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**RESPECTING RELIGION AND CONSCIENCE  
UNDER THE CHARTER**

**BY SHAWN FLYNN**

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PROFESSOR VINCENT DEL BUONO**

**UNIVERSITY OF OTTAWA,  
SEPTEMBER, 1989.**



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## I INTRODUCTION

With the proclamation of the Charter, our judiciary has been forced to address sensitive issues of religious and conscientious freedom that they seldom had to cope directly with in the past. This is not to say that issues of religious controversy were unknown before the Charter; in fact, quite the contrary is true.<sup>1</sup> But because our constitution previously made no express provision for the protection of this liberty, except for certain denominational education protections found in what is now s.93 of the Constitution Act, 1982, religious discrimination was always dealt with in the context of the central issue of prior constitutional review - that of legislative jurisdiction. The enactment of the Canadian Bill of Rights, which recognized and declared the fundamental freedom of religion, in no appreciable way changed this state of affairs for reasons that are only too well known. Consequently, our legal system never consistently or comprehensively came to grips with the meaning or scope of this civil liberty before. And in result, it could and did, regrettably, produce some decisions that today, at least, seem unduly intolerant and unfeeling.<sup>2</sup>

What the Charter has ensured, however, is the recognition of certain values - the s.2(a) freedom of conscience and religion, the s.15(1) right of religious equality, and, perhaps, a s.7 liberty of conscience - as constitutional interests that demand open and straightforward debate. By entrenching these various religious rights and freedoms as part of "the supreme law of Canada",<sup>3</sup> it has made them express limitations on the state's authority and express guarantees of political respect for religion and conscience. Thus these liberties endure as substantive standards of review in their own right, and accordingly, they must be approached in their own terms.

A number of significant court challenges have already initiated the process of defining the essence and purview of these various provisions. To briefly summarize, it has been decided that the extension of full funding to Catholic separate high schools in Ontario is immunized from a s.15 attack by the educational guarantee in s.29 of the Charter.<sup>4</sup> It has also been established that federal Sunday observance legislation violates s.2(a),<sup>5</sup> whereas some similar provincial legislative schemes both do and do not.<sup>6</sup> Moreover, it appears that the right to individual liberty under s.7 may afford a degree of spiritual or conscientious autonomy in addition to, or

supplementary to the freedom encompassed by s.2(a).<sup>7</sup> Furthermore, it has been held that education regulations requiring religious instruction in public schools violate no Charter liberties at all,<sup>8</sup> however, equivalent regulations requiring religious exercises have been found valid in Ontario by one lower court,<sup>9</sup> and invalid on appeal<sup>10</sup> (the latter ruling being followed in British Columbia).<sup>11</sup>

The key question, of course, is: will these sections have a significant impact on the spiritual life of Canadians? The above survey of recent religious jurisprudence gives some indication of the probable answer. Generally, it is unrealistic to expect any of the Charter's guarantees to produce a social revolution.<sup>12</sup> But clearly, in terms of its religious provisions, our new constitution does afford the judiciary the opportunity to correct the deficiencies of the past, and to measurably enhance the quality of sectarian freedom and equality in this country. Hence, it does not seem unrealistic to hope that, as a minimum, the protection of these "fundamental rights will be extended to those with fundamental needs".<sup>13</sup> And since one can usually expect tolerance "as long as [one's] ... norms are not in sharp conflict with societal norms such as national loyalty",<sup>14</sup> the true test of these liberties will be the right they give "to differ as to things that touch the heart of the existing order".<sup>15</sup> If the courts will not protect those anti-majoritarian, spiritual interests that logically, philosophically, and historically demand protection, then these constitutional guarantees are, in effect, quite hollow ones.

It is the objective of this thesis to explore the substantive ambit of these liberties and to thereby illuminate the extent to which both our peripheral and core needs of conscience will be safeguarded. More specifically, this examination will cover a number of inter-related issues: the employment of a purposive interpretative approach to Charter rights and freedoms; the rationale for extending constitutional shelter to sectarian and ethical concerns; the meaning of religion and conscience for constitutional purposes; the identification of the core themes of religious tolerance; and the particular analytical framework developed for applying the pertinent provisions of the Charter in light of the need to reconcile them with one another and also with other competing, non-religious, public values. In result, it is hoped that this study will convey an integrated,

comprehensive and timely picture of Charter doctrine on the issues of church and state.

## II A PURPOSIVE APPROACH TO CHARTER INTERPRETATION

The various guarantees of the Charter are couched, as one would expect, in rather vague, ambiguous and open-ended terms. Greater specificity is not desirable in constitutions because their drafters cannot attempt to comprehend every possible need, issue, or contingency. Accordingly, it has been left up to the courts to breathe life and substance into the Charter's words and phrases in the context of the cases that come before them.

Now as to how this should be done, the Supreme Court of Canada has consistently and repeatedly advocated the employment of a functional model of constitutional interpretation.<sup>16</sup> In R. v. Big M Drug Mart Ltd., Chief Justice Dickson, in what seems destined to become one of the most quoted statements of Charter jurisprudence, summed up the Court's perspective with the following guidance:

The meaning of a right or freedom ... [is] to be ascertained by an analysis of the purpose of such a guarantee; it ... [is] to be understood, in other words, in light of the interests it was meant to protect.<sup>17</sup>

And to find these concerns, we are directed to consider, among other things, its linguistic, historical and philosophical contexts.<sup>18</sup> However, we are also cautioned that "the Charter was not enacted in a vacuum"<sup>19</sup> and it is therefore important "not to overshoot the actual purpose of the right or freedom".<sup>20</sup>

Such a functional or dynamic thrust seems to demonstrate a marked attitudinal change by the courts to our civil liberties. Why has it been adopted? In the past, a formalistic or static approach characterized constitutional review. Generally speaking, formalism involved a "mechanical

and logical application of the law"<sup>21</sup> by reliance principally upon the text of the constitution. It has been criticized as being "inward looking and legocentric"<sup>22</sup> because it views law as an end in itself and not as part of the larger political and social apparatus. But more to the point, it is arguably an approach ill-suited to Charter adjudication because it is ideologically inconsistent with the courts' new mandate for judicial review - a mandate for which only a teleological posture is appropriate.<sup>23</sup>

What is the nature of this mandate and how does it entail a purposive approach? To begin with, it has been noted that the Charter expressly accords its guarantees supreme constitutional status under s.52 for the purpose of "constrain[ing] governmental action inconsistent with these rights and freedoms".<sup>24</sup> Consequently, "it necessarily follows that a portion of the state's power has been transferred from the legislature to the judiciary"<sup>25</sup> responsible for enforcing these guarantees. And so, in the words of one commentator: "[t]he proclamation of the Charter has brought a new legal order, and with it a new reality of judicial power".<sup>26</sup> In practical terms, then, the courts have become arbiters of constitutional policy. And their statesmanship role in Charter interpretation is even more obvious when it is recognized that our newly entrenched protections are not absolute in nature. Rather, they are restricted explicitly by s.1 to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".<sup>27</sup> They have also been declared by the courts to be subject to certain inherent limitations<sup>28</sup> - a view that is unpopular with a number of critics.<sup>29</sup>

In any case, the evaluation of explicit and implicit justifications for limiting the scope of these freedoms requires the courts to assume a patently political function. But how can they perform this task without a full understanding of the countervailing interests protected by the Charter? Obviously, without an appreciation of the objectives of these freedoms, the courts cannot give them an interpretation that will fulfil them, and neither can they truly balance them against competing societal concerns. Thus, the need for a teleological investigation of the right in issue is readily apparent.

This is not to say that a purposive approach openly reconciling conflicting constitutional values will always be applied. For despite the clarity of their new mandate to make "decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament",<sup>30</sup> the courts are still somewhat uncomfortable with appearing to legislate public policy. And it is evident in some of the cases that they are attempting to maintain the legitimacy of judicial review by out-dated techniques of self-restraint. Rather than openly performing their political function, the courts have, on occasion, denied it by retreating into formalistic analysis.<sup>31</sup> By drawing the line between Charter enforcement and Charter activism in this manner, courts are clouding the process of rights interpretation. It would be more honest if they sought to limit their authority through the open s.1 mechanism of interest evaluation; even though this would certainly attract more public attention. A candid functional approach is more desirable because it ensures a better structured appraisal of constitutional concerns. The silent, unarticulated, judicial balancing hidden by formalistic reasoning cannot promote the development of the socially and philosophically integrated analytical foundation necessary to give our Charter liberties their proper latitude. And so, this institutional uneasiness is a consideration that must be borne in mind when realistically evaluating the scope of any Charter guarantee.

### III THE PHILOSOPHICAL PREMISE OF RELIGIOUS TOLERANCE: A QUESTION OF RESPECT

We have seen that applying a purposive approach to our religious liberties under the Charter requires some appreciation of their normative and empirical antecedents. In fact, the courts cannot make a disciplined and effective determination of the interests or values protected by these liberties without a firm understanding of those formative roots. And so the following discussion briefly reviews the relationship of law and conscience in Western civilization with the primary intention of establishing the philosophical justification for protecting spiritual and ethical interests in contemporary society. Once the basic historical and theoretical premise of these freedoms and rights has been identified, the discussion will shift to exploring its implications for Charter interpretation. First, we will look

at why we protect religious adherents in the context of this philosophical assumption. Then the possibility of an integrated approach to religious freedom and equality will be explored by noting the general applicability of this premise. Finally, an attempt is made to outline some abstract guidelines for the comprehension of the core values it identifies. The judiciary's recognition and implementation of these values will be discussed throughout this paper.

## A. THE NATURAL LAW TRADITION

The rights of religious freedom and equality, and all human rights generally, have their origin in the development of natural law theory. The formulation of this theory will be traced from ancient times to its current expression in the Charter and other Western human rights documents.

### 1. The Contribution of Antiquity

The initial discourse probing the conflict between the inner claims of conscience and the dictates of social justice may be found in Judeo-Christian teachings, as evidenced in the Bible,<sup>32</sup> and in a variety of works of Greek ethical thought from Homer to Aristotle.<sup>33</sup> But of all the writers and thinkers of the ancient world, it was perhaps the Stoics who provided the greatest intellectual impetus to the development of natural law rights as we know them today.

Stoic philosophy was premised upon the Aristotelian conception of ideal justice, or natural law, as being those rules which best enabled man to fulfil his purposes as a social being.<sup>34</sup> But because Aristotle did not believe that all men were equal by reason of their shared humanity, his theory was flawed by its limited scope. Stoic doctrine, however, had a cosmopolitan application which emphasized that "all men were rational beings and should be regarded as free and self-governing in their actions, and therefore equal in their fundamental nature".<sup>35</sup> Accordingly, the Stoics were able to extend the notion of natural law into a universal law that

could be ascertained by logic and which was the touchstone for gauging the justice of human or positive laws.<sup>35</sup>

Unfortunately, this was as far as Stoic philosophy developed. It did not resolve the proper adjudication of conflicts between these two species of natural and positive law. Nonetheless, this theory, as transmitted by the Romans, laid the foundation for later Christian legal doctrine.

## 2. Aquinas and Scholasticism

During the Middle Ages, the Christian Scholastics attempted to merge the Greek and Roman precepts of natural law with Catholic theology. The chief exponent of Scholasticism was St. Thomas Aquinas. In his Summa Theologica, he created one of the most comprehensive philosophies of conscience and justice, and one which influenced the future pattern of natural law thinking. St. Thomas based his theory on a hierarchy of laws which tied issues of conscience to the dictates of Catholicism. He believed that natural law was divine law as revealed by deductive reasoning, and that positive law represented those rules of the sovereign which conformed with natural law. Consequently, man-made regulations became identified with religion.<sup>37</sup>

Several noteworthy implications flowed from this doctrinal premise. One of these was the establishment of a religious basis for civil disobedience. For it followed that if a citizen was bound to obey a political authority derived from God, he was not obliged to comply with any sinful commands issued by that authority.<sup>38</sup> Another formative ramification of his premise was the conception of natural rights as something of an inalienable religious heritage that no one was entitled to destroy. Sadly, however, this notion also rationally entailed the advocacy of religious intolerance. Aquinas did not believe that personal autonomy in matters of conscience was a natural right and he insisted that the citizen must be compelled to return to the true faith.<sup>39</sup> The horrors of the Inquisition serve as a stark indictment of the Scholastic union of justice and conscience.

### 3. The Secularization of Religion and Law

#### (a) The Reformation and Humanism

The Protestant Reformation and the rise of Humanism during the fifteenth and sixteenth centuries had a dramatic impact on religious liberties and the evolution of natural law philosophy. The appeals to private conscience by Luther and other Protestant reformers when justifying their break with Rome culminated in the fragmentation of Western religious unity. This in turn effected a reciprocal political fragmentation of Europe which led ultimately to the secularization of religion. Various national churches were established and subordinated to civil authority. Sectarian freedoms were restricted and religious intolerance became a political fiat that sent countries to war until the middle of the seventeenth century.

On the other hand, the secularization of religion during the Reformation did serve to promote interest, once again, in matters of science and reason. And so, this age witnessed the emergence of a new humanism which cast off the repressive shackles of scholastic philosophy. Humanism did not reject natural law, but instead, changed its source. Hugo Grotius, one of the principal architects of the humanistic theory of natural law, stressed that logic alone, and not divine revelation, dictated natural law.<sup>40</sup> Thus, he believed that all men could order their affairs in accordance with a system of natural law that reason could elicit. Hence, once again the basis for structuring social justice was sought in man's unique ability to think. But as yet, the relationship between this new, secular, natural law and positive law was rather murky. In addition, there was little agreement upon what the law of nature actually required.<sup>41</sup>

#### (b) Hobbes and the Denial of Natural Rights

Whereas man's faculty of reason had been the lynch pin of the philosophies described above, for Thomas Hobbes, it had no central significance. His positive theory of law and government, as expressed in Leviathan, assumed that in nature there was no right or wrong, no justice

or injustice, only anarchy;<sup>42</sup> and in order to escape this anarchy, men covenanted among themselves to establish a sovereign or leviathan<sup>43</sup> who was the only source of law, justice and morality.<sup>44</sup>

The objective of Hobbes' political model was to deny the existence of any authority beyond the state. The turbulence and anarchy of the English Civil War and its attendant religious disputes had convinced him that the appeals to private conscience inherent in natural law doctrine were divisive.<sup>45</sup> So in his theory he sought to diminish the force of reason by positing that there was no finality or ultimate "good" in nature - only war. Consequently, if there was no ultimate "good", there could be no higher duty for reason to discover. And thus, individual judgment was irrelevant and man had no natural rights or freedom of conscience.

#### 4. The Achievement of Locke: The Secularization of Government and the Establishment of Modern Religious Liberties

The contemporary understanding of human rights as innate superior claims upon or against the state was given its seminal expression in the late seventeenth century by John Locke. He developed a constitutional theory of political power that combined elements of Hobbes' social contract theory with natural law doctrine. As others had before him, Locke established the existence of natural rights by presupposing the rational and autonomous nature of man. He believed, unlike Hobbes, that men in a state of nature were bound by a moral code which each had the capacity to discern:

The state of nature has a law of nature to govern it which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, or possessions (emphasis added).<sup>46</sup>

And to reconcile this natural law with positive law, he insisted that man entered a compact for the establishment of civil authority in order to

preserve his natural rights.<sup>47</sup> Consequently, Locke did not regard the rights of men as flowing from mutual consent, as Hobbes had, but saw them as prior and inalienable liberties that it was the function of the state to ensure.

Moreover, within his theory Locke articulated a two-fold argument for the citizen's right to religious freedom. Firstly, he identified this liberty as a natural right in that "truth and keeping of faith belongs to men as men and not as members of society".<sup>48</sup> And, of course, once matters of conscience could be equated with natural law, they necessarily had a higher claim to the individual's loyalty than did civil dictates. Hence Locke, who could not be induced to walk against the dictates of his conscience, affirmed the moral right (and obligation) to disobey contradictory positive laws.<sup>49</sup>

The separation of church and state was the second pillar in Locke's argument for tolerance. He believed that " 'the care of souls cannot belong to the civil magistrate because his power consists only in outward force, [while] ... true and saving religion consists in the inward persuasion of the mind' ".<sup>50</sup> Therefore, Locke reasoned that the affairs of government had "nothing to do with the world to come".<sup>51</sup>

##### 5. Modern Recognition of Human Rights and the Fundamental Freedom of Religion

It was the embodiment of these principles in the United States Constitution which established for the first time the express priority of natural rights, including the freedom of religion. The relevant part of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...". And after the Second World War - a war in which appalling horrors were carried out through the instrument of positive law - natural rights theory gained some international recognition in a variety of human rights documents.<sup>52</sup>

To some extent, however, our current understanding of fundamental rights is different than that envisaged by Locke. We prefer to talk of "human" rather than "natural" rights: "Rights are no longer derived from the operations of natural reason but rather from our ideas of what it is to be human."<sup>53</sup> Thus, contemporary natural rights theories argue that every person is worthy of esteem "not by virtue of their birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans".<sup>54</sup> These theories (sometimes referred to as "liberal conceptions of the self") centre in on the human capacity for practical choice, and hold that these choices merit constitutional protection when they enable the creation of personal identity through self-knowledge, self-respect and self-expression.<sup>55</sup> In essence, the reasoning is that we are only true individuals when allowed the liberty to operate as self-regulating, logical actors;<sup>56</sup> denied the possibility of choice, we are deprived of our essential humanity.<sup>57</sup> Our judiciary have adopted this reasoning in analyzing the foundation of our Charter guarantees. Madam Justice Wilson articulates the premise thusly:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.<sup>58</sup>

Dickson J., as he then was, makes the same point in Big M:

It should ... be noted ... that an emphasis on individual conscience and individual judgment ... 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.<sup>59</sup>

## B. RESPECTING OUR RELIGIOUS LIBERTIES

### 1. Why do we Protect Religious Adherents?

It should now be apparent that we can trace the Charter's concern for the inviolability of individual conscience to the valuation of human dignity. Our constitution posits the capacity for choice and entrenches "the right to make fundamental personal decisions without interference from the state".<sup>60</sup> What decisions could be more profound than the determination of one's spiritual commitment and the choices motivated by that commitment? These are matters involving deeply felt opinions about our "ultimate concerns":<sup>61</sup> who we are, how we should live and why we exist. They are visceral conceptions of the heart and mind that have a transcendental significance. Moreover, regard for individual autonomy is a prerequisite for morality. "True moral values are those realized in the free and uncoerced choices of persons, acting conscientiously in accordance with the principles to which they willingly subject themselves".<sup>62</sup> Thus, the entrenchment of these liberties is merely a logical expression of the need to esteem an individual's "capacity" or "potentiality".

### 2. A Common Search for Respect

Charter jurisprudence indicates that the theory of human dignity is a controlling principle of rights adjudication. It is certainly the underlying norm of the s.2(a) guarantee of religious freedom<sup>63</sup> and probably the s.7 right to individual liberty.<sup>64</sup> But whether the concept is sufficiently broad to encompass the idea of equality has yet to be definitely determined. Until the Supreme Court of Canada deals fully with this question, there will continue to be "a good deal of uncertainty as to the standards to apply in determining whether a law or activity creates inequality."<sup>65</sup> This writer would suggest, however, that equality only results upon affording respect to persons as potentialities. While this is not a view accepted by all,<sup>66</sup> these concepts share an intimate relationship which has received strong judicial recognition.

In Big M, Dickson C.J.C. observed: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance on s.15."<sup>67</sup> As well, in Ref. Re An Act to Amend the Education Act, we find a statement that s.15(1) "rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect."<sup>68</sup> Consequently, the discrimination prohibited by this guarantee is any distinction that amounts to "a denial of the essential worth and dignity of the class against whom the law is directed."<sup>69</sup> The recent Supreme Court of Canada decision of Andrews v. Law Society of British Columbia reiterates:

It is clear that the purpose of s.15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.<sup>70</sup>

It would appear, therefore, that judicial determination of the parameters of both religious freedom and religious equality must involve an appraisal of the demands of human dignity.

### 3. Some Basic Principles of Respect

What does it actually mean to say that we must have regard for human dignity in matters of conscience? The following discussion presents some theoretical postulates culled from the works of various modern jurists that should govern, it is submitted, the practical application of our religious liberties. And they serve as a starting point for the identification and delineation of the interests protected under the Charter that will be discussed throughout the remainder of this paper.

First of all, the individual's entitlement to liberty under the concept of human dignity is not an absolute one. Any freedom, even one as

fundamental as that of religious autonomy, must be exercised with proper regard for the comparable rights of others. It must, therefore, logically be compromised in the interests of equality. If we recognize the human "capacity to make plans" or "potentiality" in others, and not their particular merits or abilities, then we owe respect to all equally because we are all engaged in "self-creative enterprises".<sup>71</sup>

This obligation to act in a manner that is "other-regarding"<sup>72</sup> has been established by a number of contemporary thinkers as a normative boundary for the citizen's liberties. John Rawls, for example, has advanced a theory of social justice embodying as its chief precept the idea that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."<sup>73</sup> Similarly, Ronald Dworkin has predicated his own particular model of justice upon the primary right of the individual to treatment as an equal - that is, "to equal concern and respect."<sup>74</sup>

Thus, whether or not the particular practices of certain religious adherents may, in the face of conflicting legislation, be an appropriate expression of their moral autonomy necessarily involves a comparative review of the impact of the practices and the law in question upon guaranteed freedoms. "Any freedom which one enjoys at the cost of another's disproportionate unfreedom is not an exercise of the former's right, but a denial of the latter's."<sup>75</sup>

But when does the exercise or alleged restriction of the Charter's religious liberties have this unacceptable impact upon the rights of Canadians? It has such an impact when "it affects the capacity of [believers or] other persons to exercise their choices."<sup>76</sup> After all, we ground personal independence in the assumption that the act of "choice is the very condition of the making of persons,"<sup>77</sup> so we must surely define our mutual duties of respect in the same coin. Therefore, when evaluating the ambit of our spiritual and ethical guarantees, the courts should be concerned essentially with the coercive implications of the conduct or law in issue. It goes without saying, obviously, that if the individual's belief or alleged expression of faith is not related to or necessary for a "self-creative enterprise", it does not merit protection.<sup>78</sup>

So, in light of their theoretical basis - that finds expression in so many of the Charter's provisions - our liberties of conscience should not and cannot be circumscribed by conditions irrelevant to our abilities to act as autonomous agents. If no one else's "conditions of self-respect" are endangered by the acts of a religious adherent, then society is not entitled to impose upon the latter the requirements of his own self-respect.<sup>79</sup> It is totally inconsistent with the rule of human dignity to regard another, either expressly or implicitly, as if he were incapable of choosing properly without external influences. In addition, it follows from the perception of the individual, as a "potentiality ... always in the process of becoming"<sup>80</sup> that there is no one correct, objective role model for the state to endorse. When the citizen is constantly developing, the very impermanence of his nature and interests negates the possibility of the government truly knowing the higher self or values that merit imitation.<sup>81</sup>

Having such a limited claim to moral superiority, the community should proceed cautiously in matters of conscience. Intervention must be purposive and economical. On the one hand, we must recognize that a core moral fabric or consensus is indispensable to "the cohesiveness and solidarity of any large and complex polity".<sup>82</sup> For if society is to be ordered in the interests of all, if the government is to fulfil its role of "establish[ing] the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life",<sup>83</sup> its laws must attempt to outline some acceptable community standards of conduct. "And practical principles of right conduct are moral principles."<sup>84</sup> On the other hand, the theoretical considerations mentioned above necessarily limit the values that deserve public endorsement. We are not concerned then with whether there should be some "moral establishment"; rather, the issue is what are the appropriate principles that should be incorporated in that public morality. The following conclusion of Neil MacCormick is the view adopted in this thesis:

[The powers of the] state ... may be and ought to be exercised so as to enforce moral requirements, but only those which are other-regarding duties of respect for persons, and only to the smallest extent necessary for

securing to all the conditions of self-respect as autonomous beings.<sup>85</sup>

As a result, a "limited moral establishment"<sup>86</sup> is acceptable and unavoidable if the legal system is to optimize the liberties of all citizens equally. And given the likely uncertainty over the other-regarding requirements that should ideally find expression in our laws, such an establishment ought to be impervious to criticism if it rests upon honest and reasonable foundations.<sup>87</sup>

One final aspect of the commitment to equal freedom and respect that should be touched upon is the extent to which it accommodates the disparate distribution of goods and opportunities in society. Several justifications consistent with the theory of human dignity have been propounded. Perhaps the approach most consistent with the notion of the individual as a "potentiality" and the principle of limited moral establishment is one which seeks to provide all Canadians with the necessary conditions of self-fulfilment and self-respect. It would logically accept the different treatment of certain people provided the distinction equalized the opportunities for all to develop and participate in the community.<sup>88</sup>

Another view advanced by Rawls is that dissimilar apportionment of all social values, including liberty and self-respect, is justified only if it works to everyone's advantage.<sup>89</sup> As he sees it, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."<sup>90</sup> In keeping with this principle, Rawls rejects any utilitarian balancing that would allow the general benefit to society of some inequality to outweigh minority interests.<sup>91</sup> The result is again a legitimization of inequality in some instances, and not its elimination.

A last theory, argued by Dworkin,<sup>92</sup> focuses on the equality inherent in the decision-making process. He insists that the right to equal concern and respect only guarantees a right to treatment as an equal.<sup>93</sup> It may follow from this right that sometimes we will also have the right to equal treatment - that is, the right to receive equivalent advantages - but only

in special circumstances.<sup>94</sup> Otherwise, the right to equal concern and respect requires merely that all those who will be affected by a law should have their interests considered in the political process.<sup>95</sup> And thusly, Dworkin reasons that we can justify affirmative action programs which seek equality of condition by means of uneven treatment.<sup>96</sup>

#### IV DEFINING RELIGION AND CONSCIENCE FOR CONSTITUTIONAL PURPOSES

When a Charter claimant asserts the right to follow the precepts of his faith or conscience under s.2(a) or s.7, or raises issues of religious equality, it would seem that the nature of the precepts in question must be subjected to at least some cursory, judicial scrutiny. For only those norms of religion or conscience that shape individual identity must be accommodated by the state. So the question now arises: what beliefs are actually encompassed by these terms? Initially, the parameters of this threshold inquiry were rather uncertain, but they have been clarified by the Supreme Court of Canada in Edwards. Referring to the purpose of s.2(a), Dickson, C.J.C. stated that it proscribed interference

with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being. Those beliefs, in turn, govern one's conduct and practices.<sup>97</sup>

This single standard is doubly noteworthy: firstly, because it observes no conceptual distinction between matters of religion and conscience; and second, because of its sheer breadth. The following discussion highlights the origins, components, scope and wisdom of the Edwards test.

##### A. TWO FREEDOMS OR ONE FUNCTIONALLY INTEGRATED CONCEPT?

In Big M, the Supreme Court first recognized that the freedom of religion and the freedom of conscience in s.2(a) were associated and formed

a "single integrated concept";<sup>98</sup> they were purposively united by their common philosophical justification of respect for human dignity. And accordingly, the objective distinctions between religion and conscience seemed analytically irrelevant in this fused freedom - a view apparently confirmed by Edwards. Nonetheless, early considerations of the substance of these concepts focused on attributing some independent meaning to each.<sup>99</sup> The intention was, it seemed, to characterize as religious only those creeds with a theistic centre. Consequently, the impression temporarily existed that, perhaps, the freedom of conscience was restricted to quasi-religious beliefs lacking this essential feature.<sup>100</sup>

This narrow and content-based analysis was a reflection of the many conservative definitions of religion to be found in Anglo-American jurisprudence.<sup>101</sup> The absolute dearth of guidelines on what qualities distinguish religious or conscientious beliefs in our Constitution and legal tradition forced Canadian courts to begin sketching the form of this liberty in the light of foreign opinions.<sup>102</sup> However, it would have been a serious mistake to have allowed these particular precedents to dictate the development of Charter doctrine. Neither the American nor the British judiciary have specifically been required to deal with the added burden of defining and accommodating "conscience".<sup>103</sup> And, moreover, the substantive assessments conducted in these cases are inherently problematic and impractical. There is, quite simply, no true consensus on either the meaning<sup>104</sup> or relationship<sup>105</sup> of religion and conscience.

Thus the tacit reasoning behind the Edwards formula is that since these ideas are too difficult to define objectively, we should subjectively evaluate them in terms of the role they play in an individual's or group's life.<sup>106</sup> Such a personal emphasis has been consistently employed by the United States Supreme Court following its seminal decisions in Seeger<sup>107</sup> and Welsh<sup>108</sup>. At issue in both these cases was the interpretation of a conscientious objector provision of a selective service law. The exemption in question extended only to those whose "religious training and belief" made them opposed to participation in war in any form. "Religious training and belief" was defined so as to require "an individual's belief [to be] in relation to a Supreme Being involving duties superior to those arising from

any human relation".<sup>109</sup> Refusing to limit the exemption to any specific creeds, the Court construed this requirement as follows:

Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is dependent. 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.<sup>110</sup>

The first explicit application of the American psychological approach in this country, however, was in respect to the freedom of conscience. To warrant constitutional protection Tarnopolsky J.A. maintained in Videoflicks that conscientious behaviour "would have to be based on a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions."<sup>111</sup> Accordingly, the Charter was now seen as definitely safeguarding secular beliefs that were the functional equivalent of religion for the complainant.

Significantly, Mr. Justice Tarnopolsky did not actually declare that this subjective method of characterization was equally applicable to supposedly religious beliefs; however, he implied this when he stated that the classification of essential religious practices must proceed from the individual's perspective and not from that of the majority.<sup>112</sup> But in Edwards, it would seem that the Supreme Court has decisively established a single functional standard to screen both issues of conscience and religion.

So in spite of the initial emphasis on the separateness of the realms of religion and conscience, to-date no unique jurisdictional purview for either concept has been mapped out. If the Charter truly ensures respect for the individual's freedom of choice, then it must guarantee to all who act out of conscience the same consideration received by those who act out of faith. And, inasmuch as "conscience" basically connotes "the faculty of judging the moral qualities of actions",<sup>113</sup> the functionally integrated freedom of

s.2(a) cannot distinguish between a normative, moral viewpoint and an orthodox canon of faith - a logical proposition many courts<sup>114</sup> and Canadians<sup>115</sup> appear to have acknowledged.

For instance, in Seeger, a " 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed' "<sup>116</sup> was deemed sufficiently religious to qualify the petitioner as a conscientious objector. Yet, as that legislation expressly excluded "essentially political, sociological or philosophical views or ... a personal moral code",<sup>117</sup> the implication was that no subjective distinction could be drawn between religious beliefs and private ethical philosophies. This interpretation was confirmed in Welsh where the abstract boundaries of religious belief were expanded even farther: the "parallel place" approach, it was now said, would not bar strong political or sociological opinions provided they had some spiritual or moral basis.<sup>118</sup>

Therefore, lacking any constitutional justification, it would be injudicious and analytically unhelpful to substantively compartmentalize religion and conscience. Certainly, it appears unnecessary to do so for purposes of s.2(a). But, as s.15 only refers to "discrimination based on ... religion", with no express mention of conscience, this distinction is not without importance. The judiciary can resolve this dilemma in a number of ways. The most logical and consistent solution would be to include conscience among the section's non-enumerated grounds of discrimination. Alternatively, a functional interpretation could be given to "religion" so that it would encompass claims of conscience - a tactic duplicating American doctrinal development. However, the least desirable approach would be the adoption of a content-based construction of "religion".<sup>119</sup> Nevertheless, if the courts intend to exclude matters of conscience from s.15 claims, such an arbitrary test is their only option.<sup>120</sup>

## B. THE REQUISITE ELEMENTS OF THE EDWARDS FORMULA

From the preceding material, two central aspects of a subjective determination of religious and conscientious interests may be discerned.

To begin with, the beliefs must be of fundamental importance to the believer - that is, they must be "profoundly personal beliefs ... govern[ing] one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being."<sup>121</sup> They must pertain to ... "most of one's voluntary actions."<sup>122</sup> In short, only precepts that might be termed "life-informing" will qualify for constitutional recognition.<sup>123</sup>

Next, the beliefs must be sufficiently suasive - they must, in effect, be "life-directing". The individual should "feel ... bound"<sup>124</sup> or obliged to act in a certain way; however, it may also be enough if he thinks that he is entitled by faith to follow some course of action.<sup>125</sup> But in either case, the relevant principles must have practical applications. Since the laws of the state regulate behaviour, they cannot clash with one's higher scruples unless those scruples also "govern one's conduct and practices."<sup>126</sup>

It seems appropriate, at this time, to confine the remainder of this discussion to a review of the proper evaluation and ambit of life-informing beliefs. The question of their requisite directing force will be raised in a subsequent chapter.

### C. LIFE-INFORMING BELIEFS: THE QUESTION OF SCOPE

Clearly, the Edwards standard has the potential to appreciably expand the boundaries of religious tolerance in this country. There is no doubt, for example, that the spiritual dictates of any enduring world religion should be regarded as life-informing. Even the obscure devotional doctrines of bizarre sects may qualify as such, although their formative role will probably be more difficult to establish.<sup>127</sup> And, as we have seen, profound moral opinions should also come within the Edwards description of sheltered beliefs. But is the functional classification of life-informing convictions appropriate, and is it overly inclusive?

In the United States, the "parallel place" principle has generated considerable debate among legal scholars. Some critics believe that it admits such a variety of beliefs that it opens up the freedom to simply

anyone who wishes to claim its protection.<sup>128</sup> Therefore, they predict, it may well dissipate the constitutional significance of religion.<sup>129</sup> So the inevitable conclusion is that there must be a minimum content requirement to exclude any deep-rooted economic or political views.<sup>130</sup>

At this time we cannot definitely say whether such a tactic will be incorporated into Charter doctrine. It is possible. Religion and conscience are especially unwieldy subjects that may prove beyond the theological sophistication of the participants in the legal forum. Consequently, the judiciary might indeed be tempted to adopt some convenient and conventional qualifier of life-informing beliefs. Nonetheless, it is submitted that a content-based limitation is both unnecessary and inappropriate in even hard cases.

It is unnecessary partly because the dreaded implications of a functional standard are exaggerated. As we have noted, not just any strongly held opinions will be deemed life-informing; quite the contrary, as the breadth of qualifying convictions is purposively limited by the rule of human dignity. If the right to adopt the spiritual and ethical norms of one's choice is the essential condition of the self-definition process, then only those norms which are fundamental to the foundation of separate identity must be viewed as life-informing.

Some insights into when beliefs assume such stature can be found in the writings of the theologian Paul Tillich. He perceived the essence of faith or religion to be "the state of being ultimately concerned".<sup>131</sup> Religious concerns, according to Tillich, were unconditional and without reference to any particular content or doctrine.<sup>132</sup> A belief was religious if it concerned the "total personality"<sup>133</sup> or "Being - Itself"<sup>134</sup> by referring to the whole of human reality and existence. And so, he maintained that everyone had a religion: if the word God means nothing to us, we should "translate it, and speak of the depth of [our] ... life, of the source of [our] ... being, of [our] ... ultimate concerns".<sup>135</sup>

The ultimate concern criterion has received considerable attention from constitutional jurists. Mr. Justice Clark, for one, believed that his functional evaluation of religion in Seeger embraced Tillich's theory.<sup>136</sup>

Moreover, it is interesting to note that, in Morgentaler, Wilson J. justified her acceptance of the s.7 right to an abortion in language that reflects the seemingly common focus of ultimate concerns and the rule of human dignity:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman .... It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large .... [It] is a profound social and ethical ... [decision] as well. Her response to it will be the response of the whole person. (emphasis added).<sup>137</sup>

Thus, in spite of the vague nature of the subjective standard, we are not without certain guidelines. We can deduce that beliefs which do not go to the "ultimate ground of being"<sup>138</sup> are not profoundly personal beliefs pertaining to the process of self-creation. Accordingly, the "mere decision of an individual on any particular occasion to act or not to act in a certain way"<sup>139</sup> is not directed by a life-informing precept; it is only a peripheral concern without constitutional significance. Put simply, decisions which do not "rest at all upon moral, ethical or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency"<sup>140</sup> are not protected. They do not relate to the individual's choice of identity, and this is the sole choice protected by the Charter and other human rights instruments.<sup>141</sup>

Another fallacy of the argument for a substantive boundary is the assumption that some limited subject-matter definition can be framed to specify the correct set of life-informing beliefs that should be recognized. However, the impracticality of this approach has already been noted.<sup>142</sup> If no authorities agree on which criteria are required, how can the objective horizons of our religious liberties be accurately determined? Any content-oriented test must, therefore, be either under-inclusive or so broad as to be useless.<sup>143</sup>

Yet once we admit that more convenient standards are arbitrary, we admit a basic and fatal inconsistency with the very purpose of our religious liberties. As one writer has observed:

At the very point where those approaches say, in effect, that a person must hold certain tenets or focus on certain issues in order to come within the constitutional protection, they demonstrate their incapacity to effectuate that protection. They enshrine an orthodoxy within a Constitution designed in part to protect unorthodoxy.<sup>144</sup>

Thus, the rule of human dignity undermines not only the necessity of an objective definition, it also demonstrates the total inappropriateness of such a doctrine. It is completely illogical to guarantee the freedom to engage in a self-creative enterprise and then scrutinize that freedom without reference to the formative character of the complainant's convictions. Only the functional inquiry looks at a belief's life-informing role, and this is the only inquiry acceptable under the Charter. The subject-matter or truth of the allegedly religious or conscientious beliefs is irrelevant.<sup>145</sup>

This view is further strengthened by a consideration of the subtle distinctions of the Canadian constitutional scene. Much of the American opposition to extreme functional interpretations - for example, the recognition of atheistic Marxism as religion<sup>146</sup> - stems from their preoccupation with the separation of church and state; that is, the notion that religion comprehends something beyond the competence of the legislature and that the maintenance of this jurisdictional division is a goal of constitutional review in itself. The more ultimate concerns involve matters normally within the conceded jurisdiction of the commonweal, the more uncomfortable their courts and critics become.<sup>147</sup> And to some extent, their uneasiness is compounded by the absence of a specific protection for the freedom of conscience - a civil rights omission noted earlier. The United States Supreme Court's qualification of the Seeger and Weish decisions in the following statement is particularly apposite:

A way of life, however virtuous and admirable, may not be interpreted as a barrier to reasonable state regulation[s] ... if it is based on purely secular considerations .... Thus, if the [complainants] asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.<sup>148</sup>

In contrast, the Charter does not require the separation of church and state; it only requires, once again, regard for an individual's potentiality. Consequently, whatever division of spiritual and temporal domains occurs in Canada should be viewed as the result of the freedom of choice, and not as its justification. Moreover, s. 2(a) clearly admits that conscience is not a monopoly of religious adherents. So questions involving private secular codes merely require our courts to determine the proper distribution of moral authority among the state and its citizens. No consideration of the religious nature of these codes is necessary.<sup>149</sup> Obviously then, the Canadian constitutional emphasis on this issue is quite different, and in result, Charter doctrine has greater conceptual integrity.

In this country, therefore, the claims of a modern-day Thoreau or Marx would not be rejected out of hand. Liberality and leniency are vital if this threshold examination is to be conducted without violating the very liberties we are guaranteed. Furthermore, it must be remembered that the life-informing criterion does not stand alone. The ultimate reach of our religious rights can be curtailed, if necessary, at other levels of analysis. "And any incremental increase in official inconvenience or the volume of fraudulent claims that does result must be candidly recognized as a cost of religious tolerance".<sup>150</sup>

## V THE SECTION 2(A) FREEDOM OF CONSCIENCE AND RELIGION

### A. THE ANALYTICAL FRAMEWORK: Purpose, Effect and Coercion

Section 2(a) states simply that everyone is guaranteed the "freedom of conscience and religion". Such open-ended drafting gives little indication as to how a law should be adjudged inconsistent with the liberty. In division of powers cases, the analysis of an enactment's purpose is the central determinant of its vires; its actual effects are considered only in so far as they serve to reveal its true motivation. A similar focus could have been adopted in regard to s.2(a) interpretation. Instead, for reasons that will be made apparent later, the Supreme Court of Canada has held that the assessment of these claims involves a separate review of both the purpose and effect of a challenged regulation. Each has an independent analytical relevance as "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."<sup>151</sup>

It is now commonly accepted that the investigation must begin with a consideration of the impugned law's purpose.<sup>152</sup> In the Supreme Court's majority decision in Big M, Dickson J., as he then was, stated why this must be so:

The declaration that certain objects lie outside the legislature's power... will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.<sup>153</sup>

Thus, if an impermissible purpose is established there is no need to proceed to the effects branch of this bifurcated analysis. This is not only because proof of an improper purpose is alone sufficient to defeat a government measure, but also because that measure's effects, however secular and salutary from a majoritarian perspective, cannot excuse its tainted motivation. In the words of the present Chief Justice:

Once the purpose has been classified as offensive, then the legislation cannot be saved by permissible effect. As a result it is unnecessary to determine whether the secular effect ... [here] in issue is sufficient or whether a secular effect could ever be relevant, once a finding has been made that the legislation is invalid by reason of an impermissible purpose.<sup>154</sup>

This does not imply that statutory impact has no bearing at all on the evaluation of intent. Indeed, as Dickson J. notes "purpose and effect ... are clearly linked, if not indivisible."<sup>155</sup> So, a comparison of the supposed and actual results of an enactment is frequently indicative of its true objective and hence its validity.<sup>156</sup> Moreover, Charter jurisprudence appears to be incorporating a requirement of coercive effect into its notion of improper purpose. And, of course, even if the regulation has, or is determined to have, an acceptable purpose, it is still open to the complainant to argue that its unintended effects interfere with his rights or freedoms. So this second test of constitutionality will obviously entail some re-travel over familiar ground and a review of the practical consequences of the legislation will be vital to the proper implementation of our entrenched liberties.

Obviously, the bench mark of constitutionality that must be applied at each of these analytical stages is the s.2(a) liberty itself. When first construing s.2(a), the Supreme Court identified its core values by enunciating a general notion of freedom or voluntarism consonant with the respect theory underlying the Charter. Speaking for the Court in Big M, the present Chief Justice observed:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state ... 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 .... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,

no one is to be forced to act in a way contrary to his beliefs or his conscience.<sup>157</sup>

Developing upon these prefatory remarks, Dickson, C.J.C. has recognized two freedoms from religious coercion that, not surprisingly, largely parallel the restrictive and assertive thrusts of the American anti-establishment and free exercise clauses, but with a more coherent and common focus on individual autonomy. To begin with, he maintained that everyone has the negative liberty to abstain from religious orthodoxy - a liberty he has styled "the freedom from conformity to religious dogma."<sup>158</sup> It provides citizens with the "freedom to express and manifest religious non-belief and the freedom to refuse to participate in religious practice".<sup>159</sup> And from Dickson C.J.C.'s discussion of this dual freedom in Big M and Edwards, it appears to shelter religious interests from either religious or secular legislation.<sup>160</sup> Any law that is determined to have a religious inspiration is constitutionally infirm if its effects are coercive. Hence purpose evaluation should shelter minorities from the overt imposition of denominational conformity. But any law that is determined to have a secular motivation will still be subject to review in respect of its impact upon those people who regard it as imposing sectarian values and practices. In the interests of conceptual clarity, the former facet of the freedom - that which forbids the imposition of religious indoctrination - will be referred to as the freedom from religion or religious orthodoxy; the later facet - that which protects dissident free exercise from temporal legislation - will be referred to as the freedom to dissent.

