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# CATHOLIC SCHOOLS AND FREEDOM OF CONSCIENCE IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

J. KENT DONLEVY†

## INTRODUCTION

Democracies throughout the world seek to protect the individual's conscience from state intrusion at least in so far as the interior aspect of conscience is concerned and in part in its exterior expression in society. However, the term *conscience* has not normally been expressly defined either in common parlance or juridically. Rather, colloquially it is seen as an unassailable personal argument for an individual's action or inaction, solely subjective in nature, being an interior personal ability to discern right from wrong. Juridically, it is most frequently applied in conjunction with principles of equity and freedom of religion.

This Paper asks a three part question: "How is *freedom of conscience* employed juridically within the Canadian Charter of Rights and Freedoms, how is that usage different from the idea of conscience in the Catholic Church and, of what significance is that distinction to Canada's Catholic schools?"

This Paper is divided into three parts. Part I provides a brief survey of Canadian case law that deals with freedom of conscience. Part II provides an overview of the current understanding of conscience in the Catholic Church as noted through the documents of Vatican II and the writings of Germain Grisez (1983), Bernard Häring (1978), and Cardinal Ratzinger, as he then was (1991). Part III articulates the administrative and legal challenges facing Catholic school administrators when confronted with non-conformist teachers and students who claim

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legitimacy for their positions under the "Restless-Heart-Toward-God" model of conscience.

### I. THE JURIDICAL CONSCIENCE

Prior to 1982, the Dominion of Canada, following the British model of constitutional law, did not have a written set of constitutional rights and freedoms for its citizens, excepting the Canadian Bill of Rights, which was largely ineffective as it was not a constitutional document, applied only to federal legislation, and was read-down by the courts.<sup>1</sup> Therefore, Canadians were left to trust in the democratic process and common law to protect their rights as citizens in relation to the state. That situation changed in 1982.

Although various constitutional documents had been under the control of the government of Canada, the Dominion's founding document, the British North America Act ("BNA Act"), being a statute of the United Kingdom, was under the legislative prevue of the United Kingdom.<sup>2</sup> In 1982, at the request of the Canadian government, the Parliament of the United Kingdom renamed the BNA Act the Constitution Act of 1867<sup>3</sup> and passed the Canada Act.<sup>4</sup> Attached to the latter was Schedule B, the Canadian Charter of Rights and Freedoms ("Charter").<sup>5</sup> The Charter stated, among other things, that all persons had the right under section 2(a) to "freedom of conscience and religion" ostensibly only limited by two sections: section 1 where such limitations were according to law and were "demonstrably justifiable in a free and democratic society," and section 33, the *notwithstanding clause*, which allowed the federal and provincial legislatures to temporarily suspend fundamental rights and freedoms and other rights with respect to specific legislation when articulated therein.<sup>6</sup> Although the notwithstanding clause

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<sup>1</sup> Canadian Bill of Rights, 1960, 8 & 9 Eliz. 2 Ch. 44 (U.K.), as reprinted in R.S.C., ch. 1, § 2 (Appendix 1985) ("Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights* . . .").

<sup>2</sup> British North America Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

<sup>3</sup> Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.).

<sup>4</sup> Canada Act, 1982, ch. 11 (U.K.).

<sup>5</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

<sup>6</sup> *Id.* §§ 1, 2(a), 33(1).

has been used with respect to some issues—such as language rights by the Government of the Province of Quebec—it has never been used with respect to section 2(a): freedom of conscience and religion.

Within short order, the Supreme Court of Canada was asked to adjudicate in a matter dealing with freedom of conscience under section 2(a) of the Charter. In *R. v. Big M Drug Mart Ltd.*,<sup>7</sup> the court heard a matter dealing with store closures and religious holidays. Chief Justice Dickson delivered the majority decision and, in doing so, defined the framework of section 2(a), its conjoint nature, freedom, and the role and significance of conscience in Canadian society.

He stated that “freedom of conscience and religion” form a “single integrated concept”<sup>8</sup> and that when claimed, such freedom—in the Berlinian sense of positive and negative freedom—“embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.”<sup>9</sup> Chief Justice Dickson also stated that

[f]reedom 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. . . . A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms . . .<sup>10</sup>

Lastly, the role of conscience and its significance to Canada as a free and democratic society was stated:

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or “firstness” of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as “fundamental.” They are the sine qua non of the political tradition underlying the Charter. . . . It should also be noted . . . that an emphasis on individual conscience and individual judgment also lies at the

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<sup>7</sup> [1985] 18 D.L.R.4th 321.

