ J. B. White, "Human Dignity and The Claim of Meaning: Athenian Tragic Drama and Supreme Court Decisions" (Paper presented to the Law, Culture and the Humanities Conference, March 10, 2001) [unpublished] at 2.

³⁰ *Ibid.* at 10.

In both cases, understanding of the terms and conventions used is necessary to draw meaning from the experience.

The second is that the drama and the judicial opinion both enable the discovery of meaning and significance through the opposition of character to character like that between Socrates and Crito, Creon and Antigone, More and Cromwell. Such opposition, as White puts it, is "... the soul of what we think of as drama..."³¹ And when the oppositional forces in drama or in law work well, they enable the audience and listeners to extend their understanding of the issues displayed.

The law is in this way a cultural process, working on the raw material of life—the injury to the body or the psyche, the failed business, the broken marriage, the vulgar words in the courthouse—to convert it into something else, something of its own: the occasion for the assertion of a certain set of meanings. It is a kind of translation.³²

The third is that the drama and the judicial opinion both create for the audience/listeners the possibility of drawing meaning from the experience. Both the drama and the opinion have distinctive forms and associated meanings; form and meaning in these contexts are inseparable.

It is a familiar truth of literary criticism that the meaning of a poem or a play or a novel, or any other work of art, lies not in any restatement of it into other terms—in any message or idea—but in its performance, in the life and experience it creates for its audience or viewer.³³

Meaning is transmitted through dramatic form and conventions known to the audience and in the case of the judicial opinion through legal form and language. Legal language establishes judicial distance and thereby judicial authority and follows a form of rational discourse governing the opinion.

³¹ *Ibid.* at 11.

³² *Ibid.* at 12.

³³ *Ibid.* at 24.

...the form we call the opinion of the Supreme Court—like the drama—is a cultural institution that works to teach the public, in part by bringing into the zone of collective attention that which is distant or remote, unseen and particular; in part by the way it works through dramatic opposition, with character poised against character, voice against voice; in part by the way it seeks to give meaning to the events thus examined, locating them in a larger context and a larger story, running back in time and including potentially all the elements of its institutional memory.³⁴

Conclusion

The claim of conscience reflected in these dramatic examples demonstrates the importance of both context and individual resolve. Contextually, the tension arises through the requirement to obey the law as enforced by the legitimate agent of the state. From an individual perspective the resolve is essentially immanent; it is wholly and irredeemably an individual standard, discerned by the individual who recognizes and then acts on its categorically imperative moral force. To assert the claim of conscience is to assert the fundamental integrity and dignity of the self; it is to assert that the individual takes what is at issue as unconditionally serious, non-negotiable, binding; it is an ontological claim approximating what Tillich refers to as an "ultimate concern."³⁵ The individual here affirms his/her capacity to see more clearly, to read more deeply, discern more sharply than others the quintessential moral chasm ahead and to choose to affirm self, integrity, personhood — in short moral autonomy — in the face of the authority of the state.

As Wolff concludes in his examination of these issues:

It is out of the question to give up the commitment to moral autonomy. Men [*sic*] are no better than children if they not only accept the rule of others from force of necessity, but embrace it willingly and forfeit their duty unceasingly to weigh the merits of the actions which they perform. When I place myself in the hands of another, and permit him to determine the principles by which I

³⁴ *Ibid.* at 28.

³⁵ P. Tillich, *The Protestant Era* (Chicago: University of Chicago Press, 1948) at 58, 87.

shall guide my behaviour, I repudiate the freedom and reason that give me dignity.³⁶

The examples of Socrates, Antigone, and More have obvious similarities. All three are placed in an elemental confrontation between the express authority of the state and their recognition of their personal claim to autonomy. All three must juxtapose their willingness to obey the state with their sense of personal integrity – each must choose a course of action. All three engage courses of action that lead to their deaths.

From the perspective of understanding the claim of conscience, however, the examples of Socrates, Antigone, and More also differ in important respects. Socrates, in contrast to Antigone and More, decides to honour his sense of duty and obligation to the state by obeying the laws and refusing to accept the opportunity to escape. His decision is to preserve his integrity and autonomy through his obedience to the call of duty and to the laws. Antigone and More, by contrast, preserve their integrity and obligation to their definition of self by choosing to deny the authority of the state. Prototypically, this contrast in these dramatic examples displays the fundamental tension in matters of conscience. The duty of the individual to obey the dictates of the state and its duly constituted authority is juxtaposed with the individual's obligation to preserve the integrity of the self by choosing to refuse to comply. In effect, the individual appears to be placed in the position of choosing to disobey and suffer the consequences. Whereas Socrates seems to make his choice in one direction, and Antigone and More seem to make a different choice, all three

³⁶R.P. Wolff, "In Defence of Anarchism" (New York: Harper & Row, 1970) in J.C. Smith & D.N. Weisstub, eds., *The Western Idea of Law* (Toronto: Butterworths, 1983) at 475.

nevertheless make choices that are radically constrained by the paramountcy of their personal imperatives.

Chapter III: The Evolution of Conscience and Religion

Conscience emanated originally from classical thought and was subsequently incorporated into a Christian theology and world-view. Following especially the Henrician Reformation in England with the subsequent differentiation of multiple strands of dissenting Protestants and the story of religious persecution, the notion of conscience emerged ultimately as the bedrock of religious toleration. More recently yet, the notion of 'conscience' has evolved further to recognize not only the religious basis of such a claim in the individual case but to encompass as well those whose claim to conscience derives from a non-religious or secular, ethical position. This chapter sketches these developments to contextualize the relation between 'conscience' and 'religion' from a historical perspective and to situate such a right in the western human rights tradition.

Pre-Modern Conceptions of Conscience

The idea of conscience originated in the pre-Christian era in both Greek and Roman civilizations. The Hellenic origins lie in the term *syneidesis* which is broadly equivalent to the Latin *conscientia* and the related term *synderesis*. While the root meaning of *syneidesis* is to 'know with oneself', over time this came to mean 'to know oneself'. The Latin words *conscientia* and *synderesis* are equivalents of the original Greek, yet it is *conscientia* that has persisted and entered English as 'conscience'.

Through a very useful analysis, C. S. Lewis elaborates the linguistic origins and associated meanings of 'conscience' and 'conscious'. At the outset Lewis

establishes the verb 'consciring'; this is a word he coins to denote two different aspects of conscience. 'Consciring', as Lewis terms it, is at the heart of the meaning of the Greek *suneidesis* or the Latin *conscientia*. 'Consciring' has two forms. The first is where two or more people are involved. Here, when one person says to another 'conscio', meaning 'I know something about...' he/she is 'consciring' with the other. As Lewis puts it "[t]he man who conscirs anything with me is *consciurus* (or *suneidos*) to me. The fact of his consciring is his *conscientia* (or *suneidesis*), his shared knowledge".³⁷ This form of 'consciring' creates the external witness to the shared knowledge and creates *conscientia*.

The second is the form of 'consciring' as an act of the individual 'consciring' to (or with) him/herself. In this form 'consciring' occurs privately when the individual conscirs something to him/herself. The act is one of being privy to self. This form of consciring creates the inner witness where knowledge is known solely to the individual involved and is the first element of the individual's private conscience; it is through memory that this aspect of the conscience works.

The 'inner witness', however, evolved through what Lewis refers to as the 'great semantic shift' during the early Christian era, and especially through the teaching of St. Paul, to add to the internal witness 'a judgment as to what is right and wrong'.

In its new sense *conscience* is the inner lawgiver: a man's judgement of good and evil. It speaks in the imperative, commanding and forbidding. But, as so often, the new sense does not replace the old. The old lives on and the new is added to it, so that *conscience* now has more than one meaning.³⁸

³⁷ C.S. Lewis, *Studies in Words* (Cambridge: Cambridge University Press, 1960), 184.

³⁸ *Ibid.* at 194.

The second noteworthy feature of Lewis' analysis is his recognition that 'conscience' is not a singular property, that indeed in a diverse, multicultural and pluralist society we have 'consciences' in the plural.

The more boldly men claim that *conscience* is, directly or vicariously, a divine lawgiver and the 'spotless mirror of God's majesty', the more troublesomely aware they must become that this lawgiver gives different laws to different men; this mirror reflects different faces. Hence we have *consciences* in the plural, not meaning those different conscirings which different men must obviously have but those different inner laws they acknowledge.³⁹

To foreshadow the argument in the final chapter of the thesis, recognition of 'different inner laws' as the basis of a claim of conscience makes it possible that "...almost any man can claim exemption from the laws of the state on the ground that his own particular synteresis... forbids him to obey them..."⁴⁰

Conscience and the Christian Church

While the term *suneidesis* occurs in the New Testament mainly in the epistles of St Paul to the early Christian churches, the word conscience appears as 'heart' in the Gospels. "The word 'heart', thus identified with conscience, is no longer the source of remorse after sin, but the light and guide in our moral conduct."⁴¹ The idea of 'heart' symbolizes the interior life of the individual Christian and the role of conscience in leading to a pure life in Christ. St. Paul, interpreting the teachings of Christ, expands on conscience as *suneidesis*. In the Christian tradition, conscience is never autonomous and independent of faith; it is always grounded in the will of God and when properly exercised is the will of God in action. In St. Paul's view, conscience works as the voice of God in us.

³⁹ *Ibid.* at 199.

⁴⁰ *Ibid.* at 200.

⁴¹ J. Lecler, *Toleration and the Reformation* (New York: Association Press, 1960) at 12.

Conscience in us is the inward witness which blames or praises us according to the quality of our actions: 'For our glory is...the testimony of our conscience, that in simplicity of heart and sincerity of God we have conversed in this world.'(2 Cor. 1: 12)⁴²

A guilty conscience, awareness of a fall from grace, invites remorse of conscience wherein conscience bears personal witness. LeCler points out that this idea of conscience bearing internal witness anteceded the development of Christianity and was evident in the writings of Cicero, Seneca, and Philo. St. Paul's teaching, however, extended the idea of conscience bearing witness by setting conscience as "...the light and guide for our whole moral and religious life, and not only the judge and witness of our actions."⁴³ In St. Paul's teaching

The good conscience appears here as the guarantee of faith. In fact, the good conscience is the same as the 'pure conscience' and the 'pure heart' of the Gospel; a conscience which is not sullied or obscured by sinful habits is more apt to understand the things of God and the truths of salvation.⁴⁴

The challenge to every Christian is to cultivate a good conscience. Such implies obedience to God's law as revealed in the Bible and through the gift to the world of Jesus Christ. As Hughes notes

The function of conscience is not to will but (as the derivation of the term suggests) to know — in particular to know inwardly and instinctively that there is a difference between right and wrong, that what is in accordance with the will and character of God is right and what is discordant with the same is wrong, and that it is our duty, our moral obligation to God and also to our fellow men, to do what is right and reject what is wrong.⁴⁵

⁴² *Ibid.* at 14.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 15.

⁴⁵ P. E. Hughes, *Christian Ethics in Secular Society* (Baker Book House: Grand Rapids, 1983) at 31.

The Medieval Era

The historical period from the fall of Rome to the Reformation saw the dominance of Christianity through much of the western world. Not surprisingly, therefore, the linkage between conscience and Christian faith defined the discussion and experience of conscience during these eras. Central to this consideration is the tension for the individual between 'desires' and 'right' or morally correct action—an issue that Aristotle identified. As a consequence, Aristotle and Plato played a significant role not only in early Greek thought on conscience, they also dominated medieval thought as, in many respects, they continue to influence contemporary thought on the relation between knowledge and understanding. Aristotle and Plato then serve as the secular foundation for medieval philosophy as well as modern philosophy.

Potts traces the evolution of conscience from its origins through the work of medieval philosophers Peter Lombard, Jerome, Philip the Chancellor, Bonaventure and Aquinas.⁴⁶ These philosophers, in discussing 'conscience', continued the practice of recognizing the similarity between *synderesis* and *conscientia*. Potts identifies Aquinas' major contribution to the debate about *conscientia* in his claim that *conscientia* binds us to a course of action; in Aquinas' view the imperative force is obedience to God's voice and commands. It is here in this injunction that the connection between philosophy and theology becomes apparent. Clearly Aquinas is the prototypical Christian thinker-as-philosopher addressing the issue of conscience from both a philosophical and theological viewpoint at that time.

⁴⁶ T.C. Potts, *Conscience in Medieval Philosophy* (Cambridge: Cambridge University Press, 1980).

Potts points out that the modern English sense of 'conscience' developed through two stages. The first was reflective and occurred as a consequence of witnessing one's own actions which would often cause the individual to judge his/her actions; the second is the application of this reflective sense to a person's standards of behavior, thereby placing behavior under internal scrutiny. This has become the conventionally ascribed meaning.

Against this backdrop, the medieval era gave rise to several significant tensions and shifts; these are well documented by Tierney in his historical perspective on the emergence of religious rights.⁴⁷ Tierney argues that the western experience in medieval times was paradigmatic in that it included the development of a theory of natural rights, which foreshadowed the contemporary commitment to human rights and, in particular, religious rights. Such did not occur easily nor without conflict and persecution, nevertheless Tierney identifies several features of the medieval religious experience that provide perspective on the evolution of religious rights and the role of conscience.

In his analysis, Tierney documents the vigorous attempts by the church during the medieval period to secure and sustain freedom from secular governments as one of the dominant features of the period. Tensions and wars between empires and papacy, between emperors and kings and popes, punctuated that history yielding a persisting dualism in medieval society. Ultimately the church secured freedom from the state and achieved thereby one step towards religious liberty.

⁴⁷ B. Tierney, "Religious Rights: A Historical Perspective" in N.B. Reynolds and W.C. Durham, eds. *Religious Liberty in Western Thought* (Atlanta: Scholars Press, 1996) 29-57.

A second feature characterizing the medieval period was the recognition of a commitment to spiritual liberty in the Judaeo-Christian ethic, based on an understanding of the human being "...as a morally autonomous individual, endowed with conscience and reason and free will."⁴⁸ The duty to obey one's conscience – a conscience informed not by secular autonomy but by the voice of God was paramount.

The medieval position was that a person was right to follow his conscience but that he might suffer at the hands of the authorities if his conscience led him to illicit behavior. Similarly, in the modern world, individuals may be led by a sincere conscience to violate the law – as in some forms of civil rights or anti-war protest – but the law will hold them responsible for their actions.⁴⁹

The third feature of the medieval period was the emergence of a theory or doctrine of natural rights. In particular, Tierney characterizes the twelfth century as an age of renewal in commerce, art, architecture, and courtly behavior – the start of the renaissance. In religious matters, the century saw a new emphasis on the individual—individual intent in assessing culpability, individual agreement in marriage, and individual scrutiny of conscience. And, at the same time, a strenuous public concern arose in the secular sphere affirming individual rights and freedoms.⁵⁰

The medieval period also saw the presence of a countervailing force -- namely, the persecution of heretics -- those whose beliefs placed them outside the church. The dominant justification for such persecution was grounded in the notion of treason. Heretics were traitors to God and hence merited the same kind of temporal response as traitors to king or emperor. A common religion was the organic bond

⁴⁸ *Ibid.* at 32.

⁴⁹ *Ibid.* at 37.

⁵⁰ *Ibid.* at 39-40.

that held western Christian society together. Heresy threatened that bond and thus had to be rooted out.

Reformation, Religious Persecution and Toleration

The Reformation in Europe, sparked by Luther's stand against the Catholic Church, challenged and fundamentally altered the organic conception of Christian life that had dominated medieval Europe and had sustained the authority of the Catholic Church throughout the medieval period. The radical changes provoked by the Reformation caused fundamental shifts in religious and political attitudes towards the orthodoxy and jurisdiction of Catholicism throughout Europe. Again, Tierney makes the point cogently

Between 1500 and 1700 a new web of causation was created. Europe experienced a series of savagely destructive wars of religion that ended in stalemates and a splintering of religious unity into innumerable competing sects. Eventually this led on to a growth of national states that could command the loyalty of subjects who professed a variety of religious beliefs. But before that final outcome was achieved, religious groups who rejected an established faith found themselves persecuted in many countries – Huguenots in France, Roman Catholics and Puritan separatists in England, Lutherans in the Catholic principalities of Germany and every kind of dissenter from Catholic orthodoxy in Spain.⁵¹

Those persecuted, regardless of their religious affiliation, sought toleration for their particular beliefs but without a more generalized commitment to religious freedom. From the middle of the sixteenth century, only a few political commentators argued for a more widespread commitment to religious freedom.