Aside from these negative liberties comprising the freedom from conformity, everyone has, in the Chief Justice's opinion, the positive freedom to practice or manifest their own life-directing beliefs in conduct that would otherwise be forbidden by secular ordinances.<sup>161</sup> Unless such regulatory prohibitions are sustainable under s.1 of the Charter, the state may not, even unintentionally, indoctrinate dissidents in secular values and mores inconsistent with their higher duties or concerns. As with the freedom to dissent, abridgments of this free exercise right are measured only in the context of statutory effects; any coercive burden upon the exercise of an individual's convictions is suspect.<sup>162</sup> Since the freedom to practice and the recusant freedom to dissent both involve effects

appraisals which insulate behavioural manifestations of conscience from valid, temporal laws, the distinction between these rights seems rather tenuous. And so the necessity for a scrutinization of the unintended impact of secular government action in the context of a liberty described as a freedom from conformity to religious dogma, is, to say the least, questionable. But more on this later. At this time it need only be noted that because of the intimate relationship of the freedoms to practice and dissent, they are collectively referred to in the remainder of this paper as either the freedom from secular orthodoxy, or the rights of manifestation.

This is, in brief, the conceptual skeleton of s.2(a) interpretation. Under the theory of voluntarism proclaimed by the Supreme Court in Big M, and demanded by the rule of human dignity, purpose and effects review, in the contexts of the freedoms from religious and secular orthodoxy, operate as functionally interdependent and complementary analytical components directed toward the single goal of guaranteeing individual fulfilment through the freedom of choice. Together, they seek to ensure that society does not intentionally or inadvertently assume the role of ecclesiastical arbiter. They will permit neither deliberate state interference with the formation, revision or adoption of life-informing beliefs, nor accidental restrictions on their expression. Accordingly, the Charter promises respect for the individual's chosen religious identity and "the pluralistic structure of the background social institutions necessary to make that choice both possible and meaningful."<sup>163</sup> And thus the freedom of conscience and religion would seem to immunize dissidents from state action amounting to religious or secular indoctrination. The true sum and substance of s.2(a)'s core liberties is examined in the subsequent chapters.

## B. FREEDOM FROM RELIGIOUS ORTHODOXY<sup>164</sup>

In the course of this nation's history, religion has been strongly embedded in the moral, social and cultural aspects of public life. Specifically, our legal system, like other Western legal systems, is "molded in and impressed with Christian values and traditions."<sup>165</sup> Their presence and recognition in government actions and programs assumes a number of

forms, ranging from the subtle to the overt. For instance, it is common knowledge that various criminal and civil injunctions against such anti-social behaviour as theft or murder have religious roots, although the religious aspect of these laws has certainly diminished over time. It is also common knowledge that various practices or beliefs of mainstream religious significance have received express adoption, or at least accommodation, by the state: the Lord's Day Act, only recently overturned, enjoined respect for the Christian sabbath; the reading of the Lord's Prayer has been, again, until recently, required in Ontario public school opening or closing exercises (as was singing "God Save the Queen") and it is still said, sometimes not without opposition, in such public functions or meetings as those of school boards and municipal councils;<sup>166</sup> the Bible is used to swear in witnesses in courtrooms,<sup>167</sup> while many public officials are similarly asked to take an oath upon assuming office which invokes divine retribution for breaches of faith with the words "So help me God";<sup>168</sup> denominational education rights were guaranteed under s.93(1) of the British North America Act (now the Constitution Act, 1867); and the Preamble of the Canadian Bill of Rights affirms that Canada "is founded upon principles that acknowledge the supremacy of God". So it is not stretching matters to say that before the Charter, the

separation of church and state ha[d] never been an avowed policy of Canadian legislators, and indeed, the incorporation of s.93(1) into the Charter [under s.29], together with [its Preamble's reference to the supremacy of] ... the Supreme Deity, would seem to evince a contrary legislative intention ... [with respect to the Charter as well].<sup>169</sup>

However, given the reality of our interdenominational and pluralistic post-war society, and the Charter's advancement of individual religious choice, concern now arises as to the extent to which the state may continue to ordain or proscribe religious conduct or to attempt to provide a place for religion in public affairs. This Chapter explores these questions posed by religiously influenced laws in the following manner. First, it notes the two principal features of the indoctrination standard the Supreme Court has created to gauge s.2(a) violations. Then it elaborates upon the nature

of these twin components, and assesses their conjoint impact on the freedom from religion and their basic compatibility with respect theory. Finally, it briefly discusses the appropriateness of sustaining government efforts at religious indoctrination as reasonable limits on religious liberty under s.1. In result, it is hoped to convey a principled appreciation and appraisal of the new era of Canadian "public religion" - an era of less blinkered religious activism - that has been ushered in by the Charter.

### 1. The Big M Test for Screening State Objectives

It has been said that the right to freely reject any beliefs that the state may favour, to "express and manifest religious non-belief and ... to refuse to participate in religious practice",<sup>170</sup> without fear of discriminatory consequences, is an integral safeguard for the advancement of personal self-determination. The constitution cannot respect individual religious autonomy if the government may mandate the life-informing precepts citizens should hold and obey. This is a proposition that the United States Supreme Court appears to have endorsed, since it has "categorize[d] compulsory religious observance as a potential violation of the 'anti-establishment' principle".<sup>171</sup> Furthermore, given the multicultural mosaic of our country, this notion is also in harmony with the Charter's interpretational policy of cultural respect under s.27.<sup>172</sup> For "there can be no doubt that religion is one of the main constituent parts of the culture of most societies."<sup>173</sup> In this regard then, s.2(a) and its basic philosophical premise must logically restrict the ambit of state objectives, and "an evaluation of legislative purpose must [necessarily] be an up front consideration for [such] a purposive document".<sup>174</sup>

None of these points escaped the attention of the Supreme Court in Big M. The majority judgment of Dickson C.J.C. clearly and repeatedly indicated that the compulsion of religious orthodoxy is now an insupportable political goal. In one such instance, speaking generally of state attempts at belief-control, he observed:

In an earlier time, when people believed in the collective responsibility of the community towards some deity, the

enforcement of religious conformity may have been a legitimate object of government, but since the Charter it is no longer legitimate. With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise (emphasis added).<sup>175</sup>

From the foregoing, it follows that s.2(a) purpose analysis is concerned with legislation which not merely intends to achieve a religious purpose, but which also is coercive. For recall that, by recognizing the centrality of religious voluntarism to both the freedoms from religious and secular orthodoxy, the court has focused on excluding its opposite, religious coercion, under each. These dual requirements of a religious rationale for state action, and state pressure to conform with that rationale, are also evident in these additional remarks of the Chief Justice:

What may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority" (emphasis added).<sup>176</sup>

For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose (emphasis added regarding the coercive element).<sup>177</sup>

In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious

significance of those acts to others (emphasis added regarding the coercive element).<sup>178</sup>

Given the two-fold nature of the test in Big M, the Chief Justice's insistence, noted earlier, that s.2(a) analysis begin with and possibly end with an examination of purpose, and not effects, is somewhat misleading. We will always have to look at effects even if a statute is deemed to have a religious underpinning, because it is the coercive effect of the legislation that is objectionable. Sometimes however, the imposition of conformity will be so readily apparent that the question of coercion will indeed require little, if any, attention; in these circumstances the constitutional validity of government action will depend entirely upon whether the courts characterize its rationale or motivation as religious or secular. If conformity with the allegedly religious is required for religious purposes, the law will fall. But conformity with the allegedly religious for secular purposes is not impermissible. The state is perfectly entitled to create a minimum or "limited moral establishment" in order to maximize the opportunity for all citizens to act as self-determining autonomous beings. At other times, where the state is openly cooperating with or seeking the advancement of religion, the constitutional validity of a government program will depend instead on the presence or absence of a coercive impact on religious minorities. Consequently, we prohibit government action that either prescribes<sup>179</sup> or excessively accommodates the beliefs and practices of any faith.

## 2. Religious Orthodoxy by State Prescription:

### The Identification of Purpose

In general, a statute's "purpose is religious if the government's aim is to promote or support beliefs, activities, or organizations that are religious."<sup>180</sup> Assuming the presence of a compulsive or coercive element in an impeached regulation, when will a court deem its motivation to be of such quality and thus rule it improper? This can be a very perplexing issue, particularly in situations where state and religious interests intersect. And this will be unfortunately, the most common situation, because, as one writer notes: "Governments usually act out of secular

motives, even when they are directly aiding a particular religious sect."<sup>181</sup> Thus conformity with, or the conveniencing of, religion may be a secondary consideration or a coincidental result. Does this require a finding of unconstitutionality? What if, instead, the state deliberately embraces the sacred but asserts a temporal justification? Another concern, and a very important one, is perspective. Should government action putatively infected with religious inspiration be judged from the vantage point of the political majority that approved it or from the divergent focus of minority sects whose beliefs are not necessarily in harmony with the former's value choices?

The judiciary's position on these matters may be gleaned from both Charter and pre-Charter jurisprudence. For in respect of the latter, as we noted earlier, legislative purpose evaluation has been, and remains, a central component of the division of powers process of constitutional review (formerly the sole basis for impeaching the validity of government measures). Accordingly, the discussion of these issues commences with a preliminary overview of the probable substance and limitations of the powers distribution calculus for legislative purpose scrutiny. Then two Supreme Court judgments in cases involving Sunday closing legislation are examined for what they confirm or indicate about these issues and the others noted above. Afterwards the Court's position on the question of coincidental religious conformity is explained. Lastly, this view of the permissible and impermissible intertwining of God and Caesar in compulsive state ordinances will be reappraised in the context of American and Canadian efforts to unduly expand the concepts of secular purpose and religious coincidence so as to validate state sponsorship of the patently sectarian.

#### **(a) The Application, Substance and Limitations of Division of Powers Doctrine**

According to traditional legislative power allocation theory, when a law is alleged to be beyond federal or provincial competence, judicial review begins with the determination of its "matter" or its "pith and substance". Basically this means that the true purpose of the impugned act must be

discerned so that its vires may then be determined by assigning it to an appropriate jurisdictional power base. To assist them in the identification of statutory intent, the courts have relied on a variety of considerations and techniques, and it seems only logical that they should import them into Charter analysis as well. After all, to have denied their relevance would have impeached the legitimacy of this methodology and disregarded a wealth of Canadian legal history and experience. And there seems to be, at least at first glance, no good reason why this should be necessary.

Moreover, unless Charter and jurisdictional approaches to diagnosing legislative motivation are closely aligned, the absurd possibility will exist that an enactment's purpose could have contrary religious and secular characterizations in respect of these two constitutional issues. Because, although "religion" is not expressly designated as a federal or provincial subject matter by the constitution, whenever the courts have deemed a law in "pith and substance", to be in relation to "religion", they have tended to give the impression that "religion" is exclusively encompassed by the criminal law power of Parliament.<sup>182</sup> Whether or not this is so, it is apparent that distinguishing the religious or secular aspect of government measures can be the focus of both forms of constitutional critique. And where questions of federalism do indeed overlie s.2(a) challenges, it seems inevitable that division of powers principles and precedents will inform and direct Charter assessments of purpose.<sup>183</sup> Certainly, the case law to-date bears this out, as we shall see shortly.

Now turning to the practical implications of the ultra vires doctrine, if a statute is alleged to have religious and secular elements, how is a judge drawing upon this doctrine likely to pick the particular element of the law that should be preferred? Typically, when this sort of dilemma arises in division of powers cases, according to Professor Hogg,

[w]hat the courts do ... is to make a judgment as to which is the most important feature of the law and to characterize the law by that feature: that dominant feature is the "pith and substance" or "matter" of the law; the other feature is merely incidental, irrelevant for constitutional purposes (emphasis added).<sup>184</sup>

Consequently, if the religious indoctrination test of Big M turns on a similar finding that the primary purpose of the legislation is religious, and the cases do suggest that this will be so, it is foreseeable that laws with ancillary religious objectives will survive this level of Charter scrutiny.<sup>185</sup> Any congruence with religion resulting from such secondary aims will likely be viewed as coincidental.

In any case, the factors which aid the judiciary in deducing a statute's core concern are familiar ones to constitutional students and are comprehensively described elsewhere.<sup>186</sup> It is sufficient for our purposes here to briefly highlight some of the considerations that play a role in the Charter jurisprudence examined later and to indicate another inherent limitation of this process of purpose identification.

The most reasonable criterion for classifying the central thrust or theme of a regulation, is, of course, its written text. Useful clues may be furnished by such elements as titles, preambles, or purpose clauses.<sup>187</sup> But a perusal of an ordinance's legislative history in terms of government reports and the statements of sponsoring ministers and interest groups can also be informative. Similarly, an examination of "related enactments may help place the statute in an overall pattern", while "kindred laws elsewhere may provide analogies."<sup>188</sup> Furthermore, prior judicial opinions regarding an act's subject matter are another valuable reference source. However, an assessment of a statute's operative consequences is arguably as vital as any other consideration. As indicated earlier, our courts have sometimes found effects review to be an invaluable means of ferreting out hidden and illegitimate government goals.<sup>189</sup> It should be of equal, if not greater, assistance to Charter analysis of legislative intent. For in the opinion of one American critic:

secular purpose is most effectively tested by reference to the actual impact of a legislative act: if the obvious effect of a statute is to advance or hinder a particular religious interest, then the state's purpose is necessarily less believably secular.<sup>190</sup>

Nevertheless, in spite of the seemingly thorough nature of this characterization process, it may produce unsatisfactory decisions in respect of s.2(a) objections simply because it has demonstrated this capability in several pre-Charter cases involving religious freedom. The judgments in Walters v. A.-G. Alta.<sup>191</sup> and Lieberman v. The Queen<sup>192</sup> amply illustrate the considerable leeway our courts have had in "pith and substance" adjudication and that "flexibility" has also become apparent in some Charter decisions in the publicly sensitive field of education that will be discussed later. In some hard cases then, we can expect the choice between the religious and secular features of a law to be as related to the ultimate result of that choice as it has been said to be with respect to similar determinations of legislative "matter".<sup>193</sup> And when this happens, "[t]he choice is inevitably one of policy."<sup>194</sup>

(b) First Principles Emerging from the Supreme Court's  
Sunday Closing Jurisprudence

(i) Big M<sup>195</sup>

This was the first major case in which our courts grappled with the meaning of the s.2(a) freedom in general, and its freedom from religion in particular. At issue was the constitutionality of the federal Lord's Day Act which prohibited any work or commercial activity on the "Lord's Day" - that is, Sunday. A corporate retail outlet<sup>196</sup> charged with transacting business in contravention of the Act impugned its purpose in respect of both Parliament's jurisdictional authority and the Charter. In respect of the former, the defendant alleged that if the law had a secular motivation it was ultra vires the federal government's power to legislate in relation to criminal law. But if its purpose was non-secular, it was alleged to be that of "enforcing the Christian Sunday, if not Christian religious observance, on those whose religion requires them to observe a different Sabbath or whose conscience forbids the observance of any Sabbath",<sup>197</sup> and this was inconsistent with s.2(a). The Crown made several arguments in response. First it contended that the Act's effects, and not its purpose, were the relevant constitutional consideration. Then, in a related submission, it maintained that if the Act's purpose was originally the religious one

alleged, it was so no longer; rather, it had acquired a secular justification that could be discerned from its modern and predominantly secular impact of affording a common day of rest for society. The Alberta Court of Appeal and the Supreme Court of Canada found the Act's purpose to be as the defendant alleged, and so within federal competence; however, it was also of no force and effect because it therefore necessarily infringed the Charter freedom from religion.

Clearly, judicial reasoning in this case hinged upon three considerations: 1) the proper characterization of the law's initial underlying rationale; 2) the continued relevance of that characterization for contemporary constitutional claims; and 3) the comparative significance of religious purposes and majoritarian secular effects to the s.2(a) guarantee of the freedom from religion. These subjects give a convenient shape to the insights that Big M provides on Charter purpose analysis.

Since the Lord's Day Act was impeached on jurisdictional as well as Charter grounds, we find, as intimated earlier, that the Courts' identification of its original and central inspiration was controlled by familiar legislative power allocation concerns and precedents. To illustrate, the present Chief Justice, giving the majority judgment of the Supreme Court, prefaced his characterization examination with an open admission of the inherently dual religious and secular nature of virtually all Sunday observance legislation, namely preserving the sanctity of the Sabbath and giving relief from labour.<sup>198</sup> Then he began the process of choosing between these possible characterizations by tracing the legislative antecedents of the English Lord's Day enactment which had served as a model for Canadian pre-Confederation laws of this ilk, the Sunday Observance Act of 1677. This historical survey, together with the English Act's title, convinced the majority that the "primary object of this [prototypical] legislation ... was clearly religious rather than secular."<sup>199</sup> And that conclusion was made relevant when the Court next established the essential similarity of the federal Act in "basic framework and much of [its] ... language"<sup>200</sup> with the English law of 1677.

It is quite apparent, however, from Dickson C.J.C.'s opinion, that his eventual determination of the issue was principally directed by various

leading division of powers cases. From the turn of the century, our courts have consistently and frequently decreed legislation regulating activities on religious holy days, including the Lord's Day Act, to be federal criminal legislation if such legislation was intended to conserve public morality by exhorting the performance of religious obligations.<sup>201</sup> As public morality has long been regarded as one of the "ordinary but not exclusive ends"<sup>202</sup> of the criminal law, the judiciary's "criminal law characterization [of Sunday-closing regulations therefore] evolved from a societal perception, propagated by followers of the dominant religious groups, that it was morally repugnant to violate certain religious tenets."<sup>203</sup> And so, after an extensive survey of these past decisions, Dickson C.J.C. states: "A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible."<sup>204</sup>

Moreover, the governing force of past division of powers analysis was also a determining factor in the Chief Justice's repudiation of the argument that the Act's impetus had, over time, become non-religious. It had been suggested in defence of the legislation that the Court should embrace this concept of 'shifting statutory purpose' as used by the United States Supreme court in McGowan v. Maryland<sup>205</sup> and its companion cases<sup>206</sup> to uphold similar Sunday closing ordinances. In these American judgments, although the

religious motivation of the state laws in question at the time of their passage [was indisputable] ..., Chief Justice Warren, writing for the majority, found those statutes had evolved to become purely secular labour regulation .... Whatever religious terminology still appeared in the legislation ... was to be seen simply as a historical curiosity.<sup>207</sup>

Essentially, the American Court appeared to rule that the changing social background of these measures had transformed them, lending them an impeccable legal rationale in spite of their sectarian genesis. For according to Warren C.J.:

The present ... effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.<sup>208</sup>

Now although Dickson C.J.C. was willing to concede that the modern day impact of the Lord's Day Act was probably more secular than when first enacted, he was disinclined to accept the American thesis that such a finding meant that its purpose had also been transformed; rather, he believed the law had to "be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance."<sup>209</sup> One reason why he so wedded Canadian legislative purpose identification to original intent is that, as intimated above, he viewed the proposed theory of mutable or shifting legislative purpose as being fundamentally incompatible with basic pre-Charter

notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.<sup>210</sup>

To hold otherwise, as he saw it, "could effectively end the doctrine of stare decisis in division of powers cases"<sup>211</sup> and create not only uncertainty in the law, but also encourage re-litigation of the same issues, as well as distracting the judiciary from relevant legal considerations. Furthermore, he was arguably concerned to preserve the continuity of legislative purpose identification under power allocation and Charter grounds of constitutional review. This preoccupation is particularly evident in Dickson C.J.C.'s discussion of the Crown's contention that the Lord's Day Act, because of its allegedly current temporal characterization, was sustainable through the s.1 mechanism as a reasonable limitation on the s.2(a) freedom. In his opinion:

The first and fatal difficulty with this argument is ... that it asserts an objective which has never been found by this court to be the motivation for the legislation. It

seems disingenuous to say that the legislation is valid criminal law and offends s.2(a) because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. The appellant can no more assert under s.2 a secular objective to validate legislation which in pith and substance involves a religious matter than it could assert a secular objective as the basis for the argument that the legislation does not offend s.2(a).<sup>212</sup>

Aside from the influence of federalism doctrine, another apparent reason why the majority in Big M refused to employ the shifting statutory purpose concept was that it inferred, as we saw, that the objective of government action had little significance for the interpretation and application of the freedom of conscience and religion. It was, remember, the Crown's submission that legislative effects, and not purpose, should be the sole focus of the inquiry in s.2(a) challenges.<sup>213</sup> And two further justifications were alleged to support this analytical tack. One of these was the Supreme Court's own prior determination in Robertson and Rosetanni that a freedom of religion objection to the Lord's Day Act based on s.1(c) of the Canadian Bill of Rights turned on the law's direct functional result rather than its admittedly religious goal.<sup>214</sup> It was also asserted by the Crown that judicial reliance should not be placed on an enactment's purpose because this emphasis reflected the American anti-establishment approach which was inappropriate for the comprehension of Charter religious freedoms, given the textual absence of such a principle in s.2(a).

However, as has been mentioned, Dickson C.J.C. was of the opinion that purpose analysis was a separate, prior and indispensable test of constitutional validity. The basic theoretical premises and concerns underlying this viewpoint should now be familiar ones. At bottom, its adoption permits our courts to guarantee an aspect of religious liberty not ensured by secular impact scrutinization: freedom from sectarian coercion attributable to the intentional imposition or assistance of a particular faith by the state. And Dickson C.J.C. was easily able to dismiss the Crown's

supporting arguments to advance the implementation of this core component of religious tolerance.

For instance, after noting that the Court's decision in Robertson and Rosetanni had been much maligned by some critics,<sup>215</sup> he distinguished the judgment on a number of telling points. Most significantly, he observed that the purpose of the Lord's Day Act in that case was not addressed simply because its jurisdictional vires was not in issue.<sup>216</sup> Instead, the Court confined its attention to whether the practical applications of the law abrogated the complainants' religious freedom under the Canadian Bill of Rights. Furthermore, the Chief Justice maintained that references to past American and Canadian case law in the judgment signified the Court's approval of the notion that the "freedom of religion ... include[d] freedom from compulsory religious observance."<sup>217</sup> However, as Dickson C.J.C. also noted, the majority opinion effectively avoided giving the freedom any such content because of the Bill of Rights' statutory status. Positive law was seen as superseding the "declaratory" liberties recognized by this human rights document. But the point was made in Big M that this limitation is not applicable to the interpretation of a constitutional provision like s.2(a). And so Dickson C.J.C. reasoned as follows:

With the entrenchment of the Charter the definition of freedom of conscience and religion is no longer vulnerable to legislative incursion. I conclude therefore that a definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purposes and traditions underlying the Charter; it is also in line with the definition of that concept as found in the Canadian jurisprudence.<sup>218</sup>

Finally, in respect of the Crown's establishment argument, Dickson C.J.C. was not convinced that the guarantee of the freedom from religion depended on either the presence or absence of that principle.<sup>219</sup> His indifference reflected several considerations. Firstly, he believed that this first amendment clause protected two very different interests, one of which he was unprepared to endorse or pass comment on in Big M, as he did not

need to. For although the United States Supreme Court has "categorized compulsory religious observance as a potential violation of the 'anti-establishment' "<sup>220</sup> rule, it has more usually regarded that concept as prohibiting state support for religion. And it was the applicability of this latter principle which he wished to avoid deciding in Big M. But even assuming, as the Crown argued, that this latter notion was not relevant to the Charter comprehension of religious freedom, he correctly deduced that that assumption had "no necessary implications for the question of whether the state may constitutionally compel religious behaviour or observance."<sup>221</sup> Lastly, he refused to limit the s.2(a) guarantee to just a free exercise/effects theorem, as the Crown wanted, because American first amendment jurisprudence emphasized the overlapping and heterogenous nature of its two rights of religious autonomy.<sup>222</sup>

At this point it only remains to summarize the Chief Justice's application of his own religious indoctrination test. Given that the religious rationale of the Lord's Day Act has already been discussed, we need but briefly touch upon the test's other requisite element, religious compulsion. On this question, he maintained that even though the Act decreed "non-action rather than action",<sup>223</sup> it was nevertheless "a direct command, on pain of sanction, to conform to a particular religious precept."<sup>224</sup> In result, he could not but conclude that Parliament had violated s.2(a) by "us[ing] ... the criminal sanctions at its disposal to achieve a religious purpose."<sup>225</sup> Or, as he more eloquently put it elsewhere in his decision:

the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into positive law binding on believers and non-believers alike.<sup>226</sup>

(ii) Edwards

The next major judgment of the Supreme Court to further flesh out the core values of s.2(a) was also concerned with the constitutional validity of Sunday observance legislation. This time, in Edwards<sup>227</sup> (the appeal from Videoflicks),<sup>228</sup> the Court considered whether Ontario's Retail Business Holidays Act was within provincial competence and consistent with the Charter's freedoms from religious and secular orthodoxy. Leaving aside the free exercise question for later discussion, the essential contention of certain storekeepers charged with contravening the Act was that it was intended to preserve the sanctity of the holy days of society's dominant faiths. It denied them the right to carry on a retail operation on 60 various "holidays" every year, 55 of which (including Sundays) they asserted were "historically anchored in the Christian religion."<sup>229</sup> Accordingly, they alleged the Act was ultra vires the provincial Legislature for being, in pith and substance, concerned with public morality, and thus, criminal law. And of course, following logically upon this argument, the complainants' should also have explicitly contended that the Act's purpose was untenable under s.2(a) of the Charter. "For if the Retail Business Holidays Act were intended by the legislators to promote or prefer certain Christian faiths, it would not only be ultra vires but would also be inconsistent with the Charter guarantee of freedom of religion".<sup>230</sup> However, their actual submission in respect of the religious indoctrination question appeared to suggest that the simple fact that the legislation imposed conformity with Christian Sunday observance was sufficient to invalidate it. They did not read Big M, it would seem, as also requiring proof of a sectarian inspiration when impeaching government action for infringements of their freedom from religion.

The Ontario Court of Appeal considered only the first of these closely related submissions and rejected it. The Supreme Court addressed both and rejected both. Each of their decisions was basically governed by the finding that the conformity required by the state was being exacted for secular and not religious reasons. So the legislative impetus here was viewed as something very distinct from that of the Lord's Day Act, although each enactment had, presumably, a similar result. The question, obviously, is why? The following discussion traces the reasoning of the

Supreme Court with a view to highlighting its two principal statements about purpose analysis in respect of the freedom from religion: 1) the relevance, once again, of power allocation procedures and determinations of legislative intent; and 2) the fact the state may require obedience with value choices that have religious equivalents without transgressing the Charter's injunction against religious indoctrination.

The Court's examination commenced with an assessment of the Act's jurisdictional validity. Speaking again for the majority, Dickson C.J.C. tackled this issue by first summarizing the main guidelines emerging from past jurisprudence on the distribution of legislative authority in respect to Sunday-closing laws. Since these points were not covered in any detail in our review of Big M, it seems appropriate to mention them briefly at this time for explanatory purposes. In general, there is no "legal principle dictating that pause day legislation is inherently legislation in respect of 'public morals' ".<sup>231</sup> It is accepted, therefore, that provincial legislatures may regulate Sunday activities for secular reasons. By way of illustration, if "a primary purpose of the legislative enactment of a pause day is to benefit workers ..., the legislation is properly characterized as relating to property and civil rights within the province."<sup>232</sup> Accordingly, the cases reveal no "rule of law that a province's selection of Sunday as a common pause day must inevitably be held to be a colourful attempt to enforce majoritarian religious beliefs."<sup>233</sup> A presumption of constitutionality applies lacking clear evidence that the ordinance was directed to a religious end.<sup>234</sup>

Of these preliminary propositions, the one which most concerned Dickson C.J.C., and constituted the analytical foundation of his decision, was the notion that "distinctive legislative treatment of a day, such as Sunday which has particular religious significance does not invariably require the legislation to be characterized as religious in nature."<sup>235</sup> It was his opinion, and that of Chief Justice Warren of the American Supreme Court before him,<sup>236</sup> that constitutional interpretation in these circumstances requires the courts to distinguish between the normative source and the actual purpose of government prohibitions or requirements. The judiciary should not be concerned

to characterize the historical origins ... of particular holidays. To do so would be to characterize social facts rather than characterizing the impugned law. The question in the present cases therefore cannot be reduced to a mathematical exercise of computing the number of holidays prescribed by the Act which have a religious origin. Our society is collectively powerless to repudiate its history, including the Christian heritage of the majority.<sup>237</sup>

Having thus established the appropriate focus for his inquiry, Dickson C.J.C. then proceeded to evaluate the true objective of the Retail Business Holidays Act. Then, after reviewing a variety of typical division of powers considerations, he determined that the law was enacted with the secular intent of conferring uniform holidays on retail workers, and not for purposes of surreptitiously encouraging religious worship. He relied, for example, on the Act's title and also its text. The fact that a number of plainly secular holidays were included among the pause days provided by the law was seen as suggestive of a temporal motivation, as was the variety of exemptions afforded small businesses and businesses in recreation and tourism.<sup>238</sup> The former could not be said to have been prompted by religious values (and he refused to regard them as disingenuous attempts to mask a religious purpose), while the latter, of course, were "inconsistent with the traditional religious view of appropriate Sunday conduct."<sup>239</sup>

In addition, he believed that the pertinent legislative debates and a preliminary report of the Ontario Law Reform Commission on Sunday observance legislation also demonstrated that the province had sought to take a non-sectarian approach to the question.<sup>240</sup> Indeed, the report's comments on the respective merits of Saturday or Sunday as a weekly pause day seem to have been particularly persuasive and were quoted at length. The gist of its ruminations was that Sunday was the logical choice for a secular holiday. Although its religious significance had diminished, it had become a non-sectarian institution, being the day of the week, in Canada and abroad, most characterized by social and leisure activities. Saturday on the other hand, was by tradition seen to be a market day, and thus ineligible for selection. Interestingly, the report also conceded that

choosing Sunday as a pause day would "incidentally" benefit Sunday worshippers.<sup>241</sup> Dickson C.J.C., however, did not regard this obvious religious effect as being indicative of the legislation's principal concern, and he did not even discuss it as revealing an unspoken secondary consideration.

This was the heart of the Court's jurisdictional analysis of statutory intent. Let us turn now to the s.2(a) religious indoctrination issue that the complainants raised. The crux of their argument, it will be recalled, was that the Act had "the direct effect of compelling non-believers to conform to majoritarian religious dogma, by requiring retailers to close their stores on Sunday."<sup>242</sup> Because this was also the identical effect of the Lord's Day Act, they appeared to believe that this established a breach of their freedom from religion as set forth in Big M. The Chief Justice, however, made it quite clear in his reasons that his Big M decision should not be viewed as overturning laws solely on the basis that they required conformity with the tenets of any sect. His religious indoctrination test had another component, the significance of which he emphasized when he stated:

The majority judgment of the Court in Big M ... was careful, in defining the freedom from conformity to religious dogma, to restrict its applicability to circumstances when the impugned legislation was motivated by a religious purpose.<sup>243</sup>

Thus, to repeat, unless a government measure incorporates into law religious doctrines for religious reasons, there can be no abrogation of anyone's freedom from religion. What was therefore critical to the Supreme Court's decision in Big M, and what needed to be demonstrated in Edwards, was the presence of a sectarian, legislative motivation (the fact of conformity being patent in each case). And speaking of the Ontario Act's aims, Dickson C.J.C. tersely articulated the following constitutional principle and conclusion:

What I have said above regarding the legislative purpose of the Retail Business Holidays Act and the distinction

between historical origins and legislative purposes applies as well to the Charter as it does to the distribution of powers. The Act has a secular purpose which is not offensive to the Charter guarantee of freedom of conscience and religion.<sup>244</sup>

So in conclusion, Edwards provides further confirmation of the very close relationship of the Charter and power allocation processes of purpose identification, and just as important, specific confirmation of the transportability of the federalist view that mere conformity with religious precepts is not dispositive of the characterization issue. We will not ignore state intentions on the proof of conformity and we will not impute a religious pretence to those intentions simply because conformity exists. No evidentiary presumption arises and the complainant's burden of proof is not met simply by a demonstration that the secular and the sacred overlap. As Dickson C.J.C. noted in his final comments on this subject:

Religious freedom is inevitably abridged by legislation which has the effect of impeding conduct integral to the practice of a person's religion. But it is not necessarily impaired by legislation which requires conduct consistent with the religious beliefs of another person. One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion. I cannot accept, for example, that a legislative prohibition of criminal conduct such as theft and murder is a state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill. Reasonable citizens do not perceive the legislation as requiring them to pay homage to religious doctrine (emphasis added).<sup>245</sup>

(c) Coincidental Religious Conformity

Edwards amply demonstrates the troubling problem that is posed by legislation embodying public values that naturally agree with traditional sectarian dogma because their historical roots lie in that dogma. Respect for individual autonomy demands religious disestablishment in the sense that state power not be used to enforce obedience to religious beliefs or practices. But if we accept that some moral values must be imposed upon society to ensure other-regarding respect, the appropriateness of those values is suspect if they have religious connotations. As we saw in Edwards, the Supreme Court of Canada believes, following American judicial theory,<sup>246</sup> that where the principles or choices pursued by the state have become sufficiently accepted and time-honoured to have acquired a distinctive secular validity, to have syncretized into a political morality, or a "civil religion",<sup>247</sup> if you will, then any conformity with Church teachings is merely a coincidence; no respect is enjoined for religious values as such. An objective observer, for instance, would most likely concur with the Chief Justice that Sunday had indeed become something of a civil institution in the 1970's when the Retail Business Holidays Act was enacted, but that it had a predominantly religious flavour at the turn of the century when the Lord's Day Act was passed. A determination of coincidence is thus more understandable in the former case than it would have been in the latter.

But it is foreseeable that this argument will not satisfy some dissidents and critics. It has not in the United States. In terms of practical realities, dismissing instances of coincidental religious conformity can be seen as a discrete and formalistic attempt to sustain society's principal faiths. As one writer explains:

The strategy of excluding religion from the public sphere ignores the inherent favoritism toward majority religions found in facially neutral government action and would only perpetuate the dominance of majoritarian religiosity.<sup>248</sup>

For example, according to this line of reasoning, provincial recognition of Sundays as a common pause day would be "consistent with the ... objective of avoiding the imposition of religious belief only on the premise that they have lost much of their religious content, an assumption that is belied by the fact that much of their appeal lies in their connection to religious faith."<sup>249</sup> Developing this theme further, it could be said that while only a minority of the population practice Sunday observance, it is, as Dickson C.J.C. conceded in Edwards, a "substantial minority".<sup>250</sup> Moreover, since most Canadians could be classified as "Christian" in their outlook,<sup>251</sup> it is not they who will be inconvenienced by provincial pause day legislation if someone must be inconvenienced or exempted. Can we then seriously credit the view that our elected officials would ever accommodate majoritarian interests only coincidentally? Would not true coincidence result only if the greatest convenience was equally shared by religious majorities and minorities?

In addition, the "coincidence" gloss on secular purposes has, for some American academics failed to provide a satisfactory conception of what legislative intentions are clearly temporal or spiritual. Their establishment clause violations are judged against the tripartite test set out in Lemon v. Kurtzman, the first inquiry of which is whether the measure in issue has a secular purpose.<sup>252</sup> Speaking of this test, Professor Tribe has commented that it "remains only hazily defined. Although the [United States Supreme] Court has never required an exclusively secular purpose, ... at some point it is plain that a law's religious purpose overshadows its secular aims".<sup>253</sup> But, he notes, the Court has not specifically or fully established when or how this is to be determined. Professor Dianne Zimmerman's comments have been more direct and more caustic. According to her, the resolution of the propriety of coincidental Christian conformity by American courts has been idiosyncratic:

They seem to assume simultaneously that positive law must be independent of sectarian concerns and that it can reflect sectarian concerns, as long as it does not track them too closely. This is not an intelligible standard.<sup>254</sup>

And as a result, she asserts it has not yielded principled decisions: "The outcomes ... [of cases] usually have not been well explained, creating a suspicion that the Court is proceeding more on instinct than on articulable grounds."<sup>255</sup>

However, it is submitted, in opposition to these critics, that the approach of the American and Canadian courts to religious coincidence is an understandable and unavoidable compromise that can be logically squared with the rule of human dignity and properly incorporated into Charter doctrine. Any argument that government authority can be exercised in a morally neutral fashion, absolutely free from all latent sectarian preferences, is quite fanciful. "[A]ll laws ... reflect the moral code of somebody or some group",<sup>256</sup> and it is inevitable that they will reflect the scruples of the dominant political faction.<sup>257</sup> Western society has understandably borrowed its moral foundation from the Judeo-Christian tradition, and it has borrowed so heavily that "absurd results",<sup>258</sup> or even "chaos"<sup>259</sup> would ensue if every such ideal promulgated by the state was disallowed. Professor Tribe puts this well: "If a purpose were to be classified as non-secular simply because the resulting state practice coincided with the beliefs of a religion, or because it originated in a religion, then virtually nothing that government does would be acceptable."<sup>260</sup> And this was, of course, Dickson C.J.C.'s concern in Edwards when he emphasized that the characterization of statutory intent must not be reduced to a characterization of historical facts that the nation cannot repudiate.<sup>261</sup>

But if we cannot collectively repudiate our past, what we can and must do is become more sensitive to the innate cultural bias evident in our country's chosen legal morality. This must be so whether we are assessing legislative purpose in respect of the freedom from religion or the scope of belief directed conduct in respect of the freedom from secular orthodoxy. How can this be done?

Considering Dickson C.J.C.'s emphasis in Edwards that coincidental religious conformity is unobjectionable because "reasonable citizens do not perceive the legislation as requiring them to pay homage to religious doctrine",<sup>262</sup> it appears that the Supreme Court is employing a community

perception standard,<sup>263</sup> a position quite properly advocated by many American commentators.<sup>264</sup> When a court allows a consensus-based viewpoint to determine the characterization of state action, it is not conceding that the action is acceptable. Any tendency toward government intrusion into minority religious life should be corrected by a purposive assessment of the impact of that action, since coercion is an integral aspect of both the freedoms from religious and secular orthodoxy. And for reasons that will be explained shortly, a purposive assessment of coercion must be subjective. Thus, together, these mixed perspectives<sup>265</sup> should preserve both society's core moral establishment and individual religious autonomy.<sup>266</sup>

#### (d) Beyond Coincidence

As was noted earlier, the characterization of legislative purpose is usually pivotal when it is alleged that the state is attempting to impose sectarian values on disbelievers. In these cases, the coercive nature of the impugned law is most likely to be undisputed. When, however, the state is merely assisting religious interests, should purpose analysis continue to predominate? If, for example, the state employs religious practices or symbols that retain their religious character, can its intent be anything but religious? Consider the following.

##### (i) American Distortions and Anomalies in the Interest of Majoritarian Accommodation

Although for many years the United States Supreme Court has been dedicated to the principle that the state shall not seek to advance or inhibit religious interests, one anomalous strand of establishment clause jurisprudence has maintained that the government may promote the free exercise of religion.<sup>267</sup> In the 1980's the confusion this thread has caused has become especially apparent, with the Court noticeably stretching the notions of secular purpose and religious coincidence. Because the first prong of the Lemon test requires a temporal government intention, American judges have been compelled either to style such accommodation efforts as

having secular purposes or simply to dispense with the Lemon test altogether. In result, the courts have drawn considerable academic scorn for labelling as secular that which is obviously religious.<sup>268</sup>

The two American cases which most typify forced analysis of this sort are Marsh v. Chambers<sup>269</sup> and Lynch v. Donnelly.<sup>270</sup> In the former case the Court upheld a State's practice of opening its legislature with formal prayers. The Court conceded the sectarian nature of the practice, but instead of applying Lemon, turned to history to negate its sectarian significance. It stated that because the practice is widespread and time-honoured, it has become " 'part of the fabric of society,' it is not 'an "establishment" of religion' but 'simply' a tolerable acknowledgement of beliefs widely held among the people of this country".<sup>271</sup> In Lynch the Court found that a city's inclusion of a nativity scene in a Christmas display on public property satisfied the Lemon test as having a primarily secular purpose and effect. As in Marsh, the Court appealed to historical practice and popular consensus to justify its conclusion. Its opinion has been summarized thusly:

[T]he Court argued that, first, the creche served the purpose of " 'respect[ing] the religious nature of our people' " by making public institutions receptive to religious expression. Second, when viewed in the context of the Christmas holiday celebration, the display - depicting the religious and historical origins of the holiday - could be viewed as part of the nation's cultural heritage, and thus a worthy object of government recognition. Finally, the creche had the secular purpose of instilling a "friendly community spirit of good will in keeping with the season".<sup>272</sup>

The logic underlying both cases seems to be that when a belief "forms part of the dominant self-image of society ..., its adoption by the government is an acceptable accommodation because it is already a part of public life and is not being 'imposed' by government."<sup>273</sup> In other words, it has acquired a primarily secular aspect which will pass establishment scrutiny because, to use the words the Court borrowed from McGowan, the

legislative prayers and the creche in their "reason or effect merely happen ... to coincide or harmonize with the tenets of some ... religions."<sup>274</sup>

In general, the author does not believe that there is anything wrong per se with a state's efforts to accommodate the religious life of its citizens provided such efforts are not coercive. But the author doubts, as do other observers,<sup>275</sup> that the symbolic impact of the governmental endorsements in Marsh and Lynch could seriously be regarded as having a neutral impact on minority religious autonomy. More to the point here, we should not and need not, under the Charter, call what is plainly a religious activity or symbol a secular one in order to uphold legislation which, while religious, is not coercive. American establishment "distortions" have no place in s.2(a) analysis.<sup>276</sup>

#### (ii) Using Religion for Secular Objectives in Education

In addition to free exercise accommodation, the state may defend its actions by arguing that it is simply using religion as a means to achieving an undeniably temporal end such as inculcating morality. American courts have also had to address such arguments. They have been of two minds as to their validity. Professor Tribe has serious reservations about the use of religious tools for the attaining of supposedly secular ends:

The issue is not whether the religious tools chosen will help achieve secular goals .... Rather, the problem is that, when government needlessly uses means that are inherently religious, a message of endorsement is virtually unavoidable .... In a sense, the religious medium becomes the state's message.<sup>277</sup>

In short, his concern is that such practices are inherently coercive. The subject of coercion, however, will be addressed in subsequent material. The issue at hand is whether our courts will submerge the obviously religious in a plausibly secular purpose.

Two recent Ontario cases, Elgin County<sup>278</sup> and Re Zylberberg et al. and Director of Education of Sudbury Board of Education,<sup>279</sup> provide insight into this question. These decisions involved an education regulation, whose various provisions required religious exercises and instruction in public schools, while providing an exemption mechanism for those objecting to participation. In both cases an argument was presented that the provisions had paramount secular objectives, educational and moral, which the legislation advanced.