<sup>8</sup> *Id.* at 361.

<sup>9</sup> *Id.* at 354.

<sup>10</sup> *Id.* at 353–54.

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>11</sup>

If there was a concern regarding the Chief Justice's comment it may have been with his characterization that the phrase "freedom of conscience and religion" was to be read conjointly. However, later cases from the same court have revised that understanding and determined that the elements of religion and conscience may be read conjunctively in certain cases but not necessarily, as freedom of conscience could stand alone as a fundamental freedom.

The court was soon to define conscience in juridical terms and to find freedom of conscience as a derivative right under section 7 of the Charter. In 1988, in *R. v. Morgentaler*,<sup>12</sup> the supreme court dealt with the prosecution of a Canadian doctor who set-up an abortion clinic to perform abortions for women who had not obtained a certificate from a hospital's therapeutic abortion committee as required by section 251(4) of the Criminal Code of Canada.<sup>13</sup> The court said that

[t]he principal issue raised by this appeal [was] whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*.<sup>14</sup>

In a split decision, the majority of the supreme court found in favour of the appellant doctor for one or more of three reasons: section 251(4) of the Criminal Code breached a woman's right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice";<sup>15</sup> section 251(4) breached the appellant's

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<sup>11</sup> *Id.* at 361.

<sup>12</sup> [1988] 1 S.C.R. 30.

<sup>13</sup> Criminal Code, R.S.C., ch. C-34, § 251(4) (1970) (current version at R.S.C., ch. C-46, § 287(4) (1985)) ("Subsections (1) and (2) do not apply . . . if . . . the therapeutic abortion committee for that accredited or approved hospital . . . has by certificate in writing stated that . . . the continuation of the pregnancy of such female person would or would be likely to endanger her life or health . . .").

<sup>14</sup> *Morgentaler*, 1 S.C.R. at 45.

<sup>15</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 7 (U.K.).

right to freedom of conscience under 2(a) of the Charter; and section 251(4) contained rules unnecessary to the protection of the fetus, which alone was sufficient to rule in favour of the appellant doctor.<sup>16</sup> Mr. Justice Wilson, in the majority, noted that in depriving a citizen of section 7 rights the state also deprived her of the right to freedom of conscience. Moreover, he posited that the application of freedom of conscience applied more extensively than only to religious beliefs:

The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(a) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(a) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms 'conscience' and 'religion' should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their "essential humanity."<sup>17</sup>

The significance of the *Big M Drug Mart* and *Morgentaler* cases are that the Court had defined freedom of conscience not as the collective right of a community but as an individual right, in accord with Dworkin's notion of rights,<sup>18</sup> in that it was necessary to ensure a free, liberal democracy. Further, juridically, conscience was based upon a secular liberal definition of conscience as "conscientiously-held beliefs."<sup>19</sup>

Notwithstanding the above, the Court was not prepared to give free reign to freedom of conscience within the individual sphere of action. In *Rodriguez v. British Columbia (Attorney General)*,<sup>20</sup> a terminally-ill patient suffered from an advanced state of amyotrophic lateral sclerosis and sought to be provided assistance at a future stage of the illness in order to commit suicide, as she would be incapable of the act herself. Section

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<sup>16</sup> *Morgentaler*, 1 S.C.R. at 38.

<sup>17</sup> *Id.* at 37.

<sup>18</sup> See generally RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (2005).

<sup>19</sup> *Morgentaler*, 1 S.C.R. at 179.

<sup>20</sup> [1993] 107 D.L.R.4th 342.