In England, however, the Reformation took a very different form from elsewhere in Europe as a result of Henry VIII's decision to divorce Katharine of

⁵¹ *Ibid.* at 46.

Aragon, thus precipitating the subsequent breach with Rome – an essentially political act. The Henrician Reformation in England was sparked by an act of state not by an act of faith. Jordan, in his study of the rise of toleration in England, studiously documents the process of historical change between the Reformation early in the sixteenth century and the restoration of the Stuarts and the monarchy in 1660.⁵² He argues that this century and a half was the time when England moved from a uniform, mediievally grounded Catholicism to an emergent commitment to religious toleration – a characteristic of the early modern period in intellectual history.

Examining the secular, religious and philosophical forces at work in England during this period, Jordan traces the development of the nascent commitment to freedom of conscience and religious toleration from the Henrician Reformation, through the Marian persecution of Protestants, and to the era of Elizabeth's reign where the commitment to toleration begins to emerge. Jordan argues that Elizabeth adopted a strenuously pragmatic stance towards religious observance, with prosecution for treason displacing persecution for religious belief. Elizabeth's adoption of a strictly political attitude towards religious belief, together with the gradual development of a body of opinion among the aristocrats and landed gentry, recognized the futility of religious persecution and led to the emergence of tolerance for religious diversity. Institutionalized through the settlement of the national church in 1559, the Elizabethan church "... was defined with a large and tolerant

⁵² W.K. Jordan, *The Development of Religious Toleration in England* (Gloucester, Mass.: Peter Smith, 1965).

comprehensiveness..."⁵³ that contextualized religious issues within the larger imperatives of political thought and administrative policy. As Jordan notes:

The case for religious toleration was, fundamentally, all but won during the reign of Elizabeth, though it was to require very nearly a century for men to test at the shrine of their own faith and intelligence the wisdom of a decision born of political necessity.⁵⁴

The sixteenth century in England -- the period now known as the early modern period -- saw not only the Henrician Reformation, followed by the Marian persecution, but also the nascent sense that an individual's beliefs were personal and that, providing these beliefs did not lead to treasonable behavior, to be tolerated. Even so, England was still divided by 'irreconcilable religious differences' which gave rise to the recognition that the civil state must govern pragmatically and expediently, and must recognize political loyalty and civic obedience rather than religious affiliation as measures of good citizenship.

The rise of rationalism and skepticism coincided with the emergence of toleration during the Elizabethan and early Stuart periods but, according to Jordan, the development of public skepticism and criticism flowered during the early Stuarts in the time of religious strife leading up to the Civil War.

The bitterness of the sects, the tragic futility of persecution, and the absurdity of sectarian pretensions when taken in their totality, drove many men of sensitive spirit and powerful intelligence to grasp sceptical weapons which were wielded with decisive effect against a preoccupied and embattled orthodoxy. Criticism became ever sharper and more intense.⁵⁵

Anti-clerical criticism also appeared during this period as religious factions during the Civil War replaced the ecclesiastical orthodoxy of Catholicism with the straitjacket of Presbyterianism. Such brought clerical leadership into disrepute and

⁵³ *Ibid.* at 471.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 473.

fostered the development of a "...lay Christianity which accepted as its first principle the doctrine of religious liberty."⁵⁶ The undermining of clerical influence was accompanied by an increase in religious indifference during the middle decades of the seventeenth century which served as a "...powerful dissolvent of religious zeal,"⁵⁷ and by the dawning awareness of repudiation of the pain and suffering caused by religious strife, persecution and civil war. So that by 1660 with the Restoration of the Stuart monarchy, England was not only exhausted from a century and half of religious strife and turmoil but had set itself firmly on the path of religious toleration.

Jordan's analysis yields the conclusion that by 1660, the era of the Stuart restoration, "...the mass of men in England – what might be described as the centre of gravity of opinion – had conceded the case for religious toleration with very few exceptions."⁵⁸ Not only was the theory of religious toleration substantially complete in 1660, what remained for the ensuing decades and centuries was "...the difficult process of accommodating institutions to the fact of historical change."⁵⁹ By the end of the seventeenth century, the foundation of religious toleration had been laid; the remaining tasks were to work out a *modus vivendi* in favour of toleration, so that each person could choose and practice his/her own faith without threat or coercion.

The Impact of the Enlightenment

The Enlightenment, that period of European history from the late seventeenth to the eighteenth century, saw the extension and development of trends already

⁵⁶ *Ibid.* at 475.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 467; see also Tierney, *supra* note 46 at 47.

⁵⁹ *Ibid.* at 469.

evident including the recognition of the entitlement of all persons to their conscientiously held beliefs, the further development of arguments in favour of natural rights, toleration and freedom of conscience, and an increasing emphasis on the moral aspects of conscience. Fitzpatrick documents these trends in his discussion of the effect of the Enlightenment on conscience.⁶⁰

Fitzpatrick considers several highly influential philosophers and political theorists and their important influence on Enlightenment thought on matters of conscience and religious belief. Pierre Bayle was, in Fitzpatrick's view, "...profoundly influential in the Enlightenment."⁶¹ Bayle agreed with the ethical conception of conscience and strongly favoured the principle of toleration due in part to the loss of his brother to persecution.

John Locke was also a major contributor to Enlightenment thought and, like Bayle, was very influential favouring a positive notion of toleration allowing individuals to worship as they pleased provided they did not harm civil authority and society. Locke supported the idea of individual conscience subject to the authority of the state but believed that conscience is not divinely given, it is learned from education and experience.

The Enlightenment also saw the contributions of Immanuel Kant and his critique of practical reason and the formulation of the categorical imperative, Voltaire whose belief in the inexorability of reason led in part to the Enlightenment's

⁶⁰ M. Fitzpatrick, "Enlightenment and Conscience" in *Religious Conscience, the State and the Law* eds. J. McLaren & H. Coward (Albany: State University of New York Press, 1999) 46-61.

⁶¹ *Ibid.* at 48.

focus on the use of reason to develop the moral conscience. "Reason had now become the divine legislator and natural law was the law of reason."⁶²

Pufendorf brought a useful perspective to Enlightenment ideas of conscience arguing in favour of the simplicity and accessibility of natural law for mankind and that conscience could be both informed and enlightened. Pufendorf made a significant distinction between theology and reason. "His moral conscience needed neither grace nor revelation to gain its sense of rightness"⁶³

Fitzpatrick, however, points out that it was through Deist thought and especially through the work of the third Earl of Shaftesbury, a student of John Locke, that the trend to separate theology and morality gained its greatest support. Evidently, Shaftesbury was able to move beyond traditional assumptions of Christianity

He treated conscience both religiously and morally as two aspects of man's relationship with God, but in such a way as to give priority to the moral, for it is through our moral sense of right and wrong that the religious conscience is developed.⁶⁴

And, further, as Fitzpatrick notes

Deistic thinking placed secular morality at the heart of conscientious concern; it set aside fears of future rewards or punishments as the basis for conscientious action, for to act on such a basis would imply a loss of moral freedom, involving doing the right thing for the wrong reasons. Shaftesbury's God was a loving God; his enthusiasm a rational enthusiasm, which if consistently attained would lead to a harmony between man and nature. Such a harmony implied a tolerant society in which conscience would be able to take its own decisions about the public good; a society in which there was a healthy public arena in which one could openly pursue truth and submit one's ideas to the test of public opinion.⁶⁵

⁶² *Ibid.* at 51.

⁶³ *Ibid.* at 57.

⁶⁴ *Ibid.* at 51-52.

⁶⁵ *Ibid.* at 52.

Shaftesbury's view was not, however, universally accepted. One prominent opponent, Bishop Butler reaffirmed the primacy of duty in his discussion of conscience and argued in his notable sermons that the central feature of conscience was the property of reflection prior to and upon personal action. For Butler, conscience was a fundamental element in man's constitution.

...the very constitution of our nature requires, that we bring our whole conduct before this superior faculty; wait its determination; enforce upon ourselves its authority, and make it the business of our lives, as it is absolutely the whole business of a moral agent, to conform ourselves to it.⁶⁶

The principle of reflection is the means by which an individual "...approves or disapproves his heart, temper, and action,..."⁶⁷ Conscience has a natural supremacy in man since it is integral to man's constitution; hence in Butler's view the authority of conscience is sacred.⁶⁸

Fitzpatrick concludes that the Enlightenment recognized the importance of religious toleration and the validity of the religiously grounded conscience; but it also legitimated the claim of individuals to their own independently constructed sense of right and wrong – a personal sense of conscience grounded in their religious belief. Such a conception recognized the intimate relation between religious conscience and morality.

To a significant extent the Enlightenment was built upon the commitment to reason, scientific investigation, and emancipation from dogmatic religious belief. As such its influence extended far into the subsequent centuries through the impact of the industrial revolution and more recently the widespread application of technology in society. As Fitzpatrick notes

⁶⁶ J. Butler, *Fifteen Sermons* (London: Bell, 1949) at 14-15.

⁶⁷ *Ibid.* at 38.

⁶⁸ *Ibid.* at 57.

At its best, the Enlightenment integrated religious and moral concerns., created a set of minimal standards of human rights that are morally binding on states and individuals and set out exacting standards for enlightened conduct and the creation of properly enlightened polities and communities.⁶⁹

The Modern Era

The classification of historical epochs like the 'modern era' inevitably reify, into apparently discrete historical movements, developments that extended over centuries and that are necessarily closely intertwined in and through each other. So, the 'modern era', as it is known, had its origins in the seventeenth century and incorporated a number of fundamental shifts in attitude and thought that also characterized the Enlightenment. In many respects, the Enlightenment was closely linked to the rise of modernism and features of the Enlightenment acted as foundational to the development of modernism.

Whereas the Enlightenment was characterized by the affirmation of rationalism following Descartes, the endorsement of empiricism in science following Bacon, the development of new political theory following Locke, Rousseau and Montesquieu, these in turn led to other developments in the modern era. Cartesian rationalism supported and provoked the use of analytic thought in human problem-solving separate from religiously grounded interpretations. Baconian empiricism supported and provoked the scientific revolution and the development of scientific understanding of nature and the universe. The political thought of Locke, Rousseau and Montesquieu fostered an awakening consciousness about liberty, individualism and the rights of man. In turn these developments played out in major changes

⁶⁹ Fitzpatrick, *supra* note 59 at 57.

influencing the industrial revolution, the scientific revolution, the French Revolution and the new United States Constitution.

As the movements within the 'modern era' gained momentum during the nineteenth and twentieth centuries, they spawned new forms of social and administrative organization as necessary adjuncts to imperial expansion, the extension of capitalism and industrial society and more complex government. Weber's notion of bureaucracy emerged as a form of organization compatible with the character of the demands of this emerging society. Indeed, as Arts comments

Modernity was not experienced simply as the encounter with an alternative set of ideas. Rather it was part of a process of domination, penetrating society, reshaping people's lives and enforcing a kind of conformity with the new political and economic organization that straddled the globe.⁷⁰

With the increase in bureaucracy that followed, the initial commitment to rationality metamorphosed into a commitment to instrumental reason.

The primacy of instrumental reason became the motif of the modern era. As Taylor claims⁷¹, this motif is evident in the twentieth century cult of efficiency, the pervasiveness of technology, the rise of a materialistic consumer society and the erosion of support over time for traditional religions and forms of spirituality. The rise of the modern economic state and the mechanism of the market capped the ascendance of instrumental reason.

One of the consequences of the ascription of primacy to instrumental reason, in Taylor's view, is that the structures of the industrial-technological society have had the effect of restricting choice and subverting moral deliberation. In

⁷⁰ W. Arts, ed., *Through a Glass Darkly* (Leiden: Brill, 2000) at 10.

⁷¹ C. Taylor, *The Malaise of Modernity* (Concord, Ont.: House of Anansi Press, 1991), at 5ff.

contemporary society it is often difficult for an individual to frame and sustain a position of moral independence when that requires going against the grain. As a result, Taylor identifies three *malaises* about modernity.

The first fear is about what we might call a loss of meaning, the fading of moral horizons. The second concerns the eclipse of ends, in face of rampant instrumental reason. And the third is about a loss of freedom.⁷²

Criticizing also the rise of moral relativism in the society, Taylor argues forcefully and persuasively for the importance of authenticity as a moral ideal. Influenced by Trilling⁷³, Taylor endorses authenticity as a moral force but notes that such a view requires agreement “...(1) that authenticity is a valid ideal; (2) that you can argue in reason about ideals and about the conformity of practices to these ideals; and (3) that these arguments can make a difference.”⁷⁴

The ethic of authenticity is an extension of the individualism rooted in Locke’s political philosophy. As individualism became the dominant motif in rights and rights talk in the modern era, so the logical extension to authenticity occurred as the character of the individual’s claim to self and self-determination. Authenticity focuses on the self and personal integrity; it draws the individual inward and in this way connects to conscience. “On the original view, the inner voice is important because it tells us what is the right thing to do.”⁷⁵ The connection with self, with one’s intrinsic nature lies at the heart of the moral ideal of authenticity.

Being true to myself means being true to my own originality, and that is something only I can articulate and discover. In articulating it, I am also defining myself. I am realizing a potentiality that is properly my own. This is

⁷² *Ibid.* at 10.

⁷³ L. Trilling, *Sincerity and Authenticity* (Cambridge, Mass: Harvard University Press, 1972).

⁷⁴ *Ibid.* at 23.

⁷⁵ *Ibid.* at 26.

the background understanding to the modern ideal of authenticity, and to the goals of self-fulfillment or self-realization in which it is usually couched.⁷⁶

The legacy of the modern era is found in the value placed on individualism and individual rights in the context of an increasingly technological and materialistic society, a society characterized also by the erosion of traditional forms of religion and the rise of secular values. Central in this array of secular values are sincerity and authenticity. Not surprisingly therefore, these values become salient in the subsequent analysis of claims to freedom of conscience in Chapters IV and V that follow.

Institutionalization in Public International Law

The historical origin of the notion of rights that eventually led to the institutionalization of political and civil rights in Western civilization arises from 'natural rights' in Roman law. 'Natural rights' were central components of *ius naturale* or 'natural law', a legal construct that dominated jurisprudential thought until the end of the eighteenth century. In addition to 'natural law', Roman jurisprudence also included a body of customary law known as *ius gentium* or the 'law of nations'.⁷⁷ This body of law came to define the relationships between independent states and over time, established a jurisprudential epistemology that laid the foundation for subsequent legal thought in interstate relations. In many respects, these legal notions influenced the evolution of the English common law tradition.

⁷⁶ *Ibid.* at 29.

⁷⁷ A. Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy" (2003) 31(2) Political Theory at 173.

The twelfth century saw a legal renaissance through the recovery of classical Roman law and revisiting of the concept of *ius naturale*. The movement towards natural rights resulted in the enumeration of an array of new rights for the human person including the right to own property, the right to liberty, the right to self-defence, and the right of the poor to financial support from the surplus wealth of the rich. While, by the beginning of the thirteenth century a legal language of natural rights had developed, the enumerated rights did not yet include religious rights.

The signing of *Magna Carta* in June 1215, however, is the event that is usually heralded as the first instantiation of a commitment to rights in the evolution of the common law tradition. This event was the first time in English history when the power of the monarch was limited in specific ways by the barons and nobles of the realm assembled at Runnymede. *Magna Carta* or the Great Charter as it is often referred to, represented a feudal agreement where the king agreed to respect the enumerated liberties of the barons and freemen in exchange for the fealty of the nobles. More importantly from a legal perspective, *Magna Carta* established in law a set of legal enactments and political and civil rights whose historic significance proved far-reaching.