The Zylberberg case concerned a challenge to the school exercises mandated by s.28(1) of a regulation passed under the Ontario Education Act. That section directed public schools to open or close with "the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers." The majority Divisional Court decisions of O'Leary J. and Anderson J. found no resulting violation of the complainants' freedom from religion. Unfortunately, neither of their judgments dealt comprehensively with the issue of the legislation's purpose. Both pointed to the obvious lack of an establishment clause in the Canadian constitution. But only Mr. Justice O'Leary gave any consideration to the relationship between religion and morality in education, and this only in the context of his s.1 analysis. Having found the effects of the legislation to constitute a minor infringement of s.2(a), he states:

Our schools have an obligation to teach morality. While some may argue that morality can be taught without associating it with God, few would deny that in the minds of most persons morality and religion are intertwined and that to associate God and morality is an effective way of teaching morality.<sup>280</sup>

Contrast the purpose analysis of Mr. Justice Reid in the dissent which is more direct and principled. Seeking to discern whether the purpose of s.28(1) is to impose religious exercises on public school children, he reviewed the extensive record of provincial concern with the place of religion in public schools and concluded the following:

There is ... a long history of opinion that religious instruction and religious exercises are essential, or at the least, highly desirable components of the public school curriculum. Unless we assume that the governments of this province ignored the recommendations repeatedly made to them [in various reports], we might reasonably conclude that s.28(1) expresses a conviction that religious exercises are desirable and should be the rule or standard. That explains its mandatory tone. While those who desire not to obey the rule may opt out, they must perforce seek exceptional status.

...

On its face, therefore, the regulation discloses a purpose contrary to the Charter: a purpose to interfere with religious freedom.<sup>281</sup>

Turning to the same court's decision in Elgin County, we find the majority holding:

[T]he purpose of s.28 ... [is] to provide ... for public elementary school pupils instruction in religious education as part of the curriculum in such schools .... Instruction in religious education is made available to public elementary school pupils for the purpose of introducing or instilling ... a sense of morality in the constituents.<sup>282</sup>

Several factors directed this decision of Mr. Justice Watt. He relied, for one, upon the valid secular purpose of the enabling legislation: "introducing a moral element into the education of public elementary school pupils".<sup>283</sup> He also stressed that the exemption scheme of s.28 was "quite antithetical to the assertion of indoctrinal purpose. If the true purpose of the section were indoctrinal, there would scarcely be provision made for exemption".<sup>284</sup> Finally, he insisted that the matter and manner of instruction were suggestive of a secular and permissible intent. The regulation's only provision regarding subject-matter prohibited instruction

in anything of a controversial or sectarian nature.<sup>285</sup> Moreover, as instruction was generally to be given by the classroom teacher, "[t]he potential presence of a sectarian instructor ... [was] not indicative of a legislative purpose of indoctrination".<sup>286</sup>

In the dissent, Mr. Justice Austin found that the regulation's mandatory program of religious instruction "was calculated to permit the indoctrination of school children in Ontario in the Christian faith and that it is being used for that purpose at the present time."<sup>287</sup> On the evidence before him he could not credit that the principal objectives of the legislation were only to teach religion to the children of consenting parents or to teach morality through religion. One informative document was a government report issued after the start of the program which said that " 'honesty and Christian love' " were the absolutes of a Christian society and were to be " 'taught by the strongest means at the school's command' ".<sup>288</sup> Course material, the Bible and scriptural interpretations, also confirmed, as a recent Departmental Guide noted, that " 'the ultimate aim of the instruction ... is the acceptance of the historic Christian Faith' ".<sup>289</sup> In addition, a committee report in 1969 was of the opinion that religious indoctrination " 'rather than ... true education' ",<sup>290</sup> was the thrust of the studies and recommended their discontinuance. Next, Austin J. held that the text of the legislation itself was consistent with this view. The fact that clergymen could under the regulation ask to instruct students, that children were not marked on this subject, and most importantly, that students, teachers and School Boards could all seek exemption from participation, suggested to him that education was not the state's true objective.

Finally, after finding an infringement of s.2(a), he refused to sustain the regulation under s.1. The proffered justifications of majoritarian accommodation and the teaching of moral values, quite rightly, did not persuade. He dismissed the first argument as "simply untenable",<sup>291</sup> stating: "the respondents' position, in a nutshell, is that interference with the religious rights of the minority is justifiable in order to satisfy the religious requirements of the majority."<sup>292</sup> The second argument required that he balance the interference in religious freedom caused by the supposed means (the teaching of religion) against the allegedly primary

objective of teaching morality. Austin J. was not prepared to subordinate the complainants' freedom of religion simply because other secular, and therefore more appropriate, means were available to achieve the state's end.<sup>293</sup>

The position that public moral needs can be met by religious means and will imbue them with a predominantly temporal quality was reconsidered by the Court of Appeal in Zylberberg. According to Mr. Justice Lacourciere in the dissent, the religious exercises at issue had a "secular educational purpose with a religious component."<sup>294</sup> He found this to be so for two simple reasons: the lack of previous jurisdictional review that would have occurred if the legislation had a religious purpose,<sup>295</sup> and, the fact that the legislation had been amended to allow other suitable prayers and readings.<sup>296</sup> Thus, he agreed with the "respondent Board that exercises with a religious component which are aimed at fostering moral principles encouraging honesty, integrity and good citizenship constitute a worthy educational goal".<sup>297</sup> But even assuming they have a religious purpose, they did not in his opinion violate the Charter because the purpose was one of facilitating religious activities rather than imposing them - a point, the explication of which formed, not insignificantly, the bulk of his decision.

The majority decision here, however, did not hold the object of the mandatory exercises to be the inculcation of morality, but found it on its face to have a religious purpose: "The recitation of the Lord's Prayer, which is a Christian prayer, and the reading of Scriptures from the Christian Bible [a majoritarian bias the regulation permits,] impose Christian observances upon non-Christian pupils and religious observances on non-believers."<sup>298</sup> When justifying this conclusion the Court averted to essentially the same considerations as were held pertinent by Mr. Justice Reid in his Divisional Court dissent. As to the submission that "s.28(1) had paramount secular objectives, both educational and moral, and that the religious exercises served those purposes",<sup>299</sup> the Court responded: "The opening exercises may have secular moral and educational effects but these are, in our opinion, merely derivative from their religious objective."<sup>300</sup>

In conclusion, it is submitted that the Elgin County majority decision must be regarded as fallible, given the foregoing ruling. When the government uses the plainly religious, for whatever allegedly secular purpose, the judiciary should - along with the Zylberberg Court of Appeal - categorize the legislation's objective as religious for s.2(a) analysis. Then at the next stage of the process it should be determined whether use of those plainly religious means tends to coerce - as was the real issue in both these cases. By thus remaining true to straightforward definitions of the religious and the secular, we will, perhaps, avoid the distortions, misconceptions and insensitivity we have seen in American jurisprudence.

### 3. Religious Orthodoxy by State Preference or Advancement: A Matter of Coercion<sup>301</sup>

There was much outcry and resistance to the Court of Appeal's decision in Zylberberg to overturn Ontario's scheme of mandatory religious exercises.<sup>302</sup> This serves to remind us of the depth of popular support for the accommodation of religion in civic life. If state acknowledgment of the spiritual must be limited to a token sponsorship of customs and values that no longer have exclusive sectarian import, it will plainly not satisfy those who want a more active church-state dialogue.<sup>303</sup> The following material briefly explores several related issues concerning the extent to which the state may provide a place for religion in public life. It first notes the judicial and critical support for screening religious state objectives by reference to coercion. Then it deals with the implementation of this component of the religious indoctrination test, particularly the vital question of the analytical perspective necessary to purposively apply this concept. Also discussed are the exceptions which the dissident free exercise rights guaranteed by s.2(a) and the special group rights guaranteed by s.29 logically demand. Finally this review is concluded by touching upon the issues which arise when the state assists the adherents of all sects instead of just the members of the mainstream faiths.

(a) Acknowledging a Role for Coercion

In our review of the Supreme Court's Big M judgment it was noted that the issue of whether the state may ever sponsor religion was intentionally left open. As Dickson C.J.C. elaborated: "Subsequent cases will decide the extent to which the Charter allows for state financial support for, or preferential treatment of particular religious institutions."<sup>304</sup> If we read these words in light of the religious indoctrination test also enunciated in that case, it should be clear that the degree to which the government may identify itself with religion or create "an atmosphere in which voluntary religious exercise may flourish"<sup>305</sup> is dependent upon the impact of that endorsement or facilitation on those who are not included within, or advantaged by, the state's activities. Legislation which is religiously inspired, and not obviously compulsive on its face, is consistent with s.2(a) only if it does not tend to compel by isolating or making outsiders of the excluded and the unadvantaged. Hence, as the present Chief Justice also specified in Big M, "[t]he acceptability of legislation or governmental action which could be characterized as state aid for religion or religious activities will have to be determined on a case by case basis."<sup>306</sup>

Canadian jurisprudence of this sort has, as yet, not developed appreciably although it no doubt will in time. The author is aware of only one explicit judicial effort to sustain a religiously inspired ordinance under the Charter on the basis that it did not induce religious orthodoxy. This was the judgment of Mr. Justice Lacourciere in Zylberberg. It was his opinion that the exemption provisions of the regulation in issue eliminated any coercive aspect that might have offended the complainants' freedom from religion. Therefore, he concluded that the religious exercises were constitutionally permissible because he read Big M as indicating that s.2(a) "does not prohibit all governmental aid to or advancement of religion per se."<sup>307</sup> However, for reasons that will be explored in the context of proving state coercion under the freedom from secular orthodoxy, the majority of the Court of Appeal found the school prayer program to be coercive and so never directly came to grips with the issue Lacourciere J.A. raised. Instead, the Court's plurality decision addressed and rejected a familiar argument by the Crown that the government's promotion of the prayer

scheme could not be invalidated because the Charter contained no establishment clause preventing the advancement of religion. On this point, it concurred with Dickson C.J.C.'s earlier statement in Big M that

the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate and already difficult area of law.<sup>308</sup>

However, the key feature of the majority's decision, for our purposes here, was that it found the impugned regulation inconsistent with the complainants' freedom from religion, not because it had a religious objective, but because it achieved that objective by means that were coercive. So when the Court noted, that the "absence of an establishment clause in s.2(a) does not limit the protection it gives to the freedom of conscience and religion",<sup>309</sup> it meant freedom from the imposition of religious orthodoxy. And to reinforce the significance of coercion at this level of inquiry it should be noted that Reid J., in his Zylberberg dissent, offered the opinion that there was no s.2(a) violation if the exemption mechanism gave the complainants a truly free choice.<sup>310</sup> So there is some Canadian judicial confirmation, express and implied, for the interpretation of Big M propounded in this thesis: that noncoercive state assistance for religion is compatible with the Charter.

Further support for this position may be found in the increasing interest of American jurists in permitting free exercise accommodation under their establishment clause, an interest noted earlier and one which also informed Lacourciere J.A.'s view<sup>311</sup> on intentional state aid. Traditionally, of course, American constitutional doctrine has held the first amendment's injunction against the establishment of religion to mean that the state cannot "set up a church ... [or] pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>312</sup> However, as some commentators have observed, the recent jurisprudence of the United States Supreme Court is no longer strictly consistent with this view, unless their decisions were directly bound by restrictive precedent.<sup>313</sup> Instead the Court seems to be focusing principally on coercion in its attempts to admit

religion into public life, and the Lemon test has been leniently reinterpreted to this end.<sup>314</sup>

For instance, the first prong of this tripartite standard, the requirement of a secular purpose, has been applied by some Justices "to prohibit governmental financial assistance only if the reasons for such assistance are exclusively religious. Under this approach, any secular purpose will justify government aid to religion."<sup>315</sup> Thus, the identification of legislative purpose has become less dispositive. Greater attention has attached to the second branch of Lemon, the invalidation of statutes which have a primary effect that advances or inhibits religion.<sup>316</sup> And this question has been transformed in Lynch to whether the challenged law "in reality ... establishes a religious faith, or tends to do so."<sup>317</sup> In result, greater importance is now apparently placed on the appearance, rather than the objective of government aid, presumably in recognition "that establishment clause inquiry should focus on the impact of state actions on nonadherents of benefitted creeds".<sup>318</sup> Justice O'Connor made this more explicit in her Lynch concurrence, asking if the impugned state action "endorses" or exhibits a preference for religion.<sup>319</sup> And this reformulation now seems to have general support among a majority of the Court.<sup>320</sup>

Hence, there is a growing American concern with "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices".<sup>321</sup> Accordingly, American establishment doctrine now could be said to strongly mirror the religious indoctrination test articulated in Big M. Indeed, summing up the impact of Madam Justice O'Connor's effects reformulation, one writer has commented:

[She] may be credited with redirecting Lemon toward the establishment clause value of avoiding imposition of religious belief - the primary danger of state efforts to make religion part of civic life. Signalling a preference for religion in the public sphere carries exclusionary messages and exerts a pressure to conform that is fundamentally at odds with religious autonomy.<sup>322</sup>

Where, however, American and Canadian judicial theory appear to part is in respect of the analytical perspective necessary to gauge coercion, an issue which is largely responsible for the unfavourable criticism decisions such as Lynch and Marsh have attracted.

#### (b) The Question of Intent and Perspective

The core purpose of the American establishment clause has been said by Madam Justice O'Connor to be prohibiting the state "from making adherence to a religion relevant in any way to a person's standing in the political community."<sup>323</sup> This must also be the function of the Canadian religious indoctrination test. As one writer has noted, "the first task of law in promoting self-realization is to treat the individual as a full member of the community" because "we take much of our self-assessment from what we perceive to be others evaluation of us".<sup>324</sup> In effect, the self has a dual nature, with both a collective and a separate identity.<sup>325</sup> Protection of the former aspect requires that our laws not isolate the individual from the collective by placing "the moral power of the State ... on one side of a dispute between its citizens".<sup>326</sup> For instance, the government may not "require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."<sup>327</sup> Because, as the Chief Justice remarked in Big M, when the state imposes conformity with religion for religious reasons, the "theological content of the legislation remains as a subtle and constant reminder to religious minorities ... of their differences with, and alienation from the dominant religious culture."<sup>328</sup>

Given this purpose, we can draw two analytical conclusions necessary to an understanding of coercion. Firstly, "[w]hen government makes religion a part of civic life, the absence of an official intention to influence or coerce religious life does not negate the message that adherence ... is a precondition to full membership in the community".<sup>329</sup> Sometimes the state will clearly intend to compel homage, as in Big M; in other instances, however, where the state plainly advances religion but may not intend to impose conformity, state action must still be impeachable if it is coercive, as Zylberberg demonstrates. "It is only [state] practices having ... [such

an] effect, whether intentionally or unintentionally that make religion relevant, in reality or public perception, to status in the political community."<sup>330</sup>

Second, when deciding whether state action makes dissidents feel like outsiders, the result must turn on the dissidents' perspective. This position has received much critical support. For instance, as Professor Tribe notes, if the vantage point of an insider or majoritarian adherent were adopted, "actions that reasonably offend non-adherents may seem so natural and proper to adherents as to blur into the background noise of society."<sup>331</sup> Similarly, as Ruti Teitel has remarked: "Since 'the public at large' has already expressed its views through the legislative process, judicial adoption of a 'public at large' standard ... provides no review at all."<sup>332</sup> Unfortunately, American courts have not always adopted this approach, the central weakness of a number of the more maligned opinions of the United States Supreme Court being its reliance on an objective observer standard.<sup>333</sup> In Canada it is as yet unclear what stance will be taken. However, the Ontario Court of Appeal has emphasized that we must seek "the reality of the situation faced by members of religious minorities. Whether or not there is pressure or compulsion must be assessed from their standpoint".<sup>334</sup> Arguably, this is also the position of the Supreme Court given its claim in Big M that the "protection of one religion [by the Lord's Day Act] and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity."<sup>335</sup>

### (c) Exceptions to the Rule against Assisting a Particular Faith

To the extent, therefore, that the freedom from religion proscribes any state "preference of one religious ... view over another, it necessarily prohibits the political use of religious classifications as a basis for the provision of benefits or burdens."<sup>336</sup> Two exceptions, however, arise under the Charter.

(i) Minority Free Exercise Accommodation

The state often assists dissident citizens in the exercise of their rights of manifestation by exempting them from religious burdens caused by governmental programs. It would be ironic and inconsistent with the philosophical premise of section s.2(a) if such exemptions, with obviously religious purposes, and with an obviously limited constituency of beneficiaries, were deemed impermissible under the Charter. These acts of state tolerance are a special category of free exercise advancement which Professor Tribe has said constitute a "zone of required accommodation".<sup>337</sup> Unlike situations where the state is permitted to accommodate, absent coercion, here the state is compelled to accommodate by the individual's free exercise rights.<sup>338</sup> Thus we "recognize ... that government's actions impinge on different persons in dramatically different ways so that a truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by a challenged" law.<sup>339</sup> Any notion that it is wrong for legislation or the courts to assist a particular faith in such a manner is misconceived as long as accommodation is limited to alleviating state created burdens.<sup>340</sup> If a state program is conducive to the religious lifestyle of the majority, but an appreciable inconvenience for religious minorities, the former cannot be swayed from their faith by any assistance legislative or judicial exemptions may afford to the latter. Such treatment, although unequal, merely restores an equality which ensures the freedom of choice.<sup>341</sup>

Accordingly, we can expect that when the government itself expressly alleviates the religious consequences of its laws on dissentient faiths, these efforts will be upheld. And should the legislature discriminate in their accommodation efforts, unequally protecting groups, perhaps favouring the comfortable minorities while ignoring the more divergent, then the true neutrality necessary to sustain the freedom of choice mandates affirmative judicial action.

(ii) Group Rights under s.29

The Charter in s.29 articulates our constitutional commitment to a concept of special group fulfilment. It provides that other freedoms or rights do not abrogate or derogate "from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." This has been interpreted in the Reference Re Roman Catholic Separate High School Funding<sup>342</sup> as indicating that section 29 protects these particular collective rights from challenges based on the individual freedoms recognized in the Charter. There, the Supreme Court upheld public funding for Ontario Catholic secondary schools, stating that "the rights or privileges protected by s.93(1) [of the Constitution] are immune from Charter review under s.29 of the Charter"<sup>343</sup> or "[t]o put it another way s.29 is there to render immune from Charter review rights or privileges which would otherwise i.e. but for s.29 be subject to such review."<sup>344</sup>

So the concept of respect for individual autonomy has been subordinated in this instance to historically grounded group interests, interests guaranteed in the Constitution Act of 1867. The most likely personal religious liberties to conflict with these collective rights will be those of the teachers of denominational school boards. We can expect, as in the past, that the individual teacher's freedom of religion will be subordinated to the group's s.29 privileges. Denominational role models, at least, appear to have no Charter right to "sin".<sup>345</sup>

(iii) Accommodation of All

Legislation which aids all religions in a non-preferential manner is at first glance consistent with Charter requirements. There is, nevertheless, some concern that there is an inherent potential for coercion in any government aid to religion however even-handed it might appear to the majority.<sup>346</sup> For this reason critics have insisted that state efforts should be confined to those necessary to the removal of government imposed burdens.<sup>347</sup> There is also concern that accommodation of all religions will favour religious persons at the expense of those who hold no religious

beliefs. Here the state must walk a careful line, or at least this appears to be the opinion of American courts who have warned that the state may not "aid all religions as against nonbelievers,"<sup>348</sup> or "show ... hostility to religion, thus preferring those who believe in no religion over those who believe."<sup>349</sup> The Canadian position awaits clarification. Some of our courts have clearly indicated a pro-religion bias.<sup>350</sup> Yet surely "[a] noncoercion standard protects nonbelievers and those indifferent to religion no less than it protects believers"?<sup>351</sup>

#### 4. Sustaining Improper Purposes Under Section 1

Before leaving the subject of religious orthodoxy one final issue should be addressed: may legislation which has an invalid purpose be justified as a reasonable limit under s.1 of the Charter? Recall that in Big M the appellant argued that in spite of its original religious purpose, the impugned legislation was saved by s.1 in that it now met the proper secular objective of providing for a universal day of rest. Recall also that Mr. Justice Dickson rejected this submission pointing to a "fatal difficulty"<sup>352</sup> in the appellant's argument, "that it asserts an objective which has never been found by this court to be the motivation for the legislation,"<sup>353</sup> and he further held that reliance on an ultra vires purpose under s.1 was impermissible.

The division of powers complication makes this judgment somewhat awkward to apply to the broader question of the relationship between s.1 and legislation with an invalid s.2(a) purpose. Nonetheless, Big M does indicate that legislation with the aim of enforcing religious conformity is insupportable under s.1. Referring<sup>4c</sup> to A.-G. Quebec v. Quebec Ass'n. of Protestant School Boards et al., Dickson C.J.C. reiterated the opinion given there by the Supreme Court that if an Act "purported to impose the beliefs of a State religion [it] would be in direct conflict with s.2(a)"<sup>354</sup> and incapable of legitimation by s.1. Similarly, in her separate ruling, Madam Justice Wilson noted:

Where Parliament acts for the purpose of curtailing religious freedom ... it is possible to state with certainty

that this governmental objective or interest cannot pass the s.1 test. Indeed, it was made clear in Quebec Protestant School Boards ... that legislation cannot be regarded as embodying legitimate limits within the meaning of s.1 where the legislative purpose is precisely the purpose at which the Charter right is aimed (emphasis added).<sup>355</sup>

This view has also been expressed in both dissenting lower court decisions in Elgin County<sup>356</sup> and Zylberberg.<sup>357</sup> These opinions insist "that interference with the religious rights of the minority is [not] justifiable in order to satisfy the religious requirements of the majority"<sup>358</sup> because it is inconsistent with the basic thrust of a constitutional guarantee of religious freedom. And the Court of Appeal resolution of the Zylberberg case similarly accepted the contention that "since the very purpose of s.28 of the Regulations violated s.2(a) of the Charter, it was incapable of justification under s.1."<sup>359</sup> It is likely, therefore, that legislation which is found to have a coercive religious objective will not be entitled to s.1 consideration. And is this not entirely appropriate? If a legislature wishes to act in direct opposition to the Charter freedom it should be forced to admit to the drastic nature of such action and be required to use the s.33 override.

### C. FREEDOM FROM SECULAR ORTHODOXY

In the long term, legislative impositions on conscience will rarely be attributable to laws which deliberately prescribe, advance or inhibit religious interests. More frequently, an unforeseen coercive effect on individual choice will occur directly, or indirectly, by reason of the operation, enforcement or intended scope of non-sectarian legislation.<sup>360</sup> Because whenever the state weaves value-neutral norms into the social fabric, the possibility exists that it may inadvertently impose a temporal orthodoxy which suppresses the ability of outsiders to engage in self-creative enterprises. And while it is unrealistic to expect our legislators to anticipate and comprehend all of the higher duties that govern Canadians, the state must, nonetheless, be responsive to the accidental

burdens it imposes upon human dignity. Otherwise, to ignore the question of such unintended effects "would be to ignore reality and to concede the rights of the individual or a minority to the interests of the majority, even if these interests appear legitimate as far as the majority are concerned."<sup>361</sup>

Thus, as we briefly indicated earlier, the separate scrutinization of a law's functional result serves to ensure that society's collective blindness does not unduly restrain minority religious life. And consequently, effects analysis, in the context of the freedoms to practice and dissent, plays a significant role in determining the extent to which the Charter immunizes the behavioural implications of life-directing beliefs.

This chapter is organized with a three-fold objective. Firstly, it seeks to explore the justifications for, and the recognition of, the constitutional insulation of conviction-animated conduct. Secondly, it endeavours to illustrate the disconcerting superfluousness of reviewing the effects of secular legislation under the freedom from conformity to religious dogma; that is, it advances the proposition that allegations of sectarian impact should, in the interests of conceptual clarity, be phrased in terms of the freedom to manifest or practice, rather than the freedom to dissent. And lastly, it attempts to present a comprehensive model for construing the rights of manifestation that is consonant with existing case law and the freedom of choice.

### 1. Recognition of the Freedom to Manifest or Practice

Until the entrenchment of the freedom of conscience and religion, our religious liberty did not explicitly entail the right to follow our fundamental convictions in everyday activities. Judicial opinion in pre-Charter jurisprudence appeared to limit the concept to merely the empty entitlement of believing what you wished. An example is the Supreme Court of Canada's decision in Walters.<sup>362</sup> In that case, the constraining effect of the challenged land legislation on the Hutterite communal way of life was found not to be offensive to religious freedom because the Court did not

consider their practices within its ambit; "it [did] ... not mean freedom from compliance with provincial laws relative to the matter of property holding."<sup>363</sup> Thus no one seemed to have the right to exemplify his or her scruples in behaviour that society had prohibited.<sup>364</sup>

But under the Charter, as we know, the Supreme Court of Canada has declared that the free exercise of fundamental personal convictions is the second core value encompassed within the s.2(a) guarantee; it has, therefore, necessarily abandoned the formalistic belief-action dichotomy that was so manifestly incompatible with true religious tolerance. And thus, every citizen has

the right to entertain such religious beliefs as [he or she] ... chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.<sup>365</sup>

Moreover, in accordance with the demands of the freedom of choice, not only religious beliefs and practices are protected, but also those of conscience.<sup>366</sup> Consequently, if any distinction remains today between the freedom to believe and the freedom to act, it is that the former is an inherently absolute right while the latter is subject to certain limitations that will be discussed later.

To explain this expansive turnabout, it should first be noted that the Supreme Court's position was not one born in isolation; rather, it echoes the interpretation and implementation given religious freedom by other democratic societies. Indeed, the first Charter case to admit the freedom to manifest relied, in part, on the fact that Canada had ratified the International Covenant on Civil and Political Rights. In Videoflicks,<sup>367</sup> Tarnopolsky J.A., conscious of our obligations under this document, reasoned that s.2(a) should be construed in conformity with its more elaborately described right of the individual "to manifest his religion or belief in worship, observance, practice and teaching".<sup>368</sup> Interestingly, however, the Covenant is only one of a number of international human rights instruments with similarly phrased acknowledgements of the

significance of sectarian habits.<sup>369</sup> And equally relevant is the express protection for the "free exercise" of religion in the American and Australian<sup>370</sup> Constitutions, which the judiciary of both nations have said exempts religious practice burdened by general regulatory schemes.<sup>371</sup>

So obviously there is considerable esteem, at home and abroad, for the inseparable relationship of belief and action in matters of conscience. It is an esteem commanded by the realities of faith and the contemporary understanding of human rights. From a practical viewpoint, few life-informing beliefs will have absolutely no behavioural consequences, and any that do cannot conflict with the demands of the state. The freedom of conscience and religion would thus have been a hollow guarantee if it did not protect at least some religiously animated conduct.

But at bottom, it is, as repeatedly emphasized by the Supreme Court, the liberal conception of "respect for the inherent dignity and the inviolable rights of the human person"<sup>372</sup> which most appropriately and persuasively directs constitutional deference to religious practice. We cannot truly respect human dignity unless we afford individuals the freedom of choice to seek self-awareness (belief), self-expression (action), and self-respect (good conscience) for purposes of personal self-definition. Since belief, action and conscience are such intimately and logically interrelated aspects of this single formative process, a denial of the right to act pursuant to belief is a denial of the right to find one's ultimate concerns and to achieve spiritual fulfilment; it is a denial of the right to exercise choice in the interests of self-knowledge and self-respect; it is, in short, a complete denial of the right to engage in a self-creative enterprise.<sup>373</sup>

Given this continuity between belief and action, an exclusion of religious conduct from the purview of the Charter would have been a repudiation of individual capacity for rational self-regulation - the very foundation of our fundamental freedoms. And so the s.2(a) guarantee must irrefutably entail the accommodation of the diverse rituals and customs pertaining to spiritual life. The guiding norm of Western social justice - the valuation of human dignity - permits no other interpretation.

## 2. The Freedom to Dissent: A Superfluous Conception in Respect of Secular Laws?

Just as the citizen may not be impeded in the observance of his faith, neither may he be compelled to conform with temporal norms that he regards as religious. This latter liberty of disbelief, a freedom which seems to complement the freedom to practice, is one which was referred to previously as the freedom to dissent. At present, our judiciary have only begun to delineate the content and analytical nuances of this particular interest. But although it appears to have a separate doctrinal status in regards to the evaluation of an enactment's effects, it should, nonetheless, be subject to the same methodology of interpretation as the freedom to practice. For in the author's opinion, they are not substantively distinguishable. Moreover, it is submitted that the employment of two rights of manifestation unnecessarily confuses the process of effects review carried on under s.2(a).

Recall that the conceptual source of the negative right of manifestation is the freedom from conformity to religious dogma. As we know, this freedom protects "expressions and manifestations of religious non-belief and refusals to participate in religious practice".<sup>374</sup> Now originally these twin liberties of abstention were set forth in a purpose context and were intended by Dickson C.J.C. to prohibit religious indoctrination. He has specifically mentioned his attempts to restrict their "applicability to circumstances when the impugned legislation was motivated by a religious purpose".<sup>375</sup> But in Edwards, Dickson C.J.C. extended the conceptual reach of this negative free exercise right to include the freedom to dissent in the face of temporal ordinances. There he reasoned that even if legislation had a secular inspiration, it did not preclude the possibility that it "might limit the freedom of conscience and religion of persons whose conduct is governed by an intention to express or manifest his or her non-conformity with religious doctrine".<sup>376</sup> More specifically, if someone believes that an otherwise legitimate regulation imposes sectarian values or practices, that person may allege an unconstitutional impact upon the exercise of his freedom from conformity to religious dogma. But what interests does this notion enfold that are not already catered for by the freedom to practice?

In what profound ways can we differentiate between the right to observe one's own beliefs and the right to resist conforming with the subjectively perceived beliefs of another? After all, do we truly need the right to manifest religious dissent in the face of non-sectarian laws when we can also manifest religious belief in the face of such laws?

It is certainly clear from Edwards that both of these rights operate only to protect individual moral autonomy from the impact of acceptably motivated government action. Although Dickson C.J.C. has included the freedom to dissent within the freedom from conformity, he did not intend for it to rebuff coercive religiously animated laws; this is the function of Big M's religious indoctrination test. So no point of distinction lies here.

Nor can one maintain, as some litigants implicitly have, that s.2(a), either on the basis of religious or conscientious freedom, affords an unprincipled right to object to facially-neutral legislation; quite the contrary. The single integrated concept of the freedom of conscience and religion and its attendant rights of manifestation presupposes, once again, the individual's entitlement to engage in a personal self-determining process. Hence, the dissident's refusal to participate in government programs must be pursuant to countervailing, self-definitional convictions in the same way that affirmative acts of faith must be. Furthermore, no other conclusion is possible if, as Dickson C.J.C. has intimated, objectors have a freedom from conformity to religious dogma in the face of secular orthodoxy because it is religious orthodoxy in their eyes. Society and the courts do not regard the norm in issue as religious, only the complainants do. Therefore, the source of the impeached law's offensiveness must lie in a nonconformist belief; unless minorities hold some contrary precept, there can be no imposition on their conscientious sensibilities.<sup>377</sup>

Concurring judicial opinion, moreover, supports this argument. It is, for instance, what the Chief Justice meant in Edwards when he indicated that an agnostic shopkeeper could justify his disobedience of valid Sunday closing legislation if it was motivated by "dissentient religious purposes"<sup>378</sup> or a "purpose other than to make money".<sup>379</sup> It is also what he meant when he prefaced his recognition of the freedom to dissent with a statement that secular legislation does not abridge the freedom from conformity merely

because it coincides with a religion's tenets.<sup>380</sup> And finally, it is what Tarnopolsky J.A. meant in Videoflicks when, in the context of the same fact situation, he dismissed a claim to dissent under the freedom of conscience because it was not grounded in any "fundamental belief based upon conscience".<sup>381</sup>

If the freedoms to practice and dissent are equally adjudged in terms of legislative effects, and equally insulate conduct directed by the claims of conscience, then it should be apparent that any distinction between them is merely one of semantics.<sup>382</sup> Because no matter what the affirmative or recusant qualities of the relevant beliefs, practices or laws, we can always express the freedom to manifest in terms of both of its constituent rights. To demonstrate, any positive belief permitting or requiring conduct forbidden or unduly burdened by the state, could be alleged, when manifested, to be either the practice of that belief or an expression of dissent pursuant to that belief. And, of course, the same holds true for any negative belief that prevents participation in some activity operated or ordered by the government.<sup>383</sup> Therefore, it is submitted that theoretically, at least, the freedoms to practice and dissent are one and the same; they each afford citizens the basic liberty to manifest nonconformity with secular dictates. The freedom to dissent adds nothing new; it is just a negative re-statement of the freedom to practice.<sup>384</sup>

### 3. A Cruel Choice Model of Interpretation

Accepting the appropriateness of shielding conduct directed by personal convictions, American and Canadian Courts seem to have distilled this freedom so as to insulate the practitioner only from what are, in effect, "cruel choices".<sup>385</sup> Accommodation is mandated if the functional result of the impeached ordinance is the infliction of an insufferable moral or spiritual compromise. No one is to be placed in the impossible position of having to choose between obeying the compelling, but incompatible, demands of conscience and social justice.

Thus when raising a free exercise objection, the complainant must "be prepared to show that [it] ... is based upon a sincerely held belief based

upon a life-style required by one's conscience or religion".<sup>386</sup> In other words, the court must be convinced that the behaviour in question is pursuant to a life-directing belief: first, there must be a life-informing belief that is sincerely held, and second, it must sufficiently animate or direct the disputed manifestation. Finally, to complete the cruel choice equation, the objector must establish that his directed practice conflicts with, and is unduly burdened by, the effects of the relevant law.

Once these issues have been satisfactorily addressed, an infringement of s.2(a) has been proven. At this point s.1 applies and the onus shifts to the Crown to uphold the imposition of a cruel choice as a reasonable and justified encroachment on the freedom of conscience and religion. The following discussion examines each of these steps and issues in turn.

#### (a) The Question of Sincerity

It does not serve the cause of religious liberty to expansively and subjectively evaluate life-informing beliefs unless we also gauge whether they are, in fact, regarded to be life-directing. Because if a person has no genuine commitment to these ideas, they cannot be ultimate concerns,<sup>387</sup> they cannot "function as a religion in [his] life".<sup>388</sup> Hence neither these principles, nor the conduct they inspire, are worthy of respect; an individual's conscience cannot be injured when his avowed "higher duty" is spuriously advanced to escape the constraints of social justice. However, his fraudulent assertion is a breach of the duty he owes to us all: to act in a manner that is other-regarding. For inevitably, the entire community will suffer from the dilution of government programs if preferred status is accorded to unscrupulous claims.<sup>389</sup> Thus it is not only permissible for our courts to consider the sincerity with which a belief is held, they have "a duty to do so".<sup>390</sup> Certainly the rule of human dignity demands it.<sup>391</sup>

Nonetheless, the question of religious sincerity has not featured significantly in existing Charter jurisprudence and no definitive standards or rules have been prescribed for the evaluation of this particular question of fact. But as similar judicial inquiries have been conducted under the American first amendment<sup>392</sup> and Canadian labour relations legislation,<sup>393</sup>

the relevant considerations may be culled from these sources. It is intended here to highlight only a few of the more important and intriguing of these with the purpose of presenting some evidentiary guidelines that logically follow from the values underlying s.2(a).

To begin with, we must acknowledge that the mere exigency of establishing religious commitment, in and of itself, endangers, but does not necessarily violate, the freedom of choice. Faced with the distasteful prospect of publicly disclosing and defending his or her deepest loyalties, any nonconformist may well be dissuaded from enforcing and enjoying this liberty.<sup>394</sup> It is noteworthy that although the Supreme Court has admitted the judiciary's obligation to carry out such inquiries, it still deplors the "indignity" of these appraisals and advises the state, at least, to avoid them "whenever ... possible".<sup>395</sup> Thus, unless a noteworthy public interest is affected, or there is some evidentiary justification for doubting the objector's honesty, a "minimal inquiry" is all that is required.<sup>396</sup> While being reconcilable with the religious interests it is supposed to accommodate, this approach should also be sufficient to safeguard the commonweal.

Next, whether a minimal or a more extensive inquiry is merited, the evaluation of religious sincerity demands that the trier of fact strictly divorce himself from his own personal comprehension of what is believable. At no time should the court explicitly or implicitly require the justification of avowed convictions inconsistent with traditional or majoritarian principles.<sup>397</sup> The rule of human dignity precludes any patronizing diminishment of someone's beliefs on the ground that that person is deceiving himself, rather than the state. And so, as we noted earlier, the Charter does not expect the individual to prove the truth of his views when establishing their life-informing character;<sup>398</sup> neither does it expect him to discuss the reasons for his commitment to these beliefs when asserting their honest personal significance.<sup>399</sup>

In result, the inquiry is only purposively pursued if the bench directs its attention to the determination of what the objector, and only the objector, actually believes;<sup>400</sup> accordingly, some appropriate proof of commitment must be insisted upon and must be forthcoming. Suitable

indicia of sincerity might, perhaps, in minimal inquiry situations, be found simply in the complainant's demeanour when testifying<sup>401</sup> as to the specific beliefs he alleges and their meaningfulness in his life. However, given the above constraints on questioning, this approach would undoubtedly facilitate the assertion of the most outrageous and self-indulgent objections. But we need not fear that tolerance and delicacy of feeling here will invite a multitude of the unscrupulous to swear false allegiance to any "convenient" creed, because there just will not be any very "convenient" creed in these circumstances; invariably, when the goals of the relevant government program have a low priority, or when the overwhelming majority of citizens wish to participate in them, there will be little material gain to motivate disingenuous objections.<sup>402</sup> Most claims will be rooted in honest convictions, while the number and potential impact of those that are falsified will probably not make "attempts to distinguish [the] insincere ... worth much effort".<sup>403</sup>

Moreover, in the above scenarios, the fact of a recent religious conversion should not necessarily be viewed with suspicion. It would be odd indeed if the actual exercise of the freedom of choice automatically invited a closer and more intrusive assessment of conviction. And significantly, in one recent decision of the United States Supreme Court, the question of a complainant's sincerity was never doubted nor expressly addressed despite the newness of her beliefs.<sup>404</sup> So the length of time a particular faith has been held should only be one of a number of pertinent considerations; but alone, it should not be determinative of either the standard of scrutinization applied or of its outcome.

The same holds true for infrequent or isolated instances of incongruous behaviour. Admittedly, "[t]he most convincing proof of a person's good faith in asserting religious beliefs ... [is that] he has acted according to them in his past activities",<sup>405</sup> but this cannot be pushed too far. Given the inconsistent nature of human beings and the inexplicability and illogicality of faith, we must allow for some reasonable imperfection in an individual's spiritual life.<sup>406</sup> Too exacting a standard may well amount to religious persecution.

An excellent illustration of purposive judicial leniency in situations of this type may be found in the Jones case.<sup>407</sup> There, the accused, after illegally operating a private school, sought exemption from the requisite provincial certification procedure which he saw as offensively inferring that the government, rather than God, had the final authority over the education of his children. But Jones' actions in the presentation of his defence were viewed by the trial judge as being inconsistent with this avowed conviction.<sup>408</sup> For although the accused refused to apply to the proper authorities for an evaluation and approval of his school, he nevertheless asked a secular education expert to perform an equivalent qualitative inspection in order to give evidence on his behalf. Consequently, the sincerity and factual basis of Jones' belief was, initially, dismissed in the lower court ruling.<sup>409</sup>

On appeal, however, the Supreme Court readily and tersely assumed that the accused's beliefs were genuine merely because the trial judge had subsequently proceeded to deal with the case on the supposition that an honest conviction had actually been established.<sup>410</sup> Yet quite probably, several additional considerations - ones that we have discussed - also prompted this virtual presumption of sincerity: the absence of any truly appreciable advantage that would accrue to the accused from accommodation, minimal state concerns and the solitary instance of erratic conduct.

Having established a general conception of when a perfunctory review of sincerity is called for, we can now easily deduce the contrary circumstances which warrant a more exacting inquiry: most obviously, when the public interest at stake in the uniform application of a law is so significant that the unscrupulous will find false allegiance to "convenient" creeds enticing. It is here that a history of regular observance, among other factors,<sup>411</sup> is an appropriate and persuasive endorsement of honest convictions. Accordingly, if a Sabbatarian retailer seeks exemption from Sunday closing legislation, he should be prepared to show the prerequisite pattern of behaviour consonant with his claim - customary Saturday worship.<sup>412</sup>

(b) Identifying Directed Acts of  
Faith and Conscience

Intimately related to the above subject is the verification of an activity's religious or conscientious nature. In principle, if a disputed manifestation is not governed by a fundamental conviction, it is not entitled to respect. But the implementation of this notion is not free from difficulty because, in hard cases, the judicial examination of belief-directed behaviour can easily assume an invasive or arrogant posture inconsistent with the freedom's philosophical underpinnings. For the more closely our courts presume to assess the prosaic demands of individual scruples, the more they risk imposing religious orthodoxy, the more they risk usurping the fundamental and very intimate right to construe ultimate concerns, and, in short, the more they risk abridging individual moral autonomy. How then are we to purposively evaluate the conformity between belief and action? And assuming conformity, must all conduct so rooted in faith come within the scope of s.2(a)? Or can some convenient limit curtail the number of activities that deserve society's esteem?

Let us start with the postulate that the identification of religious practices, like the identification of religious precepts, requires a personal focus. This is not a notion that has been consistently observed by Western adjudicators. For although the relevant jurisprudence is replete with strong rhetoric disclaiming judicial power to divine religious orthodoxy, judges have, nonetheless, frequently repelled religious practice claims by instructing dissidents in the proper translation of their convictions. Sometimes the courts have declined to protect action if it was not completely and directly expressive of its governing principle.<sup>413</sup> Sometimes the courts have dissected tradition and ritual in order to strictly sever those aspects they deemed unnecessary.<sup>414</sup> And sometimes, in situations of unsettled church dogma, the courts have refused to credit the objector's interpretation.<sup>415</sup> But conceptually, all such appraisals are fundamentally flawed if they ignore or minimize the individual's religious motivation.<sup>416</sup>

To illustrate and buttress this argument, we need only contrast the sensitive and model analysis of the United States Supreme Court in Thomas<sup>417</sup> with the intolerant and formalistic reasoning of the Ontario High

Court in Morgentaler.<sup>418</sup> The former case involved a Jehovah's Witness who had been employed in a steel foundry. When transferred from the production of raw steel to the manufacture of tank turrets, he quit on religious grounds. Although not all Jehovah's Witnesses had religious qualms about making armaments, Thomas believed his faith forbade weapons work. Significantly, his application for unemployment compensation was subsequently upheld by the Supreme Court, despite the fact he was " 'struggling' with his beliefs,"<sup>419</sup> despite the fact his beliefs lacked "clarity and precision",<sup>420</sup> and despite the fact others of his church held contrary opinions as to what was scripturally permitted.

In its decision, the Supreme Court took pains to repeatedly emphasize the scope of the free exercise right in such circumstances and the restraints it imposes upon judicial examinations of alleged abridgments. Most notably, it stated:

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve [them] .... One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation as not to be entitled to protection ...; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this ... area, it is not within the judicial function and judicial competence to inquire [as to who] ... more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation (emphasis added).<sup>421</sup>

But a somewhat different conclusion is implicit in the Morgentaler decision. It was argued here that s.251 of the Criminal Code violated both the freedoms of religion and conscience. With respect to the former freedom, evidence indicated that all major denominations agreed that abortion was "a deeply religious and moral issue".<sup>422</sup> It was also shown that the United Church, among others, believed "in the right of all persons to be responsible moral agents ... and to exercise their informed

consciences."<sup>423</sup> Therefore, it was maintained that the transfer of abortion decision-making authority to the therapeutic abortion committee under s.251 was a direct contravention of this right or belief - a contravention that touched the core of their understanding of a person's fundamental humanity.