241(b) of the Criminal Code of Canada prohibited the giving of assistance to commit suicide. A majority of the court held that the section 7 Charter rights of "life, liberty and security of the person" were to be balanced against the consciously held belief of the individual and further that the section 7 rights reflected and represented a value in Canadian society—the sanctity of life.<sup>21</sup> On balancing the individual's right to freedom of conscience and society's value of the sanctity of life and further, as there was no consensus in Canadian society respecting the acceptance of assisted suicide, the court concluded that the relevant section of the Criminal Code was *intra vires* and denied the appellant patient her remedy.<sup>22</sup>

In dissent, Chief Justice Lamer would have allowed the patient to take her own life with assistance and stated that commonly held religious beliefs should not preclude the operation of an individual's freedom of conscience. He stated:

In my opinion, the Court should answer this question without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia. It should consider the question before it from a legal perspective . . . while keeping in mind that the Charter has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions.<sup>23</sup>

Yet, it was clear that the majority had considered secular reasons in its decision as Mr. Justice Sopinka stated: "Aiding or [counsel]ing a person to commit suicide, on the one hand, and homicide, on the other, are sometimes extremely closely related."<sup>24</sup> Arguably, the possibility of abuse and the lack of a political consensus in favour of assisted suicide were the secular reasons for the court's judgment. That suggested conclusion is also in concert with Chief Justice Lamer's comment in *Rodriguez* where he said that the Canadian Charter "has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions."<sup>25</sup>

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<sup>21</sup> See *id.* at 397.

<sup>22</sup> See *id.* at 394.

<sup>23</sup> *Id.* at 366.

<sup>24</sup> *Id.* at 401.

<sup>25</sup> *Id.* at 366.

The current Chief Justice of the Supreme Court, McLachlin, arguably appears—in a broad sense—to agree, stating that:

There is no doubt that . . . government by consent, the protection of life and personal security, and freedom from discrimination . . . can all be advanced by moral argument. It is worth noting, however, that they can also be supported by a democratic argument grounded in conceptions of the state and fundamental human dignity that we have developed since John Stuart Mill.

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. . . [T]he legitimacy of the modern democratic state arguably depends on its adherence to fundamental norms that transcend the law and executive action.<sup>26</sup>

Notwithstanding the above, it is certainly arguable that the juridical conscience can rest its justification upon religious beliefs in a liberal, pluralistic, democracy. Taylor notes:

The secular is grounded on common action not religious beliefs but there is no reason why religious beliefs might not form such a common action. The key seems to be that one should not assume that the secular society should exclude the religious in so far as a liberal democratic pluralistic society is concerned.<sup>27</sup>

In other words, conscience is the broader concept under which conscientiously held religious beliefs would qualify as requiring freedom not the converse.

Benson offers three definitions of the secular from Canadian case law which this paper adopts:

1. The state is expressly non-religious and must not support religion in any way (“neutral” secular);
2. The state does not affirm religious beliefs of any particular religious group but may act so as to create conditions favorable to religions generally (“positive” secular);
3. The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good (“negative” secular).<sup>28</sup>

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<sup>26</sup> Hon. Beverley McLachlin, Chief Justice, Supreme Court of Can., Remarks at the 2005 Lord Cooke Lecture in Wellington, New Zealand: Unwritten Constitutional Principles: What Is Going On? (Dec. 1, 2005), available at [http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp).

<sup>27</sup> CHARLES TAYLOR, *Liberal Politics and the Public Sphere*, in PHILOSOPHICAL ARGUMENTS 257, 269 (1995).

<sup>28</sup> Ian T. Benson, *Notes Towards a (Re) Definition of the “Secular,”* 33 U. BRIT. COLUM. L. REV. 519, 530 (1999–2000).



The thorny question remained how an adjudicator could determine the bona fides of a belief when it was not religiously based. The Federal Court of Canada (Trial Division) dealt with that question in *Maurice v. Canada (Attorney General)*.<sup>29</sup> In *Maurice* a prison inmate made application for special consideration regarding a lacto-vegetarian diet which the prison officials had refused. He claimed that as other prisoners' special diets had been granted based upon religious reasons, he too should have such consideration for reasons of conscience under section 2(a) of the Charter.<sup>30</sup> His application was successful. Justice Campbell held that: "[C]ogent evidence must be produced to prove the conscientious belief to a balance of probabilities. On the evidence in the present case, I have no difficulty finding that the Applicant does have a strongly held belief regarding the consumption of animal products."<sup>31</sup> The "cogent evidence" clearly referred to not just an articulated belief but also a behavioral pattern which lent credibility to the individual's actions.