Magna Carta is indubitably an historic document of monumental legal importance. Known as the oldest of the 'liberty documents', *Magna Carta* has acquired historic recognition as the prototype of all the subsequent bills of rights; it is both a symbol of the fight against arbitrary power and a political slogan frequently invoked to affirm rights at stake. As McKechnie notes

It is no disparagement of *Magna Carta*, then, to confess that part of its power has been read into it by later generations, and lies in the halo, almost of romance, that has gathered round it in the course of centuries. It became a

battle cry for future ages, a banner, a rallying point, a stimulus to the imagination. For a King, thereafter, openly to infringe the promises made in the Great Charter, was to challenge public opinion—to put himself palpably in the wrong. For an aggrieved man, however humble, to base his rights upon its terms was to enlist the sympathy of all. Time and again, from the Barons' War against Henry III, to the days of John Hampden and Oliver Cromwell, the possibility of appealing to the words of Magna Carta has afforded a practical ground for opposition; an easily intelligible principle to fight for; a justified position to hold against the enemies of national freedom.⁷⁸

The adulation and legal significance accorded to *Magna Carta* is reflected by Thompson, who in her extensive study of *Magna Carta*, records the speech of John Balfour, Minister of the Crown, when in 1946 he received one of the original parchment copies of the Great Charter from Dr. Luther Evans, Librarian of Congress, for return to the Dean and Chapter of Lincoln Cathedral following its safekeeping during the Second World War.

Mr. Balfour termed the Charter the "forefather" of the British and American bills of rights, the American Habeas Corpus Act, and the Declaration of Independence. "The Federal Constitution of the United States," Mr. Balfour said, "contained many of its provisions and even some of its actual words; and this in turn has been the model for many constitutions in many lands. The line of descent extends to our time and we can, without flight of fancy, trace as an authentic offspring the preamble to the Charter of the United Nations. Here is a lineage without equal in human history. For this we honor the Great Charter, and for this, not as Britons or as Americans, but as members of the whole brotherhood of free peoples, we give our thanks to the Librarians of Congress for the care with which during these momentous years, they have guarded a document that is beyond replacement and above price. Magna Carta is not the private property of the British people. It belongs equally to you and to all who at any time and in any land have fought for freedom under the law."⁷⁹

Magna Carta, then, not only established civil and political rights, it acquired the character of a document with moral force and as such became the watchword and battle cry of those seeking to protect their rights against arbitrary power.

⁷⁸ W.S. McKechnie, *Magna Carta* (New York: Burt Franklin, 1914) at 128.

⁷⁹ F. Thompson, *Magna Carta* (Minneapolis: University of Minnesota Press, 1950) at v.

Nevertheless, and despite continued discussion during the medieval era of natural rights, a more explicit affirmation of human rights did not occur. Dominated by the legacy of feudalism and a strictly ordered hierarchical society grounded in mutual obligation and fealty, as well as by the ascendancy of the Church and a theologically instilled conception of duty, medieval society remained constrained by obligations and duties rather than rights. The single event that precipitated radical change, as we have seen, was the Protestant Reformation. Yet the religious strife that ensued, involving as it did the persecution of Protestants and Catholics and religiously defined and contested wars, eventually led to the recognition of religious toleration expressed as freedom of conscience.

The next significant stepping-stone to the recognition of human rights occurred early in the seventeenth century. Feudal authority had given way to the absolute prerogative of the monarch expressed as the divine right of kings. Charles I of England, committed to the notion of divine right as were other European monarchs, sought repeatedly to govern without recourse to Parliament, to levy taxes at his whim and to imprison political opponents without the benefit of *habeas corpus*. By this time in English history the writ of *habeas corpus* was well established as the primary protection against arbitrary imprisonment. Yet Charles I overrode *habeas corpus*, causing Parliament to enact the *Petition of Right* in 1627 re-affirming the principles of *habeas corpus* and thereby limiting the king's authority.⁸⁰ While Charles I did not immediately respect the *Petition of Right*, it established principled limits on the royal prerogative and protections from arbitrary imprisonment for individuals.

⁸⁰ *Petition of Right*, (U.K.), 1627, c. I.

Subsequently the political difficulties attending Charles I increased, ultimately resulting in his deposition, execution and replacement by the Puritan interregnum under the leadership of Oliver Cromwell. Cromwell's death in 1658 and the restoration of the Stuart monarchy in 1660 presaged the next major stepping-stone in the recognition of human rights. In 1688 following the death of Charles II, the English Parliament rejected the Catholicism of Charles' son, James, and declared him to have abdicated. Parliament then invited William and Mary of Orange to assume the English throne. In so doing Parliament achieved a bloodless revolution and conclusively affirmed the supremacy of parliament in the English constitutional state by enacting the *Declaration of Rights* in February 1689. This declaration is another milestone in the development of the English Constitution and affirmed the historic rights of the people, including freedom of speech in parliamentary debates; it also set the ground rules for the assumption of the Crown by William and Mary. Later in the same year, the provisions of the *Declaration* were incorporated into the *Bill of Rights*, a document with constitutional significance second only to *Magna Carta* in English constitutional history.⁸¹

John Locke, often referred to as the father of human rights, published his *Second Treatise on Civil Government*⁸² immediately following the Glorious Revolution of 1688. Locke reaffirmed the fundamental principles of individualism and the idea of individual rights in his political thought even though he was still responsive to the natural law tradition. Locke's work established the inalienable claim of the individual to rights inherent in his person as a human being and

⁸¹ *Bill of Rights*, (U.K.), 1689, c. 2.

⁸² J. Locke, *Two Treatises of Government*, 2d. ed., by P. Laslett ed., (Cambridge: Cambridge University Press, 1967)

reflected the acceptance of the principle of religious toleration set within a Protestant majoritarian viewpoint. Locke's thought seriously influenced political theory in eighteenth century Europe and extended its influence to the framers of the *U. S. Declaration of Independence* in 1776, another major milestone on the road to the institutionalization of human rights⁸³. Similarly, the political theory of Rousseau and Montesquieu in France influenced the political thinking that gave rise to the French Revolution and to the framing of the *Declaration of the Rights of Man and the Citizen* in 1789.⁸⁴

By the end of the eighteenth and the beginning of the nineteenth century, then, the modern era had witnessed a substantial development in political thought and legal consequence in Britain, France and in America. In each case a revolution in government had occurred carrying with it substantial new statements of the rights of citizens within the polity. Accomplishing the widespread acceptance of religious liberty would, however, await the liberal revolutions of the nineteenth century and the institutionalization of religious freedom in national constitutions. It would be well into the twentieth century before religious liberty was endorsed by mainline churches and incorporated into international agreements establishing human rights.

The development of a coherent statement of internationally affirmed human rights law did not ultimately emerge until the desolation wrought by the Second World War, particularly the Holocaust, found expression in the founding of the

⁸³ S. E. Morison, *Sources and Documents illustrating the American Revolution 1764-1788 and the formation of the Federal Constitution*, 2d.ed. (New York: Oxford University Press, 1965) at 157 –161.

⁸⁴ For a detailed history Schabas refers to S. Rials, *La Déclaration des Droits de l'Homme et du Citoyen* (Paris: Hachette, 1988) in W. A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996) at 6.

United Nations in 1945 through the *United Nations Charter*⁸⁵ and in the *Universal Declaration of Human Rights*⁸⁶ adopted three years later.⁸⁷ Article 18 of the *UDHR* reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁸⁸

The language expressed here, namely, 'freedom of thought, conscience and religion' recurs in other conventions and treaties subsequently declared or approved; as an example, Article 9 of the *European Convention on Human Rights* follows exactly this language from the *UDHR*⁸⁹. Bayefsky's consideration provides a clause-by-clause analysis of these international documents juxtaposed with section 2(a) of the *Charter*.⁹⁰ Her sectional analysis documents and displays expressly similar language in other international treaties like the *International Covenant on Civil and Political Rights*⁹¹, the *International Covenant on Economic, Social and Cultural Rights*,⁹² the *American Convention on Human Rights*⁹³, the *Convention of the Rights of the Child*⁹⁴, the *African Charter on Human and Peoples' Rights*,⁹⁵ and the *American*

⁸⁵ *Charter of the United Nations*, [1945] C.T.S. 7, T.S. 67 (1946), Cmd 7015, P. (1946-7) XXV 1, 145 B.S.P. 805.

⁸⁶ *Universal Declaration of Human Rights*, G. A. Res. 217 A (III), U.N. Doc. A/810. [Hereinafter *UDHR*].

⁸⁷ For detailed consideration of the history, texts and analysis of the instruments of international human rights law, see A.F. Bayefsky, *International Human Rights Law* (Toronto: Butterworths, 1992) and Schabas, *supra* note 83..

⁸⁸ *UDHR* *supra* note 85.

⁸⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955), 213 U.N.T.S. 221, E.T.S 5 [the "European Convention on Human Rights"].

⁹⁰ Bayefsky, *supra* note 86 at 174-186.

⁹¹ *International Covenant on Civil and Political Rights* (1976), 999 U.N.T.S 171, [1976] C.T.S. 47.

⁹² *International Covenant on Economic, Social and Cultural Rights* (1976), 993 U.N.T.S. 3, [1976] C.T.S. 46.

⁹³ *American Convention on Human Rights*, (1979). 1144 U.N.T.S. 1232, O.A.S.T.S 36.

⁹⁴ *Convention of the Rights of the Child*, [1992] C.T.S. 3.

⁹⁵ *African Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3 rev.5, 4 E.H.R.R. 417, 21 I.L.M. 58.

*Declaration of the Rights and Duties of Man*⁹⁶. Since the clauses of these documents concerning freedom of thought, conscience and religion tend to reiterate each other, it is redundant to enumerate each clause. Suffice it to note here that each affirms the right to freedom of thought, conscience and religion as a matter of individual choice and preference and proscribes state interference with the individual's right to express this preference.⁹⁷

In addition to international treaties, conventions and protocols and national codes of human rights that protect the right to freedom of conscience and religion within the *Charter*, constituent jurisdictions of federal states like the Canadian provinces have also enacted provincial human rights legislation that proscribe discrimination based on religion. Some of these provincial codes of human rights explicitly provide a right to freedom of conscience or religion. For example, the *Alberta Bill of Rights* expressly affirms freedom of religion⁹⁸ and the *Saskatchewan Human Rights Code* affirms the right to freedom of conscience in these terms:

Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.⁹⁹

Overall, the post WWII eras have seen a systematic expansion of legal instruments protecting human rights generally and the right to freedom of thought, conscience and religion specifically. This flowering of the panoply of rights protection reflects a strong trend towards the specification, enumeration and

⁹⁶ *American Declaration of the Rights and Duties of Man*, O.A.S. Doc. OEA/Ser.L/V/11.23, doc.21, rev.6.

⁹⁷ See Bayefsky, *supra* note 86 at 174-176.

⁹⁸ *Alberta Bill of Rights*, R.S.A. 1980, c. A-16.

⁹⁹ *The Saskatchewan Human Rights Code*, Statutes of Saskatchewan, Chapter S.-24.1, s. 4.

legislative protection of rights which in Canada is expressed nationally through the *Charter* including in s. 2 (a) the right to 'freedom of conscience and religion.'

Chapter IV: Freedom of Conscience in Law: Canadian and U.S. Perspectives

This chapter focuses attention, in particular, on the constitutional and legal development of *freedom of conscience and religion* in Canadian law to continue the process of explicating the meaning attributable to the right. Two case examples drawn from the experience of the United States in grappling with these issues are included to inform this discussion of meaning. The chapter is divided into three parts. The first documents the origin of the right in Canadian jurisprudence and then considers the foundational Canadian case *Big M*, and is in turn followed by consideration of subsequent and related *Charter* based decisions. The second reviews two archetypal U. S. cases to draw on that reasoning in seeking to clarify meaning, and the third engages a discussion of the issues raised by these decisions for the meaning of ‘freedom of conscience and religion’.

Part I: Freedom of Conscience and Religion in the Charter

How did the exact phrase ‘freedom of conscience and religion’ come to be in the *Charter*? Where did the phrase originate in Canadian constitutional development? And what presuppositions under-girded the concept? Why is ‘conscience’ explicitly linked with ‘religion’?

Tracing the origin of the phrase in constitutional development is relatively straightforward. The phrase does not appear at all in the *Constitution Act, 1867*; indeed no individual rights and freedoms are enumerated therein. The closest affirmation of religious freedom occurs in s. 93 which conferred the exclusive

legislative prerogative in relation to education on provincial legislatures while protecting in (1) the "...Right or Privilege with respect to Denominational Schools which any Class of Person have by law in the province at the Union."¹⁰⁰ While not explicitly affirming the right to religious freedom for the individual, this particular provision protected then and continues to protect denominational schools. This provision established the right of religious denominations to sustain their distinctive schools, suggesting the implicit recognition of a collective or institutionally-based affirmation of religious freedom. Furthermore, since the *Constitution Act, 1867*, was an Act of the British Parliament, it carried with it the common law protections of individual liberties that had become part of the British legal tradition - essentially an unwritten protection of individual rights and liberties. As Rand, J. observed in *Saumur v. City of Quebec*

From 1760, therefore, to the present moment religious freedom has in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.¹⁰¹

Along with the introduction of provincial codes of human rights, the post WWII era saw the enactment of the *Canadian Bill of Rights* in 1960; MacLennan documents in depth the history of the political and legal pressures between 1929-1960 culminating in the passage of the Diefenbaker Bill of Rights.¹⁰² As a federal statute, however, the Bill of Rights lacked constitutional force but did include explicit

¹⁰⁰ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), s. 93 (1).

¹⁰¹ [1953] 2 S.C.R. 299 at 17 [hereinafter *Saumur*]

¹⁰² C. MacLennan, *Toward the Charter* (McGill-Queen's University Press, Montreal & Kingston, 2003).

affirmation in s.1 (c) of 'freedom of religion' as a protected right.¹⁰³ The earliest judicial scrutiny of the meaning of 'freedom of religion' occurred in *Robertson and Rosetanni v. The Queen*¹⁰⁴ where the Supreme Court, per Ritchie, J. relying upon Rand. J.'s decision in *Saumur*¹⁰⁵ affirmed that 'freedom of religion' pre-dated the Canadian Bill of Rights and encompassed "... 'complete liberty of religious thought' and 'the untrammelled affirmation of religious belief' and its propagation, personal or institutional."¹⁰⁶

There are few other pre-Charter decisions but one that bears mention was adjudicated provincially under the *Alberta Bill of Rights*. In *Regina v. Wiebe*, the Government of Alberta charged Elmer Wiebe, a Mennonite, with contravening the *School Act* by withdrawing his children from the public system and sending them to an unauthorized private school with an uncertified teacher - an elder of the Mennonite community - as teacher. The provincial court judge Oliver, J. held, after rejecting a series of alternative defences, that the requirements of the *School Act* were rendered inoperative by virtue of the guarantee of 'freedom of religion' in the *Alberta Bill of Rights*.

In my view there exists a plethora of evidence not only of deep religious convictions sincerely held by the accused concerning the manner in which his child should be educated, but also of the unshakeable determination to educate his child in accordance with his religious beliefs.¹⁰⁷

Explicit mention of 'freedom of conscience and religion' in a document with constitutional significance for Canada as a whole, however, seems to occur first in the 1968 document "A Canadian Charter of Rights and Freedoms" proposed by

¹⁰³ W. S. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: McClelland and Stewart, 1975).

¹⁰⁴ [1963] S.C.R. 651 [hereinafter *Rosetanni*]

¹⁰⁵ *Saumur*, *supra* note 100.

¹⁰⁶ *Rosetanni*, *supra* note 103.

¹⁰⁷ *R v. Wiebe*, [1978] 3 W.W.R. at 62.