Now this was certainly not a claim that was, to repeat the exclusionary touchstone of Thomas, "so bizarre, so clearly nonreligious in motivation" that it should have been disposed of at this level of analysis. And it certainly should not have been so dismissed merely because the evidence also disclosed the existence of minor denominational opposition to the doctrinal interpretation advanced in support of the abortion right. Yet this is exactly what happened. It is instructive to fully review the High Court's judgment to uncover its outdated and erroneous preconceptions about religion, religious freedom and the judicial mandate under s.2(a).

The first disturbing aspect of its approach was the Court's view of the convictions embraced by the Charter. In its opinion:

To find a breach of freedom of religion ... the impugned law ... must ... infringe ... a tenet or fundamental doctrine of religion. [And a] ... tenet ... is a belief that the religious group believes to be self-evidently true and not open to serious debate.<sup>424</sup>

At no time did the Court suggest that the United Church's belief in the right of human beings to be self-determining moral agents failed this standard. But it is foreseeable that convictions deserving constitutional esteem will not meet this test.

By way of illustration, it does not accommodate religions which have long ascribed the right to construe doctrine to their adherents.<sup>425</sup> It also ignores the circumstances of religion historically and in the context of contemporary society. Over the years, human belief has characteristically been "the subject of debate, questioning and interpretation by believers".<sup>426</sup> And today, among the major denominations, sociologists advise us that few beliefs and practices are above reconsideration or

selective acceptance;<sup>427</sup> and this is especially true of the modern or "fringe" faiths.<sup>428</sup> Hence restricting constitutional significance to such church approved "tenets" is as inherently and unacceptably biased as would be any other objective judicial definition of protected convictions.

In any event, having established what was an acceptable normative root for religious practice, the Court then dubiously proceeded to interpose a judicial construct (which accorded conceptual importance to the doctrinal dispute) between the putative abortion right and its governing religious belief. It was stated that:

[A] distinction must be drawn between a tenet ... and a position taken by a religious group on a secular issue as a result of debate, discussion and resolution that may change from time to time .... [T]he freedom of religion ... was not designed to protect a denomination's policy position on an issue merely because the underpinnings of that position can be linked to a tenet of that religious group (emphasis added).<sup>429</sup>

And so, one is left to conclude that when sects argue the practical moral or social consequences of their beliefs and adopt official interpretations, adherents are not actually exemplifying the relevant tenet, but rather a policy position which, although it may be deeply rooted in that tenet, is still of no constitutional consequence. Only unchallenged manifestations and unchallenged beliefs are protected; no deference is due to the idiosyncratic, the deviant, or the disputed.

To be frank, this holding is presumptuous and unprincipled. The freedom of conscience and religion does not permit tidy judicial differentiations between immutable tenets and inconstant policy positions. As Thomas and some subsequent Canadian decisions<sup>430</sup> have apparently acknowledged, the community's comprehension of religious matters cannot be divorced from the dissentient perspective. What qualifies as a religious precept or a religious phenomenon is not a matter for substantive determination and it is improper for any court to presume the ability or authority to suppose otherwise.

To elaborate, action in itself is neither analytically controlling nor informative because it is not inherently divisible into secular or religious spheres, despite the apparent assumption to the contrary in Morgentaler. Because, as one writer notes: "depending on one's point of view, virtually any activity can be religious."<sup>431</sup> Moreover, unless sincerity is in issue, the opinions of third parties - be they judges or coreligionists - are immaterial. For if we have a right to define our ultimate concerns and to hold them apart from the rest of society, do we not also have a right to impute our own meanings to them no matter what anyone else believes?

This must be so. It would be incongruous to adopt a personal, formative characterization of life-informing beliefs and then impersonally construe their demands. The values that command esteem for an individual's chosen faith must also command an open-minded acceptance of his attempts to follow that faith as he understands it. If we respect man because he is a rational actor, a potentiality who is ever changing, ever re-thinking his place and purpose in the grand scheme of things, it would be absurd to limit that respect to those beliefs and practices he holds that are unquestioned by others. What right has any court to deny the individual his rationality, or to impose its conception of the enduring truths to which we all owe allegiance? The very impermanence of the human psyche, it will be recalled, refutes the possibility that any one person or any one group would ever know such truths; it mocks the absolutes envisaged by the High Court.

Therefore, it must follow that both churches and their membership have the right to reinterpret dogma.<sup>432</sup> And if we accept that the individual's autonomy of conscience extends to disagreement with religious authorities, how can we ever realistically or purposively determine the conformity between belief and action by an objective judicial inquiry. Obviously, all that should matter is what the practice or omission in question signified to the person before the bench. So long as he sincerely believes his conduct was directed by faith, we cannot gainsay its character.

Yet what of the reach of subjective belief interpretation? If the courts cannot determine the acts that are religious per se, does this mean that all

conduct directed by faith is sheltered by the Charter? Although substantive standards for excluding remote or questionable religious practices are conceptually unacceptable, could we not, alternatively, employ some non-objective limitation for purposes of acknowledging just those acts of self-definitional moment? Certainly, individual autonomy would not seem to be jeopardized by snubbing behaviour lacking personal spiritual significance. But the author doubts that this notion will truly constrain the ambit of s. 2(a) in any meaningful way as long as it is implemented in accordance with the rule of human dignity; and if it is not so implemented, it is of course, theoretically unsound.

American jurisprudence demonstrates two inconsistent approaches to the problem. In some cases, their judiciary have been satisfied if the disputed act was merely "rooted in faith" and religiously important to the individual; it did not have to assume the stature of an absolute religious imperative.<sup>433</sup> For instance, remember that in Thomas the Supreme Court refused to question the religious necessity of the claimant's conduct. As far as the Court was concerned, when Thomas left his job, he drew a line on the basis of his beliefs and it would not challenge the reasonableness of that line, even if the claimant was struggling with those beliefs.<sup>434</sup> And while this sort of lenient and minimal scrutinization is congenially respectful of man's rational nature, it does, as argued, effectively leave the free exercise right unrestrained.

But in other American cases, ones often involving rather unappealing claims,<sup>435</sup> their judiciary has moved beyond this low threshold and undertaken more intrusive functional examinations of an act's "centrality" to the religion or religious observance involved. Unless the practice was pursuant to a cardinal religious principle, it appeared that it did not qualify for protection.<sup>436</sup> However, the authoritativeness of this standard is now in doubt. According to Professor Tribe, the United States Supreme Court has never specifically insisted that government action burden an individual's core values or practices.<sup>437</sup> Moreover, other commentators believe the Court has, in fact, abandoned the test

moving ... toward the conclusion that "once a practice is deemed to be religious, questions regarding what is

'essential' as opposed to 'important', what is 'indispensable' as opposed to 'desirable' in religion is better left to the theologians" than to the courts.<sup>438</sup>

In contrast, the proper management of religious practice interests has had little pragmatic deliberation under the Charter; the nexus between belief and action has generally been so obvious, significant and compelling that it has invited little comment. The most insightful guidance we have as to Canadian judicial predispositions is to be found in Videoflicks. There Mr. Justice Tarnopolsky stated that:

[The] freedom of religion includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed ... in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned (emphasis added).<sup>439</sup>

Patently, he envisages that the right to exemplify beliefs will be limited to what is formatively essential; actions that cannot meet this criterion of constitutional worth will be found undeserving of society's concern. And this may also be the current position of our Supreme Court which has informed us in Edwards, rather offhandedly, that only legislation "impeding conduct integral to the practice of a person's religion"<sup>440</sup> can abridge s.2(a).

Such notions of "essential practices" and "integral conduct" undisputedly mimic the American centrality doctrine, and it would be unfortunate if the breadth of Canadian religious freedom should also be understood in these terms. The American standard has rightly inspired considerable academic contempt.<sup>441</sup> Several fundamental doubts exist about the conceptual and practical merits of judicial attempts to constitutionally ignore the incidental parts of religious life by even a role-oriented test of this nature.

One basic shortcoming of the search for spiritually essential conduct is that it will inevitably achieve little that could not have been achieved by the other, less impertinent American approach. For when differentiating among principal and peripheral religious exercises, our judges will still have to give primacy to the perceptions and estimations of the adherent or his church.<sup>442</sup> A court cannot make its own determination independent of these controlling authorities because regard for individual moral self-determinism requires that the valuation of religious acts must be a private and not a judicial ordering. Furthermore, not only does the court lack the prerogative to overrule or ignore the dissident's own appreciation of his conduct's personal consequence, it is also probably beyond its competence to apply this test in difficult cases without basically relying upon that appreciation.<sup>443</sup> In short, the religious observer must be allowed to set the measure of his claim's import for the very reasons that he must be allowed to construe the practices that his beliefs direct. And consequently,

centrality seems to be a one-way street. A court inclined to credit the claimant's estimate of the essential character of his practice may weigh this in the balance; a court disinclined to credit it can hardly undertake to decide the centrality issue on its own.<sup>444</sup>

Thus if we properly equate what is of self-definitional importance with what is "essential", there would seem to be little point in conducting an extensive review of a dissident's belief system to confirm the religious rank of his conduct. Once again, if a claimant can establish a normative root for his action and if he sincerely avers its spiritual importance, that should be sufficient surety of its integral nature and of its life-directing influence; any further investigation of the question is unacceptably invasive and insulting, unless, in fact, the court doubts the genuineness of his claim.

Another critical flaw of an essential practices threshold is that it is probably intrinsically incapable of affording respect to all of the concerns that should be accommodated by s.2(a). For, in spite of its functional tact, this test may tend to reflect a majoritarian understanding of legitimate religious behaviour simply because its analytical benchmark is a rather

mainstream notion of spiritual worth - "essentiality". "Essentiality" appears to assume the existence of a sacramental core of beliefs and practices that is particularly evocative of the Judeo-Christian tradition and other creeds with similarly elaborate and formalized doctrinal structures. Furthermore, as the heart of Western theistic belief is expressed in terms of religious duties to God or to third parties, the natural judicial inclination has been to stress transcendent commands and codes demanding or forbidding action. Thus what is "essential" usually becomes equated with what is, as in Videoflicks, "demanded". Indeed, in the few relevant comments of Canadian courts, the accent has definitely been on conduct which is "required", "forced", "compelled" or "bound" by conscience.<sup>445</sup> And so a strong impression seems to exist that constitutional shelter is extended only to those ordered by faith to follow a path inconsistent with secular ordinances.

But although it is comfortable to frame the issue thusly, we cannot meaningfully or purposively apply this approach to the less formal, more worldly or mystical religions. First of all, because they lack the same concentrated core of religious gravity with which we are familiar; they may see all of life - not just parts of it - in religious terms. For instance, the Amish belief that salvation requires life in a church community pervades every aspect of their existence; hence, Amish claims for religious exemptions could be limitless. How is a court to distinguish between the essential and inessential activities of this type of belief?

When confronted with the problem in Yoder, the United States Supreme Court, after an unnecessarily detailed review of the interrelationship between the complainants' Amish faith and lifestyle, basically gave up and said everything in their lives was spiritually important.<sup>446</sup> Yet surely the religious objection in that case to compulsory education beyond the eighth grade did not require so sweeping an appraisal or conclusion. If the Court had been less concerned with limiting the illimitable and more concerned with giving due deference to the practices alleged to be of sectarian significance, the Yoder judgment would have been more focused and conceptually clearer. However, as it was seemingly applied here, the centrality test was so ambivalent and presumptuous that it could have permitted the Court to reach a completely different result. For had it

found the Amish mode of life less commendable, it might have reasoned, as Professor Pepper notes, that none of their activities were essential since they all fell under religious mandates.<sup>447</sup> Thus, unless we apply this standard as advocated above, it will, in the context of such creeds, be either analytically unhelpful or an instrument of intolerance.<sup>448</sup>

Secondly, these deficiencies are compounded by an additional complication: there is not as much emphasis in certain of these sects on the Christian value of keeping faith with external duties. Religious self-interests or rights exist in the performance of (or abstention from) acts that may be encouraged or permitted (or discouraged) rather than commanded (or prohibited).<sup>449</sup> Such behaviour fits awkwardly into a cruel choice equation that underscores compelling selfless obligations; yet surely they are, as self-definitional expressions of moral autonomy, just as deserving of esteem. And it is submitted that the freedom of choice neither requires nor permits any "pernicious distinction"<sup>450</sup> between religious observances along these lines. Given that society's supposedly neutral "limited moral establishment" has, in fact, strong, majoritarian roots, the Charter will not strike a fair balance in respect of dissenters who find such laws religiously objectionable and yet are unable to show that their beliefs require them to behave in a non-legal way. At this time, however, we cannot confidently conclude that the Charter will indeed safeguard both those acts conscience demands and those it sanctions.

Consider the appellate judgments in the Morgentaler case, beginning with the summary analysis of the Ontario Court of Appeal. But first recall that the United Church believes in the individual's right to exercise moral autonomy and accepts abortion as a matter of informed conscience by a woman in consultation with her religious adviser and her physician. So it is a choice that the women of this faith are religiously free to make; it is not a choice that they are religiously compelled to make. Thus their claim could have been dismissed on the unprincipled basis that it involved a religious right rather than a religious duty; nevertheless, the Court seemed prepared to extend constitutional protection to such rights, provided that they were unqualified. Speaking of the evidence before it, the Court remarked that no group, including the United Church,

has, as part of its tenets or creed, the absolute right to an abortion. Some religions may ... permit it under certain circumstances, but that does not make it part of its essential religious practices (emphasis added).<sup>451</sup>

Presumably the Court reasoned that since the abortion decision is entrusted by the United Church to the conscience of the individual before God, it is not an unrestricted right, but an inherently self-limiting one; it will not always be an acceptable choice reconcilable with personal principles; and thus, it is unworthy of respect. No justification for this strict standard, however, was stipulated.

Then examining the issue in the context of the freedom of conscience, the Court refused to find a violation without proof of "a set of beliefs that bound one's conscience in a way that required there be complete freedom at the instance of one individual, without more, to choose abortion."<sup>452</sup> It is difficult to say precisely what this statement means. One could suggest that this requirement was actually met by the beliefs of the United Church; yet, obviously the Court did not think so. The probable inference is that conscientious rights must also be absolute. By insisting on "complete freedom", "without more", to choose abortion, the Court may again be indicating that abortion must always be seen as an appropriate choice; that is, it must be believed to be unquestionably correct in any circumstance.

Thus the apparent view of the Court of Appeal is that the constitution requires the accommodation of only those strange and self-serving acts that are stamped with the categorical approval of faith or conscience.<sup>453</sup> But if this summation does accurately represent the Court's position, it is conceptually indefensible. The Charter will not abide any neat judicial distinctions between absolute and non-absolute religious rights any more than it will between disputed policy positions and undisputed tenets. Both are formalistic, substantive smokescreens, and as such, they are incompatible with the entrenched freedom of choice; they ultimately deny the individual's right to make important self-definitional decisions by presuming to impose the court's opinion that certain choices can never attain such status. And to repeat, this is the sort of innately biased and

philosophically infirm value judgment which the judiciary has neither the authority nor the ability to make.

There is no better illustration of a profound matter of conscience than the question of abortion. For a woman, this decision "is perhaps more than any other she makes an intimate one, expressive of both her identity and her autonomy".<sup>454</sup> And it should be respected as such as long as that person believes it to be morally proper. The fact that abortion is not always the correct option, or that it may be made for inappropriate reasons by some, does not justify withholding from all women the right to choose for themselves. An indisputable implication of the valuation of human dignity is that the individual must be allowed the opportunity to err and to sin, just as he or she must be allowed the liberty to disagree with religious authorities. "The right to decide necessarily includes the right to make the 'wrong' decision."<sup>455</sup>

Yet, in order to deny the abortion claim constitutional significance, neither the High Court nor the Court of Appeal accepted these related, fundamental propositions. Sadly, they recoiled from the very idea that the citizen has a right to wrestle with the disputed or the permitted. Accordingly, it would seem that we will not fully respect man's rationality: we will honour only the unchallenged, the unqualified and the externally compelled - choices that are more or less predetermined for the individual. We will ignore completely that upon which faith has equivocated and left to the individual's own resolution or that upon which the individual begs to differ. But theoretically, these contradictions are irreconcilable. Once we proclaim the individual's right to submit himself to the precepts of his own selection, in recognition of his moral independence, we cannot dogmatically predicate that right upon the absolute correctness of his precepts or of his honest attempts to manifest them.

Unfortunately, the Morgentaler<sup>456</sup> decision of the Supreme Court of Canada failed to resolve these issues. Five members of the court, including Wilson J., ruled the law unconstitutional for procedural violations of the s.7 right of security of the person, whereas Mr. Justice McIntyre, LaForest J., concurring, voted to uphold the Code provision and perfunctorily endorsed the s.2(a) analysis of the Ontario Court of Appeal. Only Madame Justice

Wilson addressed the case, albeit somewhat clumsily and vaguely, in terms of the substantive personal interests at stake under s.7 and s.2(a). Forthrightly engaging in the conceptual dialectics of human dignity, she found that a woman's autonomy over important, intimate choices was infringed under both Charter provisions.<sup>457</sup> And interestingly, although Wilson J. made no specific reference to the overly legalistic approaches of the Ontario Courts, she contrarily stressed that the entrenchment of individual choice permits the citizen the freedom " 'to go wrong' ", " 'to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric' " in his pursuit of the values he thinks underlie the good life.<sup>458</sup>

**(c) Establishing the Constitutional Incompatibility  
of Secular and Religious Norms: Proving State Coercion**

At this point, it falls upon the objector to demonstrate that a dictate of legislative justice, by its impact, unacceptably or cruelly compromises those life choices he has shown to be of legitimate religious significance. More precisely, the court must be satisfied that there is a coercive burden on spiritual or moral behaviour that is attributable to a conflict with temporal ordinances. For the objector and judge alike, this can be the most troublesome aspect of the cruel choice inquiry. Indeed, as subsequent discussion will reveal, developing and applying analytical parameters to this question has proved a difficult task for our courts and has evoked some critical and much public misunderstanding. Accordingly, the following material attempts, initially, to set forth some key issues and guiding principles that are discernible in existing jurisprudence and that are logically consistent with the theoretical roots of s.2(a). Then it seeks to flesh out these notions in the particular context of classroom religious exercises and instruction. In this manner, it is hoped to clarify the proper approach to proving and assessing the existence and magnitude of state interference with dissident religious autonomy.

(i) Direct and Indirect Burdens

To begin with, it should be apparent from the preceding comments that in order for a s.2(a) violation to be established, the objector must first show that government action is responsible for the burden alleged. In short, a causal relationship must be proven. Sometimes the conflict between secular and sectarian norms is obvious. Then state restrictions or requirements are said to be "direct burdens" on conscience and causation will not be in issue. Blunt limitations on drug use, or wearing knives, and blanket directions concerning school attendance or blood transfusions are examples of these. Other times, however, where the duties of church and state are less patently inconsistent, an "indirect burden" on conscience may exist if some state prohibition or command obliquely imposes a special cost, either economically or psychologically, on minority religious life. Laws which require the cessation of work on a day other than one's sabbath or which require one's children to publicly opt-out of classroom religious exercises are examples of these. Quite clearly, this second form of coercion will be more difficult to link with the impugned legislation, and it is the problem which will occupy our attention here.

Initially, American and Canadian courts excluded any functional results of government action from judicial review if they did not directly curtail religious beliefs. For instance, in its 1961 decision in Braunfeld,<sup>459</sup> the United States Supreme Court upheld state Sunday closing laws on the basis that they only indirectly impacted upon the claimants - Orthodox Jewish retailers - whose faith forbade Saturday work. The simple message was that statutes which merely operate so as to make the practice of dissentient beliefs more expensive were unimpeachable. A few years later, our Supreme Court employed the same doctrinal tactic in Robertson and Rosetann.<sup>460</sup> to validate the Lord's Day Act. Mr. Justice Ritchie, speaking for the majority, first concluded, once again, that the constitutionality of the Act turned on its effect, and not its purpose. Then he decided that the business inconvenience of having to close on two days a week rather than one was a purely secular and financial result which did not abridge religious freedom under the Canadian Bill of Rights.<sup>461</sup>

Just a few years after Braunfeld, however, the American Supreme Court rejected this formalistic approach and held in Sherbert<sup>462</sup> that constitutional protection applied not only in situations where the government imposed a direct cost, but also where it incidentally withheld an economic benefit. This case concerned a Seventh Day Adventist textile worker who was discharged by her employer for her unwillingness to work on Saturdays, the sabbath day of her faith, and who was unable to find other employment for that reason. Her subsequent claim for unemployment compensation was denied by the state on the ground that she had refused to accept suitable work. Although the consequences of such a denial were indirect, they did derive "solely from the practice of her religion",<sup>463</sup> as the Court noted, and they were considerable. Hence, it was determined that her ineligibility for benefits was an unacceptable burden on the free exercise of her faith. As Mr. Justice Brennan, writing for the Court, noted:

The [Unemployment Commission's] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed against [the] appellant for her Saturday worship.<sup>464</sup>

Since Sherbert the United States Supreme Court has reaffirmed its proscription of collateral economic burdens in several similar unemployment compensation cases.<sup>465</sup> But one of the first express references to this doctrinal advance in Canadian or Charter jurisprudence was enunciated in Tarnopolsky J.A.'s seminal Videoflicks judgment.<sup>466</sup> At issue was the impact of a provision of the Retail Business Holidays Act which, it will be recalled, required certain store owners to close on holidays, including Sundays. Two groups of affected retailers were appealing their convictions for the contravention of this provision: namely, those who sincerely kept a sabbath other than Sunday and those who observed no sabbath at all. For the purposes of analysis, the discussion here will be confined to the former, as the latter are considered elsewhere in this paper.<sup>467</sup>

Now with respect to those who sincerely kept a sabbath other than Sunday (the owners of Nortown Foods Ltd.), Tarnopolsky J.A. found that the Act infringed s.2(a). He believed that it imposed a substantial penalty on this essential religious practice. In his words:

While the Act does not require that one work on one's sabbath, it nevertheless constitutes a major inducement to do so. For [these retailers] ..., being forced to close on both days of a week-end or, for that matter, any two days in a week, when one's competitors can remain open for six days, makes the observance of one's sabbath financially onerous.<sup>468</sup>

Mr. Justice Tarnopolsky drew support for this conclusion from two sources. First, he believed that one consideration in gauging the constitutionality of legislative effects was whether they were in harmony with the multicultural spirit of the Charter as embodied in s.27. Accordingly, he reasoned, if a law "makes it more difficult and more costly to practice one's religion, ... [it] does not help to preserve ... [or] enhance ... that part of one's culture which is religiously based."<sup>469</sup> And second, as indicated, Tarnopolsky J.A. relied on or embraced the American treatment of indirect effects as exemplified in Sherbert and its progeny. In both those unemployment cases and the case before the bench, the state was depriving dissidents who would not forswear their Saturday sabbath of something that they would otherwise have been entitled to. The only point of distinction was that, in Sherbert, the state was withholding the equal entitlement to government benefits, while in Videoflicks, the state was withholding the equal opportunity to engage in business 6 days a week. And this was not, for Tarnopolsky J.A., a distinction worthy of comment. If anything, in the author's opinion, the latter disability was more serious because it could mean more than the loss of 20 or 30 weeks of benefits, it could endanger someone's entire livelihood.<sup>470</sup>

Nonetheless, the above ruling was challenged on appeal by the Crown<sup>471</sup> and subsequently rejected in Edwards<sup>472</sup> in the dissenting opinion of Beetz J., McIntyre J. concurring. The common criticism is the absence of a nexus between the impugned provision and the economic hardship

experienced by devout Saturday observers. The intellectual well-spring for this position is an article by Professor Petter.<sup>473</sup> As Petter sees it, Videoflicks is wrongly decided because it "is not the legislation which causes the financial burden; it is the religion itself."<sup>474</sup> His argument, however, rests on several questionable premises.

One of these is Petter's insistence that if the law was repealed it would not eliminate the burden felt by people like the complainants. To support this view he does not contrast the resulting position of Saturday and Sunday observing retailers, but rather that of non-Sabbatarian and Sabbatarian retailers: "persons who do not observe a Sabbath would be able to open their stores seven days a week, [while] persons who [do] ... would be able to open their stores only six days a week".<sup>475</sup> Furthermore, having so far failed to account for the situation of the majoritarian Sunday worshipper, Petter next suggests that the "true effect of Sunday closing legislation is not to penalize those whose Sabbath does not fall on a Sunday, but to benefit those whose Sabbath does"<sup>476</sup> (emphasis added). And therefore, although he concedes that this benefit is discriminatory in nature and that s.15 might be invoked to require its extension to all, he does not see it as disclosing the requisite and direct causal connection for a successful s.2(a) claim.<sup>477</sup>

The majority decision of Dickson C.J.C. in Edwards, however, completely dismisses Petter's basic contention and both of its analytical props. For unlike Petter, the Chief Justice accepts that "indirect coercion by the state is comprehended within the evils from which s.2(a) may afford protection".<sup>478</sup> The obviousness of the connection between legislative action and the alleged burden is a secondary consideration. What really matters, he seems to be saying, is the prevention of cruel choices.<sup>479</sup> And rightly so, because not only can the collateral effects of valid legislation have a substantial impact on dissentient faith, but also because, as both Dickson C.J.C. and Tarnopolsky J.A. believe, this view is consistent with s.27.<sup>480</sup> Most importantly, however, what the decisions in Edwards and Videoflicks implicitly recognize, and what Petter does not, is that many of our laws, including the one in issue here, were formulated to some extent with only the adherents of the dominant Christian Churches in mind. They may, then, express some latent bias or preference for the social values we

have said constitute the "limited moral establishment" acceptable under the purpose test. They are not necessarily neutral from the dissident's standpoint.<sup>481</sup>

Yet this is what Petter seems to be unrealistically assuming since he argues that the discriminatory advantage conferred by the Act on Sunday worshipping retailers had no religious significance other than in the context of s.15. Therefore it would have been fundamentally unfair and totally inconsistent with the rule of human dignity for our courts to have approached claims such as this one by ignoring the Act's majoritarian benefits and formalistically assigning the responsibility for any minority financial disadvantage to their creeds, rather than to the state.<sup>482</sup> Is not the inescapable conclusion of Petter's s.2(a) analysis that if the complainants do not conform, they have no right to equal respect? But in terms of liberal theory, they should have this right under either s.2(a) or s.15. Thus it must be contrary to the freedom of conscience and religion "for the majority to say, you minorities cannot expect to enjoy the freedom we do because freedom cannot be perfect when, for us, the majority in this matter, it is."<sup>483</sup>

Not surprisingly then, Dickson C.J.C. refused to draw the neat distinctions between s.2(a) benefits and s.15 discrimination that Petter advocated.<sup>484</sup> Instead, he approached the causation issue using comparative analysis essentially asking, as Tarnopolsky J.A. had, whether the Jewish complainants were worse off than equivalent majoritarian shopkeepers because the Act only facilitated the free exercise of the latter's beliefs. If he found that the government had conferred a significant "advantage on Sunday-observing retailers relative to Saturday-observing retailers, the [complainants were, in fact] ... burdened by the legislation".<sup>485</sup> And when considering the respective situations of these parties in the presence and absence of state intervention, he concluded that this was indeed so.<sup>486</sup> For under the Act, devout Saturday observers could conduct business only from Monday to Friday, whereas devout Sunday observers could conduct business on Saturday as well. But if the Act had not been passed both groups would be able to open their stores six days a week. Hence the state's responsibility for foisting a "new, purely statutory disadvantage"<sup>487</sup> on the complainants was clear: "as the Act

makes it less costly for Sunday observers to practice religious beliefs, it thereby makes it more expensive for some Jewish retailers ... to practice theirs".<sup>488</sup> Furthermore, because the retail industry was proven to be highly competitive, Dickson C.J.C. also had no doubt that these relative advantages and disadvantages were significant and cruelly burdensome for the complainants.

Before leaving this subject, the author wishes to make two final observations. First, if the respective positions of these groups had not been affected by the existence of the challenged regulation, if it had instead required Monday closings, then, as Dickson C.J.C. correctly notes, neither group would have had a claim cognizable under the Charter.<sup>489</sup> Any disability would have been a product of their faith. Second, as I have tried to indicate, this inquiry will not be purposively executed unless the courts contrast the dissident's situation vis-a-vis that of his proper majoritarian counter-part, something Professor Petter failed to do, but the Chief Justice did not.

#### (ii) Differentiating Substantial and Trivial Effects

Assuming that there is some incompatibility of spiritual and secular duties, the Supreme Court has ruled, as may have been gathered from the preceding discussion, that not every resulting burden on conscience is constitutionally offensive.<sup>490</sup> No Charter freedom, including the right to observe religious convictions, requires "the legislatures to eliminate every minuscule state-imposed cost".<sup>491</sup> Apparently, the fear that total respect for entrenched guarantees would cripple the nation or, more likely, flood the courts, has prompted the judiciary to define their conceptual parameters "quite apart from any limitation sought to be imposed upon them by the government under s.1".<sup>492</sup> The test for determining whether the effect of government action violates s.2(a) is "whether it significantly impinges on the freedom to manifest or practise religious beliefs".<sup>493</sup> So it is a question of degree. Only when state requirements "put ... substantial pressure on an adherent to modify his behaviour and to violate his beliefs, [does a constitutional] ... burden upon religion exist".<sup>494</sup>

One key issue in assessing whether state interference is substantial is the relevant judicial perception. And what was said earlier on this subject with respect to evaluating the coercive impact of state support for particular religions has, of course, equal application here. In short, if the inquiry's goal of guaranteeing individual self-determinism is to be paramount, the courts must ask whether the governmental disability is burdensome for the person before the bench. Consequently, what is trivial for the complainant is that which is not coercive of the complainant. Absent "a major inducement",<sup>495</sup> absent coercion, the dissident is not put to a cruel choice and religious voluntarism under the Charter is not abridged. However, there are occasions when the courts will insist upon imposing their own interpretations of the seriousness of the burden alleged. Claims they regard as nuisance actions, raising "extremely formalistic and technical" objections will fall.<sup>496</sup> In effect, this judicially defined limitation may be an oblique, and thus polite, assault on religious sincerity. And if so used, it is not fundamentally discordant with the rule of human dignity, although it will, no doubt, confuse the jurisprudence. More troublesome are those instances in which the court deems trivial objections born of sincere religious conviction.

In these instances, it seems, the courts will be applying an objective "de minimis" standard to ensure that trivial or insubstantial burdens which they perceive as incapable of interfering with religious belief or practice are excluded from s.2(a). Whether such internal balancing is required at this point, in the interests of judicial convenience, is debatable. For some, this process is properly conducted only under s.1.<sup>497</sup> For the author, the concern is that legislative action which coerces religious choices might be deemed trivial or that the claimant will be denied protection from modest burdens even in situations where there is no significant opposing Crown interest. At base, if there is any chance that an appreciable imposition on religious interests exists, the Crown should be required to prove its case under s.1. Only the most patently trivial should be internally excluded from the s.2(a) freedom.<sup>498</sup>

A second key concern in the question of magnitude is the nature of the burden to be assessed as trivial or substantial. Again, as was indicated in the context of the freedom from religion, if the Charter is to

protect the individual's chosen religious identity, it must guarantee him full membership in the political community, regardless of his religious affiliation. Applying this notion to the freedom from secular orthodoxy, we can surmise that whenever the individual must choose between his political and religious identities, he is faced with a cruel choice. So if there is a significant, state-imposed, socio-economic cost to being different, if we deny respect, privileges, opportunities and rights, viewed as the normal incidents of civic life, we impose a substantial burden on religious freedom.<sup>499</sup> Consequently, when assessing the offensiveness of impugned government action it may be necessary, especially in cases of indirect burdens, to approach the question from this angle.

By way of illustration, although the test of substantial or trivial burdens is set forth in Edwards solely in terms of abstract religious impact, when the Chief Justice applies this test to the facts before him, we can see that he is evaluating socio-economic cost. As he variously stated:

The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s.2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial ... (emphasis added).<sup>500</sup>

It is apparent from the above analysis that the competitive disadvantage experienced by non-exempt Saturday-observing retailers as a result of the Act is at the hands of Sunday-observing retailers .... I therefore do not think that the competitive pressure on non-exempt retailers to abandon the observance of a Saturday Sabbath can be characterized as insubstantial or trivial.<sup>501</sup>

(iii) Actual and Threatened Interference with Religious Practice

Is legislation violative of the s.2(a) guarantee if its operation or intended scope only "threatens" individual conscience? Or is respect for minority faiths conditioned upon the occurrence and proof of actual constraint? In some early Charter cases, abstract conflicts were held to be insufficient grounds for a challenge. For instance, in the Jones case, the Alberta Court of Appeal ruled that the claimant parent was not an aggrieved person until he had applied for and been refused certification.<sup>502</sup> This result can be explained as an instance of the doctrine of "ripeness" which precludes relief "for those cases where a decision would be premature because harm is merely anticipated and yet uncertain".<sup>503</sup>

Yet surely the better, more purposive view, is that both actual and possible governmental intrusions are constitutionally noteworthy, provided the latter are sensibly comprehended. And as we just saw, this now is the opinion of the Supreme Court.<sup>504</sup> Some confusion remains, however, as to the doctrinal basis for protection against threats to religious freedom. Are statutory threats to conscience in themselves objectionable burdens under s.2(a)? Or, if they are not infringements, per se, are they nonetheless worthy of protection to the extent that they are ripe for relief as prospective wrongs?

Since the Charter seeks to insulate the individual's freedom of choice from state coercion, the author submits that it is more logical to analyze threats as infringements, per se, rather than as prospective harms. Thus, to the extent that there is state action which is coercive, the individual's freedom is constrained. It is irrelevant whether the legislation has coerced by the fact of sanctions or only by the threat of sanctions, as long as coercion itself exists. Such a case is not premature, with harm merely anticipated and yet uncertain. It is an instance of present harm, fully realized in its limiting effects on individual volition. It would be a formalistic insult to human dignity to hold otherwise.

Moreover, this classification choice has evidentiary ramifications for the claimant. On a ripeness analysis cases are more justiciable as the harm complained of becomes more imminent. Undue judicial insistence upon proof

of actual coercion can thereby defeat s.2(a)'s purpose. On the other hand, if our courts recognize that statutory threats to conscience are themselves objectionable, they should take a more lenient approach to evidentiary requirements. Protecting dissidents from state measures that may well deter or offend their religious practices or beliefs will require the judiciary to find infringements in the abstract, on the basis of the relevant legislative and religious particulars, and simple common sense. Lacourciere J., although with a somewhat flawed analytical perspective, puts this well:

If the circumstances disclosed in the record, or an objective analysis of the situation, could reasonably support an inference that the impugned regulation creates indirectly a coercive effect, I would not hesitate to concur with my colleagues' conclusion with respect to its constitutional invalidity. I agree that, where the inference of coercion can reasonably be drawn, there is no need for the applicants to produce concrete evidence of harm in order to demonstrate a prima facie infringement of the constitutional freedom.<sup>505</sup>

(iv) The State's Right to be Non-conformist  
in the Absence of Coercion

Is the government itself necessarily required to behave in accordance with the diverse and contradictory religious scruples of its citizenry? Is its failure to do so an objectionable encumbrance on individual spiritual sensibilities? An early and interesting Charter judgment on this point may be found in Baxter v. Baxter.<sup>506</sup> There the respondent husband opposed the granting of a decree absolute pursuant to the Divorce Act on the grounds that he was bound by the scriptures to remain married. In effect, the crux of his complaint was that because the state's views on divorce did not comport with his own, he was exposed to religious harm. The Ontario High Court, however, refused to find a s.2(a) violation. The Court reconciled the respondent's right to follow his conscience and the government's right to promote preferred values in this field of law, thusly:

[T]he Charter is written in terms of what the State cannot do to the individual, not in terms of what the individual can exact from the State. The fact that the government cannot exact from the individual a surrender of the smallest part of his religious scruples does not mean that he can demand of the government exclusion of his marriage from the provisions of the Divorce Act, the better to exercise his religious beliefs.<sup>507</sup>

Arguably, the Court's position was that the injury to conscience here was neither directly attributable to the state nor the result of any indirect coercion. It would have been surprising if it did! The Act permitted the wife to terminate their marriage, to sin, if you will, but it did not force this decision; nor did it pressure the husband to break with his faith. Is this distinction tenable? The author believes that it is. Only if the Act had excluded or favoured the adherents of certain faiths, and not those of the respondent's faith, would he have had a valid claim of indirect coercion.

Remember that no one can force upon another the conditions of that person's self-respect unless it is necessary to ensure the equality of respect for all. If you yourself are not being coerced under a government program, you cannot argue that the liberty that program permits your fellow citizens is a violation of your own personal autonomy. The state, therefore, is not bound to abide by the individual's conscience,<sup>508</sup> it must only afford him or her, and everyone else, the equal right to do so.<sup>509</sup> Otherwise, as the Supreme Court has noted, the freedom of conscience and religion does not require society "to take affirmative action to eliminate the natural costs of religious practices".<sup>510</sup> And consequently, those who despair of swaying non-believers to the true path are not entitled to impose their particular moral vision through the vehicle of the Charter.

But, of course, the prospective claimant will attempt to circumvent this conclusion by insisting that he is not seeking to thrust his beliefs on another, but rather he is just seeking relief from state coercion. And taxation legislation, which may exact funds from the dissident for a variety of foreseeably objectionable ends, seems especially susceptible to this allegation. The author doubts, however, whether assertions of this nature

will meet with much success. Consider for instance, the conceptual difficulties faced by an individual who, having contributed his tax dollars under various religiously inoffensive tariffs and levies,<sup>511</sup> now wishes to exert some control over those funds for reasons of conscience.<sup>512</sup>

This was the very issue that confronted the Manitoba Court of Appeal in Re MacKay et al. and Government of Manitoba.<sup>513</sup> The various provisions of the Elections Act providing for the reimbursement of candidates' expenses, from provincial monies in the Consolidated Fund, were said to be inconsistent with the complainants' freedom of conscience because they forced them, as taxpayers, to subsidize or to make compulsory contributions to political parties which might espouse ideas or policies they abhor. The Court of Appeal disagreed. By stressing the many and indeterminate origins of the government's monies, and the fact that it was the government which actually paid out the disputed amounts, the court isolated the complainants from the evil they alleged. Twaddle J.A., writing for the majority, summed up the matter in these words:

No citizen, by payment of tax or otherwise, is required to contribute to or support a political cause. The citizen pays a tax: the state uses it not as the citizen's money, but as part of a general public fund .... [Thus, m]onetary support by the state for the expression of minority views, however distasteful to the majority or to another minority group, cannot offend the conscience of those opposed to the viewpoint.<sup>514</sup>

Once again we see that, in accordance with liberal theory, the courts will not accept that the ethical decisions of others can "induce in anyone a pang of conscience for the moral quality of their own conduct or lack of it".<sup>515</sup> Without proof of coercion the complainants could not evoke judicial concern. Yet direct coercion was ruled out because their taxes were assessed under morally innocuous legislation. Moreover, a collateral burden on conscience could not have been shown unless the Act refunded only the expenses of candidates who held certain moral or politically offensive opinions, and this was not the case. In the right circumstances, however improbable, the Act would reimburse candidates who offended the

fundamental beliefs of all citizens. So although some candidates with repugnant views might be paid from the Consolidated Fund, the critical factor was that the expression of any viewpoint was permitted. Everyone's conscience was equally subject to the "rough and tumble" and disappointment of the political process. Whether this is a realistic conclusion is debatable, but no cruel choices flowing from the legislation existed and this is the solitary bench mark of constitutional relief.

Thus, in general, the uneasy taxpayer will occupy the moral high ground only in regard to legislation directly levying duties for a specific and religiously insulting purpose. Unfortunately, even in these cases the claimant may well not succeed. For example, although a special "surcharge for submarines" violates the s.2(a) rights of a pacifist, it is quite likely to be sustained under s.1, considering the deference American courts have extended to tax and national defense measures.<sup>516</sup>

#### (v) Religious Exercises and Instruction in Public Schools: Finding State Coercion

As we have seen, the impact of the freedom of conscience and religion on public education has been noticeable, and it has certainly been controversial. Some areas of potential conflict under the purpose test have already been indicated. In relation to effects analysis, it is foreseeable that a wide range of facially neutral school activities and programs may offend dissident parents and students. Patriotic exercises,<sup>517</sup> general curriculum content,<sup>518</sup> compulsory attendance or education,<sup>519</sup> student dress and grooming<sup>520</sup> and corporal punishment<sup>521</sup> are some possible problems that come readily to mind. The following discussion, however, is directed only at assessing the judicial inquiry into legislative effects in the two recent Ontario school cases discussed earlier: Zylberberg<sup>522</sup> and Elgin County.<sup>523</sup> Although neither of these cases involved facially neutral legislation, they should, nevertheless, be most illustrative of legislative effects analysis generally, and particularly in the field of education.

Let us begin with the Zylberberg decisions, and then employ their lessons and insights to evaluate the related judgment in Elgin County. But first recall the following about the education regulation in issue in

both cases. One provision of that regulation (s.28(1)) required the daily opening or closing of public schools with the Lord's Prayer or other suitable prayers, while other provisions (most of s.28) required school boards to provide two half-hour periods a week devoted to religious instruction. The former prayer requirement was challenged in Zylberberg, and the latter education requirement was challenged in Elgin County. Furthermore, in each case, the school board and Crown asserted that yet other provisions of that regulation (s.28 (10) - (13)), ones allowing for the exemption of students at parental request from either the impugned religious exercises or religious instruction, were a complete answer to the constitutional infirmities alleged. According to these provisions, no requests could be refused, and once made, the students were either excused from the classroom or if they chose to remain, they did not have to join in.

Essentially two complaints were raised against this opting out process by the various parents and intervenors in Zylberberg. First, they objected to the fact that it directly forced them and their children to make a religious choice. Because the state, by sponsoring this religious practice and placing the onus on the dissident to drop out, thereby compelled their children to declare, visibly and embarrassingly, their non-conformity. They not only risked ostracization but were also, some said, forced to outwardly manifest their own beliefs at the state's insistence. Thus, in addition, they asserted that the exemption alternative was illusory. In result they were actually, albeit indirectly, obliged to permit their children to participate in majoritarian religious ritual. Significantly, however, the complainants only challenged the constitutional validity of the mandatory school prayers set forth in s.28(1) of the regulation. They refrained from asking for a declaration with respect to the exemption provisions themselves as they did not wish to lose whatever option those provisions gave them to withdraw from religious instruction.

The judgments of the lower and upper court majorities were, of course, diametrically opposed. In the Divisional Court, O'Leary J. accepted that the holding of religious exercises in schools might constitute some pressure for participation, but he did not see it as a major inducement of the stature of the financial penalty in Videoflicks or the penal sanction in Big M.<sup>524</sup>

Anderson J., concurring with O'Leary J. in a separate, narrower judgment, found no pressure at all. In his opinion all the appellants were confronted with was a choice: "Choice is of the essence of freedom and the decision as to what choice is appropriate is often difficult. The difficulty is part of the price of freedom."<sup>525</sup> As far as he was concerned, it was an offence to logic and common sense to suggest that the necessity of asking for an exemption was a form of constraint.<sup>526</sup> Mr. Justice Reid, on the other hand, found, in dissent, that the effect of s.28 of the regulation was contrary to s.2(a). It seems he believed that the excusal provisions operated so as to indirectly compel dissidents to refrain from exempting their children because there was no equality in the direct burden or "price", as he called it, which the regulation imposed on willing conformists and unwilling non-conformists.<sup>527</sup>

The majority decision of the Court of Appeal agreed with Reid J.'s basic conclusion that dissident students would be reluctant to openly take advantage of their election right, and so a cruel choice was indirectly forced upon them.<sup>528</sup> Moreover, the Court also held that the abstention process, as alleged, infringed the freedom of conscience and religion in a "broader sense".<sup>529</sup> Apparently, for the majority of the Court, the direct "effect of the exemption provisions [was] ... to discriminate against religious minorities"<sup>530</sup> because it "compel[led] ... students and parents to make a religious statement."<sup>531</sup> However, as requested, the Court ruled only s.28(1) of the regulation unconstitutional. Contrast Lacourciere J.A., in dissent, who rejected this conclusion and reasoning and found that the impact of the regulation was merely formalistic and technical.<sup>532</sup> Of these many rulings, it will be shown that the majority determinations of the Court of Appeal most clearly exemplify a purposive understanding of the right in issue and the true goal of this stage of the inquiry.