Mention should be made, as Mr. Justice Campbell stated in *Maurice*, that under article 18 of the *United Nations Universal Declaration of Human Rights*, freedom of conscience is mentioned and further that Canada is a signatory to that document. However, such international documents—ratified only by the executive branch of government—are not law in Canada—although the Supreme Court has held that they may be philosophically persuasive.<sup>32</sup>

The above cases establish some of the parameters of freedom of conscience under the Canadian Charter of Rights and Freedoms. Juridically, freedom of conscience is a fundamental right of all persons; it is expressly protected under section 2(a), but may be derived from section 7;<sup>33</sup> it is defined as a belief conscientiously or strongly held;<sup>34</sup> it is an individual right not a

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<sup>29</sup> [2002] 210 D.L.R.4th 186.

<sup>30</sup> See *id.* at 188.

<sup>31</sup> *Id.* at 192.

<sup>32</sup> See *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 174 D.L.R.4th 193, 230–31.

<sup>33</sup> *Rodriguez v. British Columbia (Attorney Gen.)*, [1993] 107 D.L.R.4th 342, 387 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 7 (U.K.)).

<sup>34</sup> See *R. v. Big M Drug Mart Ltd.*, [1985] 18 D.L.R.4th 321; *Maurice*, 210 D.L.R.4th at 188–91.

collective right;<sup>35</sup> it requires a cogent manifestation and clear indicia that such a belief is bona fide held by the individual;<sup>36</sup> it is not based upon a philosophy or theology but arguably it may be so;<sup>37</sup> its expression must be balanced against the fundamental rights and values of the Charter;<sup>38</sup> and it is warranted as one of the, if not *the*, keystones to a free, democratic, pluralistic, democracy. The above is consistent with the idea that the Charter's rights and freedoms are interpreted by the courts by the *purposive method*, which takes into account the purpose and rationale of the freedom or right in question within the context of the Charter as a whole, the Canadian legal and political tradition, and the changing needs of Canadian society.<sup>39</sup> Juridically, freedom of conscience is the sine qua non of a free, democratic, pluralistic, liberal society.<sup>40</sup>

It would be remiss not to briefly mention that the term conscience has been employed in cases which have not been concerned with freedom of conscience in order to ascertain if their usage of that term is relevant to this Paper. The conclusion of this author is that such cases may have some relevance. Some Canadian cases have spoken of matters that "shock the conscience." In particular, that juridical expression has been used in matters of fundamental justice where the extradition of a foreign fugitive from Canada to a state wherein the accused might face extremely harsh treatment is seen as contrary to Canadian values.<sup>41</sup> It thus appears that conscience has, in at least some cases, perhaps under section 7 of the Charter, a collective meaning not as a fundamental freedom but rather as an interpretive principle in relation to the Charter's legal rights.

Moreover, the relevance and importance of conscience has been cited in Canadian law with regard to the application of the principles of equity. Therein it can, when there is convergence

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<sup>35</sup> See *Big M Drug Mart*, 18 D.L.R.4th at 361.

<sup>36</sup> See *Maurice*, 210 D.L.R.4th at 191.

<sup>37</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 37.

<sup>38</sup> *Rodriguez v. British Columbia (Attorney Gen.)*, [1993] 107 D.L.R.4th 342, 395-96.

<sup>39</sup> *Adler v. Ontario*, [1996] 3 S.C.R. 609, 665.

<sup>40</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 302.

<sup>41</sup> *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 22; *United States v. Burns*, [2001] 1 S.C.R. 283, 321-25; *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 522; *Gwynne v. Canada (Minister of Justice)*, 103 B.C.A.C. 1, 20-21 (B.C. Ct. App. 1998).

with an equitable principle or in the case of unconscionability, successfully establish a ground for an action: constructive trust, implied trust, compensation for error in law, and mistake in law as well as other equitable grounds.<sup>42</sup> In *Soulos v. Korkontzilas*, McLachlin cited with approval the statement by McClean “‘[g]ood conscience’ . . . lies at ‘the very foundation of equitable jurisdiction.’”<sup>43</sup> Conscience in equity is a complex area beyond the scope of this paper; however, upon reading the mentioned cases, one is left wondering whose conscience the courts are referring to. Is it the court’s conscience, the public’s conscience, a party’s conscience, a philosophical definition of conscience, or a theological definition of conscience? In any event, case law points to the relevance, perseverance, and significance of the idea of conscience in Canadian jurisprudence.