Justice Minister Pierre Elliott Trudeau (as he then was). The text, in relevant part, reads:

(b) Freedom of conscience and religion

There is some legislative protection now. The Canadian Bill of Rights, section 1, recites “freedom of religion”. The Saskatchewan Bill of Rights, section 3, declares the right to “freedom of conscience, opinion, and belief, and freedom of religious association, teaching, practice and worship”. The Freedom of Worship Act (applicable in Ontario and Quebec) declares the right to “the free exercise and enjoyment of religious profession and worship”. It is arguable, however, that a guarantee of “freedom of religion” does not protect the freedom of the person who chooses to have no religion. To protect such persons, consideration could be given to widening the guarantee to protect, for example, “freedom of conscience”.¹⁰⁸

While the connection between this clause in this document and the language in the *Charter* is not explicit, it is instructive that both this document and the *Charter* were framed under the tutelage of Justice Minister Trudeau who later became Prime Minister Trudeau. This clause in the 1968 document suggests strongly that the language appearing in the *Charter* was specifically chosen to encompass protections for those who may make a claim based on conscience independent of religion. What is perplexing is that the particular phrasing ‘freedom of conscience and religion’ does not occur in subsequent pre-*Charter* constitutional initiatives nor in the work of the Parliamentary Committee. So, for example, the Victoria Charter, emanating from the constitutional conference held in Victoria on June 14, 1971, enumerated nine articles of Political Rights, including as Article 1:

It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

Freedom of thought, conscience and religion,
freedom of opinion and expression, and
freedom of peaceful assembly and of association;¹⁰⁹

¹⁰⁸ P.E.Trudeau, *The Canadian Charter of Human Rights* (Ottawa: Queen’s Printer, 1968) at 17-18.

¹⁰⁹ Seventh Meeting of the First Ministers on the Constitution, Constitutional Conference—Report June 14, 1971 (Ottawa: Information Canada, 1971) at 52.

Subsequently, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, reiterated the language of the Victoria Charter but with the following caveat:

We would have preferred not to have freedom of thought linked solely with freedom of conscience and religion, since it actually has (and presumably is intended to have) a wider application, and as located might run afoul of the *ejusdem generis* (same genus) rule of interpretation. We believe it should rather be linked with freedom of opinion and expression.¹¹⁰

This reservation proposing the separation of 'freedom of thought' from 'freedom of conscience and religion' and linked with the language noted earlier in Justice Minister Trudeau's "Canadian Charter of Human Rights," may well account for the precise language in s. 2(a) of the *Charter*. It is instructive to note that in each of the six different versions of the *Charter* culminating in the seventh and final version, the phrase 'freedom of conscience and religion' recurs without change.¹¹¹ So, it appears plausible to conclude that the intent of the language was to permit the extension of the right to those whose claim to conscience does not necessarily proceed from an explicitly religious base but could proceed from a secular, ethical position. In this sense the language of the *Charter* appears consistent with the impetus provided by Justice Minister Trudeau in 1968 to broaden the umbrella of protection to claims of conscience grounded in both faith traditions and secular approaches.

¹¹⁰ Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer, 1972) (Co-Chairs: G L Molgat & M . MacGuigan) at 19.

¹¹¹ R.E. Elliot, "Interpreting the Charter--Use of the Earlier Versions as an Aid" [1982] U.B.C. L. Rev. 24.

R. v. Big M Drug Mart

The first and definitive Supreme Court decision to address the meaning and application of s. 2 (a) of the *Charter* is that of *R. v. Big M Drug Mart*.¹¹² In this case, the Supreme Court of Canada determined that the federal Lord's Day Act, in imposing mandatory Sunday closing of stores, created an unconstitutional infringement of the guarantee to 'freedom of conscience and religion' in the *Charter*. This decision is important in many respects not the least of which is the remarkable opinion written by the (then) Chief Justice Dickson, but especially so because it laid the groundwork for constitutional interpretation in related cases. For this thesis, the important parts of the judgment are those that illustrate the Court's attribution of meaning to 'freedom of conscience and religion': section VII of the opinion is the crucial part in this regard.

The Court, per Dickson, C.J., first addressed the notion of freedom of religion and characterized this at the outset in these terms:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.¹¹³

This opening sentence endorses a pluralist view of society, a view that is inclusive and recognizes the validity of different beliefs, tastes, customs and codes of conduct. It tacitly affirms the character of Canadian society as multicultural but it goes beyond this affirmation to an affirmation of differences based on factors other than cultural (important though these are). It thereby affirms a more inclusive, more encompassing conception of pluralism.

¹¹²*Big M*, *supra* note 5 at 321-374.

¹¹³*Ibid.* at 353.

Continuing the Court noted that:

Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that.¹¹⁴

Central to the Court's conceptualization of freedom are the related notions of personal choice, free will or volition, and autonomy. These are the values that undergird the concept of freedom of religion and that the right protects. Individuals are free only when they can choose their religious beliefs, do so from their own volition, and thereby exercise choice as the practice of their personal autonomy. Of particular concern here, of course, is the correlative notion of the absence of coercion of belief by the state or by agencies of the state. Such coercion is impermissible, since such coercion inevitably vitiates these values and thereby denies the right. Further, the individual must be free to practice and exercise religious beliefs freely and without hindrance by any other but especially by the state, its agents and agencies. Chief Justice Dickson elaborated this reasoning:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitation as are necessary to protect public safety, order, health, or morals or

¹¹⁴ *Ibid.*

the fundamental rights and freedom of others, no one is forced to act in a way contrary to his beliefs or his conscience.¹¹⁵

What is important here is the Court's explicit recognition that the *Charter* protects both from direct and indirect coercion, compulsion and restraint. The final sentence of this part of the opinion "Freedom means that, ..., no one is to be forced to act in a way contrary to his beliefs or his conscience" appears to open the door to a broader interpretation; namely, the tacit recognition that 'conscience' may include non-religious beliefs or world views.

Chief Justice Dickson then considered and rejected the possibility of majoritarian compliance emanating from a dominant religious culture and imposed upon religious or non-religious minorities as fundamentally antithetical to the spirit of the *Charter* and, in particular, to s.27 – the multicultural affirmation clause. "The Charter safeguards religious minorities from the threat of "the tyranny of the majority."¹¹⁶

Thereafter, Dickson, C.J., relying on the purposive approach established in *Hunter v. Southam*¹¹⁷, elaborated the test by which the meaning of a right or freedom protected by the *Charter* should be established

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous

¹¹⁵ *Ibid.* at 353.

¹¹⁶ *Ibid.* at 354.

¹¹⁷ [1984] 2 S.C.R. 145.

rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.¹¹⁸

The Court next turned its attention to the historical context from which the right to freedom of conscience and religion emerged. Summarily reviewing this context, Dickson, C.J. clearly situated the origin of 'freedom of conscience and religion' in the religious struggles of post-Reformation Europe, in the record of religious persecution that characterized that and succeeding eras, in State-based attempts to compel and coerce individual religious belief, and in the subsequent emergence of religious toleration as the basis of religious freedom in the Stuart Restoration. And it is here that the Court recognized the contextual significance of the right.

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

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 constrain its manifestation...

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government...

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. *The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest*

¹¹⁸ *Ibid.* at 357-358.

whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. *Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.* It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest specific religious practice for a sectarian purpose.¹¹⁹

Given this reasoning, what inferences may be drawn about the Court's assertion that 'freedom of conscience and religion' forms *a single integrated concept*? It seems clear that the notion of integration here refers to the intimate linkage between conscience and religion evident during the Reformation and the ensuing decades as described in the preceding chapter. During these decades and leading up to the recognition of religious toleration for all, adherents of self-professed true belief whether Catholic, or one of the many dissenting Protestant sects, all justified their claim to conscience on their particular religious grounds. So the religious or faith-based character of their claim to conscience admitted a wide variety of essentially different religious beliefs. Religion and conscience were treated as the opposite sides of the same coin. This seems to be the plausible origin of the Court's characterization of 'freedom of conscience and religion' as an integrated concept.

Yet, while the above affirmation that religious belief and practice are paradigmatic of conscientiously-held beliefs is incontrovertible, the judgment also

¹¹⁹ *Ibid.* at 361-362 (Italics added for emphasis).

opens the door to the possibility that religious non-belief, e.g. atheism, or belief in a secular ethic are equally protected by s. 2(a). Dickson, C.J. does not develop this line of reasoning in this decision because such is not relevant to the facts in *Big M*. Nevertheless, it is instructive to note that the possibility is acknowledged here.

Subsequent Charter Cases

Since *Big M*, superior courts in Canada have relied upon the reasoning laid down in *Big M* to guide other decisions involving s. 2 (a). Shortly after *Big M*, the Supreme Court had to adjudicate *R. v. Edwards Books & Art*¹²⁰, another case involving legislated closing of stores on Sundays in Ontario under the *Retail Business Holidays Act*. In this case, the Court found that the purpose of the Act was not religious in character but designed to provide a day of rest to the entire retail sector of the province and so was saved under s. 1. In reaching this conclusion, however, the Court relied extensively upon the precedent in *Big M* and did not distinguish the elements of 'freedom of conscience and religion' tending instead to focus on the 'religion' component of the right. The one exception is that Dickson, C.J., in *obiter*, noted with approval the observation made by Tarnopolsky, J. A. in the appellate decision "[w]hile freedom of conscience necessarily includes the right not to have a religious basis for one's conduct..."¹²¹ Here again the Court recognized that freedom of conscience could rest upon a non-religious basis; such a view is not developed in the decision because the facts of the case under judicial scrutiny did not merit such attention, nevertheless the judicial door was once more left ajar.

¹²⁰ *R. v. Edwards Books & Art Ltd.* [1986] 2. S.C.R. 713.

¹²¹ *Ibid.* at 19.

In *Prior v. Canada*¹²², by contrast, the Federal Court of Canada found no nexus between taxes paid and government expenditures such as to offend freedom of conscience and religion. In this case, Jerilynn Prior relied on her constitutional entitlement to s. 2 (a) to challenge the practice of the Government of Canada in allocating a proportion of annual national tax revenue to military expenditures. As a Quaker, Jerilynn Prior opposed such expenditures on the grounds of her religiously informed conscience. She had calculated the military expenditures as a proportion of the Canadian government's annual budget and reserved that same proportion of her taxes for payment not to Revenue Canada but to the Peace Tax Fund in Victoria, British Columbia. She appealed the Revenue Canada assessment but the Tax Court of Canada rejected her appeal on the grounds that the potential abridgement of her s.2 (a) *Charter* rights was a reasonable limit in a free and democratic society. At trial, the Federal Court of Canada rejected Jerilynn Prior's application for declaratory relief on the grounds that the requirement that she pay income taxes to Revenue Canada did not abridge her freedom of conscience and religion. The Federal Court of Appeal sustained the Trial Court's ruling.

Many of the subsequent cases since *Big M*, involving claims under s. 2(a) and usually framed as claims to freedom of religion, have raised issues of educational policy and practice. As an example, *R. v. Jones*,¹²³ presented a case in which Thomas Jones, pastor of a fundamentalist church, defied the compulsory attendance requirements of the province of Alberta by educating his own three children and others in a church basement. He argued that the compulsory attendance

¹²² [1988] 2 F.C. 371 (F.C.C.), [1989] F.C.J No. 903 (F.C.A.).

¹²³ [1986] 31 D.L.R. (4th) 569.

requirements, i.e. that his children attend public school or that he apply for the statutory exemption, contravened his right to 'freedom of conscience and religion' by substituting the authority of the State for that of God. He also argued that the compulsory attendance requirements abridged his right to 'liberty' under s.7 of the *Charter*. The trial court rejected the s. 2(a) argument but sustained Jones' claim under s. 7. The Court of Appeal reversed and entered convictions against Jones on all counts.

The Supreme Court found that, while the School Act required some interference with Jones' freedom of religion, the challenged provisions did not offend s. 2(a) of the *Charter*. The Court also rejected the s. 7 argument. In its reasoning on s. 2(a), the Court did not distinguish the elements of 'freedom of conscience and religion', focusing exclusively on 'freedom of religion' since this was the ground of Pastor Jones' case. While 'freedom of conscience and religion' were conflated in the judicial arguments, the Court understandably did not attempt to disentangle these notions. It is worth, however, noting in passing the Court's special mention of the sincerity of Pastor Jones' beliefs; nevertheless, it explicitly disavowed any judgment as to the validity of those beliefs.

Three cases from different provinces addressed the constitutionality of the use of the Lord's Prayer and the reading of a passage of the Bible as opening exercises in public schools. The landmark decision was handed down by the Ontario Court of Appeal in *Zylberberg v. Sudbury (Bd of Education)*¹²⁴ and was followed by the B.C. decision in *Russow v. British Columbia (Attorney General)*¹²⁵ and later by *Manitoba*

¹²⁴ (1988) 65 O.R. (2d) 641 (Ont. C.A.) (hereinafter *Zylberberg*).

¹²⁵ (1989) 35 B.C.L.R (2d) (B.C.S.C.) (hereinafter *Russow*).

Assn. For Rights and Liberties v. Manitoba.¹²⁶ The latter two cases relied exclusively on the reasoning in *Zylberberg* which had applied the reasoning from *Big M* to the facts of that case.

The Ontario Court of Appeal held that the use of the Lord's Prayer and the reading of a passage from the Bible offended the right to freedom of conscience and religion. This practice was unconstitutional because it imposed a Christian religious perspective on all students in the public schools regardless of their own religious or non-religious preference. Further, the Court found that the opportunity for students to seek exemption from these exercises created a coercive environment that distinguished them as different, which also violated their right to freedom of conscience and religion. Like *Big M*, the decision in *Zylberberg* is carefully reasoned and set a precedent for the cases of *Russow* and *Manitoba*, yet the focus of the case is upon the meaning of 'freedom of religion' within the facts of the presented case. The decision does not distinguish the notion of 'conscience' at all.

Three related cases, all from Ontario, merit brief mention because they all involved claims under s.2 (a). In *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*¹²⁷ the appellants challenged the constitutionality of the instructional practices of religious education permitted under the Education Act of Ontario and the associated authorized religious curriculum. The Court struck down the religious education curriculum of the Elgin County Board of Education because the curriculum, being dominantly Christian and reflecting a majoritarian viewpoint, offended s. 2(a) of the *Charter*. Here too, the Court relied on the reasoning in

¹²⁶ [1992] 5 W.W.R 749, 94 D.L.R. (4th) 678 (Man. Q. B.).

¹²⁷[1990] 65 D.L.R. (4th)1 (Ont. C. A.) (hereinafter *Elgin County*).

Zylberberg respecting the exemption provisions, finding them to be coercive of a majoritarian religious standpoint. In response to its own rhetorical question: Does religious indoctrination violate s. 2(a) of the *Charter*? The Court responded “[t]he short answer is that it must. State-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities.”¹²⁸ Subsequently the Court reiterated the reasoning in *Big M* respecting the meaning to be attributed to s. 2(a).

The second case, *Adler v. Ontario*¹²⁹, involved a challenge by parents who for reasons of religious or conscientious belief had decided to send their children to private schools. They argued that the denial of public funding by the province of Ontario to these private schools was unconstitutional. The Supreme Court, following an extensive review of the constitutional significance of s. 93, and the status of denominational and dissentient schools in the Canadian constitutional scheme rejected this argument. The decision does not address the meaning of s. 2(a) but is significant in that it clarifies the status of s.93 vis-à-vis other provisions of the *Charter*.

The third case, *Bal v. Ontario (Attorney General)*¹³⁰ addressed the claim by parents of minority religious faiths that the government of Ontario had a responsibility under s. 2(a) and (b) and s. 15(1) to provide alternative religious schools from public funds. After an extended review of the arguments where the Court re-affirmed its decisions in *Elgin County* and *Adler*, the Supreme Court rejected this argument. Beyond re-affirming the nature of indoctrination and

¹²⁸ *Ibid.* at 23.

¹²⁹ *Adler v. Ontario*, [1996] 3 S.C.R. 609, (hereinafter *Adler*).