It should be apparent that, in light of the obligatory and majoritarian nature of the challenged observances, there was a pivotal relationship between any initial determination of direct discrimination or penalization and any subsequent determination of collateral coercion. Unless the exemption provisions were themselves offensive, no indirect compulsion to participate in the prayer exercises of s.28(1) existed. But because the complainants confined their challenge solely to s.28(1) of the regulation, for

reasons already noted, the question of indirect coercion was, by default, the central issue in the case. Understandably then the Court of Appeal began its analysis with this question, and it is the only question expressly addressed by Mr. Justice Reid. The discussion here follows this approach, although it seems appropriate to start with a general consideration of why O'Leary J., Anderson J. and Lacourciere J.A. decided as they did. Then, where relevant, the contrary analysis of Reid J. and the Court of Appeal will be superimposed.

The critical flaw in the rulings of those three judges who found no s.2(a) infringement was that of perspective. When evaluating the consequences of an exemption declaration and the pressure it created to conform, they failed to adopt a suitably subjective<sup>533</sup> and comparative focus; and this tainted much of their reasoning. It certainly distorted their appreciation of the evidence presented and of the evidentiary burden. For instance, actual indirect coercion was alleged by the parents, and barring insincerity, their claims should have merited considerable weight. But by employing an objective viewpoint, these judges were free to dismiss the parents claims as trivial. Moreover, the likelihood that the regulation might, in these general circumstances reasonably threaten or be "capable of interfering with [dissentient] religious belief or practice", as Dickson C.J.C. put it in Edwards,<sup>534</sup> was simply dismissed as unworthy of consideration, at least by Mr. Justice Anderson. In his words:

I can conceive of circumstances in which insensitive practice, asserting or implying that to exercise the right to be excused was in some way discreditable or reprehensible, might produce an element of compulsion, coercion or constraint. The material before us disclosed no suggestion of any such situation. In my view, the mere possibility of abuse should not condemn the regulation.<sup>535</sup>

Since the Divisional Court's decision pre-dated Edwards, this unwillingness to sensitively appraise legislation in the abstract, this overly demanding concern with proof of real coercion, is somewhat forgivable. But Lacourciere J.A.'s similar and much later conclusion is not. Writing after

Dickson C.J.C's subjective and comparative analysis in Edwards, Lacourciere J.A. continues in an unacceptably majoritarian, non-comparative and "fact bound" slant:

Neither common experience nor the evidence in this case lend support to the conclusion that the obligation to seek an exemption imposes on religious minorities a compulsion to conform to the practices of the majority .... [T]he evidence is clear that students of the respondent Board are regularly excused from classroom or educational activities for many different reasons. They are permitted to be absent from school to observe religious holidays at their parents' request. It has not been suggested that a request of this nature raises in the minority students or their parents any concern in differentiating them from the majority.<sup>536</sup>

Mr. Justice Reid's examination of these evidentiary considerations, on the other hand, is sound, purposive s.2(a) analysis. He was prepared to accept the allegations of actual compulsion, although neither penal sanction nor financial burden existed, because he was willing to review the question from the appellants' standpoint. As he stated:

It may be that a control or limitation indirectly imposed is not readily appreciable to those who are not affected by it. It may be difficult for members of a majoritarian religious group, as I am, to appreciate the feelings of members of what, in our society, are minority religions. It may be difficult for religious people to appreciate the feelings of agnostics and atheists. Yet nevertheless those feelings exist. No one has suggested that the feelings expressed by [the] applicants are not real, or that they do not run deep.<sup>537</sup>

Furthermore, he was even prepared to accept that compulsion could be found in this case in the absence of proof. Commendably commenting on

the obviousness of the state coercion exerted on both parent and child, he remarked:

Is evidence needed to establish that some parents might be so reluctant to stand on their rights [that] they will refrain? .... [Moreover,] if most of the pupils willingly conform, might not a few whose family faith is Moslem, or Hebraic or Buddhist, feel awkward about seeking exemption? Peer pressures and the desire to conform, are notoriously effective with children. Does common experience not tell us that these things are so, and that such feelings might easily, and reasonably, lead some not to seek exemption, and unwillingly conform, or others to seek it, and be forced to suffer the consequences to their feelings and convictions.<sup>538</sup>

Significantly, the Court of Appeal indicated its approval of Mr. Justice Reid's analysis and succinctly reiterated his principal conclusions as to why the regulation, in reality, had been shown to indirectly compel minority cooperation. In its words:

The evidence in this case supports this view. The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practice.<sup>539</sup>

Turning to the "broader" or direct implications of the mandatory prayer regulation, recall that O'Leary J., Anderson J. and Lacourciere J.A. saw little objectionable in requiring unwilling participants to excuse themselves with a public profession of disbelief or non-conformity. It was for Anderson J., remember, merely a "difficulty" inherent in the price of freedom. Lacourciere J.A. is more expansive, employing two arguments in support of the regulation worthy of mention here. Firstly, he maintains

that "[t]here is nothing in the definition of freedom of religion in Big M or Edwards Books which supports the view that being compelled to make a religious statement alone constitutes a violation of s.2(a)."<sup>540</sup> Accordingly, he does not believe that the concept can be so encompassing as to oblige the state to avoid placing the burden of such decisions on dissidents. "In my view, the government may not compel students to participate, but it is not prevented from creating a situation where a choice as to whether or not to participate must be made."<sup>541</sup> And he buttresses his position by adopting O'Leary J.'s conclusion that forcing these situations upon religious minorities is really beneficial for them.<sup>542</sup>

To respond to his first point, if religious voluntarism is to be an honoured constitutional value, the conscience of everyone must be, within reason, a personal affair. As Dickson C.J.C. noted in the context of religious sincerity:

In my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing.<sup>543</sup>

Moreover, if every dissident citizen is entitled to the same social and political respect afforded citizens of the dominant Christian churches, then a state generated religious statement must be particularly prohibited when it is asked only of the few and not of the many. And if these things are true, can Mr. Justice Lacourciere's initial presumption have any validity? Is it not inherently unfair and unconstitutional to require dissidents to proclaim their non-conformity, to brave this public indignity as the cost of securing a special exemption from a government established religious program? Is this not a cost attributable to majoritarian insensitivity and one which the Charter forbids?<sup>544</sup>

A decision of the United States Supreme Court suggests as much,<sup>545</sup> and Reid J. and the Ontario Court of Appeal have left no doubt that they find this indeed to be the case. Mr. Justice Reid has stated his position just so:

I cannot accept the view that the objectors must pay a price for their objection, when the willing conformists pay no price. It does not seem to me to be the majority's function, or the government of Ontario's function, to shake a finger at some parents and say, you are too sensitive; you and your children must pay a price for your beliefs ....<sup>546</sup>

The Court of Appeal has been equally pointed in its remarks. The majority in Zylberberg agreed with and quoted the following statement by a provincial committee evaluating religious education on the effect of the regulation's exemption scheme, as it applied to religious instruction:

It is our view ... that this special treatment is in itself discriminatory and should as far as possible be eliminated from the public school system .... It is important to see clearly where the responsibility in this situation lies: contrary to popular belief, discrimination is not the problem of those who are discriminated against but of the "smug majority" who permit the practice, and who alone have the power to end it (emphasis added).<sup>547</sup>

Consequently neither Reid J. nor the Court of Appeal believed that the right within the regulation to be excused overcame its fundamental abridgment of the s.2(a) guarantee. "On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion."<sup>548</sup>

Moving on to the other prop of Lacourciere J.A.'s judgment, we find him, as did O'Leary J. before him, making overly much of the "fact" that the challenged exemption scheme had not harmed pupils belonging to minority sects; instead, it had had a good influence on them. The appellants had submitted in support of their claim a psychologist's affidavit on this question, but as Lacourciere J.A. emphasized, their expert "could go no further than to assert that the requirement of seeking an exemption 'may be harmful' to the children."<sup>549</sup> Whereas it was the opinion of two

psychologists for the School Board that moderate levels of pressure to conform were part of the normal developmental process in children and so should not be characterized as "harmful".<sup>550</sup> Requiring students to cope with the conflicts attendant upon opting out of morning prayers would, they believed, strengthen personal convictions and build character.<sup>551</sup>

Accordingly, it was contended by O'Leary J., and accepted by Lacourciere J.A. that the "difficulties" faced by minority children under the regulation were advantageous and would, consonant with the spirit of s.27 of the Charter, actually promote religious tolerance and understanding. Lacourciere J.A. put it thusly: "We as a contemporary multicultural Canadian society are trying to encourage minority children to be proud of their ethnic heritage and to assert their respective religious or ethnic identities".<sup>552</sup> Similarly, O'Leary J. insists: "Difference is to be worn with pride not hidden".<sup>553</sup> And if disclosing it "is an embarrassment, it is nevertheless an embarrassment that will have to be faced throughout life".<sup>554</sup>

To be frank, this proposition is not only intolerant but also conceptually insupportable. It portrays a serious miscomprehension of the nature of religious liberty and of multiculturalism, and the Court of Appeal said as much:

The effect of religious exercises cannot be glossed over with the comment that the exercise may be "good" for minority pupils .... This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the feelings of young children. It is also inconsistent with the multicultural nature of our society as recognized by s.27 of the Charter ....<sup>555</sup>

In guaranteeing the freedom of choice under s.2(a) and reinforcing this freedom with the admonition under s.27 to seek the preservation and enhancement of minority culture, the constitution makes the fact of coercion the only issue before the bench. If government actions or regulations pressure people in their religious choices, then they are intrinsically

offensive, intrinsically harmful. And so there is no evidentiary requirement that actual or potential psychological harm to students need be proven. It is no defence to a Charter breach to allege that state coercion has salutary results, however real or imagined. Whether governmental pressure is beneficial, or not, is, as the Court of Appeal stated, quite irrelevant.<sup>556</sup>

The above examination should now enable us to draw some conclusions as to the validity of the approach and the decision of the Ontario Divisional Court in Elgin County, currently under appeal. The two central arguments of the complainants in this case are familiar ones. Firstly, they alleged that the overall effect of both the regulation's religious instruction classes and its exemption process was to indirectly coerce their participation in a government program which compromised their personal beliefs and enforced indoctrination in majoritarian religious precepts. Once again this was because these classes were obligatory, because the regulation permitted teachers to focus predominantly on Christian beliefs (which they were shown to do), and because the right to be excused was not a viable alternative to unwilling participants. Secondly, it was claimed that "the effect of the exemption scheme ... constitutes an unjustifiable infringement on the applicants' freedom of religion in its requirement of public proclamation of disagreement with prescribed religious observance."<sup>557</sup> Significantly, however, this time the claimants were impeaching virtually all of s.28, including its exemption provisions.

The majority opinion of the Divisional Court, as written by Mr. Justice Watt prior to the Court of Appeal's decision in Zylberberg, ruled, not surprisingly, that the joint and separate impact of the regulation's religious instruction-exemption machinery was, "at bottom, a formalistic and technical one: an exemption must be sought by the applicants."<sup>558</sup> Because students were excused without question or qualification, he was unprepared to regard the exemption request as a substantive burden on religious freedom. And thus, after finding no direct coercive or penalizing overtones in the election right, he was able to determine that the regulation subjected no one to indirect religious indoctrination.

Quite obviously, this holding largely mirrors the objective, non-comparative conclusions of this Court in its earlier school prayer

judgment, and similarly shares the latter's critical deficiencies. Most importantly, given the Court of Appeal's subsequent and contrary condemnation of state created, stigmatizing religious proclamations, Mr. Justice Watt's conclusion on the constitutionality of s.28's exemption provisions is, to say the least, suspect; and, in result, the remainder of his analysis is undermined. The author, furthermore, would like to note Watt J.'s stark misreading of the evidence and the claimant's evidentiary onus, and his fallacious assumption that the regulation with its "religious statement" exemption is no more obnoxious than its enabling legislation which mandates no public religious choice.

What is disturbing about the evidentiary analysis in Elgin County is that it warns us that even a supposedly subjective judicial appraisal can mask an unacceptable majoritarian perspective. After "assuming a view of the evidence most favourable to the applicants",<sup>559</sup> as he put it, Mr. Justice Watt insisted that they had failed to discharge their burden of persuasion. Yet consider what was demonstrated in support of their claim. There was actual evidence that dissident children and parents regarded the exemption election as being directly and appreciably alienating and indirectly coercive. For instance, Mr. Justice Austin, in the dissent, summarized the testimony of one family, in these words:

Mr. and Mrs. Millington say they considered this option very carefully and they discussed it with Andrea. She was already very sensitive about the fact that her religion was different from that of her teacher and her classmates and they feared that excluding her in the manner suggested would ostracize and embarrass her. Andrea could not accept this as a real choice. She was worried about being teased by her peers and became upset at the suggestion. She said "Please don't make me sit in the hall". Accordingly, they decided that it was in her better interest not to have her exempted from the classes.<sup>560</sup>

But Watt J. held this evidence to have dubious value. Rather than recognize what it said about the regulation's individual or family significance, or its broader group implications, he minimized it thusly:

It may well be argued that the evidence of the impact of a particular curriculum of studies in religious education upon a single public elementary school pupil ... lacks sufficient relevance to warrant its reception and consideration on the issue of the constitutional validity of ... the regulation .... At all events, in my respectful view, assuming relevance, its probative value upon such issue is, at best, somewhat tenuous.<sup>561</sup>

This in the face of expert opinion available to the Court which should have been seen as lending credence and weight to such allegations. However because there was disagreement among the two psychologists who gave evidence as to the existence of peer pressure to remain in the classroom during religious instruction, it was deemed not to be dispositive.<sup>562</sup> But all things being equal, and assuming that this "fact bound" focus is an acceptable approach to determining when legislation is capable of abridging religious freedom, Watt J. seems to have attributed no substance at all to the dissident parents' allegations. Yet given their evidence of actual harm, however irrelevant and unnecessary to the question of coercion and however disputed among the experts, could there be any doubt of their sincerity? Would any parent leave his or her children in a class environment which gave them recurring nightmares of the devil and hell, and which led them to suppose their parents or teachers were lying to them, as was shown here, unless they perceived an equally significant cost to removing their children from that environment? Was not Austin J. correct to conclude then that in this case there indeed was "evidence of real coercion"?<sup>563</sup>

Finally, the author wishes to reply to a most peculiar argument made by Mr. Justice Watt in defence of the regulation. But first it is important to emphasize that in Elgin County, none of the applicant parents thought that the provision of religious education, as opposed to religious indoctrination, was constitutionally impermissible.<sup>564</sup> The corporate

applicant, the Corporation of the Canadian Civil Liberties Association, was of a different view. It maintained that there should be no specific course of study in religious education.<sup>565</sup> But no applicant, corporate or otherwise, alleged that the regulation's enabling legislation was in violation of s.2(a) of the Charter. This is because s.50 of the Education Act, the relevant substantive provision, neither imposes religious instruction, as the impugned regulation does, nor does it force a public religious choice upon dissidents. It simply allows a student to receive such religious education as his or her parents desire. A scheme which permits students to opt into religious classes before or after school would be as equally consonant with this section as the scheme actually in place. Now it was Watt J.'s curious view that because no one impeached s.50 or suggested that s.28 of the regulation went beyond its authorization, it could not be said "that the administrative scheme put in place by s.28 ... which not only implements and tracks the statutory mandate, but which also provides for unqualified exemption ..., has ... [an] impermissible effect."<sup>566</sup> But surely this conclusion cannot logically be supported on such a flimsy supposition. When dissidents take issue with a regulation, the validity of its enabling legislation is no guarantee of constitutionality. Neither is the fact that the regulation is within statutory authority. A regulation's administrative validity is judged by its statute, its constitutional validity is judged by the Charter.

In conclusion, the author respectfully submits that the Ontario Court of Appeal should not, and is unlikely to, uphold this Divisional Court ruling. And generally speaking, it may be that some other schemes of religious instruction and religious exercises will have no coercive aspects, but the present regulatory effort plainly fails to accord religious minorities the respect they are promised by the Charter. In the Canada of 1989, such disregard for human dignity should not exist.

#### (d) Upholding Cruel Choices Under s.1

We cannot gain a true appreciation of the scope of our religious liberties unless we address the explicit limits imposed upon them in the interests of our fellow citizens. For in a liberal democracy, it will be

recalled, human rights adjudication inevitably entails the comparative restriction of individual self-determinism. No one's rights are superior to those of another; instead they may be restrained when it is necessary to ensure the equal ability of others to engage in their own self-creative enterprises. This is the essential integrity of liberal rights theory: it weighs the competing public and private interests and elevates the former when the dissidents practices jeopardize

the institutional structure necessary to protect the very autonomy that the individual is asserting. Thus, the state's compelling end is not an independent value to which free exercise is sacrificed; its end is instead the preservation of the pluralistic social structure that makes the free exercise of religion possible.<sup>567</sup>

American jurists have long accepted this concept of limited freedoms, although their constitutional guarantees are textually unlimited. In their free exercise jurisprudence they developed a "compelling interest" doctrine which controls the scope of the first amendment right.<sup>568</sup> The Charter, however, in s.1 establishes an express standard for reappraising the conceptual boundaries of infringed rights. In the context of s.2(a), s.1 analysis will begin once the court concludes that a cruel choice has been foisted upon the dissident. The Crown seeking to defend its inadvertent constraint of religious expression will be required to prove that it is a reasonable limitation prescribed by law, and demonstrably justified in a free and democratic society; otherwise, it is not supportable and relief for the dissident must be forthcoming.

The question to be addressed here is whether the free exercise of individual choice will be unduly sacrificed under s.1 in the name of countervailing majoritarian interests. Given the conservative nature of our courts and their inherent fear of the political, this is certainly possible. Section 1 analysis requires that the courts accept and assert a policy-review function and that they implement it fully mindful of the Charter's philosophical impetus. If they fail to do either, then this level of inquiry will become an unprincipled sham: it will be neither purposive nor consistent, but merely a disingenuous vehicle for sustaining incidental

religious repression in the name of judicial deference. Accordingly, let us begin with a consideration of the analytical structure set forth in s.1 case law to date.

Assuming the state's interference with religion is prescribed by law, it must meet the two-stage standard of legislative "ends" and "means" laid down by the Supreme Court in Oakes.<sup>569</sup> First, the governmental interest or policy objective involved must have " 'sufficient importance to warrant overriding a constitutionally protected right or freedom'," that is, it must address" concerns which are 'pressing and substantial' ".<sup>570</sup> Second, the means must satisfy a proportionality standard of three components. To begin with, the measures used must have a rational connection with legislative intent in that they must be "carefully designed to achieve the objective in question".<sup>571</sup> Then, in addition, they must " 'impair as little as possible the right or freedom in question' ".<sup>572</sup> Moreover, the effects of the law must be proportional to the objective sought. Furthermore, the Court in Oakes stressed that the standard of proof at each of the above stages would be "a very high degree of probability ... generally [requiring] cogent and persuasive" evidence.<sup>573</sup>

Clearly, the Crown, on the face of this prescribed course of inquiry, has a substantial burden and one seemingly commensurate with the rule of human dignity. Individual personality will not be lightly compromised in the interests of public initiatives: "trivial objectives or those discordant with the principles of a free and democratic society"<sup>574</sup> will not override the s.2(a) guarantee. Moreover, the state must show convincingly that it has rationally chosen, from among the range of alternatives available, the least restrictive mode of achieving the desired goal: sloppy or overly-broad restrictions on our fundamental freedoms will fail. Finally, and just as important, is the Supreme Court's open acknowledgement of the political nature of its role when assessing the proportionality of the particular balance the government has struck between conflicting religious and societal values.

Thus the Oakes test appears to provide a principled structure for evaluation of s.2(a) infringements. At the same time, however, it must be recognized that within this framework the courts have considerable leeway

in determining what interests will be placed on the scales and what weight each will merit.<sup>575</sup> American commentators have argued that the balancing involved in free exercise cases is inherently malleable, driven by the results sought and the particular facts of each case.<sup>576</sup> As the following survey of American and Canadian case law will make clear, the bottom line on religious freedom will be drawn on the basis of these judicial decisions.

The relevant jurisprudence divides into three typical fact situations involving: 1) regulations proscribing harm to identifiable third parties; 2) regulations proscribing harm to the self; and 3) general regulatory schemes. The first two deal principally with the legitimacy of the legislation's objective or its "ends", while the last raises the full gamut of possible s.1 issues. Each of these will be discussed in turn.

#### (i) Regulations Proscribing Harm to Identifiable Third Parties

It is generally accepted that the prevention of harm to third parties is a "pressing and substantial" concern which warrants legislative action overriding guaranteed rights and freedoms. Religious freedom is not a license for anti-social behaviour. Accordingly, the prevention of "non-trivial, non-speculative, direct injury to [specific] third parties resulting from religious conduct",<sup>577</sup> as one writer puts it, unquestionably constitutes a valid governmental objective, which may, assuming proportionality, defeat free exercise rights.

The most familiar "victims" shielded from religiously motivated behaviour are children. In case after case, parents' free exercise rights have been overridden whenever their convictions have endangered the health and welfare of their offspring.<sup>578</sup> Canadian courts have, for instance, had little difficulty in upholding child welfare laws that award the state guardianship for the purpose of providing essential medical services.<sup>579</sup> They have also found it easy to summarily restrict the access rights of non-custodial parents whose attempts to religiously indoctrinate their children were not in the latter's best interests.<sup>580</sup> Indeed, the paramountcy of the child's well-being is usually considered to be so

self-evident that the s.1 analysis in these cases is cursory or even non-existent.<sup>581</sup>

But the principle of non-trivial, non-speculative, direct injury to identifiable third parties probably extends beyond harm to children. Religious beliefs and behaviour that are, for instance, racially or sexually discriminatory are constitutionally suspect.<sup>582</sup> Third party economic interests may also deserve protection in appropriate circumstances.<sup>583</sup> On the whole, the less other-regarding conviction directed conduct is, the less likely that it will be given free rein.

#### (ii) Regulations Proscribing Harm to the Self

Unlike the instances of paternalistic state action above, when legislation's sole objective is to safeguard capable adults from the potentially harmful or dangerous consequences of their own religious activities, judicial activism is likely.<sup>584</sup> The rule of human dignity does not accord with government programs which seek to impose the state's "ideal of the 'best possible life' as a way of justifying intrusion upon the religious autonomy of a citizen".<sup>585</sup> Therefore, the courts will step in when legislation presumes to protect the individual from the effects of his own moral decisions. In these circumstances, the individual's religious choices are his own business, "even unto death".<sup>586</sup>

However, if legislation has broader goals than merely suppressing harm to the self, if its protective reach also includes the public at large, the analysis becomes more complicated. If the harm to the third parties meets the test set forth in the preceding section, that is to say, if the harm is direct, well-defined and non-speculative, then it will likely qualify as a "pressing and substantial concern". If, on the other hand, the third party harm is diffuse and ill-defined, results are difficult to predict. Consider genuine dissentient free exercise challenges to narcotic control legislation.<sup>587</sup>

In these cases, the state has a legitimate and substantial interest in restricting the use of and trafficking in drugs among the population at

large. Most challenges to any reasonable regulatory scheme will fail even though the scheme does restrict the liberty of individuals, say Rastafarians, or Hindus, who are religiously motivated to partake of illicit substances. However, in respect of some unusual claimants the state's third party interests can be so diminished that its ordinances are no longer sufficiently compelling or proportional to be upheld. The claim in Woody<sup>588</sup> by members of the Native American Church to use peyote in their religious services succeeded for the following reasons: because of its obvious sincerity (as testified by the longstanding history of the practice); because of its importance (it was regarded as a deity); and significantly because the church's restrictions on membership (limited to American Indians), its isolated physical location and its self-regulation all combined to minimize any threat to efficient drug enforcement elsewhere. So the effective result was that the only appreciable state interest remaining in this case was the untenable one of shielding the believer from himself or his chosen faith.

### (iii) General Regulatory Schemes

The truest indicator of community tolerance will be the success of constitutional challenges to broad governmental regulatory schemes. It is here that courts will most overtly be required to strike a balance between the individual's religious freedom and majoritarian institutional structures. Often, the courts will be asked to order that the regulatory scheme accommodate, through exemption, the individual interest. Since the cost of such accommodation will be distributed among the polity as a whole and not placed on any particular individual or group, one might anticipate that in these instances dissentient religious freedom would outweigh regulatory ease. Moreover, since a single exemption offers little threat to a broad regulatory structure, success appears even more likely. But such arguments are simplistic. For the cost of accommodation, though distributed, can be appreciable, and the single litigant before the court can become many. A more realistic perspective recognizes that these factors will militate against any significant adjustment of the legislative status quo.

In order that the following treatment of the case law have a useful focus, two "rules of thumb" have been drawn from American commentary.

These rules should be understood both as explanatory principles, broadly descriptive of existing case law, and as governing principles, mandating overall results for theoretical purposes.<sup>589</sup> The first deals with claims brought on behalf of numerically insignificant minorities: unless their behaviour is noticeably anti-social, free exercise claims will be most easily sustainable by these groups.<sup>590</sup> The second deals with claims brought on behalf of numerically significant minorities: unless the legislature has blatantly ignored such groups, regulations born of reasonable political compromise will likely survive judicial scrutiny.<sup>591</sup>

The claims of numerically insignificant minorities will be addressed first. In American law, the Woody case set forth in the immediately preceding section neatly fits our first rule of thumb. The impugned actions were not socially deviant to the extent of causing direct harm to specific third parties. Therefore, the limited nature of the claim favoured accommodation in fact and theory. The majoritarian regulatory scheme survived intact with a clearly defined judicial exemption for the minority. Other American cases similarly fit the rule;<sup>592</sup> however, it will more clearly demonstrate the fragility of community tolerance if we examine one which thwarts the rule.

In Bowen v. Roy,<sup>593</sup> the plaintiff sought an exemption from a statute requiring the use of social security numbers in welfare programs, arguing that according to Native American belief the use of social security numbers impaired the spirit. The exemption was denied by the American Supreme Court in spite of the fact that the lower court ruled that the government's interest in administering the scheme could have been satisfied without insisting upon a social security number for the claimant. As O'Connor J. similarly argued, in the minority: "Granting an exemption to Little Bird of the Snow, and to the handful of others who can be expected to make similar religious objection ... will not demonstrably diminish the government's ability to combat welfare fraud".<sup>594</sup> The majority of the Supreme Court, on the other hand, were concerned to afford the government wide latitude, given the expansive nature of the scheme. They did not insist that the chosen means be the least restrictive possible, but only that they be a reasonable means of advancing the state's goal.<sup>595</sup> Using this doctrinal refinement of the compelling interest test, the Court permitted what was

only a very marginal enhancement of the stated social objective at the expense of minority religious interests.

Turning now to Canadian law. There is only one Supreme Court of Canada decision which appears to fit in this category - the Jones<sup>596</sup> case. Here the majority, finding no s.2(a) violation, did not address the s.1 issue. However, both minority judgments did, and significantly one of these, that of La Forest J. (Dickson C.J.C., concurring), is doubly flawed.

First, La Forest J. relieves the Crown of the burden of discussing alternative practices because the Crown's chosen means are the "obvious way to administer"<sup>597</sup> the program. Given the Oakes test's insistence that the disputed measure impair the guaranteed freedom as little as possible and that cogent and persuasive evidence demonstrate this, we must ask whether La Forest J. is lowering the judicial standard of review. What circumstances justify this departure? In the other dissenting opinion, that of Madame Justice Wilson, the Oakes proportionality test was applied unamended.

While there can be no doubt that the province has a compelling interest in education, more than this is required under s.1 .... [T]he means employed must impair as little as possible the right or freedom in issue .... The government adduced no evidence to establish that having the parent apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction. The legislature, for example, could clearly have given the education authorities the power to inspect on their own initiative.<sup>598</sup>

Second, because of this failure to seriously question the appropriateness of the chosen means, La Forest J. lacks a context in which to evaluate the magnitude and nature of the state's interest. He does not progress far beyond the basic truth that the nation has a legitimate concern in the education of the young. While this is clearly so, the relevant legal interest here was less amorphous: it was exposing a small student constituency to unauthorized home instruction until state action

could be instituted for their protection. Whenever inserting societal weights into the scales of s.1 analysis, the courts cannot be content with abstract summations of public values but rather they must seek the immediate or reasonably prospective, non-speculative harm that burdens civic life. Absent such a sceptical and searching appraisal, religious choices will never be afforded serious consideration.

The issue La Forest J. should have addressed was whether the specific interests of the identifiable third parties involved, together with the additional costs of less convenient means, outweighed the religious affront imposed upon Mr. Jones and others with similar religious convictions about education. Since the number of parents so inclined is probably small, and since the state has an existing school attendance enforcement structure, one doubts the accommodation requested "would cut to the heart of the legislation and severely impede the achievement of important state goals"<sup>599</sup> as Mr. Justice La Forest so feared. Moreover, given the briefness of the unauthorized instruction period, the likelihood of parental good faith, and the probability that older children in these circumstances will truly share their parents beliefs, the interests at issue here are reasonably commensurate and not so clearly at variance as in the health and welfare situations noted above. Hence the claims of conscience raised deserved a more open and realistic treatment.

Let us now move on to consider the interests of numerically significant minorities, those cases we predicted would survive constitutional scrutiny to the extent they were the product of considered legislative compromise. We will begin with a brief analysis of one case which involves a losing challenge.

The application of s.1 in the Edwards plurality decision of the Supreme Court, as written by the Chief Justice, is an excellent example of purposive judicial deference to legislative initiative, implemented through the progressive and systematic devaluation of the Oakes test. As Professor Sharpe puts it:

In Edwards Books and Art Ltd. v. R., the majority opinion of the Court made it clear that the vigour of s.1 analysis

will vary depending upon the nature of the right infringed, and upon the objective and socio-economic context of the impugned legislation.<sup>600</sup>

Note, moreover, that Dickson C.J.C.'s refinement of the proportionality test is more focused and more deliberate than that of La Forest J. in Jones. Leniency is evident in each successive step of the test. First of all, the evidentiary burden of the Crown was met with one dated government report whose merits were questionable.<sup>601</sup> Next, although the Retail Business Holiday Act provided exemptions for some retailers, there was no obvious logic to the exemption scheme. It nonetheless was regarded as satisfying the proportionality test's first step of rational connection. As far as Mr. Justice Dickson was concerned the legislation "need not be tuned with great precision".<sup>602</sup> Finally, we see once again a retreat from the Oakes position that the impugned measure must abridge the freedom as little as possible, the court stating it was sufficient if the means offended religious freedom "as little as reasonably possible"<sup>603</sup> (emphasis added).

The driving impetus of Dickson C.J.C.'s judgment is that the drafters of the Act had not ignored a foreseeable impact on minority religious life. Since the legislature had afforded Sabbatarian interests a measure of political respect by enacting the exemption scheme, and thereby had made a concerted effort to accommodate them, he refused to substitute a judicial opinion for a legislative one "as to the place at which to draw a precise line".<sup>604</sup> It did not matter that a marginally more satisfactory scheme might have been devised, as he would not hold the legislature to such "an excessively high standard".<sup>605</sup> But it is noteworthy that he did consider alternatives, and at length. Moreover, he expressly rejected the dated American view (and by implication that of La Forest J.'s in the dissent) that no legislative effort was needed to accommodate Sabbatarian retailers.<sup>606</sup> "In my view the principles articulated in Oakes makes it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers."<sup>607</sup> Once this attempt has been made differential treatment in the resulting scheme is permissible: "it is open to balance the religious freedoms of the many members of a particular religious group against those of the few".<sup>608</sup> This philosophical approach is arguably consistent with Dworkin's position, set

forth earlier, requiring that all those affected by legislation have their interests equally considered in the political process, but not requiring in the result equal treatment of all affected.<sup>609</sup>

Accordingly, religious liberty requires that the state take seriously minority accommodation.<sup>610</sup> Where the state has failed to do so it is essential for the courts to take over the political dialogue through the s.1 mechanism. Ensuring respect for those who cannot speak effectively with their ballots must become the judiciary's constitutional duty; and it seems clear from the case law what this implies. For instance, in R. v. Westfair Foods Ltd., Sunday closing provisions were held to be unconstitutional on the grounds that: "Neither the Legislature of Saskatchewan nor the municipal council of the city of Saskatoon made any attempt to alleviate the effects of their laws on Saturday observers and that omission, it appears is fatal".<sup>611</sup> In R. v. Canada Safeway Ltd. Store No. 252<sup>612</sup> we see the same deficiency prompt the same conclusion. Even when some legislative attempt is made to accommodate dissidents, it must be more than illusory. By way of example, in the American decisions of Sherbert and Thomas the statutory condition at issue provided that a person was not eligible for unemployment compensation if he had quit or refused to work without good cause. The state administrative authorities did not include religious hardship within the definition of "good cause". But as we know the Supreme Court provided relief in both cases. And lastly, as the decision of the Ontario Court of Appeal in Zylberberg demonstrates, where an exemption is available, the dissenter must be able to make effective use of its protection. If the procedure is so onerous or threatening that it discourages use, if it requires that the dissenters publicly divulge their convictions, it is no true effort at accommodation.

In conclusion, the jurisprudence suggests that we cannot expect more than political respect and fair treatment for the religious practices of significant minorities. For them judicially enforced accommodation will only be striking when legislative blindness has been stark. However, in regard to numerically insignificant minorities, it will be unfortunate if their interests do not fare more advantageously before the bench, because here the costs of accommodation may be truly small and the need for protection

even greater, as these people will have less political sway and public sympathy.

## VI RESPECTING CONSCIENCE UNDER THE SUPPLEMENTARY SECTION 7 AND SECTION 15 RIGHTS

The s.2(a) freedom of conscience and religion has been the principal focus of our discussion to this point. Without doubt, this guarantee is pivotal to the constitutional protection of religious interests. But as least one other Charter provision is also relevant. Religion is an enumerated ground in both of s.15's equality rights. Discrimination on this basis is specifically prohibited by s.15(1), while s.15(2) expressly permits affirmative action programs for those disadvantaged because of their faith. And perhaps, further protection will be based in s.7's requirement that no one be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. At least it has been suggested that s.7's notion of liberty encompasses individual autonomy in conscientious and spiritual matters.

However, it is not yet entirely clear how these different provisions will interact with s.2(a) or what they add. And this is the question specifically addressed in the following material. First, s.7 will be analyzed. In light of s.2(a)'s explicit protection of conscientious freedom, it will be argued that an interpretation of s.7 which asserts an individual liberty of conscience is both unnecessary and cumbersome. Second, the inclusion of religion as an enumerated ground in s.15 will also be brought into question. As long as s.2(a) is given a properly broad and purposive interpretation, it should generally not be necessary to invoke s.15 in order to fully protect an individual or a group from discrimination on the basis of religion.

### A. LIBERTY OF CONSCIENCE

The suggestion that s.7 provides protection in the religious and conscientious realm arises primarily in the two Supreme Court decisions of Jones<sup>613</sup> and Morgentaler.<sup>614</sup> In both these cases the Court was presented

with American precedent for an expansive interpretation of the term "liberty" that would include interests similar to s.2(a)'s freedoms. Also, by the time these two cases were decided the Court had already established a liberal framework for analyzing s.7 claims in the Reference re s.94(2) B.C. Motor Vehicle Act.<sup>615</sup> This framework will be set forth first, then the United States case law will be briefly reviewed before we move on finally to discuss Jones and Morgentaler.

At issue in the Motor Vehicle Act Reference was a statutory provision which set a mandatory prison sentence as punishment for driving a motor vehicle with a suspended licence. The statute did not provide for a defence of failure to receive notice of the suspension. Thus, an individual could be imprisoned - an obvious deprivation of liberty - for an offence they did not knowingly commit. Was this then in violation of the principles of fundamental justice? It was argued by the Crown that these principles were limited to the procedural requirements traditionally placed on government when depriving individuals of their freedom, that all such procedural requirements had been met, and that the Charter attack on a strict liability offence which mandated imprisonment could only be successful if s.7's principles of fundamental justice extended beyond the merely procedural.

The Court, however, rejected this dichotomous reasoning, Lamer J. stating:

The task of the court is not to choose between substantive or procedural content per se but to secure for persons 'the full benefit of the Charter's protection' ... under s.7, while avoiding adjudication of the merits of public policy".<sup>616</sup>

In reaching this conclusion Lamer J. argued that American constitutional experience was of limited relevance to Canadian s.7 analysis. Specifically, he refused to allow the American debate over "substantive due process" to define his interpretation of s.7's "principles of fundamental justice".<sup>617</sup>

The American due process clauses (the fifth amendment governs the Congress and the fourteenth governs state legislatures) protects persons from being deprived of "life, liberty or property, without due process of law". The checkered history of substantive due process under these clauses is well known, from the early decisions which struck down remedial social legislation on the grounds that the legislation infringed the liberty to contract, to the later decisions which protect certain privacy and autonomy rights, principally a woman's right to an abortion.<sup>618</sup> These later decisions are, at first glance, of relevance to s.7 Charter interpretation.<sup>619</sup> Essentially, they employ an expansive definition of the term "liberty" to extend protection beyond the mere requirement that procedural prerequisites be met prior to restraining an individual's physical liberty. The paradigmatic statement of the broader definition, a statement which is now being quoted by Canadian courts, is that found in Meyer v. State of Nebraska.<sup>620</sup> There the United States Supreme Court commented:

Without doubt ... [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>621</sup>

The extended American definition of liberty, however, must be used in Charter interpretation with restraint, and only after careful analysis in each instance of the appropriateness of so doing. Professor Hogg describes the structure of the American clauses, a structure which is fundamentally different from that set forth in the Charter as follows:

The due process clause of the fourteenth amendment (applicable only to the states) has been held to incorporate many of the rights contained in the first ten amendments (applicable only to the Congress), including such substantive rights as freedom of speech and

religion and the right to fair compensation for the public taking of property. The due process clause of the fifth amendment has been held to incorporate the right to equal protection of the laws that is contained only in the fourteenth amendment. And both clauses have led to the recognition of a variety of substantive rights of privacy and personal integrity, which have been used to strike down a state law prohibiting the use of contraceptives, and a state law prohibiting abortions.<sup>622</sup>

Two important points should be noted in Professor Hogg's comments: first, U.S. jurisprudence has had to impute a substantive right of freedom of religion to the fourteenth amendment due process clause in order to provide protection from interference by state legislatures with religious liberties, the explicit guarantee of religious freedom only being applicable to the federal power; second, U.S. jurisprudence has also imputed privacy rights to both due process clauses. Clearly, the first doctrinal manoeuvre is unnecessary under the Charter, there being no question that s.2(a) applies to both federal and provincial powers. Less clear, however, is the necessity for the generation of privacy rights under s.7 to protect interests of conscience and personal autonomy.

It is this writer's submission that it would be totally inappropriate to follow the American approach in this matter. The first amendment protection of religious rights does not, it should be remembered, provide protection for freedom of conscience; it only expressly guarantees the free exercise of religion. This is in stark contrast to the Charter's equal treatment in s.2(a) of religion and conscience. As argued earlier, the Charter should provide through s.2(a) the same consideration to those who act out of conscience as it does to those who act out of faith. Therefore, there should be no need to protect the individual's right to make significant, life-informing moral decisions under s.7, this right being expressly granted in s.2(a).<sup>623</sup>

Moreover, the use of s.7 to protect such interests is not only of questionable necessity, but it also creates a cumbersome and somewhat illogical analytical framework. For example, in her decision in Morgentaler

Madam Justice Wilson addressed the question of whether s.7's notion of liberty included the individual's "right to make fundamental personal decisions without interference from the State".<sup>624</sup> She held that respect for human dignity required that liberty be interpreted so as to grant "the individual a degree of autonomy in making decisions of fundamental personal importance".<sup>625</sup> While this approach is in accord with the basic premise of Charter interpretation, it creates an awkward overlap with s.2(a) protection. For when Wilson J. moves to the second step of s.7 analysis to inquire as to whether deprivation has occurred contrary to principles of fundamental justice, she makes the following argument:

The question, therefore, is whether the deprivation of the s.7 right is in accordance not only with procedural fairness ... but also with the fundamental rights and freedoms laid down elsewhere in the Charter .... [A] deprivation of the s.7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice.<sup>626</sup>

Then, after somewhat vague analysis,<sup>627</sup> she finds an infringement of s.2(a)'s freedom of conscience which permits her ultimate conclusion that the legislation is not "in accordance with the principles of fundamental justice within the meaning of s.7."<sup>628</sup>

A similar process is undertaken by Wilson J. in Jones.<sup>629</sup> There she rejects the appellant's submission that s.7 "includes the right as a parent to bring up and educate one's children ... 'as one sees fit,' "restricting s.7's ambit to the right" to raise his children in accordance with his conscientious beliefs."<sup>630</sup> In result, the appellant was required to prove the conscientious nature of his actions.<sup>631</sup>

It is difficult to discern any purpose to the s.7 analysis in such cases. A successful Charter challenge will require a finding of a s.2(a) violation. But if such a finding is made why would one need to bother with s.7 at all? Moreover, inclusion of rights of conscience in s.7 creates difficulties for a

coherent definition of this "legal right". Patrice Garant, for example, begins her analysis of the liberty aspect of s.7 so:

The liberty of the person envisaged by section 7 must be distinguished from those liberties enumerated in section 2, which is also concerned with the person, but from its moral, spiritual or psychological aspect. (emphasis added)<sup>632</sup>

In the interests of conceptual clarity, simplicity and coherence, then, autonomy in matters of conscience should be protected under the express freedom granted fundamental status by s.2(a).

## B. RELIGIOUS EQUALITY

Although a number of academics have written and theorized on the subject of s.15 equality rights,<sup>633</sup> and although it has generated considerable case law,<sup>634</sup> it is not yet possible to definitively summarize its meaning or analytical structure. This is because, to date, the Supreme Court has rendered only one important judgment in respect of the s.15 guarantee, Andrews,<sup>635</sup> and this judgment not only rejected the two principal discrimination methodologies that had previously emerged from the lower courts, but it also left a number of important questions unanswered. Nonetheless, Andrews appears to suggest that the Court's approach to s.15(1) claims will largely parallel that discussed in respect of s.2(a). And, at least in the context of religious liberty, this should not be surprising. Since sectarian interests are protected under both of these provisions, and as these interests are arguably the same, given their common normative antecedents, it would be anomalous if the analysis or meaning of these guarantees differed appreciably.

To explain, Andrews enunciates a notion of equality that focuses on the need to safeguard individuals from legal distinctions that are discriminatory. McIntyre J., speaking for the Court on this point, puts it thusly:

I would say then that discrimination may be described as a distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.<sup>636</sup>

Consequently, it is quite clear that s.15(1), like s.2(a), will afford protection from deliberate, as well as accidental, impositions on religious conscience. Furthermore, it is evident that the analysis of s.15(1) claims will be primarily impact oriented. Whether intentional or unintentional discrimination is alleged, the impugned law-sanctioned distinction must always have a "bad" effect: discriminatory consequences must flow from the ordinance in the same sense that coercive consequences are required to support allegations of intentional or unintentional coercion under s.2(a).