In sum, the juridical conscience in Canada is intrinsically entwined with the concept of freedom and is perceived by the courts as a keystone for a free, democratic, pluralistic society. It is secular in nature and relies upon the history, norms, and values of Canadian society for its content and juridical interpretation which in turn underpins and legitimizes the authority of the modern democratic state. Moreover, as a concept it is present in matters of extradition and equity and is used as a collective concept for Canadian values acting both as a shield (negative liberty) and a sword (positive liberty) for the individual.

## II. THE CHRISTIAN CONSCIENCE

Part II of the Paper looks briefly at past understandings of conscience in the Catholic Church, relevant documents of Vatican II, and the writings of Germain Grisez, Bernard Häring, and Cardinal Ratzinger (as he then was in 1991) with reference to the idea of conscience.

### A. *Generally on Conscience*

There have been many scholarly works that have been written on conscience, which encompass the history of the

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<sup>42</sup> *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 450, 455 (stating that courts consider good conscience of the applicable parties when examining constructive trusts); see also *Pettkus v. Becker* [1980] 2 S.C.R. 834, 844, 859 (citing *Rathwell*).

<sup>43</sup> [1997] 2 S.C.R. 217, 232–33 (citing A.J. McClean, *Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship*—*Pettkus v. Becker*, 16 U. BRIT. COLUM. L. REV. 155, 222 (1982)).

concept from the Greeks;<sup>44</sup> through Judaism and biblical sources;<sup>45</sup> to modern times touching upon other views: Catholic,<sup>46</sup> Protestant,<sup>47</sup> Orthodox,<sup>48</sup> Islam,<sup>49</sup> Buddhism,<sup>50</sup> Hinduism,<sup>51</sup> psychology,<sup>52</sup> and biology.<sup>53</sup> Such an historical overview is obviously beyond this Paper.

Suffice to say that every human being is faced with decisions which she or he perceives as a choice between right and wrong, good and bad, or bad and bad. It is also true that the individual in that position will attempt to exercise some understanding, no matter how rudimentary, of right and wrong, good and bad, or bad and worse. Further, once having made the decision, it will be open to future scrutiny by the individual with respect to its coherence with the criteria upon which it was chosen.

<sup>44</sup> See generally APULEIUS: ON THE GOD OF SOCRATES 8–15, 25–26 (Thomas Taylor & Laurence Ogilvy trans., Holmes Publishing Group 3d ed. 2001) (1822).

<sup>45</sup> See generally Jonathan Gorsky, *Conscience in Jewish Tradition*, in CONSCIENCE IN WORLD RELIGIONS 129 (Jayne Hoose ed., 1999) [hereinafter CONSCIENCE IN WORLD RELIGIONS].

<sup>46</sup> See generally PHILIPPE DELHAYE, *THE CHRISTIAN CONSCIENCE* (Charles Quinn trans., 1968); TIMOTHY C. POTTS, *CONSCIENCE IN MEDIEVAL PHILOSOPHY* (1980); ROBERT J. SMITH, *CONSCIENCE AND CATHOLICISM: THE NATURE AND FUNCTION OF CONSCIENCE IN CONTEMPORARY ROMAN CATHOLIC MORAL THEOLOGY* (1998).

<sup>47</sup> See generally Michael Robbins Weed, *Conscience in Protestant Ethics: An Examination of Protestant Views of the Nature and Function of Conscience Focusing on the Thought of Select Contemporary Theologians* (May 8, 1978) (unpublished Ph.D. dissertation, Emory University) (on file with author); Dave Leal, *Against Conscience: A Protestant View*, in CONSCIENCE IN WORLD RELIGIONS, *supra* note 45, at 21; DIETRICH BONHOEFFER, *ETHICS* (Eberhard Bethge ed., Neville Horton Smith trans., 1964) (1949).

<sup>48</sup> See generally Stephen Thomas, *Conscience in Orthodox Thought*, in CONSCIENCE IN WORLD RELIGIONS, *supra* note 45, at 99.

<sup>49</sup> See generally Ron Geaves, *Islam and Conscience*, in CONSCIENCE IN WORLD RELIGIONS, *supra* note 45, at 155.