¹³⁰ *Bal v. Ontario (Attorney General)* [1994] 21 O.R. (3rd) 681.

reiterating its position that coercive religious practices in schools reflect a majoritarian stance and are coercive of minority beliefs, the Supreme Court did not further refine the definition and meaning of s. 2(a). So, while the Supreme Court affirmed in *Elgin County*, it rejected the arguments in *Adler* and *Bal*. Adjudicating these claims in terms of s. 2 (a), the Court did not distinguish the notion of ‘conscience’ as a separate element in any of these cases.¹³¹

The social context of religion and conscience arose also in *Chamberlain v. Surrey School District N.* 36¹³² when the Supreme Court adjudicated whether the Surrey School Board, in its decision banning three books depicting same-sex families for use in the primary grades, had acted in conformity with the requirements of the B.C. School Act. Specifically, the Court confronted the School Act’s commitment to secularism and non-denominationalism and found that the Board’s decision violated the principles of secularism and tolerance affirmed in s. 76 of the School Act. Gonthier, J., in dissent, focused on the tension between a religiously shaped conscience and secular action.

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that “...Canada is founded upon principles that recognize the supremacy of God and the rule of law”. According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience

¹³¹ Another case that addresses freedom of religion without addressing freedom of conscience separately is *Young v. Young* [1993] 4 S.C.R..

¹³² (2002) SCC 86 File No.: 28654, (2002) 221 D.L.R. (4th) 156; see also *Trinity Western University v. BCTF* [2001] 1 S.C.R. 772.

be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of modern pluralism.¹³³

Gonthier, J's attention here to the possibility of an 'atheistically informed' conscience in contrast to a 'religiously informed' conscience acknowledges the central distinction drawn in this thesis. His comments also acknowledge the importance of this distinction to a robust and pragmatic conception of pluralism.

Expanding the Conception of Conscience

To date, the majority of cases addressing the meaning and application of s. 2 (a) have relied upon the interpretation laid out in *Big M*, applied in *Jones* and refined in *Zylberberg*. These cases have focused primarily on the meaning and application of 'freedom of religion' and have conflated 'conscience' with 'religion' in apparent accordance with Dickson, C.J.'s original formulation in *Big M* of 'freedom of conscience and religion' as an integrated concept. A notable departure from this view is that of Justice Wilson in *Morgentaler* who opened the door to considering 'freedom of conscience' as a broader and independent construct.

Justice Wilson's concurring opinion in *R. v. Morgentaler*¹³⁴ extends the ambit of s. 2 (a) articulated in *Big M*. This case, in which Dr. Morgentaler *et al* were charged with conspiracy to procure a miscarriage (abortion) contrary to the Criminal Code, brought into judicial consideration whether s. 251 of the Criminal Code of Canada infringed several sections of the *Charter* including s. 2(a) and s. 7. The Court, in its majority opinion, only focused upon s. 7 and did not consider s. 2(a)

¹³³ *Ibid.* at § 137.

¹³⁴ [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, (hereinafter *Morgentaler*)

arguments. Justice Wilson, however, rejected the majority's reliance on procedural considerations and affirmed in her reasoning a woman's inherent right to liberty under s. 7 - meaning complete personal autonomy to decide whether to carry a pregnancy to term or not. In elaborating her reasoning, Justice Wilson noted

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(a) of the Charter. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2 (a) makes it clear that this freedom belongs to "everyone", i.e. to each of us individually.¹³⁵

While it is arguable whether s. 2 (a) was intended to be applied to issues like the termination of pregnancy as a matter of conscience in the same way as other claims of conscience are framed is arguable. Nevertheless, Justice Wilson's argument does recognize the centrality of personal autonomy in the making of what for some women may well be a moral decision and a matter of conscience. Termination of pregnancy is seldom a simple matter but it is arguable whether all such decisions merit the status of a matter of conscience; some decisions may be entirely pragmatic. Nevertheless, Justice Wilson subsequently affirmed the possibility that freedom of conscience and religion should be broadly construed to permit independent, although related, meaning.

Two other cases have also foreshadowed a broader conception of conscience. *Ontario (Attorney-General) v. Dieleman* ¹³⁶involved an application from the

¹³⁵ *Ibid.* at 494.

¹³⁶ [1994] 20 O.R. (3rd)229, 117 D.L.R. (4th) 449, 1994 CarswellOnt 151 (Ont. Ct. (Gen. Div.)), (hereinafter *Dieleman*).

province of Ontario to enjoin anti-abortion protesting by the defendants outside hospitals, abortion clinics, doctors' offices and homes. Adams, J. writing for the Divisional Court, addressed the claim of one of the defendants, Jane Ubertino, who argued that she was exercising her freedom of conscience and religion under s. 2 (a).

Starting from the Supreme Court's decision in *Big M*, Adams, J. noted Chief Justice Dickson's expansion of the right to freedom of religion to include "...the right to manifest religious belief by worship and practice or by teaching and dissemination"¹³⁷. He recognized this to be a considerable elaboration of the language in s. 2 (a) and raised directly the tension between religious belief and religiously motivated action. Given Ubertino's participation in picketing, this case focused upon her religiously motivated *action*. This 'action' was what the state sought to regulate. As Adams, J. noted "[I]t seeks to do so in the name of secular values – the health and welfare of women patients."¹³⁸

Turning, then, to an analysis and clarification of what is required by a religious affiliation—belief or action, Adams, J. held that the concept of "religion" connotes the beliefs of a group of adherents—a group that is bound together with a set of common beliefs, customs, rituals, and practices of worship. He concluded that Ubertino in the case of her picketing, was not acting as a member of a group, she was acting independently. Hence she was not in this action exercising or practicing her religion. The case, however, shades into a consideration of freedom of conscience "...because of the potential subsumation of "religion" by reference to "conscience" in s. 2 (a).¹³⁹ As Adams, J. continued

¹³⁷ *Ibid.* at § 703.

¹³⁸ *Ibid.* at § 704.

¹³⁹ *Ibid.* at § 705.

A claim based on conscience is potentially more pervasive than that based on religion in that the circle of “activity” motivated by conscience will be much wider. But is “action” motivated by conscience intended to be protected by the *Charter* in contrast to “protection against invasion” of a sphere of individual intellect and spirit such as protection against officially disciplined uniformity on orthodoxy? I think not. In my view, Ubertino is not being conscripted by an interlocutory order to a cause she fundamentally abhors and that being so, her freedom of conscience will not be adversely affected.¹⁴⁰

What is particularly instructive about Adams J.’s judgment here, from the perspective of this thesis, is that he draws a distinction between ‘conscience’ and ‘religion’. He distinguishes ‘conscience’ as a more inclusive and extensive concept than religion, one that subsumes within its reach a variety of claims—some that may be religious in character but also others that may not be religious in character; such may include the freedom of individual intellect and spirit that are not religiously informed. All such claims, he suggests, invite constitutional protection against officially sanctioned uniformity or orthodoxy. From this perspective, claims of conscience may arise from a range of non-religious grounds. Such claims do, however, seem to be individual in character—that is, they do not require membership in a group as a pre-condition for recognition.

In *Roach v. Canada*,¹⁴¹ the Federal Court of Appeal confronted the argument that taking an oath of allegiance to the Queen as a necessary condition of obtaining Canadian citizenship imposed a coercive burden upon the appellant and constituted an infringement of his s. 2 (a) right to freedom of conscience. The appellant held republican views and argued that oath-taking violated his freedom of conscience. In

¹⁴⁰ *Ibid.*

¹⁴¹ *Roach v. Canada (Minister of State for Multiculturalism and Citizenship (C.A.))*, [1994] 2 F.C 406 (F.C.A.), (hereinafter *Roach*).

dismissing the appeal, the Federal Court rejected the argument that oath-taking imposed a coercive burden and infringed *Charter* rights.

Linden, J. A., writing for the majority, addressed the meaning of freedom of conscience and religion. Noting that “[t]here is little authoritative jurisprudence on freedom of conscience under paragraph 2. (a) of the Charter,”¹⁴² Mr. Justice Linden referred to Madam Justice Wilson’s concurring reasons in *Morgentaler* as instructive. After reiterating Justice Wilson’s comments, Justice Linden noted

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).¹⁴³

Subsequently, Justice Linden articulated the character of a test for assessing any interference with freedom of conscience. Such “...would require a claimant to show that his or her conscientiously held moral views might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial.”¹⁴⁴

The case law adduced here provides evidence in the reasoning of Wilson, J., Adams, J., and Linden, J.A. of their awareness that ‘freedom of conscience and

¹⁴² *Ibid.* <http://reports.fja.gc.ca/fc/1994/pub/v3/1994fca0277.html/> at 8.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

religion' could, given the appropriate fact pattern, be interpreted solely in terms of a claim of conscience absent a religious dimension. For Wilson, J. the decision to terminate a pregnancy is a moral decision and is an expression of a woman's autonomy. For Adams, J. 'conscience' is the larger, umbrella concept that subsumes religiously grounded claims but also admits individual autonomy and intellectual freedom. For Linden, J.A. freedom of conscience invokes strongly held moral ideas of right and wrong. To date, however, no case in Canada has been decided solely on the grounds of a claim to freedom of conscience without a religious component. It is instructive therefore to turn to the experience of the United States for examples of case law that may shed light on this issue.

Part II: Two Examples from the United States

The experience of constitutional adjudication and jurisprudential evolution in the United States is helpful in highlighting issues of 'religion' and 'conscience', so it is to the crucial steps in that experience that this thesis now turns.

In contrast to s. 2 (a) of the *Charter*, the constitutional protection for religion in the U.S. Constitution occurs in the First Amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Since, these provisions 'state an objective' it has left the interpretation of the language to the judiciary.¹⁴⁵ As a result a considerable body of case law has developed but for the limited purposes of this thesis, the focus is on two landmark cases: *United States v. Seeger*,¹⁴⁶ and the following case, *Welsh v. United States*.¹⁴⁷ Both these cases addressed claims by *Seeger* and *Welsh* respectively arguing their

¹⁴⁵ L.H.Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1988) at 1155.

¹⁴⁶ 380 U.S. 163 (1965), (hereinafter *Seeger*).

¹⁴⁷ 26 L. Ed 2d 308 (1970), (hereinafter *Welsh*).

conscientious objection to military service on the basis of their 'religious training and belief' under the Universal Military Training and Service Act (50 USC Appx § 456(j)). In both cases the U.S Supreme Court extended previous judicial reasoning into new terrain—reasoning that is relevant and illustrative for thinking about the meaning of s. 2 (a) of the *Charter*.

Seeger and Welsh

As the United States Supreme Court noted in *Welsh*¹⁴⁸, the controlling factors in *Seeger* and *Welsh* were strikingly similar. Both men had been raised in religious homes, had attended church regularly in childhood, neither had continued formal religious adherence into young adulthood and neither belonged to any organized religious group or church community. At the point of registration for Selective Service, neither had yet developed pacifist principles. Subsequently, as their views on war developed, they sought exemption from military service under § 6 (j) of the *Universal Military Training and Service Act* which permitted exemptions from military service in these terms:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.¹⁴⁹

While neither *Seeger* nor *Welsh* could sign the Selective Service form affirming that their objection to military service rested on their 'religious training and belief' as

¹⁴⁸ *Ibid.* at 316.

¹⁴⁹ *Ibid.* at 317.

defined in the statute, both did affirm their deeply held conscientious objection to taking part in wars where people were killed. "Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice."¹⁵⁰ In neither case was there any doubt about the sincerity and depth of their conviction. Their cases reached the Supreme Court because lower and appellate courts could not find evidence to satisfy their 'belief in relation to a Supreme Being' as required by the statute and as justification for granting them exemption on the grounds of conscience.

So for the first time in *Seeger*, the U. S. Supreme Court confronted the plaintiff's reliance on the authenticity and centrality of his "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed".¹⁵¹ The Supreme Court had to determine whether such satisfied the requirement for conscientious objection. In grappling with this, the Court stipulated the following test:

The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.¹⁵²

And then in assessing *Seeger*'s claim the Court noted:

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.¹⁵³

Ultimately the Court approved his claim for conscientious objector status:

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at 318.

¹⁵² *Supra* note 142 at 176.

¹⁵³ *Supra* note 142 at 319.

We think it clear that the beliefs which prompted his [*Seeger's*] objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers¹⁵⁴.

Confronting *Welsh's* claim, the Court noted that he was both more insistent and explicit than *Seeger* in denying that his views were religious. Yet *Welsh* had declared his beliefs were "certainly religious in the ethical sense of the word."¹⁵⁵ In his original application for conscientious objector status he had written:

"I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' *On the contrary; it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant." . . . *Welsh* elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," 404 F 2d, at 1081, we think *Welsh* was clearly entitled to a conscientious objector exemption. Section 6(j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs would give them no rest or peace if they allowed themselves to become a part of an instrument of war. ¹⁵⁶

What is especially noteworthy about these cases is the judicial expansion of the interpretation of section 6 (j) of the *Universal Military Training and Service Act* by the reading into the language of the statute, meaning that recognized the claims of *Seeger* and *Welsh* to conscientious objector status on the grounds that the depth and authenticity of their convictions were such as to be equated with the depth and sincerity of belief of a devoutly religious person.

Central to this reasoning, as is evident in both decisions, is the Court's reliance on contemporary progressive theology, notably that of Paul Tillich who

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* at 320.

¹⁵⁶ *Ibid.* at 320-1, (italics in the original).

conceived of 'God' as the fundamental, existential 'ground of our being'; a notion similar in its imperative force to the Kantian conception of the categorical imperative. Such judicial invocation expands the definition of 'religion' to an individual's belief in and commitment to a matter of 'ultimate concern'. Essentially, the U. S. Supreme Court established an expansive, functional definition of religion following Tillich's conception of ultimate concern. In assessing this judicial adoption of Tillich's approach to the free exercise clause of the U. S. Constitution, the Harvard Law Review noted:

To remain true to the free exercise clause, then, a definition must proceed at a level of inquiry that does not discriminate among creeds on the basis of content, that does not circumscribe the very choices which the Constitution renders inviolate.

What those choices are - and thus the meaning of religion for free exercise purposes - can therefore be limited only by a broader inquiry which looks at the role played by a system of belief in an individual's life and which seeks to identify those functions worthy of preferred status in the constitutional scheme. This is precisely the kind of inquiry at the root of the ultimate concern test espoused by Tillich and relied upon by the Court in *Seeger* and *Welsh*.¹⁵⁷

The Harvard Law Review analysis proposed four justifications for this approach: 1) by focusing on functional rather than content-based criteria, the approach is compatible with the idea of free exercise; 2) the approach is sufficiently structured so that only those beliefs of 'ultimate concern' are admissible; 3) the approach reduces the dangers of religious chauvinism, and 4) the test is appropriate to the preferred status given to the first amendment. As the Review asked rhetorically, "Indeed, what concerns could be more deserving of preferred status than those deemed by the individual to be ultimate?"¹⁵⁸

¹⁵⁷ Harvard Law Review, "Toward a Constitutional Definition of Religion" (1978) 91 Harvard L. Rev. 1056 at 1075.

¹⁵⁸ *Ibid.*

The Harvard Law Review identified two corollaries to this argument; 1) that fidelity to the purposes of the free exercise clause demands that any concern deemed ultimate be protected, regardless of how “secular” that concern might seem to be; and 2) that the only actor competent to decide what constitutes an ultimate concern is the individual believer. Further, in an extremely important and illustrative explanatory comment, the Harvard Law Review noted that:

An ultimate concern, by definition, cannot be superseded. Thus, if government orders a person to violate his ultimate concern, he will be unable to comply and, as a result, will be penalized either through criminal sanctions or loss of government benefits. The *Kauten* court recognized this when it said that religious belief “*categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.*” 133 F.2d at 708¹⁵⁹

Part III: The Conflation of Religion and Conscience

The problem with this approach, however, is that while these decisions lend credibility to the view that a secular, ethical claim of conscience is possible, they conflate the notion of religion with the notion of conscience. This is in some ways not surprising because the term ‘conscience’ does not appear in the First Amendment which is itself complicated by the dualism of prohibiting the establishment of religion while affirming the free exercise thereof. Furthermore, it does this by reducing ‘religion’ to a matter of ‘ultimate concern’ which presumably is also the paradigmatic character and significance of a claim of conscience. So for a right such as s. 2 (a) in the *Charter*, the notion of ‘ultimate concern’ is only

¹⁵⁹ *Ibid.* (italics added for emphasis)

marginally useful because it fails to distinguish between words that in common usage appear to have somewhat different meanings. The U.S. experience then, conflates the notions in ways that are jurisprudentially unworkable - at least in the Canadian context - by vitiating the conventional meanings attributed to religion and substituting Tillich's notion of ultimate concern as the defining characteristic of religion. From this perspective 'religion' becomes a matter of ultimate concern which is also the character of a claim to conscience, hence the words become, from a semantic point of view, synonymous.