This purposive interpretation of s.15(1) is consistent with the analytical framework established in respect of the freedom of religion. It represents a significant advancement in the constitutional meaning of equality. It accepts the essential reality that whenever the government incorporates differentiations in our social justice mechanisms "systemic" discriminatory results may occur, results that are admittedly inadvertent, but potentially of constitutional significance nonetheless. And thereby, it clearly rejects dated notions of discrimination that were founded upon an element of intent.

Unfortunately, however, the Supreme Court's definition of discrimination is not analytically complete. Quite properly, it suggests that equality is "a comparative concept, the condition of which may only be ... discerned by comparison with the condition of others in the social and political setting in which the question arises."<sup>637</sup> And there is sound acknowledgement in this decision, as well as in the Charter's text itself, that discrimination can arise when the differently situated are treated equally.<sup>638</sup> But a standard is needed to establish when unequal or equal treatment is discriminatory,

and Anderson offers only vague conceptual assistance in determining the analytical template for comparative review.

For instance, at one point in his decision, Mr. Justice McIntyre makes the following observation:

Distinctions based on personal characteristics attributed solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.<sup>639</sup>

But he does not explain why some distinctions grounded in group associations, such as denying children the right to drive automobiles or exempting conscientious objectors from military service, may be acceptable under the Charter. Nor is it made clear, in terms of basic constitutional theory, why it is not discriminatory to deny benefits to those who are undeserving. Elsewhere in his analysis, McIntyre J. attempts, it seems, to rectify this omission by reference to the pejorative notion of "prejudice". In his opinion:

The words "without discrimination" ... are a form of qualifier built into s.15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice, or disadvantage.<sup>640</sup>

Again, however, he does not set forth how this idea will advance the comparative review conducted under s.15(1). Yet as he also appears to have accepted that the objective of this freedom from discrimination is to ensure respect for human dignity,<sup>641</sup> it would seem logical that the essence of constitutional inequality or discrimination should be distilled from the demands of human dignity. The way in which liberal theory directs comparative determinations of coercion under s.2(a) should also inform comparative determinations of discrimination under s.15(1).

If this proposition is accepted, certain considerations that the Supreme Court has not really dealt with in the context of the equality guarantee may

be readily ascertained. It implies, for example, that the function of a discrimination effects test is the rather familiar one of prohibiting the state from making certain personal characteristics over which individuals have no control (sex, race, disability), or those over which they are free to make profound personal choices (religion), relevant in any way to their standing in the political community. Given this purpose, we can deduce in a principled manner not only how great or what type the comparative disadvantage must be, but also from what perspective it must be judged. And what has been said on these questions in the context of s.2(a) has equal relevance here. This reasoning, however, also serves to underline how unnecessary s.15's guarantee of religious equality is. It seems to add nothing that furthers the cause of religious tolerance.<sup>642</sup>

Suppose a provincial government decided to fund Jewish private schools, a decision not directed by the denominational rights of s.29. Under s.2(a), a Muslim school board could allege a violation of its freedom from religion because significant state support for one religious sect over another must be regarded as coercive and therefore invalid. Similar results will obtain under s.15(1) because the equality guarantee, as one writer notes, "can be triggered where the state favours one group of people over another by giving it additional benefits."<sup>643</sup> This is, very simply, what discrimination means. Thus, the conceptual overlap inherent in the ideas of "coercion" and "discrimination" will almost always, I suspect, dictate concurrent determinations. Whether a violation of one or the other is alleged, will likely depend on the preferences of the objecting dissident.

## VII CONCLUSION

Clearly, under the Charter, our nation has become more sensitive to the diverse range of beliefs and practices of religious minorities. This is partly attributable to the constitutional status of the Charter's religious guarantees. It is also due to the functional approach the courts have employed in the interpretation of these liberties, and in particular, to judicial acceptance of the theory of human dignity as the underlying norm of at least the s.2(a) freedom. Given this notion's inherent limitations, the other-regarding obligations it imposes on each citizen, no radical expansion

of spiritual rights should be expected in a liberal democracy. But as we have seen, its emphasis on religious voluntarism purposively concentrates judicial scrutiny on the question of state coercion. In result, the free private choice so fundamental to individual moral autonomy and self-fulfilment has been expressly recognized and significantly advanced with the development of a principled and coherent s.2(a) analytical framework. And, of course, no small debt is owed to American jurists whose efforts and mistakes have assisted our courts in this task.

This structure notwithstanding, it is apparent that there remains considerable judicial discretion to reinforce the status quo and to abandon the Charter mandate for choice and plurality. Such opportunities exist, it will be recalled, in the characterization of a law's principal inspiration in difficult freedom from religion claims. They are also present when violations of the freedom from secular orthodoxy are raised. For example, it remains to be seen whether the identification of religious practices will exclude conduct governed by inconstant religious policy positions and conduct sanctioned by faith. In addition, dissident interests may be unduly and too hastily devalued in s.1 analysis. But when we ask our courts to address and weigh issues of public policy, as we do in this process of rights adjudication, a high level of discretion is inevitable. All we can expect, and what we must demand, is that the necessary balancing of competing community and minority concerns take place openly and give an equal and purposive consideration to the latter. Without this, respect for individual conscience cannot be validly subordinated to majoritarian demands. And without this, there is no true social commitment to religious tolerance or to the concept of individual worth which sustains our democratic political tradition.

FOOTNOTES

1. For a summary of pre-Charter jurisprudence see Patrick Macklem, "Freedom of Conscience and Religion in Canada" (1984) 42 U.T. Fac. L. Rev. 50; Irwin Cotler, "Freedom of Assembly, Association, Conscience and Religion", in Tarnopolsky and Beaudoin (eds.), "Canadian Charter of Rights and Freedoms", Toronto: Carswell (1982) 123, at 185-208.
2. See, e.g., Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651; and Walters v. A.G. Alta.; Fletcher v. A.G. Alta., [1969] S.C.R. 383. It was the judicial reluctance to give any open and thorough analysis to questions of religious tolerance that is particularly objectionable in such decisions. One is left with the impression that religious freedom merited nothing more than an indirect and superficial review.
3. Constitution Act, 1982, s.52.
4. Reference Re Roman Catholic Separate High Schools Funding (1987), 77 N.R. 241 (S.C.C.).
5. R. v. Big M Drug Mart Ltd. (1985), 58 N.R. 81 (S.C.C.) [hereinafter referred to as Big M].
6. For rulings upholding store closing enactments, see Edwards Books And Art Ltd. et al. v. The Queen (1986), 28 C.R.R. 1 (S.C.C.), [hereinafter referred to as Edwards]; R. v. Sobeys Stores Ltd. (1986), 69 N.B.R. (2d) 246 (Q.B.); and London Drugs Ltd. and Brick Warehouse Ltd. v. City of Red Deer (1987), 55 Alta. L.R. (2d) 56 (Q.B.). But for rulings striking down such measures, see R. v. Westfair Foods Ltd. and Canada Safeway Ltd. (1987), 58 Sask. R. 274 (Q.B.); and R. v. Canada Safeway Ltd. Store No. 252 (1989), 37 B.C.L.R. (2d) 199 (C.A.).
7. At least this is the position adopted by Madam Justice Wilson in the cases of Jones v. The Queen et al. (1986), 25 C.R.R. 63 (S.C.C.) and Morgentaler et al. v. The Queen, (1988), 82 N.R. 1 (S.C.C.).

8. Corp. of the Cdn. Civil Liberties Assn. v. Ontario (Minister of Education) (1988), 64 O.R. (2d) 577 (Div. Ct.), [hereinafter referred to as Elgin County].
9. Re Zylberberg et al. and Director of Education of Sudbury Board of Education (1986), 55 O.R. (2d) 749 (Div. Ct.).
10. Re Zylberberg et al. and Director of Education of Sudbury Board of Education (1988), 65 O.R. (2d) 641 (C.A.).
11. Rusnow v. B.C. (A.G.) (1989), 35 B.C.L.R. (2d) 29 (S.C.).
12. For an argument that the Charter is not an instrument of development for Canadian society, see Henri Brun, "The Canadian Charter of Rights and Freedoms as an Instrument of Social Development", in Beckton and MacKay (eds.), "The Courts and the Charter", Toronto: University of Toronto Press (1985) 1.
13. A. Wayne MacKay, "Judging and Equality: For Whom Does the Charter Toll?", in Boyle and MacKay (eds.), "Charterwatch: Reflections on Equality", Toronto: Carswell (1986) 35, at 51.
14. R.W. Bibby, "Fragmented Gods: The Poverty and Potential of Religion in Canada", Toronto: Irwin Publishing (1987) 60.
15. Board of Education v. Barnette (1943), 319 U.S. 624, at 642.
16. See, for instance, Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Oakes (1986), 65 N.R. 87; Edwards, supra, note 6; Morgentaler, supra, note 7.
17. Supra, note 5, at 112.
18. Ibid.
19. Ibid.

20. Ibid.
21. Supra, note 13, at 73.
22. Ibid., at 69.
23. Formalism supposes that judges decide cases on the basis of neutral principles which do not involve them in questions of policy; however, critics point out that all adjudication requires the imposition or acceptance of certain social values and this is especially true of Charter adjudication. See note 13, at 82-3 and 90; N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague But Meaningful Generalities" (1982), 4 Supreme Court L. R. 57; N. Lyon, "The Charter as a Mandate for New Ways of Thinking About Law" (1983), 9 Queen's L.J. 241; G. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview", (1983) 61 Can. Bar Review 19, at 24-5; V. Del Buono, "The Implications of the Supreme Court's Purpose Interpretation of the Charter", (1986) 48 C.R. (3d) 121. But for an argument that a formalistic approach should be the initial method of Charter interpretation see B. Strayer, "The Canadian Constitution and the Courts: The Function and Scope of Judicial Review", (3rd ed.), Toronto: Butterworths (1988) i-ii.
24. Hunter, supra, note 16, at 132.
25. Supra, note 12, at 2.
26. Del Buono, supra, note 23, at 132.
27. Constitution Act, 1982, s.1.
28. The Supreme Court appears to have taken the position that no Charter right, even s.7's substantive right to life, liberty and security of the person, is absolute. See particularly the decisions of Wilson J. in Operation Dismantle Inc. et al. v. The Queen, [1985] 1 S.C.R. 441, at 489; and in Jones, supra, note 7, at 86.

29. A number of writers have maintained that the only weighing process involved in the application of the Charter should be the one conducted under s.1. Otherwise, if the substantive Charter provision contains no limiting language, it should be treated as absolute. See P. Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter", (1983) 13 Manitoba L.J. 669, at 679 - 80; M. Rankin and A. Roman, "A New Basis for Screening Constitutional Questions Under the Canadian Charter of Rights and Freedoms - Prejudging the Evidence? : Operation Dismantle Inc. et al. v. The Queen", (1987) 66 Can. Bar Review 365, at 381-82; P. Hogg, "Constitutional Law of Canada", (2nd ed.), Toronto: Carswell (1985) at 683-84.
30. R. v. Therens, [1985] 1 S.C.R. 613, at 638.
31. For a discussion of formalistic lapses by the Supreme Court, see supra, note 13 at 99-100 and 103.
32. Reviews of relevant material in the Old and New Testaments demonstrating the primacy of the duty to obey God speaking through conscience may be found in R. Regan, "Private Conscience and Public Law: The American Experience", New York: Fordham University Press (1972) at 207-211; and in H. Freeman, "A Remonstrance for Conscience", (1958) 106 Univ. Penn. L.R. 806, at 813-14.
33. For a discussion of pertinent material see Regan, *ibid.* at 211-12; and Freeman, *ibid.*, at 814-15.
34. D. Lloyd, "The Idea of Law", London: MacGibbon and Kee Ltd. (1965) at 70.
35. N. Kinsella, "Tomorrow's Rights in the Mirror of History", in Gall (ed.) "Civil Liberties in Canada: Entering the 1980s", Toronto: Butterworths (1982) 1, at 9.

36. Supra, note 34, at 71.
37. E. Pollack, "Jurisprudence: Principles and Applications", Columbus: Ohio State University Press (1979) at 9.
38. Regan, supra, note 32, at 215.
39. H. Jan Van Eikema Hommes, "Major Trends in the History of Legal Philosophy", New York: North - Holland Publishing Co. (1979) at 57.
40. Ibid., at 92.
41. Supra, note 34, at 75.
42. T. Hobbes, "Leviathan", New York: The Liberal Arts Press (1958) at 106 and 108.
43. Ibid., at 142-43.
44. Ibid., at 148.
45. Ibid., at 253.
46. J. Locke, "The Second Treatise of Government", New York: The Liberal Arts Press (1952), chap. 11, at 5.
47. Regan, supra, note 32, at 220.
48. Supra, note 46, at 10.
49. Regan, supra, note 32, at 221.
50. Ibid.
51. Ibid.

52. See, for instance, the acceptance of the inherent dignity and innate rights of all persons in the preambles of the Universal Declaration of Human Rights (adopted by the United Nations in 1948), the International Covenant on Civil and Political Rights (adopted by the United Nations in 1966), and the Canadian Bill of Rights.
53. K. Minoque, "The History of the Idea of Human Rights", in W. Laguer and B. Rubin (eds.), "The Human Rights Reader", New York: New American Library Inc. (1979) 3 at 14.
54. R. Dworkin, "Taking Rights Seriously", Cambridge: Harvard University Press (1977) at 182.
55. K. Karst, "Individuality, Community, and Law," in M. Schwartz (ed.), "Law and the American Future", New Jersey: Prentice-Hall (1976) 68 at 75.
56. W. Conklin, "In Defence of Fundamental Rights", Netherlands: Sijthoff and Noordhoff (1979) at 203.
57. Neil MacCormick, "Legal Right and Social Democracy: Essays in Legal and Political Philosophy", Oxford: Clarendon Press (1982) at 41. According to this writer, philosophers today speak of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life." *Ibid.*, at 39. See also John Garvey, "Free Exercise and the Values of Religious Liberty" (1986), 18 Conn. L.R. 779, at 789: "The vision [of the good], ultimately is one of persons who, because of the effective exercise of their autonomy, are able to identify their lives as their own, having thus realized the inestimable moral and human good of having chosen one's life as a free and rational being."
58. Morgenthaier, *supra*, note 7, at 118.
59. *Supra*, note 5, at 113. Dickson C.J.C. has also identified human dignity as a key supporting principle of social justice in the context of s.1 in Oakes, *supra*, note 16, at 87. Although he views respect for

human dignity as but one of a number of fundamental democratic values, it can be said that all of these - "equality, accommodation of a wide variety of beliefs, respect for ... group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" - necessarily flow from this basic concept.

60. Morgentaler, supra, note 7, at 119.
61. The eminent Protestant theologian, Dr. Paul Tillich, defined faith as "the state of being ultimately concerned". See Paul Tillich, "Dynamics of Faith", New York: Harper and Row (1957) at 1.
62. MacCormick, supra, note 57, at 22.
63. According to Dickson, C.J.C., there is an obvious "relationship between respect for individual conscience and the valuation of human dignity". See supra, note 5, at 113; and also see supra, note 59 in respect of s.1.
64. For a lengthy list of American authorities arguing that this concept of personal autonomy prevents government interference with certain critical individual decisions, see Garvey, supra, note 57, at 781, n.8. And for Canadian judicial application of these precedents to s.7 interpretation see the decisions of Madam Justice Wilson at supra, note 7.
65. W. Black and L. Smith, "Section 15 Equality Rights under the Charter: Meaning, Institutional Constraints and a Possible Test", in "Your Clients and the Charter", Montreal: The Canadian Bar Association (1987) at 2.
66. Dworkin, for example, maintains that our conception of liberty rests upon the more fundamental right of equality. Supra, note 55, at 266-78. But, as his primary right of equality entitles persons to "equal concern and respect", it might be said that this notion of equality is essentially "respect" oriented.

67. *Supra*, note 5, at 108.
68. (1986) 26 D.L.R. (4th) 1, at 42-3 (Ont. C.A.).
69. R. v. Punch, [1986] 1 W.W.R. 592, at 603 (N.W.T.S.C.).
70. [1989] 2 W.W.R. 289, at 305 [hereinafter referred to as Andrews], per McIntyre J. McIntyre J. was dissenting in the result, Lamer J. concurring; however, Wilson J., Dickson C.J.C. and L'Heureux-Dube J. concurring, states: "I have had the benefit of the reasons of my colleague, Justice McIntyre, and I am in complete agreement with him as to the way in which s.15(1) of the Canadian Charter of Rights and Freedoms should be interpreted and applied" (at 258).
71. *Supra*, note 56, at 199-200.
72. *Ibid.*, at 200.
73. J. Rawls, "A Theory of Justice", Cambridge: Harvard University Press (1971) at 60.
74. *Supra*, note 56, at 273.
75. MacCormick, *supra*, note 57, at 42.
76. *Supra*, note 56, at 205.
77. *Ibid.*
78. *Ibid.*
79. MacCormick, *supra*, note 57, at 36-7.
80. *Supra*, note 56.
81. *Ibid.*, at 195 and 201.

82. MacCormick, *supra*, note 57, at 34. It should be noted that this author provides a very persuasive discussion of the general appropriateness of the legal enforcement of certain moral values at 18-38.
83. Morgentaler, *supra*, note 7, at 134.
84. MacCormick, *supra*, note 57, at 18.
85. *Ibid.*, at 37.
86. *Ibid.*
87. *Ibid.* The body of philosophical theory directing Charter interpretation  
generally agrees that exercises of democracy should be rationally explicable and defensible to everyone in that society. From this follows the conclusion that, because no individual's private nonrational insights are entitled to bind others, particularized religious beliefs cannot be used to justify law.  
Diane Zimmerman, "To Walk a Crooked Path: Separating Law and Religion in the Secular State" (1986), 27 *Wm. & Mary L. Rev.* 1095, at 1102.
88. *Supra*, note 65, at 9.
89. *Supra*, note 73, at 62.
90. *Ibid.*, at 61.
91. K. Fogarty, "Equality Rights and Their Limitations in the Charter", Toronto: Carswell (1987) at 17.
92. *Supra*, note 54, at 272-78.
93. *Ibid.*, at 273-74.

94. *Ibid.*
95. *Ibid.*
96. *Ibid.*, at 223-39.
97. *Supra*, note 6, at 34.
98. *Supra*, note 5, at 113.
99. In R. v Videoflicks Ltd. (1984), 48 O.R. (2d) 395, at 420-22 (Ont. C.A.) for instance, Tarnopolsky J.A. separately defined the freedom of religion and the freedom of conscience. The Alberta Court of Appeal also envisaged two freedoms in the s.2(a) guarantee, although it was reluctant to attempt their definition. See R. v. Big M Drug Mart (1983) 5 D.L.R. (4th) 121, 136. While overseas, the cases interpreting Article 9 of the European Convention of Human Rights, which protects "freedom of thought, conscience and religion", have distinguished between religion and beliefs or attitudes determined by thought and conscience. See J.E.S. Fawcett, "The Application of The European Convention on Human Rights", Oxford: Clarendon Press (1969) 199.
100. A guarded interpretation of "religion" implicitly lent matters of conscience a sectarian character in a number of these preliminary opinions. According to one writer, "conscience" "would protect systems of belief which are not theocratic ..., and which might not be characterized as religious for that reason (or for some other reason)". See P.Hogg, *supra*, note 29, at 710-11. This word, in effect, "encompass[ed] the rights of those whose fundamental principles [were] ... not founded on theistic belief". Big M. *supra*, note 99, at 136. Therefore, in R. v. W.H. Smith, [1983] 5 W.W.R. 235, at 256 (Alta.P.C.) the following conclusion was drawn:

The addition of the word "conscience" does not make any significant change .... [It] is intended to ... include ... as protected certain codes or systems of belief which are as fundamentally important and vital to their adherents as are more "orthodox" religions but

which do not include the concept of a theistic centre among the cardinal principles of belief.

101. Convenient surveys of judicial interpretations may be found in these works: W.S. Tarnopolsky, "Discrimination and The Law in Canada", Toronto : Richard De Boo Limited (1982) at 180-88; Irwin Cotler, *supra*, note 1, at 190-94; Lawrence Tribe, "American Constitutional Law", 2d. ed., Mineola, New York: The Foundation Press Inc. (1988) at 1179-183.
102. There is, for example, no definition of either term in the Charter, the Canadian Bill of Rights, or in any of our human rights statutes. Nor can any be found, to this writer's knowledge, in other Western constitutions. Furthermore, pre-Charter case law offers little insight into the meaning of "religion" and none on the question of "conscience". The latter omission is understandable since s.2(a) expresses the first constitutional acknowledgment of individual moral autonomy in the history of this nation.
103. The first amendment of the United States Constitution makes no reference to this term. Consequently, the authority of American religion theory in Charter interpretation is undermined. This issue is developed in more depth below. See *infra*, text accompanying note 147.
104. Indeed, it has been argued that no particular factors or set of factors has been identified that satisfactorily distinguishes religion from philosophy or ideology for constitutional purposes. See K.Greenawalt, "Religion as a Concept in Constitutional Law" (1984), 72 Cal.L.Rev 753. And similarly, another commentator has noted that there is "such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems to accommodate them all". J. Choper, "Defining 'Religion' in the First Amendment" (1982), U. Ill. L. Rev. 579. A perusal of the material identified in note 97 above would quickly verify these conclusions.

105. Generally speaking, if we accept for the moment that questions of conscience involve moral evaluations of right and wrong, then religion may be something more than conscience; a religion may not only prescribe a code of ethical rules, it may also prescribe spiritually fulfilling rituals and ceremonies. (For an argument that a cult could be regarded as religious without adopting a moral platform, see Greenawalt, *ibid.* at 773). On the other hand, in the sense that religion judges the moral quality of actions, it could be said that conscience is a semantically broader concept. According to Irwin Cotler "there is a virtual subsumation of 'religion' under 'conscience' in the particular context of s.2(a) given the more encompassing connotations of the latter". See Irwin Cotler, "Freedom of Conscience and Religion", in "Your Clients and the Charter", Montreal: The Canadian Bar Association (1987) at 13. But American courts, out of necessity, have interpreted "religion" to include an updated moral conscience. See *infra*, text following note 116. So although these concepts are not tautologous, the difficulty of determining any rational distinction between them is obvious.
106. Tribe, *supra*, note 101, at 1182. Where, however, the Charter claimant is alleging that the state is imposing majoritarian religious precepts upon him rather than alleging interference with his own person beliefs, then the sectarian quality of the state's activities will indeed be objectively determined. See *infra*, text accompanying notes 263-265.
107. United States v. Seeger, 380 U.S. 163 (1965).
108. Welsh v. United States, 398 U.S. 333 (1970).
109. Universal Military Training and Service Act, 50 U.S.C.A. App. 465(i) (West Supp. 1981).
110. *Supra*, note 107, at 176.
111. *Supra*, note 99, at 422.

112. Ibid., at 420.
113. Black's Law Dictionary, 5th ed., St. Paul, Minn.: West Publishing Co., 1979.
114. Canadian judicial recognition of the individual's moral autonomy is increasingly forthcoming. In Re Mackay et al. and Government of Manitoba (1985), 23 C.R.R. 8, at 11, the Manitoba Court of Appeal, relying on the Oxford English Dictionary, concluded that "conscience" - in s.2(a) - meant the "self-judgment ... [of] the moral quality of one's conduct". And in Edwards, Dickson, C.J.C. stressed that because certain agnostic complainants lacked a "moral compulsion" to observe a Sabbath, they could not establish an impairment of their freedom of conscience and religion. *Supra*, note 6, at 36. While in Morgentaler, Wilson J. indicated that the integrated concept "should be broadly construed to extend to conscientiously-held beliefs ... grounded in religion or in a secular morality". *Supra*, note 7, at 135.
115. The idea of pluralism in this nation has so spilled over into the moral and religious spheres that sociologists speak of a Canadian "Moral Mosaic". *Supra*, note 14, at 57-9.
116. *Supra*, note 107, at 166.
117. *Supra*, note 109.
118. *Supra*, note 108, at 342.
119. A theistic comprehension of religion, for instance, would portray a theological chauvinism that is irreconcilable with either the constitutional mandate for free choice or for religious equality: it would mock common usage by excluding a number of persons, such as Buddhists, who are generally perceived to be religious. Furthermore, it flies in the face of the Charter's direction in s.27 to interpret our freedoms with a view to preserving and enhancing the heritage of all cultures.

120. Given the potential scope of a functionally interpreted freedom of conscience, the freedom of religion would seem a pointless guarantee unless the former freedom is specifically limited by some substantive criteria. See Cotler, *supra*, note 105.
121. Edwards, *supra*, note 6, at 34.
122. Videoflicks, *supra*, note 99, at 422.
123. One writer puts such beliefs this way: "The character of belief which is claimed as a human right concerns those beliefs which men subscribe to as convictions fundamental to their way of life and purpose in living." See L.J. MacFarlane, "The Theory and Practice of Human Rights", New York: St. Martin's Press (1985) 60.
124. Videoflicks, *supra*, note 99, at 422.
125. See *infra*, text, for a discussion of belief sanctioned behaviour, at 88-91.
126. Edwards, *supra*, note 6, 34.
127. The evidentiary burden of this threshold test could fall particularly heavily upon members of obscure or nascent churches, and even more so on persons with privately determined convictions. Unlike the faithful of traditional religious organizations, their beliefs may be undocumented and little known. In these circumstances, the courts cannot be unduly demanding or they will undermine the freedom of choice. Significantly, the United States Supreme Court has taken a very tolerant stance with respect to unusual religious beliefs. The belief in one case that the government's use of a social security number could be spiritually harmful was accepted without discussion. See Bowen v. Roy, 106 S. Ct. 2147 (1986). For a review of this problem in the context of euthanasia, see Fran Carnerie, "Euthanasia and Self-Determination: Is There a Charter Right to Die in Canada" (1987), 32 McGill L.J. 299, at 326.

128. See, for example, P.E. Johnson, "Concepts and Compromise in First Amendment Religious Doctrine" (1984), 72 Cal. L. R. 817, at 833; and Comment, "Conscientious Objectors - The New Parallel Belief Test - United States v. Seeger" (1965), 14 Cath. U.L. Rev. 238, at 246.
129. John H. Mansfield, "The Religion Clauses of the First Amendment and the Philosophy of the Constitution" (1984), 72 Cal. L.R. 847, at 851.
130. Quite a variety of approaches and definitions have been propounded to restrict intensely emotional opinions of an overly secular nature. It has been suggested, for instance, that the objector's reaction must not only be intense, but of a quality akin to religious anguish. See D. Gianella, "Religious Liberty, Nonestablishment, and Doctrinal Development" (1967), 80 Harv. L. Rev. 1381, at 1428-29. In a similar vein, another observer maintains that we should protect only those beliefs with extratemporal consequences. See Choper, *supra*, note 104, at 597-601. But a wider conception of religious convictions, offered by John Mansfield, requires them to address "basic questions about the meaning of suffering and death and the existence of spiritual reality". J. Mansfield, "Conscientious Objection - 1964 Term" (1965), 2 Religion and Pub. Ord. 3, at 9. And it has even been argued that we should not employ any one definition, but instead use an analogical perspective to decide if something is religious by comparison with the indisputably religious. See Greenawalt, *supra*, note 104.
131. *Supra*, note 61.
132. They had only to promise ultimate fulfilment (regardless of the content of this promise) in return for an unconditional surrender to the ultimate concern. *Ibid.*, at 1-2.
133. *Ibid.*, at 4.
134. D. Mackenzie Brown, "Ultimate Concern: Tillich in Dialogue", New York: Harper and Row (1965) 2. For instance, Tillich argued that secular humanists were within the community of the faithful because

they saw the divine as "manifest in the human: the ultimate concern of man [being] ... man". *Supra*, note 60, at 63. His thesis assumes then that we can rank an individual's concerns to discover the essential ones which give direction and substance to his entire life. And it is these concerns that are the stuff of religion.

135. *Supra*, note 107, at 187.

136. *Ibid.*, at 180.

137. *Supra*, note 7, at 125.

138. *Supra*, note 134, at 3. But what is the most adequate expression of ultimacy? According to Tillich, ultimacy means nothing finite. *Ibid.*, at 24. He saw faith as a human potentiality because "man is able to understand in an inner personal and central act the meaning of the ultimate, the unconditional the absolute, the infinite". *Supra*, note 61, at 9. Thus a finite concern - such as worldly success - was idolatrous. It might require total surrender, but it would not offer ultimate fulfilment. *Supra*, note 61 at 2. Because, if God is the indefinable "ground of being", we cannot make an object or thing of Him. There cannot be a God or even a "Highest God" as these are limiting concepts. *Supra*, note 134.

This inadequate sketch of Tillich's theory demonstrates the amorphous nature of "ultimate concerns", and the difficulty of their practical comprehension and application under the Charter. Nonetheless, Tillich's work serves to reinforce the argument for a tolerant understanding of religion and conscience. In addition, it supports the position presented in this paper that a functional focus is inherently self-limiting. A life-informing belief should be regarded as Tillich views questions of faith - as a "centered act of the personality". *Supra*, note 61, at 5. For further discussion advancing a constitutional interpretation based on the ultimate concern doctrine, see Alfred G. Killilea, "Standards for Expanding Freedom of Conscience" (1973), 43 *Univ. Pitt. L.R.* 531 at 542-47; and, Note, "Toward a Constitutional Definition of Religion" (1978), 91 *Harv. L.*

Rev. 1056. But see the following articles for a critical review of this theory: Choper, *supra*, note 104, at 594-97; and Greenawalt, *supra*, note 104, at 806-11.

139. Videoflicks, *supra*, note 99, at 422.
140. *Supra*, note 108, at 342-43.
141. Although this criterion has not received acknowledgement in European cases interpreting language comparable to s.2(a), it is arguable that it is consistent with their rulings. For instance, those deeply held political or private views that they have excluded would probably also have been unprotected under the Charter. See X. v. Fed. Republic of Germany, 24 Council of Europe Decisions and Reports 137, D 8741 / 79 (Eur. Commn. Of Human Rights 1981) regarding the strong personal desire of a complainant to have his ashes buried on his own land: and McFeeley v. U.K., 20 Council of Europe Decisions and Reports 44, D 8317 / 78 (Eur. Commn. of Human Rights 1980) wherein an application for political prisoner status by I.R.A. inmates was not recognized as a claim of conscience. But significantly in another decision, the philosophy of pacifism was found within the ambit of their freedom of thought and conscience in Art. 9. See Arrowsmith v. U.K., 19 Council of Europe Decisions and Reports 5, D 7050 / 75 (1978), Council of Europe Committee of Ministers Resolution D H (79) 4.
142. *Supra*, note 104.
143. Note, *supra*, note 138, at 1073-74.
144. *Ibid.*
145. In fact, Canadian and American courts have traditionally admitted that they are "in no position to question the validity [or worth] of a religious belief". Jones, *supra*, note 7, at 71. For it is not generally the state's business "to approve the personal decisions made by its citizens". Morgentaler, *supra*, note 7, at 120. Otherwise,

the inquiry process would itself infringe the individual's autonomy of conscience by substituting a judicial conceptualization of life's ultimate concerns for his own. Hence, the United States Supreme Court has held that beliefs could be religious even if they were not "acceptable, logical, consistent, or comprehensible". Thomas v. Review Board, 101 S. Ct. 1425, at 1430 (1981). But for a recent transgression of this rule, see Prior v. M.N.R. (1987) 1 C.T.C. 2076, at 2091-92, where the court appears to have challenged the soundness of the convictions in question. And for a discussion of religious verity in the context of sincerity, see *infra*, text, at 76.

146. For a review of legal articles considering the tenets of various political movements as ultimate concerns, including Marxism, see Choper, *supra*, note 104, at 596-97.
  
147. Critical and judicial opinion regarding the constitutional interpretation of religion in the United States has been coloured and warped by the supposedly inconsistent goals of the free exercise and nonestablishment clauses. Torn between the necessity to accommodate an ever-growing and incredibly diverse variety of sects and theological perspectives, and the difficult and conflicting requirement to insulate increasingly overlapping religious and state interests, American jurists have had no single controlling principle of rights adjudication. In result, the freedom of choice fails to be accorded the dominance it has been given under the Charter. This is illustrated, for instance, in a statement that the primary objective of the religion clauses is "to isolate government from matters that it has neither the power nor competence to control". See Choper, *supra*, note 104, at 601. And further evidence of American doctrinal confusion may be found in the not infrequent failure of their lower courts to observe the functional approach of the Seeger and Welsh decisions. See Note, "Developments in the Law - Religion and the State" (1987), 100 Harv. L.R. 1606, at 1625-31. Interestingly, in an attempt to reconcile these clauses, some scholars have urged the recognition of the paramountcy of the free exercise right. See, for instance, Tribe, *supra* note 101, at 1201; and, Gianella, *supra* note 130, at 1389. Yet other American thinkers who have concentrated on

the central issue of individual autonomy have asserted, like our Supreme Court, that the ideal of personal fulfilment by free choice underscores all religious liberties. See *infra*, note 372.

148. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).
149. To repeat, spiritual and moral beliefs may be functionally inseparable, but neither substantively limits the other, and neither is superior to the other.
150. Note, *supra*, note 138, at 1083.
151. *Supra*, note 5, at 105. Invalidation is not, however, the sole Charter remedy that might alleviate instances of governmental religious intolerance. Admittedly, "complete invalidation is the inevitable consequence of a finding of" improper statutory purposes "because purposes inform laws in their entirety". Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The examples of Overbreadth and Vagueness", in Robert J. Sharpe (ed.), "Charter Litigation", Toronto: Butterworths (1986) 233, at 287. But where the effects rather than the purposes of legislation are impeached, "complete invalidation is not an inevitable remedy. The appropriate remedial response depends upon the extent of the impairment of rights." *Ibid.* Following American doctrine, our courts have begun to utilize constitutional exemptions or declarations of partial invalidity for purposes of granting religious minorities relief from the disparate impact of otherwise acceptable laws. For a discussion of Charter jurisprudence on point, see *ibid.*, at 278-80. And also see Canada Safeway, *supra*, note 6 at 206-07 for an illustration of the difficulties in granting such relief to corporations. If the courts cannot readily and fairly identify to whom an exemption should be given and how those people are to be exempted, then there cannot be any partial invalidation declared pursuant to s.52 nor any exemption provided under s.24.
152. Initially, however, a few judges urged that the question of legislative effects be given primacy. Madam Justice Wilson, for one, has argued

in Big M that the Charter be viewed as "an effects-oriented document in the first instance," because placing the initial analytical focus on effects, rather than purpose, would "impose a less heavy evidentiary burden on the plaintiff." *Supra*, note 5, at 121. Tarnopolsky J.A. has also indicated support for this view. See Videoflicks, *supra*, note 99, at 415. Whether this difference in method would produce different results is doubtful. Both approaches agree that purpose and effects can each be critical. Where they differ is over which question should be the starting point of analysis. And whether or not it is easier to prove the unconstitutionality of one or the other will vary from case to case. Sometimes the purpose of a law will be patently impermissible, but most often, of course, the opposite will be true. In the latter case, the majority approach in Big M still affords objectors the opportunity to impeach an enactment's effects. For discussions of these contrary visions of Charter analysis, see H. Scott Fairley, "Developments in Constitutional Law: The 1984-85 Term", (1986) 8 *Sup. Ct. L. Rev.* 53, at 61-70; Cotler, *supra*, note 105, at 22-4; Dale Gibson, "The Law of the Charter: General Principles", Toronto: Carswell (1986) at 52-5; and William F. Pentney, "Interpreting the Charter: General Principles", in Beaudoin and Ratushny (eds.), "The Canadian Charter of Rights and Freedoms", Toronto: Carswell (1989) 21, at 32-4.

153. *Supra*, note 5, at 105.
154. *Supra*, note 5, at 115.
155. *Ibid.*, at 105.
156. In this sense, the Charter and jurisdictional analysis of purpose seem indistinguishable. See Hogg, *supra*, note 29, at 320-21 for a discussion of effects within the jurisdictional framework.
157. *Supra*, note 5, at 108.
158. Edwards, *supra*, note 6, at 34.

159. *Ibid.*, See also *supra*, note 5, at 113.
160. Edwards, *supra*, note 6, at 34-6.
161. *Supra*, note 5, at 108 and 113. See also Edwards, *supra*, note 6, at 33-4.
162. Edwards, *supra*, note 6, at 33.
163. Note, "Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self" (1984), 97 Harv. L.R. 1468, at 1475. That the Supreme Court of Canada regards this as so is undeniable. For its belief that our political and philosophical traditions mandate not only the freedom from secular orthodoxy, but also, the freedom from religion see Big M, *supra*, note 5, at 113.
164. Is there a freedom from conscientious orthodoxy as well as one from religious orthodoxy? Since the subjects of religion and conscience are conceptually indistinguishable under the Charter, this would seem appropriate. Little, however, has been said by our courts on the question of which moral viewpoints the state is entitled to enforce. The only noteworthy judicial consideration of this issue may be found in the judgment of Wilson J. in Morgentaler. For a discussion of her opinion, see *infra*, note 627.
165. Big M, *supra*, note 99, at 155.
166. See, for instance, the following articles: Bruce, DeMara, "Moscoe Wants Lord's Prayer Banned at Council" (Tuesday, September 27, 1988), *The Toronto Star*, A10; "Trustees Keep Lord's Prayer" (Wednesday, October 12, 1988), *The Toronto Star*, F8; "Councillors Split on Lord's Prayer" (Wednesday, January 18, 1989), *The Toronto Sun*, 30.
167. This practice will inevitably be challenged under the Charter. To date it has not been dealt with on its merits, to the author's knowledge, but efforts have been made to overturn the practice.

See, Judy Nyman, "Court Bible Challenge Thrown Out" (Tuesday, February 23, 1988), *The Toronto Star*, A26.

168. For examples of public servants swearing oaths including such sacred incantations see, Royal Canadian Mounted Police Act, R.S. 1985, c.R-10, Sch.; and Canadian Security Intelligence Service Act, R.S. 1984, c.21, Sch.
169. Cotler, *supra*, note 1, at 201.
170. *Supra*, note 5, at 113.
171. *Ibid.*, 110. For instance, in McGowan v. Maryland, 366 U.S. 420 at 453, (1961), that Court stated that legislation will violate the first amendment's establishment clause "if it can be demonstrated that its purpose is to use the state's coercive power to aid religion." It has also been suggested in the dissenting opinion of Mr. Justice Douglas in that case (one favourably noted by our Supreme Court in Edwards, *supra*, note 6, at 31) that there is also "an interference with the 'free exercise' of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community." *Ibid.*, at 576-77.
172. Support for this position may be found in the Supreme Court's insistence in Big M, *supra*, note 5, at 108, that "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians." This statement was elaborated at 109 in the majority decision as follows:

If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.
173. R. v. W.H. Smith, *supra*, note 100, at 258.

174. Fairley, *supra*, note 152, at 67.
175. *Supra*, note 5, at 116.
176. *Ibid.*, at 108.
177. *Ibid.*, at 113.
178. *Ibid.*, at 115. Other courts have made similar comments. For what was, I believe, the initial Canadian enunciation of this double aspect standard of religious indoctrination, see the dissenting judgment of Cartwright J. in Robertson and Rosetanni, *supra*, note 2, at 661: "In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion." And this interpretation was first applied to s.2(a) by the Alberta Court of Appeal in Big M, *supra*, note 99, at 136, where it similarly proclaimed that: "Standards shall not be imposed for purely sectarian reasons." Equivalent expressions by the United States Supreme Court may be found, for instance, in McGowan, *supra*, note 171; and in Braunfeld v. Brown, 366 U.S. 599, at 607, where it observed that if "the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid".
179. What if, instead, state action is aimed at inhibiting the religious activities of certain faiths? The circumstances in which such interference is politically desirable will be rare, but as Canadian legal history reminds us, they should be anticipated. (See, for example, Dist. of Kent v. Storgoff (1962), 38 D.L.R. (2d) 362 (B.C.S.C.) regarding a municipal by-law prohibiting Doukhobours from entering a town; Saumur v. City of Quebec, [1953] 2 S.C.R. 299 with respect to a by-law that permitted police officials to forbid the distribution of religious tracts in the streets by Jehovah's Witnesses; and Walters v. A.G. Alta., *supra*, note 2 (discussed *infra*, note 191). How are government programs of this ilk to be assessed? Our courts have not yet addressed this question under the Charter. When they do, liberal theory will require them to conclude that laws which inhibit

religious practices primarily for reasons of religious intolerance, rather than for appreciable secular concerns, unacceptably promote religious orthodoxy.

Since the state may not directly impose sectarian conformity by dictating the beliefs that citizens must observe, neither may it indirectly impose conformity by limiting the scope of beliefs that citizens may freely observe. Both deny freedom of choice and both are affronts to human dignity. Significantly, the United States Supreme Court appears to agree with this position, as it has said that government policies will violate the first amendment's establishment clause if their purpose is " 'to endorse or disapprove of religion' " Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting the concurring judgment of O'Connor J. in Lynch v. Donnelly, 465 U.S. 668, 690 (1984)). Thus restrictive or anti-religious laws, as well as prescriptive ones, should be constitutionally impeachable under the Big M indoctrination test. The discussion that follows concerning analysis of the latter species of legislation has, it is submitted, equal relevance for claims involving the former.

180. Greenawalt, *supra*, note 104, at 796.

181. Johnson, *supra*, note 128, at 827.

182. Certainly various Supreme Court judgments have either implied, assumed or expressly stated so and they have been interpreted, sometimes guardedly, and sometimes confidently, as deciding that religion and religious freedom are indeed federal matters. See, for instance, Hogg, *supra*, note 29, at 706; D.A. Schmeiser, "Civil Liberties in Canada; Oxford: Oxford University Press (1964) at 85-7; Fairley, *supra*, note 152, at 61-62; Albert S. Abel and John I. Laskin, "Laskin's Canadian Constitutional Law", Toronto: Carswell (1975) at 846-47; and Irwin Cotler, "Freedom of Conscience and Religion", in Beaudoin and Ratushny (eds.), "The Canadian Charter of Rights and Freedoms", (2nd ed.), Toronto: Carswell (1989) at 177-78. However contrast these opinions with the following observations of Dickson C.J.C. in Edwards. After reviewing the relevant caselaw he stated:

Never has a majority of this court held that Parliament (or indeed the provincial legislatures) has exclusive jurisdiction in respect of religion or freedom of religion. The question remains an open one.

...

There are, undoubtedly, religious matters within exclusive federal competence, most notably prohibition against the profanation of the Sabbath .... In my view there [also] exist religious matters which must similarly fall within provincial competence. Section 92(12), [for example,] expressly allocates the solemnization of marriages, a class of subjects with important historical or traditional religious dimensions, to the provincial legislatures .... It would seem, therefore, that the Constitution does not contemplate religion as a discrete constitutional "matter" falling exclusively within either a federal or provincial class of subjects. Legislation concerning religion or religious freedom ought to be characterized, I believe, in light of its context, according to the particular religious matter upon which the legislation is focused.