Clearly this cannot work. The words 'religion' and 'conscience' do have different meanings and uses in conventional language and these must somehow be jurisprudentially recognized. The question is how?

Distinguishing Religion and Conscience

Timothy Macklem, in an extensive discussion of the democratic justification for enshrining freedom of religion in a constitution, offers a distinction that may be useful. First, Macklem distinguishes 'religion' in this way

...the term religion refers to collective participation in institutions and practices that manifest a freely given personal commitment to a particular set of beliefs, beliefs that are not based on reason alone but are held, at least in part, on the basis of faith. There are four principal elements to this definition of religion: first, institutions and practices that serve as vehicles for the collective expression of religious belief, the protection of which is the distinctive contribution of a guarantee of religious freedom; second, freely given personal commitments to the articles of religious belief; third, the articles of religious belief themselves, howsoever they may be defined; and fourth, the mode by which religious belief is held, namely, faith.¹⁶⁰

Such a definition seems plausible as a means of identifying 'religion'.

Macklem's inclusion of 'faith' as a defining characteristic of religious belief is central

¹⁶⁰ T. Macklem, "Faith as a Secular Value" [2000] 45 McGill L.J. at 27.

to his conceptualization and enables him to argue, persuasively it seems to me, that only faith "...is capable of providing the moral basis for a guarantee of freedom of religion,..."¹⁶¹ He goes on to examine the nature of faith which he contrasts with reason

When we say that we believe in something as a matter of faith, or to put it the other way around, when we say that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that which can be established by reason but is not believed for reason's sake.¹⁶²

This in turn leads to his distinction between faith and conscience where faith as a non-rational property is integral to religious belief in contrast to conscience which Macklem argues is a rationally derived understanding.

In short, religious belief is sustained by faith, conscientious belief by reason. It is true that the claims of religion and the claims of conscience frequently coincide, as in conscientious objector cases, for religion commonly asks us to believe what there is reason to believe as a matter of conscience. Yet only the claims of religion are consequently referred to as faith, for only the claims of religion are endorsed as a matter of faith. The claims of conscience, by contrast, are the product of reason.¹⁶³

The consequence of such reasoning (which unfortunately Macklem does not pursue for such is not his purpose) is that a claim of conscience is derived from a rationally examinable position. So to summarize, claims of religious freedom are grounded on faith, claims of conscience are grounded in reason.

The distinction is apparently neat but not so clean in practice as it appears because claims to freedom of religion are frequently couched as well as claims of conscience and vice-versa. Yet it is possible to consider a claim to conscience that is grounded solely on a non-religious, ethically derived basis. So, as examples, Pastor

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at 33.

¹⁶³ *Ibid.* at 36.

Jones' argument that the compulsory attendance requirements of Alberta vitiated his freedom of conscience and religion is clearly grounded in his faith. By contrast, the claim made by *Seeger* and *Welsh* in the United States appears predominantly to rest on considerations of reason that war is unethical because it inevitably involves killing other human beings, which in turn violates their affirmation of the inherent value of human life. The problem, of course, is that in the cases of *Seeger* and *Welsh*, while the rational basis for their claim appears dominant, one can never be entirely sure - given their religious upbringing - that their claim is purely rational, i.e. wholly unaffected by their prior religious upbringing. There is also the issue of the cultural context, the pervasive and sometimes not obvious influence of Judaeo-Christian doctrine and ethics throughout Western civilization, that may inadvertently affect an individual making a claim of conscience on apparently secular, ethical grounds.

Consider another example. Doukhobours, Hutterites, Menonites, Quakers are traditionally pacifist sects whose pacifism derives from their faith. In time of mandatory military conscription, representatives of these sects could legitimately argue their resistance to military service based on their historically validated pacifism and their individual commitment to these beliefs, a s.1 argument notwithstanding. A committed secular humanist, by contrast, one raised in a family of secular humanists, could in like circumstances argue an ethically grounded objection to military service not because killing is contrary to his/her religious faith but because it is ethically wrong to take another human life or because the particular war violates the principles of international law.

Similarly, those raised in religious traditions and holding devout religious beliefs could oppose abortion on the grounds that conception and human life are

God-given and may not be terminated by human agency. By contrast, others who adopt a secular view and who place unconditionally high value on the inherent right of a woman to reproductive autonomy, could affirm her right to make decisions about her reproductive activity and capacity from a purely ethical and personal point of view.

Both kinds of claims would therefore be admissible under s. 2(a): the faith-based claim to freedom of religion and the reason-based claim to freedom of conscience. If this analysis is useful, s. 2(a) could be interpreted to admit a claim purely on grounds of faith or alternatively on grounds of reason. In practice, however, these claims are likely to become conflated. This suggests that the notions of faith ('freedom of religion') and reason ('freedom of conscience') are not dichotomous but exist on a continuum with more emphasis placed on one end or other of the continuum depending upon the nature of the claim.

Nevertheless, the distinction between 'faith' and 'reason' may still be useful in clarifying the meaning of s. 2(a). Accepting Macklem's distinction would mean that Canadian courts could rely upon the evidence of an individual's faith to assess a claim under freedom of religion, and could expect that a claim under freedom of conscience would rest predominantly if not exclusively on non-religious and rationally articulated grounds. Certainly such a distinction appears broadly compatible with the origin of the language in s. 2(a), with the primary formulation of the meaning of s. 2(a) by Chief Justice Brian Dickson (as he then was) in *Big M*, and with the door being left ajar to admit a non-religious claim of conscience compatible with the position advocated by Justice Wilson (as she then was) in *Morgentaler*.

The Secularization of Conscience

Writing for the majority in *Big M*, Dickson, C.J. based his interpretation of s. 2(a) on the historical context of post-Reformation Europe and especially on the development of a commitment to religious toleration in the seventeenth century in England. Such a view recognized the prototypical linkage and intrinsic integration of 'religion' and 'conscience' embedded in the rise of dissenting Protestant denominations and in the historic stance of the Catholic Church. In this western evolution, 'religion' and 'conscience' were inextricably intertwined, interdependent and integrated notions. Given the above analysis, it seems eminently plausible to conclude that such recognition undergirded Dickson's conception of s. 2(a) as articulated in *Big M*. It is, of course, the case that for many religiously committed people, the claim of conscience is still embedded in their faith.

The face of the world, however, changes. With the advent of the enlightenment and the commitment to rationalism, modernity and scientific investigation, attitudes towards faith and conscience also altered. So the tendency to entertain claims of conscience grounded in an individually described moral or ethical position and in human rights law gathered momentum.

The U.S. experience points to the secularization of conscience when the individual's claim ensues from a rational as opposed to a faith-based source. What appears to be warranted, therefore, is the recognition that the idea of conscience is multi-dimensional and has in recent centuries, evolved from an exclusively integrated notion to one that includes the possibility of a grounded, secular claim.

Chapter V: Freedom of Conscience and Religion in a Pluralist Society

Now and then it is possible to observe the moral life in process of revising itself, perhaps by reducing the emphasis it formerly placed upon one or another of its elements, perhaps by inventing and adding to itself a new element, some mode of conduct or feeling which hitherto it had not regarded as essential to virtue.

L. Trilling, *Sincerity and Authenticity*

Underlying Intuitions of Values

In seeking to understand and appreciate the character of freedom of conscience and religion in a pluralist society, especially one like Canada with its commitment to multiculturalism, it is helpful at the outset to think in terms, as Taylor puts it, of the 'underlying intuitions of value'.¹⁶⁴ Such are the presuppositions under-girding our conventional understandings of rights, for example. So in the historic development of conscience, the foundational elements are that conscience is the property of the individual person, in which the sense of self is central. With the subsequent integration of conscience, as Aquinas characterized it, as 'reason commenting on conduct', conscience became the basis for the Catholic Christian perspective of individuals forming their consciences in conformity with the theology and teaching of the Church. From this perspective, the conscience in Catholic theology is always and necessarily contextualized in terms of the Christian (*viz*

¹⁶⁴ C. Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1982) at 41.

Catholic) conception of duty and obedience to the will of God as interpreted and promulgated by the Catholic Church.

By contrast, the occurrence of the Reformation with the ensuing struggles to establish Protestantism and ultimately the recognition of the principle of religious toleration, affirmed in the Protestant tradition both "... the principles of private judgment and the *absolute* primacy of conscience,..."¹⁶⁵ This development re-affirmed the claim of the individual conscience. The rise of Protestantism and the emergence of religious toleration as a value of civil society laid the groundwork for the individual's claim to conscience both on private, religiously affiliated grounds but also opened the door to claims based on private, non-theistic and secular grounds.

The individual's claim to conscience and the affirmation therein of private judgment on matters of personal ethical importance also carried within it the recognition of personal autonomy as another 'underlying intuition of value' with the associated notions of volition or free will, and choice. Autonomy and personal agency on matters of conscience connect in this view and provide the basis for individual claims to moral deliberation and right action. Furthermore, these values underpin much of the jurisprudential construction reflected in the *Charter*; enumerated rights, like those included in Fundamental Freedoms, Democratic Rights, Mobility Rights, Legal Rights, Equality Rights, to name only the most obvious, in establishing the rights of the individual do so in ways that recognize the 'underlying intuitions of value' identified here.

¹⁶⁵D. Armstrong, "Conscience: the Catholic Church's (Newman's) View" (1998) <http://ic.net/~erasmus/RAZ267.HTM> ct2. Emphasis in the original.

The analysis of the U.S. cases yields other insights about the character of a claim to conscience judicially recognized. In several places in *Welsh*, the U.S. Supreme Court notes and commends the 'sincerity' of the position advanced by *Seeger* and *Welsh*. Indeed the Court stipulates the appropriate test of conscience as a sincere and meaningful belief that occupies in the life of the possessor a place parallel to that filled by God in those with a devout religious affiliation. Such a view connects with Trilling's analysis of the rise of sincerity in European literature and society from the sixteenth century onwards and its contemporary manifestation as 'authenticity'.¹⁶⁶ What appears to have happened in *Welsh* is that, following Trilling's argument, the U.S. Supreme Court was instrumentally involved in the process of the moral life revising itself by recognizing and adding sincerity and authenticity to the adjudication of the claim of conscience. In so doing, however, the U.S. Supreme Court moved away from an exclusive reliance on the traditional definition of conscience as a faith based claim to one recognizing a claim based on ethics and reason, thereby endorsing a secular, ethically grounded and personal conception of conscience.

A further, and perhaps more significant 'intuition of value' that various clauses of the *Charter* possess and reflect, is the recognition and protection of 'difference' as a fundamental constitutional property. This is certainly a value that under-girds 'freedom of conscience and religion' especially so when conscience is conceptualized to admit both religious and secular claims. The variety of individual religious affiliations and ethical positions possible in a pluralist society — especially one committed to multiculturalism as in Canada — presume the value, recognition

¹⁶⁶ L. Trilling, *Sincerity and Authenticity* (Cambridge, Mass: Harvard University Press, 1972)

and judicial affirmation of difference both as a presupposition and as an interpretive principle of legal reasoning. The focus on difference and the implications of such a value for law has attracted a substantial body of legal scholarship in the United States particularly in the work of Martha Minow¹⁶⁷ and Iris Young.¹⁶⁸ In Canada the work of Charles Taylor¹⁶⁹ and Will Kymlicka¹⁷⁰ on multiculturalism brings a distinctive Canadian perspective to the discussion.

The recognition of pluralism in religion and the rise of secularism have drawn attention in the United States. Monsma and Soper in the introduction to their volume on equal treatment of religion in a pluralist society identify the significant trends giving rise to the need for their work: increasing religious pluralism in the U.S.; the growing numbers of people espousing fundamentally secular systems of belief – essentially viewing the rise of secularism as a “community of moral conviction”; and the increasing dissatisfaction with the judicial decisions of the U.S. Supreme Court in church-state matters.¹⁷¹

The last paper by Rogers Smith is particularly noteworthy; it addresses the issue of equal treatment from a liberal separationist viewpoint. In this paper Smith calls for fully equal treatment in these terms:

My call for *fully* equal treatment does not mean that rights of religious conscience cannot be placed in a ‘preferred position’, as in the Religious

¹⁶⁷ M. Minow, *Making all the Difference* (New York: Cornell University Press, 1990) and *Not only for Myself* (New York: New Press, 1997)

¹⁶⁸ I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) and *Inclusion and Democracy* (New York: Oxford University Press, 2000)

¹⁶⁹ C. Taylor, *supra*, note 52.

¹⁷⁰ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Toronto: Oxford University Press, 1996).

¹⁷¹ S.V. Monsma & J.C. Soper, *Equal Treatment of Religion in a Pluralist Society*, (Grand Rapids: Eerdmans, 1998), 1-5.

Freedom Restoration Act. It does mean, however, that rights of secular conscientious belief should be given equal preferred standing.¹⁷²

What is noteworthy here is the argument that secular conscience should be granted status equal to that of religiously grounded conscience.

The Canadian Supreme Court has not yet addressed this issue. The structural differences between the U.S. and Canadian Constitutions make it unlikely that judicial reasoning in Canada would parallel that in the United States. What is not unlikely by contrast is the possibility that the increasing multiculturalism and pluralism of Canadian society together may give rise to an increasing secularism in Canadian society which may well provoke similar challenges to established interpretations. Secularism and pluralism may generate a new definition of freedom of conscience and religion in Canada.

Ultimately the justification for such a definition must rest in the interpretation of the *Charter*. The *Charter* is the expression of liberal democracy in Canada. While the tolerance of the liberal democratic state for difference rests at the core of the challenge for judicial interpretation, the state cannot permit judicial affirmation of difference that would threaten the existence of the state itself. The question then is what range of difference could the modern liberal state permit in the quest for recognition of the right to freedom of conscience?

Developing a Judicial Test

In enumerating fundamental freedoms s. 2 of the *Charter* starts with the word '[e]veryone'....¹⁷³ On a *prima facie* and literal basis such an introductory word

¹⁷² R.M. Smith, "Equal" Treatment? A Liberal Separationist View, in Monsma and Soper, *ibid.* at 181 (italics in original).

invites the observation that by simple definition no one subject to the protection of the *Charter* is excluded from the benefit of s.2 or any of its constituent freedoms. The scope and reach of 'everyone' in s. 2 has not received definitive judicial attention. Yet, if the assumption is made that the provisions of the *Charter* apply to Canadians, permanent residents and in some case visitors to Canada and if this is the definition of the class 'everyone', then it seems plausible to argue that s. 2 (a) should be interpreted to include both those who have a clear religious affiliation as well as those who are atheist, agnostic or otherwise non-believers. These latter individuals should, it seems reasonable to argue, also be able to claim the protection of s. 2 (a) by virtue of their conscience absent a religious affiliation or belief. Were this not so, those without a religious affiliation would be denied the right that s. 2 (a) confers. Clearly that should not be the case. Furthermore, such an interpretation would be compatible with the 'broad and generous' perspective on Charter interpretation.

So the central issue facing the Supreme Court of Canada is how to recognize freedom of conscience in s. 2 (a) of the *Charter* as the basis for constitutional protection in an instant case. What test should or might the Court employ to determine whether or not the claim of an individual qualifies for constitutional protection under freedom of conscience? How should or might the Court distinguish between a claim of conscience that merits constitutional protection in contrast to other strongly held positions that could result in non-compliance with law? How should or might the Court distinguish between claims of conscience putatively grounded in reason that satisfy an appropriate test in contrast to claims that might

¹⁷³ P.W.Hogg, *Constitutional Law of Canada*, vol. 2 (Scarborough: Thomson Carswell, 1997) at 34:1-2..

be dismissed simply as illogical or flawed, as sheer opportunism, as trivial and insubstantial, or as convenience wrapped in constitutional language?

Adjudicating a claim of conscience under s. 2 (a) requires a court of competent jurisdiction to apply an appropriate test to determine whether the facts and characteristics of the presented claim merit constitutional protection. Such a test cannot just be a conceptual layout of key elements; it must permit pragmatic legal application. Without that, the test is simply a conceptual reification disconnected from the real world of judicial adjudication. So, for example, the test must enable the Court to distinguish constitutionally valid claims of conscience from those it might justifiably deem specious or not compelling. A good example of such a test is the *Powley*¹⁷⁴ test where the Supreme Court identified the conditions that must be satisfied to establish the eligibility of Métis claimants to aboriginal status under the Charter.

In *Powley*, the Court developed a clear and straightforward test suitable to the post-contact reality of the Métis. The first step required the affirmation of the Métis' right to hunt for food as contextually recognized and site specific. The second required the determination of the validity of the claim of the Métis people to being a historic rights-bearing community with evidence of a physical presence in the Upper Great Lakes region and evidence of shared customs, traditions and a collective identity. The third required the affirmation of the existence of an historic and present community recognizing that aboriginal rights in the case could only be exercised through the individuals' ancestrally based membership in that community.

¹⁷⁴ *R v. Powley*, [2003] S.C.C. 43. File No.: 28533

The Court laid out the key elements of the test in these terms. Claimants must self-identify as a member of the Métis community; they must present evidence of an ancestral connection to the historic Métis community; and they must demonstrate their acceptance by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed.¹⁷⁵

It is the clarity and simplicity of the *Powley* test that commends its mention here. At present no similar test relating to freedom of conscience exists. And while it may prove difficult to devise such a clear and straightforward test because claims of conscience are obviously not as concrete as claims covered by *Powley*, nevertheless this part of the discussion focuses on beginning to articulate the components of such a test and to work out its utility in application.

Collating the Threads

In order to articulate such a test, however, it is necessary to review the conceptual threads characteristic of conscience yielded by the preceding polyvocal cultural analysis. These substantive threads, collated here, provide a backdrop for the subsequent discussion of a putative judicial approach to claims of conscience and the development of a test incorporating the requirements of coherence theory. What insights into the nature of conscience, then, do these voices yield?

At the outset it is useful to recall the presuppositions set out in Chapter I. The first is that law is fundamentally a cultural institution and the *Charter* is the institutionalized expression of prized cultural values in a constitutional design; as such the *Charter* serves as the constitutional template in terms of which contested cases are interpreted. The second is that the centerpiece of the law is the judicial

¹⁷⁵ *Ibid.* at § 31-33.

decision in which the law is interpreted, applied and made real through the process of judicial review. The third is that judicial decision-making or adjudication relies on the medium of language; it is the language of judgments that establish judicial meaning and subsequently establish precedents, inviting thereafter analysis and thoughtful scrutiny. And the fourth is that judicial decision-making often occurs in times of changing social conditions and attitudes; as a result the changing social context can influence judicial interpretations. These presuppositions come into play in this discussion as the putative meaning to be attributed to 'freedom of conscience' is examined and framed in a potentially useful judicial form.

The examination and discussion of the dramatic examples in Chapter II provide one set of culturally defined voices on the nature of conscience. Common to these examples involving Socrates, Antigone and More is the prototypical and foundational tension between the political authority of the state to make and enforce laws for the common good versus the challenge of the individual to preserve his/her personal autonomy as an independent moral agent. The tension, in short, is between the authority of the state and the autonomy of the individual, between the state's demand for compliance and the individual's preservation of personal integrity, between the state's power to coerce and the individual's affirmation of volition.

The heuristic utility of these dramatic examples is that they demonstrate that the claim of conscience is wholly and irredeemably an individual standard, discerned by the individual who recognizes and then acts on its categorical, imperative moral force. Thereby individuals, whether Socrates, Antigone, or More, affirm in their different ways, the fundamental integrity and dignity of the self — their moral autonomy in the face of coercive state authority.

Reviewing the conceptual development of conscience from its classical roots in Greek and Roman thought in Chapter III yielded the idea of conscience as the ‘inner witness’. With the integration of this notion with Christianity, the ‘inner witness’ evolved into the voice of God speaking to personal dilemmas of good and evil, right and wrong. As such the ‘inner witness’ became the law giver to the individual, expressing the will of God. Conscience and religious belief became intimately linked and inseparable. Ultimately the Reformation in England created the political conditions of religious persecution — at different times both Protestant and Catholic — such that the quest for religious toleration arose on pragmatic grounds voiced in terms freedom of conscience and religion. Over time the principle of religious toleration emerged as the dominant motif and as the basis for a pragmatic accommodation of religious difference. Conscience and religion thus became integrated.

The judicial history of freedom of conscience and religion in Chapter IV focuses particularly on the incorporation of this language in the *Charter* and its subsequent interpretation, especially by Chief Justice Dickson in *Big M*. While the language of ‘freedom of religion’ had entered constitutional discourse before the *Charter* became part of Canada’s constitutional regime, the origin of the precise language in the *Charter* itself seems to have resulted from the influence of Pierre Trudeau. In his earlier working paper proposing *The Canadian Charter of Human Rights*¹⁷⁶, then Justice Minister Trudeau had proposed widening the guarantee of freedom of religion to subsume under the rubric of freedom of conscience those without a religious affiliation.

¹⁷⁶ Trudeau, *Canadian Charter of Human Rights*, *supra*, note 107.

The attribution of more extensive meaning to s. 2 (a), however, attended the decision of the Supreme Court in *Big M*. Here particularly significant distinctions in an impressively eloquent opinion directed attention to the meaning of 'freedom' in the context of conscience and religion. The Court held that in a broad sense freedom embraces both the absence of coercion and constraint in matters of conscience and religion as well as the right to manifest religious beliefs and practices providing such manifestations do not interfere with like rights for others entitled to the same freedom. It is clear from the Supreme Court's reasoning that the government may not coerce individuals to affirm a specific religious belief contrary to their conscience nor to engage in religious practices for a sectarian purpose.

Chief Justice Dickson's characterization of 'freedom of conscience and religion' in *Big M* as an integrated concept has substantially influenced subsequent judicial decisions. Few decisions have recognized the possibility that a claim of conscience absent a religious affiliation could be advanced. Notwithstanding the possibility that Justice Wilson's argument in *Morgentaler* mistakes who s. 2 (a) was intended to protect, her reasoning opens the door to a broader conception of conscience. So does Justice Linden's reasoning in *Roach* and Justice Adam's reasoning in *Dieleman*.

Yet we have to turn to the experience of the United States to find cases in *Seeger* and *Welsh* that actually affirm a secular, ethical claim to conscience. What is particularly noteworthy is the evident reliance of the U.S. Supreme Court on the sincerity of the claims by Seeger and Welsh, their depth of commitment and the personal ontological significance of their positions in establishing the validity of their claims. The Court also established a useful test based on recognition of "[a] sincere

and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”¹⁷⁷ Underlying this is the recognition of a position that is unconditionally serious for the claimant; that is, the claimant’s position invokes fundamental issues of personal epistemology and ontology. Finally, Trilling and Taylor’s recognition that ‘sincerity’ as a value has evolved in the modern era into ‘authenticity’ as a dominant construct and value, adds another essential thread to the collation of threads from the polyvocal cultural analysis.

How then is the Court to assess the putative claim to conscience absent a religious affiliation or grounding? Whether or not a presented claim of conscience is eligible for constitutional protection involves the Court in determining the validity of the claim. Another way of considering the validity of the claim is for the Court to determine the coherence of the claim. Such a task requires assessing the coherence of the propositions forming the claim or lying at the heart of the claim. Assessing the coherence of these propositions would enable the Court to establish the validity of the claim. The proposal here is that the Court take into consideration both the substantive threads of meaning elicited through the polyvocal cultural analysis and the formal requirements of establishing the coherence of the propositions forming the claim.

Validity Through Coherence

Judicial assessment of rationally defensible principles would, it is submitted, be facilitated through an assessment of the coherence of a claim in terms of its constitutive properties of consistency, comprehensiveness and cohesive unity. These

¹⁷⁷ *Seeger, supra* note 142.

criteria refer to the extent to which the propositions under-girding a claim of freedom of conscience are coherent—that is, that the set of propositions do not demonstrate any incompatibility or conflict with each other in the set; that that they are consistent—that is, that each proposition in the set relates to each other and that together they form a single cohesive unit; and that the argument, through its constitutive propositions, demonstrates coherence. Assuming a positive assessment of these criteria, the court would be able to conclude that the claimant's position was coherent in these circumstances and hence would establish eligibility for constitutional recognition.

Adopting coherence theory to resolve the difficulty of assessing the validity of a claim of conscience under the *Charter* requires appreciation of the properties of the theory. Coherence theory is a criterial approach to specifying whether propositions relate to one another coherently. "The 'coherence' of a propositional set is accordingly to be understood as requiring not simply (1) the obvious minimum of *consistency*, but also (2) the feature of being *connected* in some special way."¹⁷⁸

Rescher goes on to specify the conditions that must be met to satisfy the requirements of a workable coherence theory. The five most relevant conditions are:

1. The truth of a proposition is to be assessed in terms of its 'coherence' with others: whether or not it is to be classed as true depends largely or exclusively on its relationships of compatibility or conflict with others. Correspondingly,
2. The issue of the truth of a proposition is a *contextual* matter in the sense that one cannot in general determine whether or not a proposition is true by inspecting it in isolation, but only by analyzing it in the setting of other propositions. Accordingly,

¹⁷⁸ N. Rescher, *The Coherence Theory of Truth* (Oxford: Clarendon Press, 1973) at 33.

3. The truth of propositions is crucially dependent on matters of *systematization*, that is, of their logical linkages with other propositions together with which they form a connected network. Thus

4. Truths must constitute a *system* that is *consistent* and whose members are appropriately *connected*; they must be interrelated so as to form a single cohesive unit, whose very cohesiveness acts to exclude other possibilities.

5. Moreover, this systematic unit must be sufficiently large to embrace the domain of real fact; it must exhibit a certain completeness — nothing can be omitted without due warrant. Accordingly, the domain of truth is determined through contextual considerations of compatibility and conflict and must be ‘systematic’ in being consistent, comprehensive, and cohesively unitary. These several systematic facets must be predominant in the coherence determination of truth.¹⁷⁹

While the establishment of the ‘truth’ of propositions is not the primary task of judicial decision-making at the appellate level in contrast to trial decisions, it is nevertheless useful to distill the essentials of these conditions. Such distillation permits the identification of those necessary properties of a test to establish the coherence or validity of a claim of conscience under s. 2 (a). Such properties include the contextual significance and compatibility of the propositions that form the basis of the test and an ensuing claim, and the systematic character of these propositions evident in terms of their consistency, comprehensiveness and cohesive unity.

A Proposed Test

The preceding chapters and discussion have documented and displayed an array of voices speaking about conscience. These voices and their associated discourses have yielded some important insights about conscience; insights that permit the framing of a set of general propositions. These propositions would, it is argued, provide the basis for a test suitable for use by the Canadian Supreme Court

¹⁷⁹ *Ibid.* at 43-44.

in adjudicating the claim of an individual seeking constitutional protection under 'freedom of conscience' in s. 2 (a) of the *Charter*. Such propositions would also need to meet the requirements of coherence theory.

The first proposition is that a claim of conscience is intrinsically the stance of an individual, often outside a group, organization, institutional setting or faith tradition. So, the claim is not usually relational; it does not necessarily draw its significance from an established social context. As exemplified in the examples drawn from tragic drama, the claim of conscience is reflected in the refusal of the individual to comply with the requirements and edicts of the state. Central to this refusal to comply is the preservation of personal autonomy.

The second proposition is that while conscience is inextricably conflated or bound up with the right to freedom of religion, religious belief is not essential to the claim of conscience. A claim of conscience can be purely secular and ethical in character. A corollary of this proposition is that the claim of conscience is predominantly based on reason; in contrast the claim to religious freedom is predominantly based in faith.

The third proposition is that the claim of conscience rests for its validity on the authenticity and coherence of the position advanced by the individual and evidence that the individual has demonstrably held this position over time as a personal categorical imperative and consistent principle of individual integrity. Authenticity and coherence are foundational elements of the claim of conscience and comprise one strand of the judicial test.

Given these propositions it is now possible to articulate the elements of the proposed test. The test has three essential properties that the Court would need to

consider in adjudicating claims of conscience such as those in the following hypothetical scenario and like cases. Claims of conscience arise from an evident conflict between state action on the one hand and an individual's refusal to comply on the other. The individual's refusal to comply is based on a position of personal significance where the individual affirms the integrity of the self and the right to personal autonomy in tension with the requirements of the state. Such tension may require judicial consideration to determine whether or not the individual's claim merits constitutional recognition and protection.

The essential requirements of the proposed test are threefold. First, that the claim advanced in the case reflects an individual refusing to comply with state action on the basis of a deeply held personal position. Second, there must be a preponderance of evidence that the claimant's position is authentic and coherent -- that it represents a moral or political commitment justified by reason rather than faith. And third, there must also be a preponderance of evidence that the claimant has either demonstrably held this position over time as a consistent principle of individual integrity, or, as a result of significant personal reflection and introspection, has recognized the existential force of a personal categorical imperative. 'Existential force' implies the recognition of the unconditional ontological gravity of the matter at hand for the individual. Assuming that these three requirements are met by the case in question, the Court would arguably be justified in upholding the right to 'freedom of conscience' under s. 2 (a). Even so, the Court would still need to assess and decide the applicability of s. 1 of the *Charter* through the *Oakes* test.

The legal framework for analysis under s. 1 and the test for the government to justify a *Charter* infringement was set out by the Supreme Court of Canada in *R v. Oakes*¹⁸⁰. In *Oakes*, the accused was charged with unlawful possession of a narcotic for purposes of trafficking. The accused challenged the constitutional validity of s. 8 of the *Narcotics Control Act* which provided that if the Court finds an accused in possession of a narcotic, the accused is presumed to be in possession for the purposes of trafficking and that, if the accused cannot prove on a balance of probabilities that he/she did not have the intent to traffic, he/she must be convicted of trafficking. The Supreme Court of Canada held that the section violated the presumption of innocence in s. 11(d) of the *Charter* and was not justified under s. 1.

In *Oakes*, Chief Justice Dickson set out the purpose of s. 1 as follows:

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured.¹⁸¹

Chief Justice Dickson also laid out a fundamental principle to guide the application of the justificatory test:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.¹⁸²

¹⁸⁰ [1986] S.C.J. No. 7 [hereinafter *Oakes*].

¹⁸¹ *Ibid.* at § 63.

¹⁸² *Ibid.* at § 64.

In *Oakes*, the Court established that the onus of justifying the limit on the *Charter* right or freedom rests on the party seeking to uphold the limitation.¹⁸³ The test is on a preponderance of probability and must be applied rigorously.¹⁸⁴ In his judgment, Chief Justice Dickson outlined the *Oakes* test as follows:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *R. v. Big M Drug Mart Ltd.*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R. v. Big M Drug Mart Ltd.*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, at p. 352. Third, there must be proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”.¹⁸⁵

The Court went on to state:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or

¹⁸³ *Ibid.* at §§ 66 & 67.

¹⁸⁴ *Ibid.* at § 67.

¹⁸⁵ *Ibid.* at §§ 69 & 70.

groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.¹⁸⁶

In *Oakes*, the Court held that Parliament's objective of decreasing drug trafficking could be characterized as pressing and substantial. However, the Court held that there was no rational connection between the basic fact of possession of illegal drugs and the presumption that possession was for the purpose of trafficking.

In the first stage of the *Oakes* test, courts must consider whether the purpose of the impugned legislation is sufficiently pressing and substantial enough to warrant overriding a *Charter* right. Once a pressing and substantial objective is recognized, the second stage of the test requires courts to assess whether the means chosen are reasonable and demonstrably justified. In turn, this requires the application of a form of proportionality test with three elements. The first element requires courts to decide if the restriction on the *Charter* right is rationally connected to the law's pressing and substantial objective. The second element is the principle of 'minimal impairment'; courts must decide whether the proposed restriction impairs the *Charter* right minimally or more than necessary to achieve the objective of the legislation relative to alternative measures to achieve the objective in question. The Court clarified that even if the first two elements are met, the third might not be satisfied if the deleterious effects of the measure on individuals and groups were so severe that the measure could not be justified.