Supra, note 6, at 27. The significance of his position on this question will become apparent in the discussion respecting the government's right to enact religious exemptions from facially neutral legislation. See *infra*, text, at 65. Obviously such provisions have an undeniable religious purpose, but they would be beyond provincial authority if the traditional view on the issue continued to prevail under the Charter.

183. Nonetheless, early academic opinion was divided on this point. For one writer who assessed the adjudication process under the Charter as also requiring the characterization of "matter", see Neil Finkelstein, "The Relevance of Pre-Charter Case Law for Post-Charter Adjudication", (1982) 4 Supreme Court L.R. 267. A contrary position was held, however, by Professor Hogg. See, *supra*, note 29, at 660.
184. *Supra*, note 29, at 314.
185. One commentator, however, has suggested that secondary religious purposes should not be excluded from review on the basis of division of powers precedents. See William Black, "Religion and the Right of Equality", in Bayefsky and Eberts (eds.), "Equality Rights and the

Canadian Charter of Rights and Freedoms", Toronto: Carswell (1985) 131, at 146 and 149.

186. See, for instance, Hogg, *supra*, note 29, at 313-22; and Abel, *supra*, note 182, at 98-103.
187. Abel, *ibid.*, at 102.
188. *Ibid.*
189. For a summary of the analytical role of legislative effects in division of powers case law, see Hogg, *supra*, note 29, at 320-21. It should be mentioned, however, that the courts can and have ignored this consideration when they so choose. See, for example, the cases discussed *infra*, notes 191 and 192.
190. Gail Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment", (1978) 45 U. Chi. L. Rev. 805, at 824.
191. *Supra*, note 2. In this case the Alberta Communal Property Act imposed restrictions on the communal holding of land that were intended to limit the expansion of Hutterite "colonies". But the law was upheld by the Supreme Court as being in relation to land tenure and not religion, despite its special religious consequences for Hutterites. Martland J., who wrote the opinion of the Court, did not seem to find the primary religious effect of the statute indicative of its true purpose because he did not see that effect as being religious. As far as he was concerned the Act did not interfere with Hutterite religious beliefs; it merely governed their land holdings. (See *infra*, text accompanying notes 362-364 for a discussion of the belief-action dichotomy employed in pre-Charter cases such as this one to limit the scope of dissentient rights). This conclusion is difficult to accept. In the words of one critic:

The history of the legislation implies that the purpose of the act was to control land holdings of Hutterites. Communal land holding is a fundamental religious tenet of the Hutterite faith; the exercise of that tenet was

what the Act sought to regulate. To separate Hutterite land holdings from Hutterite religious activity and to hold that the Act only interfered with the former is to redefine the Hutterite faith. Martland failed to recognize the fact that the purpose and effect of the legislation was to infringe upon religious exercise ....

Macklem, *supra*, note 1, at 56.

192. [1963] S.C.R. 643. In this case the Supreme Court upheld a municipal by-law which required poolhalls and bowling alleys to be closed between midnight and 6 a.m. on weekdays and all day on Sunday. According to Ritchie J., who spoke for the Court in this case, the inclusion of a Sunday prohibition in the by-law "does not afford sufficient evidence to justify the inference that [it] ... is directed towards the prevention of the profanation of the Sabbath." *Ibid.*, at 650. And so he concluded that the restriction was "primarily concerned ... with secular matters." *Ibid.*, at 649.

Some critics, however, believe he improperly stressed form over substance. Consider the following comments of Professor Hogg:

Ritchie J. ... did not explain what could be the "secular" purpose of a prohibition of business on Sunday which did not apply to any other day of the week. Nor did he explain how the dominant purpose of such a prohibition was to be ascertained. In referring to the Sunday observance cases he emphasized the religious connotations of the titles and preambles of the statutes in issue in those cases. But such formal criteria are not satisfactory grounds for rulings on constitutionality, because formal criteria can be satisfied by appropriate legislative drafting.

*Supra*, note 29, at 410. See also Macklem, *supra*, note 1, at 53.

193. Hogg, *supra*, note 29, at 323.
194. *Ibid.*
195. *Supra*, note 5.
196. Whether or not a corporation is able to exercise the s.2(a) freedom, it was held in this case that it may invoke s.2 to strike down

unconstitutional laws. In a freedom from religion claim, as Dickson C.J.C. noted, [i]t is the nature of the law, not the status of the accused, that is in issue". Ibid., at 95. But for persuasive discussions of corporate incapacity to hold religious beliefs for purposes of the freedom from secular orthodoxy, see Andrew Petter, "Not 'Never on a Sunday'; R. v. Videoflicks Ltd. et al." (1984-85), 49 Sask. Law Rev. 96 at 101; and Wallace Rozefort, "Are Corporations Entitled to Freedom of Religion Under the Canadian Charter of Rights and Freedoms?" (1986), 15 Man. L.J. 199. Moreover, it should be noted that in Edwards, supra, note 6, at 52, the Chief Justice did not hesitate to concur with these writers' conclusion "that a business corporation cannot possess religious beliefs". However, if we are to protect the equal rights of dissident businessmen to incorporate without special cost to their religious life, corporations should not be denied standing on behalf of their owners, officers or employees. See Rozefort, *ibid.*, at 217-18; and note Dickson C.J.C.'s leanings in this direction in Edwards, supra, note 6, at 52: "A more difficult question is whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons." Because s.1 upheld the legislation in this case, it was an issue he did not decide, but since he at least found a s.2(a) violation we can infer his probable position on corporate standing. See also Canada Safeway, supra, note 6, at 206-07 for an example of the problems presented in granting an exemption to a corporate complainant.

197. *Supra*, note 99, at 136.
198. *Supra*, note 5, at 96.
199. *Ibid.*, at 98.
200. *Ibid.*
201. For Dickson C.J.C.'s survey of the pertinent Canadian Sunday observance jurisprudence in Big M, see supra, note 5, at 98-104. And for some academic reviews of these decisions, see the following:

Schmeiser, *supra*, note 182, at 101-09; Macklem, *supra*, note 1, at 51-4; and Hogg, *supra*, note 29, at 409-11.

202. Reference as to the Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1, at 50.

203. Edwards, *supra*, note 6, at 19.

204. *Supra*, note 5, at 105. The persuasive weight of powers distribution precedent was equally influential in the majority decision of the Alberta Court of Appeal, although the Court also attempted to reinforce the case law with its own interpretation of the Act's purpose as evidenced by its text. Summing up these considerations, Mr. Justice Laycraft, giving the majority judgment, stated:

In these cases and in others appear a number of judicial pronouncements confirming the religious basis of the Lord's Day Act, and confirming that the purpose of the act is one of morality - to enforce the concept of the Christian Sunday .... The Act itself confirms this purpose by its title, by references within it to "the Lord's Day" and by the provision in section 11(a) that "any necessary or customary work in connection with divine worship" shall be deemed to be "work of necessity or mercy". The religious purpose of the Lord's Day Act is, in my view, beyond doubt.

*Supra*, note 99, at 134-35.

205. *Supra*, note 171.

206. Braunfield, *supra*, note 178; Callagher v. Crownkosher Supermarkets of Massachusetts (1961), 366 U.S. 617; and Two Guys from Harrison-Allentown v. McGinley (1961), 366 U.S. 582.

207. *Supra*, note 5, at 104. Implicit in Warren C.J.'s decision was the notion that the State of Maryland, at least, had brought its mind to the legislation each time it amended the Act over the course of its history. Interestingly, the Alberta Court of Appeal had indicated a willingness to reappraise the purpose of the Lord's Day Act if there had been evidence of a similar history of amendments. See *supra*, note 99, at 136.

208. Supra, note 171, at 445.
209. Supra, note 5, at 107.
210. Ibid.
211. Ibid.
212. Ibid., at 117.
213. As its Canadian proponents urged, the United States Supreme Court "in ignoring the religious motivation for [Sunday closing] ... legislation ... [it was] implicitly assessing [their] effects rather than the purposes which originally underlay [their] ... enactment". Ibid., at 107.
214. Supra, note 2, at 657.
215. For criticism of the discrete "effects" test applied in this case, see Cotler, supra, note 1, at 200-2 and 207; Macklem, supra, note 1, at 59-60; and Bora Laskin, "Freedom of Religion and the Lord's Day Act; The Canadian Bill of Rights and the Sunday Bowling Case", (1964) 42 Can. Bar Rev. 147, at 156.
216. Supra, note 5, at 106.
217. Ibid., at 115
218. Ibid.
219. Ibid., at 110.
220. Ibid.
221. Ibid.

222. Ibid.
223. Ibid., at 115.
224. Edwards, supra, note 6, at 33.
225. Supra, note 5, at 116.
226. Ibid., at 108.
227. Supra, note 6.
228. Supra, note 99.
229. Ibid., at 404.
230. Edwards, supra, note 6, at 17.
231. Ibid., at 19.
232. Ibid., at 20.
233. Ibid., at 19-20.
234. Ibid., at 21.
235. Ibid.
236. Writing in McGowan, supra, note 171, at 445, he stated:  
To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.
237. Edwards, supra, note 6, at 21-2.

238. *Ibid.*, at 23.
239. *Ibid.*
240. *Ibid.*, at 23-4.
241. *Ibid.*, at 24.
242. *Ibid.*, at 33.
243. *Ibid.*, at 35.
244. *Ibid.*, at 28. For similar determinations in respect of equivalent retail legislation in other provinces, see *supra*, note 6. None of these decisions casts doubt on the propriety of the state objective in issue. Those laws that were struck down were infirm because they failed to provide a free exercise exemption scheme - a point pursued elsewhere in this paper. See *infra*, text accompanying notes 610-612. Sunday observance laws regulating fishing and hunting, however, have had a more chequered Charter history. A ban on such activities is more likely to serve the religious conscience of the majority than secular conservation interests. For cases in which legislation of this sort has been found to be improperly motivated, see R. v. Quinlan (1983), 12 C.R.R. 81 (N.S. C. Ct.); and R. v. Peddle and Rice (1986), 61 Nfld. and P.E.I.R., 58 (Nfld. S.C.). But also note that the latter decision was overturned by a 2-1 majority this year in R. v. Rice, an unreported judgment of the Newfoundland Court of Appeal. This case graphically illustrates the difficulty complainants and courts will have with coincidental ordinances that lack any documented or obvious purpose. Judicial balancing or policy choices will be most obvious in such circumstances.
245. Edwards, *supra*, note 6, at 34-5.
246. It has been well settled in the United States that a legislative enactment does not contravene the first amendment just because it "happens to coincide or harmonize with the tenets of some or all

religions". McGowan, supra, note 171, at 442. To illustrate the point, their Supreme Court has said that the fact "the Judeo-Christian religions oppose stealing does not mean that a State ... may not, consistent with the Establishment Clause, enact laws prohibiting larceny." Harris v. MacRae, 448 U.S. 297, at 319 (1980). And, of course, this was the position that Court adopted in respect of Sunday closing regulations. See supra, text accompanying note 194; and supra, note 236. For an early Charter enunciation of this concept, see Videoflicks, supra, note 99, at 422.

247. For discussions of the American "civil religion" as a syncretic constitutional creed evolved from the intersection of secular and sectarian interests, see O. Carroll Arnold, "Religious Freedom on Trial", Valley Forge, Pa.: Judson Press (1978) at 27-35; and Note, supra, note 147, at 1619-22 and 1651-55.
248. Note, *ibid.*, at 1610.
249. *Ibid.*, at 1653, n.61.
250. Supra, note 6, at 24.
251. Census data shows that as of 1981 "almost 90% of Canadians continue to claim Roman Catholic (47%) or Protestant (41%) ties .... Another 5% are associated with other religions. The remaining 7% have no affiliation." Supra, note 12, at 47.
252. 403 U.S. 602, at 612-13 (1971).
253. Supra, note 101, at 1209.
254. Zimmerman, supra, note 87, at 1096.
255. *Ibid.*, at 1097. For similar American judicial comments on the mercurial nature of this standard, see Tribe, supra, note 101, at 1209, n.29. And for a brief discussion of two judgments illustrative of these criticisms, see *infra*, text accompanying notes 267-276.

256. Arnold, *supra*, note 247, at 82.

257. On this point, the following comments of Professor McCormick, *supra*, note 57, at 30 are particularly apposite:

The interests protected from invasion by criminal laws are interests legitimated by a given conception of a just social order .... Hence, naturally, the laws which are justified by the harm principle on a given interpretation of 'harm' [or respect] do indeed coincide with widely held precepts against 'harmful' [or disrespectful] behaviour. But they do not merely coincide; the criminal law in so far as it is concerned with fending off harmful behaviour is necessarily geared to protection of what are legitimate interests according to a certain dominant political morality - the 'ideology' which ... enjoys 'hegemony' within a given polity.

258. Zimmerman, *supra*, note 37, at 1099.

259. Wallace v. Jaffree, *supra*, note 179, at 70.

260. *Supra*, note 101, at 1205. Similarly, see Merel, *supra*, note 190, at 821 where she remarks that the American constitution does not

require the invalidation of any law that happens to advantage any particular religious view. Such a broad reading of the establishment prohibition is inherently unworkable, ... since almost any law may offend the religious sensibilities of some one individual.

261. *Supra*, note 6, at 22. Other Canadian courts have echoed this concern as well. For instance, the Newfoundland Court of Appeal has said that the "Charter was not intended to eradicate all influences upon society which may emanate from its cultural, religious or social history." Rice, *supra* note 244, at 15 of the majority judgment.

262. *Supra*, note 6, at 35.

263. It is unusual to see such an explicitly realistic statement of the judicial approach to legislative purpose assessment in either Canada

or the United States. Sometimes the impression is given that "the goal of the inquiry is to determine legislators' actual, subjective motives". See Tribe, *supra*, note 101, at 1210. But occasionally it may also be admitted that "to be honest, [this is] almost always an impossible task." Edwards v. Aquillard, at 107 S. Ct. 2573, at 2605 (1987). So as Professor Hogg notes, when

the courts refer to the "intention" of the statute or of the legislative body that enacted it[, this can] ... not be taken too literally. A statute cannot have an intention, and a deliberative body such as a legislature is likely to have as many intentions (or purposes) as there are members. As Lederman has said, what is really being sought is "the full or total meaning of the legislation", judged "in terms of the consequences of the action called for".

One American case that well illustrates this reasonable man approach is Barnette, *supra*, note 15 where flag saluting was deemed constitutional as long as objectors were exempted " '[b]ecause the prevailing, dominant view of religion classifies the flag salute as secular, in contravention of the heterodox definition devoutly held by the [objecting] witnesses.' " Note, *supra*, note 163, at 1484. Another such case is Wallace, *supra*, note 179 where the United States Supreme Court ruled that a moment-of-silence statute which included the word "prayer" was unconstitutional because " '[p]rayer' holds religious significance for most people". Tribe, *supra*, note 101, at 1187.

264. See, for example, Marc Galanter, "Religious Freedoms in the United States: A Turning Point?", (1966) Wis. L. Rev. 217, at 223 ("The state may carry out such policies as long as they are not concerned with what is ordinarily deemed to be religious practice."); Tribe, *supra*, note 101, at 1187 ("Whether a given practice constitutes a forbidden establishment may ultimately depend on whether most people would view it as religiously significant."); and Note, *supra*, note 163, at 1485 ("For purposes of the establishment clause, religion should be defined by social consensus. When the government interferes with beliefs or activities generally believed to be religious, it oversteps the bounds of its constitutional authority.").

265. In result, "religion" is defined objectively with respect to challenges alleging the imposition of religious orthodoxy, but subjectively with respect to challenges alleging the imposition of secular orthodoxy. One commentator harmonizes this duality thusly:

Although the functional definition avoids any inquiry into the content of belief, it encompasses only those beliefs that are fundamental to the identity of the believer .... Consensus for purposes of the establishment clause protects plurality without crippling the government. The fundamental concerns of the majority are placed beyond the influence of the state, and the minority is still protected by the free exercise clause, which provides an exemption from the law but does not invalidate it.

Note, *supra*, note 163, at 1485.

266. For some writers this approach alone is not seen as sufficient to eliminate undue religious bias. One suggested alternative means of restricting incidents of forced religious observance is to discredit certain state laws that impose secularized Christian canons on society, but which "are hard to validate on purely rational grounds" or which could not be said to prevent harm to individuals. See Zimmerman, *supra*, note 87, at 1099. A commonly cited example is the regulation of sexual behaviour. It is the view of some that no "argument can be made on rational grounds for preferring as morally correct any particular arrangement of sexual relations between or among consenting adults." See Zimmerman, *ibid.*, at 1105 and n.28 for a list of like thinkers. Hence it could be maintained that the ideals sought in such legislation are not other-regarding ones, and their supposedly temporal objectives should be discounted. In other words, they should not be acknowledged as part of society's limited moral establishment because they represent deliberate attempts to impose nonrational, religious beliefs.

American courts, however, have refused to regard such claims as religious conflicts. Zimmerman, *ibid.*, at 1099. In Harris v. McRae, *supra*, note 246, for instance, the United States Supreme Court rebuffed an argument that a regulation restricted the funding of abortion raised establishment concerns because it incorporated Catholic doctrine into law. As far as the Court was concerned the

restriction was "as much a reflection of 'traditionalist' values ... as it was an embodiment of the views of any particular religion". Ibid, at 319. So a religious coincidence existed, but not a religious purpose. However, one might ask what the logical justification for this traditionalist view was. If the fetus is not a person, it is difficult to see how abortion laws can be sustained, except in the interests of the mother's health. And herein lies the crux of the matter. For many the fetus is a human being from conception. How, therefore, can we define what is other-regarding or rational in the arena of public morality without reference to a specific ethical code. It is inescapably a question of perspective. For a further discussion of Harris and the abortion issue, principally from the free exercise angle, see *infra*, note 510.

267. For a brief and recent Canadian survey of significant accommodation decisions in the U.S. see the dissent of Mr. Justice Lacourciere in Zylberberg, *supra*, note 10, at 670-672. And for an insightful American discussion of the increasing shift from "separation" to "accommodation" evident in their case law, see Ruti G. Teitel, "The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance", (1986) 21 Harv. C.R.-C.L.L.R. 651. Also see the discussion *infra*, text, at 61-63.
268. See, for example, Teitel, *ibid.*, Tribe, *supra*, note 101, at 1289-95; and Note, *supra*, note 147, at 1655-59.
269. 463, U.S. 783 (1983).
270. *Supra*, note 179.
271. Note, *supra*, note 147, at 1656, citing the majority. Contrast the dissenting position of Mr. Justice Brennan that "prayer is fundamentally and necessarily religious". Marsh, *supra*, note 269, at 810. See also, Wallace, *supra*, note 179.
272. Note, *supra*, note 147, at 1656. In most instances, however, it should be mentioned that when the state has tried to borrow religious

symbols, American courts have been less tolerant. The use of the cross, for instance, has been prohibited, as well as the insertion of a "motorist's prayer" in a state road map. But the motto "In God we trust" has been upheld as being patriotic rather than sectarian. For the relevant case law see *ibid.*, at 1653, n.62.

273. *Ibid.*, at 1659.
274. See Marsh, *supra*, note 269, at 792; and see Lynch, *supra*, note 179, at 682.
275. For criticism of the United States Supreme Court's position on gauging the coercive effect of majoritarian accommodations, see *infra*, text accompanying note 333.
276. These American "distortions" are also emblematic of the "flexibility" a reasonable man test of religiosity permits the courts. At any one point in time, reasonable men may reasonably "differ on whether history has erased religion from such practices." Tribe, *supra*, note 101, at 1295. And as the "religious composition and attitudes of the ... population change, future may courts may react with ... incredulity to the suggestion that creches merely happen to coincide with religion." *Ibid.*, at 1296.
277. *Ibid.*, at 1285. For a discussion of the question and relevant American case law, see his text at 1284-98.
278. *Supra*, note 8.
279. *Supra*, note 9 and note 10.
280. *Ibid.*, at 760.
281. *Ibid.*, at 768.
282. *Supra*, note 8, at 657.

283. Ibid., at 658.
284. Ibid.
285. Ibid., at 659-60.
286. Ibid., at 660.
287. Ibid., at 707.
288. Ibid., at 696.
289. Ibid., at 698.
290. Ibid.
291. Ibid., at 716.
292. Ibid.
293. Ibid., at 717.
294. Supra, note 10, at 664.
295. Ibid. For a discussion on federal and provincial jurisdiction, see supra, note 182.
296. Supra, note 10, at 665.
297. Ibid., at 666.
298. Ibid., at 654.
299. Ibid., at 660.
300. Ibid., at 661.

301. It should be pointed out that many intricacies of the problem of state coercion are examined later in this paper in the context of the freedom from secular orthodoxy. What is said there has equal relevance here.

302. Despite the Zylberberg ruling, a number of school boards deliberately ignored its prayer ban, waiting for the Ministry of Education to draft a new regulation. They were so encouraged, and somewhat vehemently, by many of their constituent parents. For instance, the chairman of the Lincoln County Board is reported to have said: " 'We've had a lot of support for our stand ... and hardly anyone has complained about it.' " And in those districts where the morning exercises were stopped the detrimental result was evident to some board trustees only a few months later:

Since we eliminated the prayer there has been more tension, more edginess among students and gobs more graffiti that was never there before. That suggests there is a growing tide of lawlessness that maybe wouldn't be there if we gave God his place in the schools .... The silent majority of people just feel that kicking God out of the school wasn't the way to go.

Gary Webber-Proctor, "Take Trustees to Court on Prayer, Group says" (Tuesday, December 20, 1988), *The Globe and Mail*, A3. See similarly interesting statements of trustees, concerned parents and minority spokespersons in Margaret Polanyi and Juan Escobar, "Some Ontario Schools Use Morning Prayers Despite Court Ruling" (Wednesday, January 4, 1989), *The Globe and Mail*, A12; and Kevin Donovan, "Church Leaders Laud Ban on Compulsory Classroom Prayers" (Sunday, September 25, 1988), *The Toronto Star*, A25. Obviously the process of defining rights in a democratic society is not always an agreeable one.

303. For a discussion of the right of individuals to demand that the state facilitate the practice of their creed, see *infra*, at 98-101.

304. *Supra*, note 5, at 110.

305. McDaniel v. Paty, 435 U.S. 618, 639 (1978).

306. Supra, note 5, at 110.
307. Supra, note 10, at 678.
308. Supra, note 5, at 110 (cited in Zylberberg supra, note 10, at 658).
309. Supra, note 10, at 659.
310. Supra, note 9, at 766.
311. Supra, note 10, at 668-72.
312. Everson v. Bd. of Education of the Township of Ewing et al., 330 U.S. 1, at 15 (1947).
313. Teitel, supra, note 267, at 652, describes the Court's pertinent 1984-85 decisions thusly:

The outcomes of the key establishment cases may have appeared to reaffirm principles of separation. However, the opinions in these cases continued the recent trend away from strict separation. The holdings ... were narrow and can be explained by their close factual similarities to controlling precedents .... [Otherwise,] the Court has continued to apply a considerably weakened version of the Lemon test.

314. Earlier judicial opinion however expressly denied that the establishment clause "depend[ed] upon any showing of direct governmental compulsion". Engel et al. v. Vitale et al., 370 U.S. 421, at 430 (1962). So Lacourciere J.A. is correct when he notes in Zylberberg, supra, note 10, at 670 that "the weight of U.S. authority favours the position that, as a general principle, state support for religion, even in the absence of any element of compulsion, violates the Establishment Clause". But this is probably not a true appreciation of current American thinking. See, for instance, Michael W. McConnell, "Coercion: The Lost Element of Establishment", (1986) 27 Wm. and Mary L. Rev. 933 who argues that recognition of coercion in establishment analysis is vital to the central issue American courts

tend to overlook - religious choice - and is the means for reconciling the seemingly contradictory guarantees of the first amendment:

A rule that forbids government actions with the purpose or effect of advancing religion fails to distinguish between efforts to coerce and influence religious belief and action, on the one hand, and efforts to facilitate the exercise of one's chosen faith, on the other. It is meaningless to speak of "advancing" religion without specifying the reference point. To protect religious freedom against persecution "advances" religion, as does treating religion neutrally if the prior practice had been to discriminate against it.

Ibid., at 940. And for another writer who offers a review of American jurisprudence which makes coercion relevant to both establishment and free exercise clauses, see Jesse H. Choper, "The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments" (1986), 27 Wm. and Mary L. Rev. 943, at 948-50. See also *supra*, note 267.

But some critics continue to believe that if coercion is also an element of establishment analysis, establishment adds nothing. See Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim about Original Intent" (1986), 27 Wm. and Mary L. Rev. 875, at 921-922. The author would suggest, however, that the freedom from religion does indeed add something - freedom from religiously inspired and coercive legislation. As long as we associate the right of free exercise with non-sectarian state action, then constitutional protection for religious autonomy is incomplete unless we also ensure the right to abstain from any government program which impose religious conformity for religious reasons.

315. Teitel, *supra*, note 267, at 657.

316. *Supra*, note 252.

317. Lynch, *supra*, note 179, at 678.

318. Note, *supra*, note 147, at 1647.

319. Lynch, supra, note 179, at 690.
320. Teitel, supra, note 267, at 679.
321. Grand Rapids v. Bull, 105 S. Ct. 3216, at 3226 (1985).
322. Note, supra, note 147, at 1647.
323. Lynch, supra, note 179, at 687.
324. Karst, supra, note 55, at 78.
325. Note, supra, note 163, at 1473-75.
326. Big M, supra, note 99, at 318. The separate aspect of identity is protected by the freedom from secular orthodoxy. See Note, supra, note 163, at 1473-74.
327. Epperson v. Arkansas, 393 U.S. 97, at 106 (1968). To protect the formation as well as the expression of life-informing beliefs, American Courts have carefully screened legislative attempts to manipulate students' study programs for religious indoctrination purposes. For a discussion of relevant U.S. case law see Note, supra, note 147, at 1665-68. Similarly, if the Charter is not to allow the pre-emption of free religious choice, then surely our courts must also rule that education material cannot go "beyond the dissemination of ideas ... and openly promote a particular religious dogma". See Douglas A. Schmeiser, "Multiculturalism in Canadian Education", in "Multiculturalism And The Charter: A Canadian Legal Perspective", Toronto: Carswell (1987) 167, at 183. Would it be permissible then for school boards to annually assist in the distribution of 400,000 free Gideon Bibles, as is the practice, when the "non-Christian kids don't see their books handed out in school"? See Lois Sweet, "Free Bibles Sensitive Issue for Schools", (January 25, 1988), The Toronto Star, C1. Concern must also arise in respect of various provincial education regulations which specifically require teachers to inculcate Christian principles of morality in their pupils. See Schmeiser, *ibid.*,

at 174-76; and Judith C. Anderson, "Effect of Charter of Rights and Freedoms on Provincial School Legislation" in Manley-Casimir and Sussel (eds.), "Courts in the Classroom: Education and the Charter of Rights and Freedoms", Calgary: Detselig Enterprises Limited (1986) 183, at 190. But this writer would suggest that as long as these values have assumed a "secular" stature, their promotion is unlikely to be vulnerable to constitutional attack on the basis of the freedom from religion. Some, however, might argue that such a "secular" education has a hostile impact on religious minorities. See *infra*, note 518. But also see Note, *supra*, note 147, at 1668-72 for a contrary position.

328. *Supra*, note 5, at 108.
329. Note, *supra*, note 147, at 1648.
330. Lynch, *supra*, note 179, at 692.
331. *Supra*, note 101, at 1293.
332. *Supra*, note 267, at 680.
333. See Note, *supra*, note 147, at 1647-50; Teitel, *supra*, note 267, at 679-80; Tribe, *supra*, note 101, at 1293-95.
334. *Supra*, note 10, at 654.
335. *Supra*, note 5, at 108. And see also *supra*, note 172.
336. Merel, *supra*, note 190, at 823.
337. *Supra*, note 101, at 1168.
338. Unless the state reasonably attempts to make allowances for known minority religious practices, it is probable that the courts will not regard the challenged law as a reasonable limit under s.1. See, *infra*, text accompanying notes 610-613.

339. *Supra*, note 101, at 1168.
340. Teitel, *supra*, note 267, at 684. If, for example, Sikh Canadians in the RCMP were permitted to wear turbans instead of the required and traditional Mountie headgear, such accommodation should not be constitutionally vulnerable simply because the government preferred to be religiously sensitive, rather than religiously aloof. The freedom of choice that directs s.2(a) interpretation does not, once again, require such strict neutrality that we must never make allowances for the precepts of minority faiths. Admittedly, however, sectarian exemptions are quite inconsistent with the Lemon establishment test employed in the United States. But if this principle is used to support Charter arguments against state accommodation of dissident religious life, it may be undermined by the fact that the American Supreme Court has refused to apply Lemon to free exercise claims, apparently valuing free choice over neutrality. See Tribe, *supra*, note 101, at 1168. Considerable academic comment has been generated by the seemingly incompatible goals of the first amendment clauses, some of which was noted earlier. See *supra*, notes 314 and 147. For further scholarly discussion attempting to reconcile American free exercise and establishment doctrine, see Note, *supra*, note 147 at 1631-34 and 1715-23; and Tribe, *supra*, note 101, at 1166-69.
341. As the Supreme Court noted in Big M, *supra*, note 5, at 114:
- The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.
342. *Supra*, note 4.
343. *Ibid.*, at 294.
344. *Ibid.*, at 295.

345. For a pre-Charter discussion of this issue see Brian L. Fish, "Constitutional Aspects of Teacher Dismissals", (1979) 17 Alta. L.R. 545. And for relevant Charter jurisprudence see Re Essex County Roman Catholic Separate School Board and Tremblay-Webster et al. (1984), 45 O.R. (2d) 83 (C.A.); Re Caldwell et al. and Stuart et al. (1984), 15 D.L.R. (4th) 1 (S.C.C.); Metropolitan Separate School Board (1988), 65 O.R. (2d) 598; Nfld. Teachers' Assoc. and Walsh v. The Queen (Sept. 7, 1988), Doc. No. 9/86 (Nfld. C.A.), affirming (1986), 59 Nfld. and P.E.I. R. 129 (Nfld. T.D.). And also, see Romulo Magsino, "Denominational Rights in Education" in Manley-Casimir and Sussel (eds.), "Courts in the Classroom: Education and the Charter of Rights and Freedoms, Calgary: Detselig Enterprises Ltd. (1986) 77.
346. One critic has suggested that the Lemon test prohibiting the assistance of religion was "derived from a belief that government support ... is inherently coercive, even if extended to all religions." Teitel, supra, note 259, at 653. Apparently, the assumption is that in practical terms, the state probably cannot hope to accommodate all religions equally. It certainly could not, for instance, order public school curriculums to comply with the beliefs of all faiths. See Note, supra, note 147, at 1670.
347. Tribe, supra, note 101, at 1198-99; and Teitel, supra, note 260, at 684.
348. Torcaso v. Watkins, 367 U.S. 488, at 495 (1961).
349. Abington School Dist. v. Schempp, 374 U.S. 203, at 225 (1963).
350. For instance, in Zylberberg, supra, note 9, at 763 one judge made the following observation: "Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same effort reinforcing the belief of non-believers that God does not exist as in teaching believers about the nature of God." But again, absent state coercion, I would suggest there is no duty on the government to accommodate either the believers or the non-believers. See, infra, text, at 101-104.

351. McConnell, *supra*, note 314, at 940. McConnell argues there that aid to religious private schools would interfere with the religious choice of non-believers desiring to attend non-religious schools. Another writer sees the question somewhat differently. According to Gail Merel, *supra*, note 190, at 827, the state is prohibited from "the purposeful advantaging of one religious or irreligious opinion over another, not of religion over nonreligion." As she elaborates:

the religion clauses do not mandate government neutrality with respect to religious and nonreligious belief, because the very essence of the political compromise embedded in the establishment clause is that government must itself remain secular, or politically nonreligious, at all times. The appropriate dichotomy is ... not between those who believe and those who hold no religious viewpoint, but between those who favour and those who oppose some or all religious views.

*Ibid.*, at 813.

352. *Supra*, note 5, at 117.

353. *Ibid.*

354. [1984] 2 S.C.R. 66, at 88 (cited in Big M, *supra*, note 5, at 106).

355. *Supra*, note 5, at 121-22.

356. *Supra*, note 8, at 716.

357. *Supra*, note 9, at 772.

358. *Supra*, note 8, at 716.

359. *Supra*, note 10, at 659.

360. *Supra*, note 99, at 415.

361. *Ibid.*, at 415-16.

362. *Supra*, note 2.

363. Ibid., at 393.
364. The doctrinal roots of this proposition lay in dated American case law. It was the basis upon which their courts sustained legislative interferences with sectarian conduct in spite of the first amendment's unequivocal assurance that "Congress shall make no law ... prohibiting the free exercise" of religion. (A brief review of these old decisions may be found in Note, *supra*, note 147, at 1705-06). And perhaps its most explicit adoption in this country was voiced in Robertson and Rosetanni, *supra*, note 2, at 657, where Ritchie J., speaking for the majority, quoted the following passage of Frankfurter J.'s dissent in Barnette, *supra*, note 15, at 653:
- The constitutional protection of religious freedom terminated disabilities, it did not create new privileges .... Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.
- For other Canadian reiterations of this overly legocentric comprehension of religious freedom see R. v. Harrold, [1971] 3 W.W.R. 365 at 374 (B.C.C.A.) and Caldwell v. Stewart (1982), 132 D.L.R. (3d) 79, at 88-9 (B.C.C.A.). But for a singular and confusing pre-Charter exception to this viewpoint see Saumur v. City of Quebec, *supra*, note 179.
365. *Supra*, note 5, at 108.
366. Ibid., at 113.
367. *Supra*, note 99, at 420.
368. Article 18.
369. Article 9 of the European Convention on Human Rights and Article 18 of the Universal Declaration of Human Rights guarantee the freedom to manifest religious beliefs in language identical with that of the Covenant's Article 18. But surprisingly, no significant judgments

under these instruments have advanced the right of practice. European Convention jurisprudence, for instance, has generally failed to protect the conduct in issue and has not developed any important principles. See Black, *supra*, note 185, at 142; and Graham Zellick, "The European Convention of Human Rights: Its Significance for Charter Litigation", in Robert J. Sharpe (ed.), "Charter Litigation", Toronto: Butterworths (1986) 97, at 104.

370. Section 116 provides that "The Commonwealth shall not make any law for ... prohibiting the free exercise of any religion."
371. In Sherbert v. Verner, 374 U.S. 398 (1963), the United States Supreme Court abandoned its longstanding position that religious activities did not enjoy constitutional protection; and ever since, it has repeatedly reaffirmed its commitment to the accommodation of such conduct. (For a discussion of this case, see *infra*, text, at 93; and for current surveys of relevant American free exercise jurisprudence see Tribe, *supra*, note 101, at 1242-75; and also see Note, *supra*, note 147, at 1703-15). Australian precedents, on the other hand, are less authoritative. See, for instance, Christopher Enright, "Constitutional Law", Sydney: The Law Book Company Limited (1977) at 334-35. Nonetheless, dicta in one Australian judgment clearly rejected an argument that religious behaviour was excluded from the purview of s.116 of their Constitution. See Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth (1943), 67 C.L.R. 116, at 124.
372. *Supra*, note 5, at 108. By contrast, the United States Supreme Court has seldom attempted to identify, much less justify, the values upon which its free exercise jurisprudence rests. Criticism of that Court's "unhealthy" reluctance to articulate the theoretical foundations of this freedom may be seen in these articles: Garvey, *supra*, note 57, at 782-83; and Note, "Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities" (1980), 90 Yale L.J. 350, at 356-57. See also Note, *supra*, note 147. However it should be mentioned that American writers have, themselves, commented comparatively little on this issue. Those who have recognized the

individual autonomy or freedom of choice rationale as the normative underpinning of both religion clauses include: Merel, supra, note 190; Note, supra, note 147; and Note, supra, note 163. But for an argument disputing this thesis see Garvey, *ibid.*

373. For the source of this analysis, see Karst, supra, note 55, and Note, supra, note 163.
374. Supra, note 5, at 113.
375. Edwards, supra, note 6, at 35.
376. *Ibid.*
377. In result, the only recourse for those who lack such a belief is to impeach the legislation's purpose.
378. Supra, note 6, at 36.
379. *Ibid.*, at 35.
380. *Ibid.* This remark, noted previously in the context of the purpose test, adds further insight to the issue in hand when considered in conjunction with Dickson C.J.C's preceding comments. To elaborate, in the appeals from Videoflicks, one appellant, Paul Magder, had no belief requiring a day of rest. Nonetheless, he demanded an exemption arguing that the courts could not predicate accommodation upon whether or not claimants held certain non-majoritarian beliefs without improperly reinforcing the Christian view of religion. (See his Supreme Court factum, at 22.) The author disagrees. The Edwards decision on this point is not disrespectful of dissidents who lack a Sabbatarian belief. These people do not qualify for an exemption because they have no need for one; the law imposes no cruel choice upon them.
381. Supra, note 99, at 422.

382. Consistent with this argument is the fact that no court has assigned the direct or indirect coercive effects of state action specifically to either right of manifestation.
383. So it follows that we cannot simply conceive of the rights of manifestation as being intrinsically matters of action (practice) and inaction (dissent). Certainly Dickson C.J.C. did not differentiate between them on this basis in Edwards. The freedom to dissent, as he has described it, permits active expressions of minority beliefs in the face of restrictive ordinances, just as the freedom to practice does. *Supra*, note 6, at 35-6. Moreover, there is, as I have maintained, a common right of inaction within these freedoms; although, the courts have not, as yet, discussed this abstention right in the context of religious practice. But when a law requires conduct which the observance of minority beliefs forbids, how can this not be violative of the freedom to practice? Are conscientious objectors not affirmatively exercising their convictions when they refuse military service? Does it make sense to view such abstentions as expressions and manifestations of religious non-belief and refusals to participate in religious practice?
384. All the Chief Justice has done in Edwards is to categorize religious manifestation interests under temporal regulations in terms of a freedom "from" (the freedom from conformity - that is, the freedom to dissent) and a freedom "to" (the freedom to practice). As one commentator has observed:
- For every freedom "to" is a freedom from governmental or other restraints on the protected act. And every freedom "from" here implies a freedom to engage in activities without the imposition of certain kinds of restraints or influences.
- Galanter, *supra*, note 264, at 225.
385. This concept was first so expressed, the author believes, by Stewart J. in his perceptive dissent in Braunfeld v. Brown 366 U.S. 599, at 616 (1961). There he said that a law which compelled an Orthodox Jew to decide between his faith and his financial survival imposed a "cruel choice" which no state was entitled to demand. And in its

subsequent free exercise jurisprudence the United States Supreme Court adopted his "premise that individuals should not be compelled to choose between deeply-held religious beliefs and participation in public life unless an overriding state interest could not otherwise be served". Note, *supra*, note 147, at 1711. For a discussion of two of these cases, see *infra*, text, at 79-80 and 93.

386. Videoflicks, *supra*, note 99, at 423.
387. Indeed, comparatively speaking, the question of bona fides conviction is so fundamental that it should take precedence over the characterization of an individual's principles. And accordingly, as a number of writers and judges have stressed or implied, it is logically preferable to dismiss suspicious or colourable claims on the basis of their insincerity rather than by reference to their life-informing qualities. See, for instance, Black, *supra*, note 185 at 140; Tarnopolsky, *supra*, note 101, at 186; and Tribe, *supra*, note 101, at 1182. Also see the pre-Charter decision of *R. v. Beales*, (unreported, B.C.C.A.), cited in M. Jackson, "Comment: Bill of Rights - Freedom of Religion - Use of Prohibited Drugs for Religious Purposes: R. v. Beales" (1972), 7 U.B.C. L. Rev. 125 at 126, wherein a trial judge found the claimant's life-informing principles to be religious because the claimant genuinely believed that they were.
388. *Supra*, note 108, at 339.
389. Gianella, *supra*, note 130 at 1418.
390. Jones, *supra*, note 7, at 71.
391. Moreover, because abridgements of this very private freedom may be perceptible only to the dissident, "it is reasonable and fair to suggest that ... relief can only be contemplated when [he has met] ... the minimal requirement of a showing of sincerity". Killilea, *supra*, note 134, at 553. "Otherwise, s.2(a) ... might become a limitless excuse for avoiding all unwanted legal obligation". Videoflicks, *supra*, note 99, at 423.

392. For a summation of the pertinent case law, see Tribe, *supra*, note 101, at 1243-46.
393. In Videoflicks, Tarnopolsky J.A. suggested that the Charter inquiry into sincerity would "be analogous to that pursued ... with respect to conscientious objection to trade union membership" in such cases as Re Civil Service Ass'n of Ontario (Inc.) and Anderson et al. (1975), 9 O.R. (2d) 341, at 343 (Div. Ct.) [hereinafter Anderson] and Re Funk and Manitoba Labour Board (1976), 66 D.L.R. (3d) 35, at 37 (Man.C.A.). *Supra*, note 99, at 423. Anderson, in particular, enumerates a number of seemingly useful criteria; however, none of these were actually addressed or applied in Videoflicks. And this is unfortunate, because certain of these concerns appear, at second glance, to be inappropriate for the assessment of forthright constitutional claims. To illustrate, one consideration advocated in Anderson is "the nature of the applicant's beliefs - their relationship to a divine being and the moral dimensions of such beliefs". Now not only does this express an outdated content-based comprehension of life-informing beliefs, but it has no bearing at all on the issue of whether those beliefs are actually held. Similarly, another criterion regarding the "'directness of the connection between the ... belief and the objection'" seems to pertain more to the identification of religious conduct and religious burden than to religious sincerity. Several other factors are also suspect because they imply that the dissident must account for his chosen beliefs in order to prove their genuineness. See *infra*, note 399.
394. For members of visible minorities, this will surely be the most offensive aspect of the s.2(a) process of rights review. But it will become an especially daunting proposition for those adherents of little-known sects who must, in addition, persuade the court of the life-informing qualities of their unorthodox, and possibly unpopular, spiritual or moral precepts.
395. Edwards, *supra*, note 6, at 48-9.

396. Tribe, *supra*, note 101, at 1246.
397. As Professor Tribe puts it, the examination "must be strictly limited to [questions of a] ... relatively 'neutral' sort". *Ibid.* Nonetheless he fears that judicial opinion will "inevitably reflect ... the ... [court's] view of the reasonableness of the claimant's belief." *Ibid.*, at 1245. However other commentators are more encouraging and argue that religious sincerity can indeed be severed from religious verity if we focus our attention principally upon the dissident's conduct. See, for instance, Killilea, *supra*, note 139 at 552.
398. *Supra*, note 145.
399. In Hobbie v. Unemployment Appeals Com'n of Florida, 107 S. Ct. 1046, at 1051 N.9 (1987), the United States Supreme Court regarded " 'an inquiry into one's reasons for adopting' " certain religious beliefs as being no less intrusive and violative of the free exercise right than a " 'judicial inquiry into the into the truth of [those] ... beliefs' " (quoting Callahan v. Woods, 658 F. 2d 679, at 687 (19th Cir. 1981). And thus, whether one's faith is the product of revelation, upbringing, study or some incomprehensible process or source, it should have no analytical significance. But contrarily, the Ontario Court of Appeal has, in Videoflicks, *supra*, note 99, by its reference to pre-Charter case law, presumably condoned just such an examination of the claimant's " 'previous religious experience' " and " 'the relationship between that experience and [his or her] current beliefs' ". Anderson, *supra*, note 393. If so, this is fundamentally inconsistent with the philosophical underpinnings of s.2(a); neither of these questions can be addressed without essentially requiring the individual to discuss why he holds the beliefs that he does.
400. Developing this theme further, the ascertainment of Church doctrine is not, per se, the goal of the inquiry into the complainant's sincerity. See Re Funk, *supra*, note 393. Membership in a particular sect does not necessarily signify that the individual espouses all of its teachings; quite the opposite. Studies have shown that the "religion of the vast majority [of Canadians] is a religion of isolated

fragments". *Supra*, note 14, at 72. (And see also *infra*, text, at 83, for an argument that the devout even have a right to make their own personal interpretations of those articles of faith that they do, in fact, adhere to). Thus, the convictions of a complainant's coreligionists can be as irrelevant as the private views of the judiciary.

401. Anderson, *supra*, note 393.

402. Religious protests in the fields of education and health provide cases in point. There is, for example, no social value in forcing minority children to engage in flag salutes or classroom prayers; neither is there any measurable, non-constitutional benefit for those citizens seeking exemption from such activities. And where there is a significant community interest at stake, such as in the enforcement of school attendance, the provision of adequate instruction or the preservation of life, disagreement is, again, unlikely to be improperly inspired because compliance is generally advantageous. Few parents will seek, on spurious grounds, to deny their children a proper education or a blood transfusion.

403. *Regan*, *supra*, note 32, at 6.

404. Hobbie, *supra*, note 399.

405. *Killilea*, *supra*, note 138, at 552.

406. *Note*, *supra*, note 138, at 1081, n. 123.

407. *Supra*, note 7.

408. R. v. Jones (1983), 8 C.R.R. 92, at 99 (Alta. Prov. Ct.).

409. *Ibid.*, at 100.

410. *Supra*, note 7, at 71-72. (The Alberta Court of Appeal failed to address the issue. See R. v. Jones (1984), 11 C.R.R. 180).

411. Another consideration discussed by some American authorities is the willingness of the individual to discharge an alternative, but equivalent, burden if his claim is upheld. Conscientious objectors who accept noncombatant assignments in war zones are cited as illustrative of this principle. See Regan, *supra*, note 32, at 6; and Note, *supra*, note 138, at 1082. However conscription laws burden everyone drafted to some degree; this is not, of course, true of all legislation. Accordingly, in this writer's opinion, if we are to uphold human dignity, no offer of substitute performance should be accepted or expected, and no such burden imposed, if the complainant was not on an equal footing with the majority of his fellow citizens at the time his freedom of conscience and religion was infringed.

Suppose, for instance, that a Sabbatarian is fired for refusing to work on Saturdays. Should this person have to prove his or her bona fides when seeking unemployment compensation by present offers of alternative service? Why should this person have to make such proposals and endure such burdens to receive what everyone else is entitled to enjoy without qualification? In this scenario, therefore, we can only fairly gauge sincerity in terms of past offers of substitute performance that were made when the individual was still employed; this is the only occasion when the situation of the Sabbatarian is comparable with that of the non-Sabbatarian. One critic, however, does not agree. See Note, *ibid.*, at 1082. But for a supportive precedent, see Hobbie, *supra*, note 399 where the question of sincerity was little discussed probably because the claimant Sabbatarian had offered before her dismissal to work evenings and Sundays, instead of Saturdays.

412. Videoflicks, *supra*, note 99, at 422.

413. Arrowsmith, *supra*, note 141, at 38.

414. See, for example, R. v. Jack and Charlie, 62 N.R. 14. Contrast Frank v. State, 604 P. 2d 1068 (Alaska 1979).

415. R. v. Morgentaler, Smoling and Scott, (1984), 47 O.R. (2d) (Ont. H.C.), at 412-413.
416. For a holding of the Ontario Court of Appeal refusing to even consider the application of s.2(a) to a couple's failure to obtain medical assistance for their child, see R. v. Tutton (1984), 14 C.R.R. 314. Contrast this unsound decision with the same Court's earlier ruling in Videoflicks discussed *infra*, text, at 85.
417. *Supra*, note 145.
418. *Supra*, note 415.
419. *Supra*, note 145, at 1427.
420. *Ibid.*, at 1430.
421. *Ibid.*, at 1430-31. The United States Supreme Court has continued to emphasize its incompetence to judge the dictates of faith in several subsequent cases. See Goldman v. Secretary of Defence, 734 F. 2d 1531, 1537 (D.C. Cir. 1984) where the fact that certain "Orthodox Jews who consider themselves devout [and] do not feel obliged to cover their heads at all times" did not detract from the right to wear a yarmulke while on duty in the air force. When this case was appealed to the Supreme Court no issue was taken with the plaintiff's religious position (Goldman v. Weinberger, 106 S. Ct. 1310 (1986)). See also United States v. Lee, 50 U.S.L.W. 4201, 4202 (1982) in which the court stated: "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee of the government has the proper interpretation of the Amish faith". And a similar dictum was announced in Widmar v. Vincent, 102 S. Ct. 269, 271 n. 6 (1981).
422. *Supra*, note 415 at 409.
423. *Ibid.*

424. Ibid., at 412.
425. For instance, see Dorff, "Judaism as a Religious Legal System", 29 Hastings L.J. 1331, 1334-41 (1978) describing the process of interpreting Jewish law.
426. MacFarlane, *supra*, note 123, at 60.
427. Bibby, *supra*, note 14, at 126-7.
428. Those sects within the "metaphysical movement" promote a pragmatic theology which is responsive rather than prescribed or absolute:
- Dogma is implicitly made to fit the need of the congregations .... [Consequently, t]he belief in continual, ongoing divine revelation and its interpretation characterizes these churches. Their theologies are subject to public and private renewal; and often frequent renewal. Because the body of official doctrine is in the hands of lay clergymen, men concerned in the immediate problems of the world, frequent changes in the doctrinal base can be expected.
- Irving I. Zaretsky (ed.), "Religious Movements in Contemporary America", Princeton: Princeton University Press (1974) at iii.
429. *Supra*, note 415, at 412.
430. Videoflicks, *supra*, note 99, at 420-1; Edwards, *supra*, note 6, at 34. Contrast the Ontario Court of Appeal's condonation of the bifurcation in R. v. Morgentaler (1985), 52 O.R. (2d) 353, at 391. A much earlier decision of this same court is preferable. In the pre-Charter case of Donald v. The Board of Education for the City of Hamilton, [1945] O.R. 518, the plaintiffs refused to take part in morning exercises which required singing the national anthem and saluting the flag, relying on a statutory exemption right from exercises having religious content. The Court found for the plaintiffs arguing (at 520): "For the Court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the Court to deny that very religious freedom which the statute is intended to provide".

431. Galanter, *supra*, note 264, at 277.
432. MacFarlane, *supra*, note 123, at 64 comes to a similar conclusion.
433. For two relevant cases involving American Indians which expressly rejected a benchmark of "absolute necessity" in favour of one of "religious roots" see Frank v. State, *supra* note 414, at 1071, and Teterud v. Burns, 522 F. 2d 357 (8th Cir. 1975), at 360. See also Yoder, *supra*, note 148, at 215 and 220 insisting that religious claims have religious roots and admitting that conduct that is "religiously grounded" or "religiously based" may be within the free exercise clause. For one Canadian writer who supports this position see Black, *supra*, note 185, at 145 where he argues that "any conduct motivated by religious belief," regardless of its centrality, should be entitled to consideration under the Charter, though not necessarily protected.
434. *Supra*, note 145, at 1430.
435. Dissidents seeking to rely on free exercise rights to justify use of mind-altering drugs have been subjected to intensive and unsympathetic scrutiny. See Leary v. United States, 383 F. 2d 851 (5th Cir. 1967) in which the court refused to overturn the defendant's conviction for marijuana use pursuant to his Hindu faith arguing that marijuana use was not a central facet of Hinduism. The opposite result was reached in People v. Woody, 61 Cal. 2d 716 (1964). See *infra*, text, at 121. For a pre-Charter decision by a Canadian court restraining drug use see Beales, *supra*, note 387. For an argument that drug use can be a legitimate religious practice that should not be excluded by centrality tests, see Greenawalt, *supra*, note 104, at 780.
436. In Sherbert, *supra*, note 371, at 406, the court suggested that only the core of religion is protected by its emphasis on the cardinal nature of a Sabbatarian claimant's religious injunction against Saturday work.

437. Supra, note 101, at 1247. That Court's statement on the subject in Yoder, supra, note 148, at 210 and 235 is difficult to interpret. By unduly emphasizing the extreme threat that school attendance requirements posed to the Amish way of life, the Court implies that a burdened religious practice has to be central or vital to the claimant's faith. This contradicts its express opinion in the decision that religious claims only need religious roots.
438. Stephen L. Pepper, "The Conundrum of the Free Exercise Clause - Some Reflections on Recent Cases" (1982), 9 N. Kent. L.R. 265, at 285.
439. Supra, note 99, at 420.
440. Supra, note 6, at 34.
441. See, among others, Greenawalt, supra, note 104, at 780-81; Note, supra, note 147, at 1734-35; Note, supra, note 372, at 359-361; Galanter, supra, note 264, at 274-78; Pepper, supra, note 438, at 282-85.
442. As the United States Supreme Court recognized in Seeger:
- "In such an intensely personal area ... the claim of the registrant that his belief is an essential part of a religious faith must be given great weight [and so] ... 'a scheme of life ... ought not to be denounced as not pertaining to religion when its devotees regard it as an essential tenet of their religious faith'."
- Supra, note 107, at 184.
443. Arguably, the very notion of essentiality or centrality is so vague as to imply no obvious helpful or generally relevant rules. Discovering the core of religious belief has been said to be a difficult task "even for theologians; religions have survived the loss of even apparently fundamental features": Note, supra, note 372, at 360, n. 60. Moreover, as applied to most religions this doctrine "requires such penetration of another's symbolic system, such dissection and reconstruction of essentially nonrational beliefs as to be virtually

impossible for the trier of fact". Note, *supra*, note 138, at 1080, n. 120.

444. Galanter, *supra*, note 264, at 270.
445. See Edwards, *supra*, note 6, at 36; Hothi v. R., [1985] 3 W.W.R. 256, at 257 (Man. Q.B.); Morgentaler, *supra*, note 415, at 391; Videoflicks, *supra*, note 99, at 422-23.
446. *Supra*, note 148, at 210.
447. *Supra*, note 438, at 284, n.91.
448. Instances of such judicial underprotection are common in decisions involving American Indian religious observances. Their faiths maintain that sacred emanations permeate the world, and so, like the Amish, they fail to compartmentalize life into the temporal and the spiritual. *Ibid.*, at 284. Moreover, they do not "rank the importance of the rituals that compromise their religious life". Note, *supra*, note 147, at 1735. Thus, it is not surprising that the application of the centrality doctrine to Native Indian claims has often ethnocentrically denied the importance of their practices. For a current list of relevant cases and articles, see *Ibid.*, at 1734, nn. 135-141.
449. Native Indian beliefs are also illustrative of this point, and significantly, some American courts have accommodated or at least considered such claims. For instance, the Indian religious perspective dictates that the body is sacred and long hair is a gift from the Great Spirit. In Teterud it was successfully argued that wearing long hair was a religious practice rooted in faith. *Supra*, note 433. See also, Bowen, *supra*, note 127, and *infra*, text, at 122, for an example of another self-regarding Indian religious belief deemed constitutionally significant.
450. Note, *supra*, note 372, at 360.
451. Morgentaler, *supra*, note 430, at 391.

452. Ibid.
453. In hard cases the judiciary has tended to retreat into analytical absolutes that begrudge religious tolerance. In Gillette v. United States, 401 U.S. 437 (1971), at 439-41, the United States Supreme Court held that Catholics could not escape military service because their faith forbade participation in unjust wars. But if we give the issue a proper subjective assessment, we should concede that such a claimant may have a categorical revulsion to a specific war. As Killilea argues: "this treatment of religion could stand up well .... There is no necessary logical contradiction in uncompromising obligations in respect to particular wars". *Supra*, note 138, at 548, n. 68.
454. Gerety, "Redefining Privacy" (1978), 12 Harv. C.R. - C.L.L. Rev. 233, at 274. See also Thornburgh v. American College of Obstetricians and Gynecologists (1986), 106 S. Ct. 2169, at 2184-85, cited by Wilson J. in Morgentaler, *supra*, note 7, at 124.
455. Helen Garfield, "Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner" (1986) 61 Wash. L. Rev. 293, at 319, n. 157. The author does not wish to imply, however, that abortion is necessarily and solely an issue between a woman, her doctor and her conscience. Whatever rights or interests the fetus has must be weighed in the balance under s.1. Despite the fundamental personal importance of the abortion choice, it will probably not be enough to always determine this moral issue which so obviously can involve competing concerns of a comparable magnitude. The point here is that women should not be denied this right to decide just because they may exercise it without regard for what their own conscience requires. For a discussion that the rubric of individual autonomy is an unhelpful one for resolving moral debates, being "itself ... morally neutral", see Ian T. Benson, "An Examination of Certain 'Pro-Choice' Abortion Arguments: Permanent Concerns about a 'Temporary' Problem" (1988), 7 Can. Journal of Family Law, 146.

456. Supra, note 7.
457. For a brief discussion of her analysis of the s.7 and s.2(a) issues see the text accompanying notes 624-628.
458. Supra, note 7, at 119 and 134. For an insightful commentary on this decision see, D. MacAlister, "R. v. Morgentaler: Access to Abortion and Section 7 of the Charter" (1988), 7 Can. Journal of Family Law 166.
459. Supra, note 178.
460. Supra, note 2.
461. Ibid., at 657-58.
462. Supra, note 371.
463. Ibid., at 404.
464. Ibid. Significantly, the Court not only viewed the withholding of a state "benefit" as a "burden", but expressly rejected an argument to restrict constitutional protection to situations in which a "right" and not merely a "privilege" is burdened. "It is too late in the day to doubt that the libert[y] ... of religion ... may be infringed by the denial of or placing of conditions upon a benefit or privilege." Ibid. Given the degree to which society is now government managed, it would have been an affront to human dignity to have done so. Regulations which deny benefits or privileges to individuals acting on a religious belief must be seen as serious threats to the freedom of choice.
465. Thomas, supra, note 145, and Hobbie, supra, note 399. However, the 1986 case of Bowen, supra, note 127 raised some concern that the American Supreme Court was retracting its position on this point. See Note, supra, note 147, at 1709-12. The fact that the Hobbie

decision postdates Bowen supports the view that the latter case is an aberration.

466. Supra, note 99, at 425.

467. See infra, text accompanying note 380.

468. Supra, note 99, at 423. The Alberta Court of Appeal reached a similar conclusion in Big M in regard to the effect of the Lord's Day Act. Speaking for the majority, and echoing the position of the United States Supreme Court in Sherbert, Mr. Justice Laycraft observed:

Whatever its degree, the Lord's Day Act, in my opinion, imposes a coercive burden on the free exercise of religion or conscience. Like Brennan, J., I can see little difference between the practical effect of that burden and a penalty imposed for Saturday (or Friday) worship.

469. Supra, note 99, at 427-28.

470. Again, as noted by the Alberta Court of Appeal in Big M: "In the face of greater activity permitted a competitor, the 'inconvenience' may become financial ruin." Supra, note 99, at 138.

471. Supra, note 6, at 37.

472. Ibid., at 55-7.

473. Petter, supra, note 196.

474. Ibid., at 99.

475. Ibid.

476. Ibid.

477. Ibid.

478. Supra, note 6, at 38. See also his earlier comments in Big M, supra, note 5, at 108.
479. "It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious belief, are potentially within the ambit of s.2(a)." Edwards, supra, note 6, at 33.
480. Ibid., and Videoflicks, supra, note 99, at 423.
481. It is difficult to imagine that any legislature would enact ordinances which, even indirectly, inhibit the religious exercises of the voting majority to any appreciable extent.
482. In a recent decision, the United States Supreme Court has also rejected the argument that the dissident, herself, and not the state, is the agent of her own misfortune. See Hobbie, supra, note 399, at 1051.
483. Supra, note 9, at 770.
484. Supra, note 6, at 38.
485. Ibid.
486. Ibid.
487. Ibid.
488. Ibid.
489. Ibid.
490. Jones, supra, note 7, at 85.
491. Edwards, supra, note 6, at 34.

492. Operation Dismantle, supra, note 28, at 489.
493. Edwards, supra, note 6, at 36.
494. Thomas, supra, note 145, at 717-18.
495. Videoflicks, supra, note 99, at 423.
496. Jones, supra, note 7, at 86.
497. See infra, notes 28 and 29.
498. For an American example of a trivial burden, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), where an exemption from a minimum wage requirement was denied because members of the objecting nonprofit religious organization could simply return the wages their faith forbade them to accept. For a Canadian illustration, see Jones, supra, note 7.
499. Note, supra, note 163, at 1478.
500. Edwards, supra, note 6, at 34.
501. Ibid., at 38.
502. Supra, note 410.
503. Robert J. Sharpe, "Deciding whether to Decide", in Sharpe (ed.), "Charter Litigation", Toronto and Vancouver: Butterworths (1986) 327, at 340. Note also the comment: "In R. v. Jones, the Alberta Court of Appeal took the prematurity doctrine to unusual lengths ...", at 341. The problem of impending or future harm also arises in the context of standing, for a recent review of the issue, see Dale and Scott Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms", in Beaudoin and Ratushny (eds.), "The Canadian Charter of Rights and Freedoms", Toronto: Carswell (1989) 781, at 794-98.

504. See text accompanying note 500 regarding burdens "capable" of interference. And compare with Wilson J.'s observation in Big M, supra, note 5, at 121, "that [a]n actual or potential impingement on a protected right" is prohibited.
505. Supra, note 10, at 684-5. The author, however, takes issue with Lacourciere J.A.'s emphasis on an "objective" appraisal. This inquiry must assume a subjective posture if it is to be purposively implemented. Otherwise, judges will indeed "hesitate" to find the prima facie infringement that common knowledge of the human condition will direct, just as Lacourciere J.A. did when applying his standard.
506. (1983), 6 C.R.R. 165 (Ont. H.C.).
507. Ibid., at 168 (paraphrasing Mr. Justice Douglas in Sherbert, supra, note 371, at 416).
508. The right of free exercise is not an instrument for the repression of the majority at the hands of the minority. This is just as indefensible as legislation which deliberately seeks to indoctrinate the latter. Hence no one can "insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." " Estate of Thorton v. Caldor, 472 U.S. 703, at 710 (1985). (Quoting Otten v. Baltimore and Ohio R. Co., 205 F. 2d 58, 61 (2d Cir. 1953)).
509. This is well settled. For instance, in Re Mackay, supra, note 114, at 12, the Manitoba Court of Appeal indicated that the  
  
Constitution does not guarantee that the state will not act inimically to a citizen's standards of proper conduct: it merely guarantees that a citizen will not be required to do, or refrain from doing, something contrary to those standards.  
  
While in Bowen, supra, note 127, at 2153, the United States Supreme Court made a similar observation: "The Free Exercise Clause affords an individual protection from certain forms of governmental

compulsion; it does not afford an individual a right to dictate the conduct of the government's internal procedures."

510. Edwards, supra, note 6, at 38. Similarly, Professor Tribe notes that in "religion, as in other spheres, government has no general duty to subsidize the exercise of constitutional rights." Supra, note 101, at 1275. For an extreme application of this principle, see Harris, supra, note 246, wherein the constitutional right to an abortion was held not to require the state to finance abortion, even though the state heavily supported the alternative to abortion - childbirth.

The significance of Harris to the Canadian abortion scene is patent when it is understood that our Supreme Court in Morgentaler merely suggested that the right of women to decide this question for themselves should be paramount in the early stages of pregnancy; it did not guarantee that a doctor would be available to perform it or that provincial health care plans would pay for it. And indeed some provincial governments have made little attempt to provide funding or access since that decision. See David Vienneau, "Abortion Access Depends on Where You Live" (Saturday, January 28, 1989), The Toronto Star, A4. But the author has difficulty reconciling Harris with the seemingly contrary statement of our court in Big M, supra, note 5, at 108 that objectionable state coercion includes "indirect forms of control which determine or limit alternative courses of conduct available to others." In Harris, was not the government essentially allowed to indirectly alienate the constitutional right of poor women to end their pregnancies? Surely, society's entitlement to prefer certain life-choices or moral positions does not also entitle it to thwart the valid free exercise rights of those holding contrary views by such financial discrimination unless it can be justified under s.1. Otherwise, is this really distinguishable from the situation in Edwards? For a criticism of this decision, see Tribe, supra, note 101, at 1345-47.

Therefore, the decision in Harris only makes sense if you take the view that the foetus is a person. Then the state would have grounds for its position. But this case is still inconsistent with any belief

that women have, at least some right to choose for themselves. Yet this has been the American position for some years. Roe v. Wade, 410 U.S. 113 (1973), seemed to establish that during the first trimester, the woman's personal autonomy was "of greater constitutional value than the protection of nonviable fetal life." Tribe, *supra*, note 101, at 1358. If this is so, can any government logically deny this liberty through absolute funding constraints?

511. It goes without saying, that many have sought to ease their conscience by simply not paying some part of their taxes at all. There are a number of American decisions involving individuals religiously opposed to war who withheld from their income tax an amount equivalent to the percentage of the national budget spent on defense. Typically, these claims have failed for what would be s.1 reasons under the Charter: national defense and fiscal integrity enjoin mandatory participation. For one brief discussion of such cases, see Choper, *supra*, note 314, at 953. See also *infra*, note 516.
512. For an argument by the Historic Peace Churches that provision be made in the federal Income Tax Act to allow them to "redirect" that portion of their taxes intended for military purposes into a peaceful tax fund, see Gisella Ruebsaat, "The First Freedom: Freedom of Conscience and Religion in Canada", Victoria: Conscience Canada Inc. (1985), at 15-20.
513. *Supra*, note 114.
514. *Ibid.*, at 12. The Ontario Court of Appeal came to a similar conclusion with regard to the s.2(d) freedom of association in the recently decided case of Lavigne v. O.P.S.E.U. (1989), 67 O.R. (2d) 536, at 565-6. There the applicant union member argued that mandatory payment of dues diminished his constitutionally protected associational interests. The Court rejected this argument stating:

"The interest he may have in being left alone or in being unencumbered by any monetary obligation to the bargaining agent selected by the majority of the bargaining unit or in not having any part of his payment to the union, no matter how trivial or

insubstantial, devoted to purposes unacceptable to him is not, in our view, an interest of constitutional status entitled to protection under the Charter."

515. *Supra*, note 114, at 12.
516. The mesmerizing force of these particular state interests in American jurisprudence is amply demonstrated in the decision of United States v. Lee, 455, U.S. 252 (1982). In this case an Amish employer objected to paying Social Security Taxes for his Amish staff because their faith forbade both the payment and the receipt of such benefits. Not surprisingly, no evidence indicated that an exemption for the Amish would diminish the net revenues of the Social Security system. The same did not hold true of those persons desiring to avoid contributing to the military establishment through their personal income taxes. Nonetheless, the United States Supreme Court, fearing the necessity for future exemptions of the latter group, refused to contemplate any exemption for a claim that did not jeopardize the fiscal apparatus in question. As the Court noted: "If, for example, a religious adherent believes war is a sin, ... such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function". *Ibid.*, at 260. For criticism of the Court's analysis see Pepper, *supra*, note 438, at 299-302; and Choper, *supra*, note 314, at 951-3.
517. A number of provinces, seeking to inculcate sentiments of loyalty and nationalism, have enacted school legislation which specifically authorizes patriotic observances and exercises. (For a survey of such provisions see either Schmeiser, *supra*, note 327, at 176-77; or Anderson, *supra*, note 327, at 200, n.57). And although some of these measures have no express provision for parental objection, there is little doubt that the s.2(a) guarantee will invalidate any attempt to compel student participation. For persuasive precedent establishing the right of Jehovah's Witnesses to refrain from mandatory patriotic exercises see the decision of the United States Supreme Court in Barnette, *supra*, note 15, and a similar pre-Charter decision of the Ontario Court of Appeal in Donald, *supra*, note 430.

518. A parent may object, for instance, to a child's instruction in sex education, or to the "anti-religious" messages he or she perceives in certain schoolbooks. In such instances, will the parent have a Charter remedy in s.2(a)? Although the parent may rightly claim that his or her constitutional right to supervise the religious and moral education of his or her child is thereby abridged, it is likely that the courts will prefer to uphold this intrusion under s.1 so long as the instruction in issue is "of a factual nature and does not promote any particular religious viewpoint." See Schmeiser, *supra*, note 327, at 182. The common stance taken in the caselaw on this question is that it is in the student's best interest to receive a diverse and open education. For a review of these decisions, see Schmeiser, *ibid.*, at 182-83. Hence a parent probably cannot hope to limit a child's exposure to, at least, the core aspects of the supposedly value-neutral ideology promoted in public school classrooms any more than that parent could hope to do so through home or private instruction, given the education regulations which enforce equivalent standards on the latter alternative. For a strong criticism of the resulting secular indoctrination of dissentient students, see Stephen Arons, "Constitutional Litigation and Educational Reform: Canada's Opportunity", in Manley-Casimir and Sussef (eds.), "Courts in the Classroom: Education and the Charter of Rights and Freedoms", Calgary: Detselig Enterprises Limited (1986), 133, at 160.
519. The state does not, in general, have complete authority in the education field. Its interest is limited to what the Supreme Court of Canada has termed "the 'efficient instruction' of the young." See Jones, *supra*, note 7, at 74. So it is well settled that the state may compel education and that parents cannot withhold their children from all secular schooling. (For a discussion of this subject see Schmeiser, *supra*, note 327, at 177-81; and Anderson, *supra*, note 327, at 186-89). But the state may not insist that a student attend class on a religious holy day. (In fact most provinces specifically exempt attendance on those days, and there have been no prosecutions for non-attendance because of this reason. See Schmeiser, *ibid.*, at 178. For contrary, but dated American case law, see Galanter, *supra*, note

264, at 229, n.72). Nor may the state insist that children attend school beyond a certain grade if a particular level of education threatens their religious life-style. See Yoder, supra, note 148. Neither may the state insist that a child attend a public school; it can, again, only require education. So parents do have the right to send their child to a religious school that meets state requirements. (See Pierce v. Society of Sisters of the Holy Name, 268 U.S. 510 (1925) for the first enunciation of this principle). However, it seems that the state may insist that those parents who wish to opt-out of the public school system and to teach their children at home apply for authorization, even if this contravenes their beliefs. See Jones, supra, note 7.

520. A student's religiously inspired physical appearance may conceivably conflict with school policies. But if, for instance, native students wish to wear their hair long or Orthodox Jews wish to wear their skull caps, then the Charter should be seen as giving them that right. And in regard to the contentious question of a Sikh's right to wear a kirpan, compare the decision refusing a claim in Hothi, supra, note 445, with a decision of the Alberta Queen's Bench permitting the dagger to be worn (if blunted and tied down) as described in Judith Anderson, "Case Comment: Suneet Singh Tuli v. St. Albert Protestant Board of Education" (February, 1987), 1 School Law Commentary, Case File No. 1-6-3.
521. There is European precedent for the view that parents may resist school attempts to administer corporal punishment to their child on religious grounds. See Campbell v. United Kingdom, [1982] 4 E.H.R.R. 293. For an argument that this case should guide Charter interpretation of the issue, see Schmeiser, supra, note 327, at 184.
522. Supra, note 9, and supra, note 10.
523. Supra, note 8.
524. Supra, note 9, at 757.

525. *Ibid.*, at 780.
526. *Ibid.*
527. *Ibid.*, at 768-70.
528. *Supra*, note 10, at 654-55.
529. *Ibid.*, at 655.
530. *Ibid.*
531. *Ibid.*
532. *Ibid.*, at 685.
533. See, for instance, Lacourciere J.A.'s express admission of an objective analysis of the evidence in the text accompanying note 505, and compare this approach with the personal dissentient perspective advocated by the majority, *infra*, text accompanying note 334.
534. *Supra*, note 6, at 34.
535. *Supra*, note 9, at 782.
536. *Supra*, note 10, at 683.
537. *Supra*, note 9, at 769.
538. *Ibid.*
539. *Supra*, note 10, at 655. To support its position of the patent susceptibility of young minds to religious imposition in the school environment, the Court referred to and adopted a similar opinion expressed by Brennan J. in Abington School District v. Schemp, 374 U.S. 203, at 288 (1963). For critical comment also noting the effectiveness of peer pressure and the need to belong to the "group"

on suppressing minority students' religious practices, see A. Wayne Mackay, "The Canadian Charter of Rights and Freedom: Implications for Students", in Manley-Casimir and Sussel (eds.), "The Courts in the Classroom: Education and the Charter of Rights and Freedoms", Calgary: Detselig Enterprises Limited (1986) 9, at 28; and Tribe, *supra*, note 101, at 1177-79.

Courts, however, may hold a different view of exemption schemes involving adults. The idea expressed in one American establishment decision is that mature citizens are not as impressionable as children, nor as vulnerable to coercion. See Marsh, *supra*, note 269, where it was determined that the State Legislature could begin its sessions with a prayer by a chaplain. Abington was distinguished here on the ground that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' ... or peer pressure". *Ibid.*, at 792. But the better view would be that the respect afforded minority citizens should not diminish as they become adults; the subjective dissident test still applies. We cannot objectively presume to dismiss their interests this way when they remain the actual victims of state insensitivity. For support for this argument, see Engel v. Vitale, 370 U.S. 421, 442 (1962) where it was implied that the coercive aspect of state sanctioned prayer was no different for legislators or Justices than for school children; "[e]very such audience is in a sense a 'captive' audience." See also Chief Justice Dickson's concern to avoid state inquiries into retail shopkeepers' sincerity, *infra*, text accompanying note 543.

540. *Supra*, note 10, at 679.

541. *Ibid.*, at 680.

542. *Supra*, note 10, at 758-60.

543. Edwards, *supra*, note 6, at 48. It is noteworthy that when the Chief Justice was assessing alternatives to the exemption procedure of the Retail Business Holidays Act in Edwards, he was most concerned to shelter dissident beliefs from government examination. Accordingly,

this was one reason he preferred the existing mechanism for opting-out. The businessman seeking to open his store on Sundays merely had to be closed on Saturdays. Nothing more was required. *Ibid.*, at 48-50.

544. See Dickson C.J.C.'s comments in Big M, *supra*, text accompanying note 328, which, although made in the context of the purpose test, seem equally appropriate here.

545. In obiter, Mr. Justice Brennan made the following observation in Abington on whether or not the availability of an exemption option removed the coercive element from an obligatory school prayer regulation:

The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held ... that a State may require neither public school students nor candidates for an office of public trust to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as a prerequisite to the exercise of his constitutional right of abstention.

*Supra*, note 539, at 288. In a somewhat similar vein, note the following comments of Murphy J. with respect to compulsory declarations of allegiance: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all". Barnette, *supra*, note 15, at 645. But for contrary opinions see Engel *supra*, note 539, at 430; and McCollum v. Board of Education (1948), 333 U.S. 203, at 232.

546. *Supra*, note 9, at 770. Mr. Justice Reid did say, however, that if a truly free choice were offered, that is, if all students were able to opt-in, rather than to opt-out, then there would have been no coercion or "price". *Ibid.*, at 768.

547. *Supra*, note 10, at 656.

548. Ibid. It should be mentioned again that the Zylberberg judgment of the Court of Appeal majority has been strongly endorsed by the British Columbia Court of Appeal in respect of a similar mandatory prayer provision. See Russow, supra, note 11.
549. Ibid., at 683.
550. Ibid., at 683-84.
551. Ibid.
552. Ibid., at 683.
553. Supra, note 9, at 759.
554. Ibid.
555. Supra, note 10, at 656-57.
556. Ibid., at 656.
557. Supra, note 8, at 654.
558. Ibid., at 664.
559. Ibid., at 665.
560. Ibid., at 692.
561. Ibid., at 665. Interestingly, Watt J. appears to have ignored not only the evidence of the child here, but also that of her own parents, and that of two other parents as well.
562. Ibid.
563. Ibid., at 715.

564. Ibid., at 624.
565. Ibid., at 626.
566. Ibid., at 673.
567. Note, *supra*, note 163, at 1479.
568. This principle has been variously described in American case law: "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens," (Bowen, *supra*, note 127, at 2167 (dissenting opinion)); "only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." (Yoder, *supra*, note 148, at 215.).
569. *Supra*, note 16.
570. Ibid., at 128-29.
571. Ibid., at 129.
572. Ibid.
573. Ibid., at 128.
574. Ibid.
575. Mackay, *supra*, note 13, at 93 makes the point as follows:
- It is now generally accepted that there is a significant element of personal choice in adjudication. What influences a judge in making a choice, where he or she is not bound by some rule? This question is more important when one notes that there are very few rules that can bind an innovative judge. Choices are more often the result of a balancing of competing values, and that is what the Charter invites.

576. See Note, *supra*, note 147, at 1712; Marcus, "The Forum of Conscience: Applying Standards Under the Free Exercise Clause" (1973), 1973 Duke L.J. 1217, at 1218-19; M. Tushnet, "The Constitution of Religion" (1986), 18 Conn. L.Rev. 701, at 706.
577. Pepper, *supra*, note 438, at 275.
578. See, for instance, M. v. Dir. of Child Welfare (1986), 47 Alta. L.R. (2d) 380, at 397 (Q.B.); and Re Ryan Killins (1987), 10 C.R.D. 425 10-01 (Alta. Prov. Ct.).
579. *Ibid.* See also, Re B. (1982), 2 C.R.R. 329 (Alta. Prov. Ct.); and Re Tyson Pendergast (1985), 6 C.R.D. 525.90-04 (B.C. Prov. Ct.).
580. See Brown v. Brown (1983), 7 C.R.R. 214 (Sask. C.A.); and Fougere v. Fougere (1986), 70 N.B.R. (2d) 57 (Q.B.).
581. These decisions seldom turn upon the question of the child's religious liberty because the courts refuse to attribute religious beliefs to minors they deem incapable of actual commitment or reason. See, for example, see M. v. Dir. of Child Welfare, *supra*, note 578, at 397; and Re L. (C.P.) (1988), 70 Nfld. and P.E.I. R. 287, at 302-303.
582. See, for example, Bob Jones University v. United States, 461 U.S. 574 (1983) where a school with racially discriminatory policies that were religiously directed was denied tax exempt status because the state had a compelling interest in eradicating racial discrimination.
583. In a non-religious context, note Dickson C.J.C.'s acceptance of a legislative objective of protecting third party economic interests provided that the potential for harm to those third parties from a work stoppage was "so massive and immediate and so focused in its intensity as to justify the limitation" of employees' freedom of association (emphasis added). R.W.D.S.U. v. Saskatchewan, [1987] 1 S.C.R. 460, at 477-78.

584. Tribe, *supra*, note 101, at 1268.
585. *Ibid.*, at 1258.
586. As was noted by the court in Re B., *supra*, note 579, at 332: "if a responsible adult refuses to accept a blood transfusion for himself ... the state should not and will not intervene". And for a similar and particularly well reasoned decision respecting the right of a mature 12 year old girl with well thought out religious beliefs to refuse blood transfusions inconsistent with those beliefs, see Re Children's Aid Society of Metropolitan Toronto and K.(Lisa D.) et al. (1985), 23 C.R.R. 337 (Ont. Prov. Ct.). A consideration of the religious autonomy of the terminally ill in the context of the life-affirming provisions of the Criminal Code, may be found in Carnerie, *supra*, note 127. At bottom, the state's duty is not to save the individual from self-inflicted harm, but to warn him of the risks he is assuming. See Conklin, *supra*, note 56, at 206-7.
587. See Greenawalt, *supra*, note 104, at 782-784 and Tribe, *supra*, note 101, at 1269-70 for summaries of American case law rejecting religious challenges to such laws. The twin driving forces of these decisions are judicial concern with enforcement and sincerity. Canadian case law is not as numerous or as detailed as the American jurisprudence, but see Beales, *supra*, note 387, and R. v. Kerr (1986), 75 N.S.R. (2d) 305 (N.S.S.C., A.D.).
588. *Supra*, note 435.
589. There are certain subject matters with which the courts are extremely reluctant to interfere and in these fields the rules of thumb have little predictive power. Matters of national defence and taxation, for instance, have overawed the American judiciary. See Goldman v. Weinberger, 106 S. Ct. 1310 (1986), and commentaries in Note, *supra*, note 147, at 1708-9, and in Teitel, *supra*, note 267, at 687. And see Lee, *supra*, note 516.
590. See Diane Zimmerman, *supra*, note 87, at 1108.

591. See Lillian R. Bevier, "The Free Exercise Clause: A View from the Public Forum" (1986), 27 Wm. and Mary L. Rev. 963, at 967.
592. Greenawalt, *supra*, note 104, at 787 includes some American examples.
593. *Supra*, note 127.
594. *Ibid.*, at 2167.
595. *Ibid.*, at 2156-57. This represents a significant retreat from the strict scrutiny standard set forth in previous jurisprudence of the United States Supreme Court. For a summary of that standard's judicial history, see Tribe, *supra*, note 101, at 1251-75.
596. *Supra*, note 7.
597. *Ibid.*, at 74.
598. *Ibid.*, at 86.
599. New Jersey State Board of Higher Education v. The Board of Directors of Shelton College, 448 A. 2d 998 (N.J. 1982) (cited by LaForest J. in Jones, at 75).
600. Robert J. Sharpe, "Judicial Development of Principles in Applying the Charter", in Finkelstein and Rogers (eds.) "Charter Issues in Civil Cases", Toronto: Carswell (1988) 1, at 14.
601. For a criticism of the section 1 analysis in the majority opinion of Edwards that particularly stresses the evidentiary deficiencies of the Crown's argument, see Geoffrey D. Creighton, "Edwards Books and Section 1: Cutting down Oakes" (1987), 55 C.R. (3d) 269.
602. *Supra*, note 6, at 43.
603. *Ibid.*

604. Ibid., at 50.

605. Ibid.

606. Ibid.

607. Ibid.

608. Ibid., at 49-50.

609. Supra, text, at 16-17. Madam Justice Wilson, on the other hand, maintains in Edwards that no limitation on religious freedom is a reasonable limitation if it has the effect of differentiating among members of a religious group. In her words: "It seems to me that when the Charter protects group rights such as freedom of religions, it protects the rights of all members of the group .... For, quite apart from considerations of equality to do so is to introduce an invidious distinction into the group and sever the religious and cultural ties that binds them together." Supra, note 6, at 70.

610. In the United States, governmental inattention to religious circumstances in situations where public goals could be realistically achieved in conjunction with a scheme of religious exemptions, has been viewed by their Supreme Court as hostility towards religion. See Sherbert, supra, note 371, at 406. And one critic has suggested that an improper constitutional "purpose to burden or advance religion would be inferable from a state's failure to set up an appropriate administrative mechanism to sort the sincere from the insincere." See Mark Tushnet, "Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses" (1986), 27 Wm. and Mary L. Rev. 997, at 1001.

611. Supra, note 6, at 279.

612. Supra, note 6. Judicial comment in this case at 205 on the necessity for a satisfactory legislative effort to mitigate minority religious burdens was quite clear:

Where it is possible without injury to the legislative scheme or the rights of others to alleviate the effects of these laws on those whose religious freedoms are violated, then such provision must be made before it can be said that the legislation is a reasonable limit.

613. Supra, note 7.

614. Ibid.

615. [1985] 2 S.C.R. 486.

616. Ibid., at 497.

617. Ibid., at 498.

618. For a recent academic review of American substantive due process see Jamie Cameron, "The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication", in Sharpe (ed.), "Charter Litigation", Toronto: Butterworths (1986) 69, at 82-89. And for a recent judicial summation see the opinion of Madam Justice Wilson in Morgentaler, supra, note 7, at 120-25. See also Tribe, supra, note 101, at 1337-70.

619. The earlier cases, of course, are not, since they rested on the American clauses' protection of "property", a protection not included in s.7.

620. 262 U.S. 390 (1923).

621. Ibid., at 399.

622. Supra, note 29, at 748.

623. In the interests of clarity it is also appropriate to protect these notions under s.2(a) rather than through an extended definition of liberty. Note, for instance, that the abortion rights in the United States are termed by their courts to be "privacy rights". But as Professor Tribe argues: "This is something of a misnomer: what is truly implicated in the decision whether to abort or to give birth is not privacy, but autonomy." *Supra*, note 101, at 1352. A similar point is made by Helen Garfield in her article noted at *supra*, note 455, at 316-8.

624. *Supra*, note 7, at 119.

625. *Ibid.*

626. *Supra*, note 7, at 129-30.

627. After stating that the abortion decision "is essentially a moral decision, a matter of conscience" because of its important and intimate nature, Wilson J. found, with too little explanation, that the law forbidding abortion deprived women of their freedom of conscience. *Supra*, note 7, at 130. In her opinion,

[F]or the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another (emphasis added).

*Ibid.*, at 135. Because she holds both the effects and purpose of the law to be objectionable, it appears that it has transgressed some sort of freedom from conscientious orthodoxy. She does not, however, speak of the issue in these terms. At one point in her judgment she asks whether the conscience of the woman or that of the state should be paramount. *Ibid.*, at 130. At another, she complains that the law has decided something for a woman that she has a right to decide for herself. *Ibid.*, at 126. So it is patent that she perceives some limit to the moral viewpoints which the state may enforce. But she does not clearly explain how this should be ascertained, either generally, or in the particular context of the abortion question. I would

suggest that purpose analysis here should parallel that conducted in respect of the freedom from religious orthodoxy. It should assess whether the law is intended to decide a moral dilemma generally believed to be of such a private quality that it should remain within the realm of individual choice. If this standard is used, it should ensure the constitutional equivalency of conscience and religion.

628. *Ibid.*, at 136. For critical reviews of her analysis of the concepts of liberty and fundamental justice, see MacAlister, *supra*, note 458; and Patrice Garant, "Fundamental Rights and Fundamental Justice", in Beaudoin and Ratushny (eds.), "The Canadian Charter of Rights and Freedoms", Toronto: Carswell (1989) 330, at 344.
629. *Supra*, note 7.
630. *Ibid.*, at 89.
631. *Ibid.*, at 90.
632. *Supra*, note 628, at 341.
633. See, for instance, Wm. Black and Lynn Smith, "The Equality Rights", in Beaudoin and Ratushny (eds.), "The Canadian Chapter of Rights and Freedoms", Toronto: Carswell (1989) 557; David Baker, "The Changing Norms of Equality in the Supreme Court of Canada" (1987), 9 *Supreme Ct. L. R.* 49; and Fogarty, *supra*, note 91.
634. For a recent critical review of the existing jurisprudence, see Black, *ibid.*
635. *Supra*, note 70.
636. *Ibid.*, at 308.
637. *Ibid.*, at 299.

638. Ibid. This is presumably why s.15(2) safeguards affirmative action programs from constitutional challenges. And this, of course, finds a parallel in minority free exercise accommodation.
639. Supra, note 70, at 308.
640. Ibid., at 313.
641. See his comments noted earlier, *infra*, text at 13.
642. Note, for instance, that after dealing with the s.2(a) question raised in Magder v. The Queen (1989, unreported, nos. 417/88 and 418/88, at 17), the Ontario Court of Appeal found it unnecessary to deal with the related s.15(1) argument raised in the case which was conceded by the Crown "as being identical in result to the infringement of the freedom of religion."
643. Neil Finkelstein, "Laskin's Canadian Constitutional Law" (5th ed.), Toronto: Carswell (1986); at 1311.

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