¹⁸⁶ *Ibid.* at § 71.

Subsequently, in *Dagenais v. Canadian Broadcasting Company*¹⁸⁷, the Supreme Court of Canada refined the proportionality element of the *Oakes* test and held that “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.”¹⁸⁸

The *Oakes* test then comes into play after the establishment of the validity of the claim to freedom of conscience under s. 2 (a). A hypothetical scenario illustrates this application.

Two Hypothetical Scenarios: Musa Razik & Sven Olsson *

Masala Razik had come to Canada as an infant with her parents, Musa and Nimo Razik, when they had left Somalia as refugees fleeing from the ethnic violence in the civil war there. Settling in the Somali community in Toronto, the family had established themselves quickly and had prospered. Shortly after they arrived in Canada, Masala’s brother Mohammed was born. After five years as landed immigrants, the family decided to remain in Canada permanently and obtained Canadian citizenship. The children went to school, learned to speak English fluently and adapted well to living in Canada, at the same time integrating effectively into the Somali-Canadian community in Toronto.

As Masala approached puberty, however, Musa Razik became concerned that his daughter should have the culturally sanctioned ritual of female circumcision

¹⁸⁷ [1994] 3 S.C.R. 835; 120 D.L.R. (4th) 12.

¹⁸⁸ *Oake*, *supra* note 174 at § 95.

* The names and details in these cases are entirely fictional and have no relation in fact to any living person. Any similarity is entirely coincidental.

performed on her. Inquiring in the Somali community about arrangements for the operation, Musa found out that the Government of Canada had passed legislation in 1997 prohibiting female circumcision as a form of genital mutilation. Consulting with a lawyer, Musa learned that he was entitled to 'freedom of conscience and religion' under the *Charter*. So he challenged the federal legislation on the grounds that the legislation fundamentally impaired his freedom of conscience by banning a ritual practice that was deeply embedded in his culture.

The Ontario Divisional Court rejected Musa's challenge to the federal legislation. The Court concluded that while Chief Justice Dickson in *Big M* acknowledged that a truly free society accommodates a wide variety of beliefs, diversity of tastes, customs and codes of conduct, not all such tastes, customs and codes of conduct are entitled to constitutional protection. The Court recognized that whereas female circumcision may be a ritually sanctioned cultural practice in Somalia and other parts of Africa, it is not culturally sanctioned in Canada. The argument brought by Musa Razik that such a practice should merit constitutional protection under his entitlement to freedom of conscience failed to convince the Court. Even taking into consideration the fact that the practice represents a real cultural difference and hence was eligible for judicial recognition under s. 23, failed to establish the constitutional viability of Musa's claim.

In rejecting Musa's claim the Court relied upon the reasoning of the Supreme Court in *R.B v. Children's Aid Society of Metropolitan Toronto*, a case involving a Jehovah Witness' child and parental opposition to a blood transfusion

The appellants [parents] proceed on the assumption that Sheena is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, Sheena has never expressed any agreement with the Jehovah's Witness faith,

nor, for that matter, with any religion, assuming that any such agreement would be effective. There is thus an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not hold a religious belief. In fact, denying an infant necessary medical care could preclude that child from exercising any of her constitutional rights, as the child, due to parental beliefs, may not live long enough to make choices about the ideas she should like to express, the religion she should like to profess, or the associations she should like to join. "Freedom of religion" should not encompass activity that so categorically negates the "freedom of conscience" of another.¹⁸⁹

While the Court acknowledged that the practice of female circumcision offends the sensibilities of Canadians, the Court rejected Musa's argument on the grounds that the *Charter*, as an expression of culturally endorsed values, does not permit actions by parents that cause harm to their children or that violate their children's constitutional entitlements. Female circumcision, in the view of the Court, would deny to the victim the full enjoyment of her rights to human autonomy and would offend the inviolable rights of the female person, hence was constitutionally impermissible.

Sven Olsson, 23, had grown up in Ottawa, the youngest son of a family of Canadian citizens with Swedish roots. His uncle, Olof, had represented Sweden at the United Nations and had been much influenced by the commitment and example of his senior colleague, Dag Hammarskjöld, Secretary-General of the United Nations until his untimely death in 1961. Sven, in turn had been close to his uncle Olof, developing through this relationship a deep and abiding interest in the idea and work of the United Nations.

¹⁸⁹ *R.B. v. Children's Aid Society of Metropolitan Toronto* [1995] 1. S.C.R. 315 at § 231, [1994] S.C.J. No. 24 File no.23298.

During his junior years in high school in Ottawa, Sven had joined the school's United Nations Club and had participated actively in the work of the Club throughout his high school years. In grade 10 he became the Club's secretary-treasurer. Subsequently in grade 11 he assumed responsibility for arranging the Club's program of visiting speakers bringing to the club's functions representatives from the local chapter of the United Nations Association in Canada. Ultimately, in grade 12, he became the Club president, a position he held until he completed grade 13. Chosen valedictorian of his graduating class, young Sven spoke of the quintessential importance of the rule of law in international relations and commended the expression of this commitment through the United Nations. His uncle Olof, now elderly, was in the audience.

Sven entered the University of Ottawa to complete his B. A. in Legal Studies as a precursor to a career in law—not surprisingly he intended to specialize in international law. He graduated in June 2003. In his degree, he wrote his Honours Essay on “Canada and the United Nations” in which he explored the role that Canada had played in the framing of the United Nations Declaration of Human Rights through the leadership of John Humphries, and the ensuing development of Canada's role through the following decades. His particular interest lay in tracing and affirming Canada's commitment to the value of the rule of law in international affairs, the principle of multi-lateralism in United Nations' interventions sanctioned by the Security Council, and the fundamental respect due to the provisions of the UDHR.

September 11, 2001, or 9/11 as it is now known, radically changed the international scene. The terrorist attacks on the World Trade Centre in New York

had resulted in the dispatch of Canada's volunteer troops to Afghanistan. With peacekeeping commitments elsewhere and with decades of financial cutbacks, the Canadian armed forces were seriously overextended. As a result, when the Government of Canada acceded to pressure from the United States and Britain to participate in the invasion of Iraq by committing two brigades of infantry and mechanized units, Canada was short on deployable military formations. Despite loud and voluble opposition, Canada introduced federal legislation "The Emergency Conscription Act." This Act required the registration of all young men between 18-25 for mandatory military service; the registration applied to Canadian citizens and to landed immigrants alike.

Sven received his "call-up" papers during the fall of 2003. Wholly opposed to a war that, in his view, lacked an authoritative United Nations mandate and that violated the United Nations commitment to preserve the right of peoples to self-determination, Sven challenged the legitimacy of "The Emergency Conscription Act." He argued that the Act, as the expression of the will of the Government of Canada, violated his freedom of conscience under s. 2 (a) of the *Charter*. Sven could not, in conscience, comply.

The Ontario Divisional Court rejected his challenge to the federal legislation on the grounds that, following the Supreme Court's reasoning in *Big M*, s. 2 (a) is an 'integrated' concept where a religious or faith-based position is necessary to sustain a claim to 'freedom of conscience and religion.' Since Sven had argued his claim solely on the basis of his rational commitment to the principles of international law, the absence of a faith-based element rendered his argument unsustainable in the judgement of the Divisional Court.

Sven appealed to the Ontario Court of Appeal. The Court of Appeal recognized that Sven's claim to freedom of conscience could be sustained solely on the grounds of his evident, sincere and rational commitment to the principles of international law without the presence of a faith-based component. Nevertheless, the Court held that the requirement of mandatory military service was a reasonable limit in a free and democratic society. Sven appealed to the Supreme Court on the grounds that his entitlement to freedom of conscience should not in these circumstances be vitiated by the limits of s. 1. The Supreme Court of Canada was then faced with the challenge of sorting out both the meaning of s. 2 (a) and the appropriateness of the s. 1 limitation.

Application to Hypothetical Scenarios

Do the hypothetical scenarios involving Musa Razik and Sven Olsson satisfy the proposed test? In the case of Musa Razik, the Court would probably have found that Musa's advocacy of female circumcision for his daughter Masala was essentially the stance of an individual acting alone but would also have recognized that Musa's ethnic background and cultural context had to be recognized in assessing his position. Indeed Musa's argument in favour of female circumcision rested exclusively on his wish to observe the ritual practice of his cultural tradition. In this sense, his argument was predominantly secular and cultural in character and represented a deeply held personal position. By contrast, the Court would probably have concluded that while Musa's position was authentic and was a deeply seated cultural stance on his part, his advocacy of female circumcision would have failed the test of coherence. It would have done so because Musa's bid to impose female circumcision on his daughter required the recognition and assertion of his autonomy

for the express purpose of infringing Masala's autonomy. Such a proposal would have been deemed wholly inconsistent with his constitutional responsibility as a parent to uphold and preserve his daughter's autonomy.

Applying the s. 2 (a) test in Sven Olsson's case might well result in the Court sustaining his claim to freedom of conscience. Sven's refusal to accept conscription for service in Iraq was evidently the decision of an individual acting out of a deep and considered position. Sven's story demonstrates that he had developed his belief in and commitment to the United Nations and its role in international law over a considerable period of time. His upbringing in a family connected to the work of the United Nations, his experience participating in the United Nations Club at school, his subsequent studies at the University of Ottawa, all provided a clear preponderance of evidence that his stance respecting his refusal to serve in Iraq arose from a deeply held and consistent personal position having the existential force of a categorical imperative. So it would have been plausible for the Court to conclude that Sven's stance was authentic.

Similarly, the Court would likely have found Sven's position to be coherent. Sven held that the war in Iraq to which he was summoned was not appropriately sanctioned by the United Nations and hence was illegal. Such a stance was evidently coherent because this position was consistent with Sven's commitment to international law and his belief in the principle of multi-lateralism. His opposition to the state's requirement for him to engage in military service arose from his recognition that by agreeing to serve he would have fundamentally compromised his personal integrity. In Sven's view, federal legislation was being used to promote and prosecute a war that was inherently illegal because the war lacked an authoritative

United Nations mandate. To comply with the 'call-up' notice would have subverted all he had come to value and understand about international law.

Finally, given Sven's long standing commitment to the principles of the United Nations and to those of international law, the conclusion seems warranted that he had demonstrably held this position over time as a personal categorical imperative and as a consistent principle of individual integrity. So it seems probable that the Court in applying the s. 2 (a) test would conclude that Sven's argument satisfied the test and the criteria of coherence and would sustain Sven's claim to freedom of conscience.

The Court would then have to consider the applicability of the *Oakes* test. In *Olsson*, the federal government would have the onus of demonstrating that the conscription of Sven to serve in Iraq is a sufficiently pressing and substantial national policy objective to justify overriding Sven's right to freedom of conscience. The Court would have to balance the national interest as articulated in the federal legislation with Sven's constitutional entitlement under the *Charter*. The Court's decision would necessarily depend upon the complexion of the Court at the particular moment of judicial decision. As Macklem reminds us "...any particular conception of a fundamental right is ultimately grounded in the political and philosophical values to which the judge passing judgment adheres."¹⁹⁰

Since Sven Olsson's case is hypothetical, the judicial resolution must also be hypothetical. My sense is the Court might well find that Sven's constitutional entitlement to freedom of conscience as a fundamental freedom enunciated in the *Charter* should not be overridden by the federal conscription requirement. Judicial

¹⁹⁰ P. Macklem, "Freedom of Conscience and Religion in Canada" (1984) 42(1) U.T.Fac.L.Review 50.

recognition that freedom of conscience has been fundamental to the historical development of political and social institutions in Canada, might impel the Court to conclude that the federal conscription requirement is neither sufficiently pressing nor substantial enough to warrant overriding Sven's freedom of conscience.

Adopting this posture, the Court would essentially be saying that restricting freedom of conscience, that is, by coercing Sven's compliance with law through state mandated action, could not be justified in these circumstances.

Epilogue

The claim of conscience is complex and this inquiry has focused on the central conceptual dimensions of conscience from a polyvocal cultural perspective. In particular, the inquiry has focused on those dimensions that could be invoked to justify in constitutional terms a secular, ethical claim as opposed to one with religious grounding. To date, however, no legal challenges to state action have arisen in Canada from an exclusively secular, ethical perspective. Such remains to occur.

This inquiry, while revealing the existential complexity of the claim of conscience has also provoked other questions. Why, for example, do some individuals challenge state action on grounds of conscience while others in like circumstances do not? What is it about these individuals, their upbringing, their education, their capacity for introspection, reflection and moral deliberation that enables them to recognize the existential force of the tension they face and refuse to comply with state action? Two further examples illustrate the complexity of these decisions for the individual.

Tom Berger, in his book *One Man's Justice* recounts the case of Richard Price who in April 1985 had deliberately leaked a confidential cabinet report. Since he had

breached his oath of confidentiality through this act, he was fired from his position as director of policy and program consultation in the Department of Indian and Northern Affairs. Subsequently Richard Price was charged with criminal breach of trust. Berger successfully intervened on his behalf but notes in his narrative of the case “[f]or Richard Price, it was a matter of conscience. He felt he had a higher duty to the public interest than the duty he owed to the government of the day.”¹⁹¹ It appears that Richard Price was motivated by his own sense of integrity to the public interest. Yet Tom Berger notes elsewhere in the story that Richard Price was also an ordained United Church minister who possessed a ‘Christian conscience.’ One is left with a question about the ethical significance of being an ordained minister in leading Price to act on an ostensibly secular basis—his sense of duty to the public interest.

Recently, the Globe and Mail carried a story under the headline “The Soldier Who Refuses to Fight”.¹⁹² The story concerns Jeremy Hinzman, a U.S. soldier who refused to ship out with his unit—the second battalion of the 504th Parachute Infantry Regiment—for Iraq. He deserted his unit, crossed the border into Canada with his wife and child and is applying for refugee status here. His chances of success are apparently slim; nevertheless, he is using his conscientious objection to serving in Iraq and the likelihood of persecution if he is returned to the United States as the basis for his refugee claim.

Over many months of soul-searching, alone and with his family, Jeremy had become convinced that the invasion of Iraq was an international human rights

¹⁹¹T. R. Berger, *One Man's Justice* (Vancouver: Douglas & McIntyre, 2002) at 166.

¹⁹²M. Valpy, “The Soldier Who Refuses to Fight” *The Globe and Mail* (7 February 2004) F3.

violation in which he could not morally take part. This part of the story bears a striking resemblance to the hypothetical scenario involving Sven Olsson. The story of Jeremy Hinzman, however, has religious connections. Michael Valpy reports that Jeremy had become interested in Buddhism before enlisting in the army. He evidently submitted an eloquently written explanation of how spiritually he had changed his mind about serving in the military and had requested a transfer to non-combatant status. Valpy quotes Hinzman as having written

...that he had entered the army "to be part of a force that was working to do good...to help stem the tide of senseless conflict...Although I still have a great desire to eliminate injustice, I have come to the realization that killing will do nothing but perpetuate it. Thus, I cannot in good conscience continue to serve."¹⁹³

It is not clear how much of Jeremy Hinzman's decision to claim conscientious objection to the war in Iraq grew out of his interest in Buddhism or to the influence of the Quakers with whom he associated both in the United States and in Canada following his arrival here. Yet it appears clear from the story that his grounded opposition to involvement in the war in Iraq arose from his reasoned conclusion that the war constituted a violation of international law. The story leaves the impression that reason predominated in his moral deliberation.

The claim of conscience, then, especially in a pluralist and multicultural society like Canada will be framed in some cases from a distinctively religious perspective and in some cases from a secular, ethical perspective. In some cases both elements—faith and reason—will be present. What is certain is that the *Charter*, if it is to be the 'living tree' of constitutional development, will necessarily have to admit both forms of claims.

¹⁹³ *Ibid.*

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