<sup>50</sup> See generally George D. Chryssides, *Buddhism and Conscience*, in CONSCIENCE IN WORLD RELIGIONS, *supra* note 45, at 176.

<sup>51</sup> See generally ARVIND SHARMA, *HINDUISM AND HUMAN RIGHTS: A CONCEPTUAL APPROACH* (2004).

<sup>52</sup> See generally SIGMUND FREUD, *THE EGO AND THE ID* (Joan Riviere trans., Norton 1962) (1923); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); 1 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); DAVID W. ROBINSON, *CONSCIENCE AND JUNG'S MORAL VISION: FROM ID TO THOU* (2005); Gregory Zilboorg, *Superego and Conscience*, in CONSCIENCE: THEOLOGICAL AND PSYCHOLOGICAL PERSPECTIVES 210 (C. Ellis Nelson ed., 1973).

<sup>53</sup> See generally A. Bachem, *Ethics and Esthetics on a Biological Basis*, 25 PHIL. SCI. 169 (1958); Benedict Carey, *Brain Injury Said to Affect Moral Choices*, N.Y. TIMES, Mar. 22, 2007, at A19.

This section of the Paper asks, from a Catholic perspective, from what source does the desire to choose the right or the good derive, how does one determine the content which allows one to determine the right from the wrong, and lastly through what process can one make that determination? Aquinas, Vatican II, Grisez, Häring, and Ratzinger have provided some guidance with respect to those questions.

### B. Aquinas on Conscience

St. Thomas Aquinas is the touchstone for Roman Catholic thought on the conception of conscience and so his views will be briefly reviewed. For Aquinas, the faculty of reason is inherent to all humans and allows the individual to comprehend the natural law, which is created and directed by God. Moreover, reason encompasses not just the intellectual faculty of the mind but also all other ways of knowing. He posits that by human nature all people seek the good and avoid the evil as an unerring, innate condition of being human. This innate condition is called *synderesis* and as Aquinas says:

[I]n order that there can be some rightness in human deeds, there must be some enduring principle which has unchangeable rightness and by reference to which all deeds are tested, such that this enduring principle resists everything evil and gives assent to everything good. This is what *synderesis* is, whose job is to murmur back in reply to evil and to turn us towards what is good. Hence, it is to be admitted that it can not do wrong.<sup>54</sup>

Having established a basic element in being human as a tendency towards the good, Aquinas moves on to what he terms conscience. He considers conscience an act, not a power as “according to the very nature of the word, [it] implies the relation of knowledge to something . . . .”<sup>55</sup> It may be in error as it is the

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<sup>54</sup> St. Thomas Aquinas, *Debated Questions on Truth 16–17*, in CONSCIENCE IN MEDIEVAL PHILOSOPHY 122, 128 (Timoth C. Potts ed., 1980) [hereinafter St. Thomas Aquinas, *Debated Questions*]. Author’s note: Aquinas’s lecture notes, entitled “Disputed Questions on the Truth,” have been translated in part by Potts. That translation is contained in Potts’s book, which is afore referenced. All subsequent quotations from Aquinas from “Disputed Questions on the Truth” are from Potts’s translation and are referenced to the pages in Potts’s book. Potts translated from the Latin text in S. Thomae Aquinatis, *22 Opera omnia, Quaestiones disputatae de veritate* 501–528 (Ad Sanctae Sabinae 1972).

<sup>55</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. 1, Q. 79, art. 13, at 408 (Fathers of the English Dominican Province trans., 1948) (1266–1273) [hereinafter *SUMMA THEOLOGIAE*].

application of the a priori principle of the good known in synderesis to a particular, contextual situation. Aquinas is clear that although one must follow one's conscience, merely doing so will not guarantee the correct choice, but such will ensure that sin will not be incurred.<sup>56</sup> Nevertheless, even in error, he says "[w]ithout any doubt, *conscientia* binds."<sup>57</sup> He explains this proposition, saying:

[T]o believe in Christ is good in itself and necessary for salvation; all the same this does not win the will unless it is recommended by reason. If the reason presents it as bad, then the will reaches to it in the light, not that it is really bad in itself, but because it appears so because of a condition that happens to be attached by the reason apprehending it.<sup>58</sup>

However, willful blindness results in moral culpability as "[i]f, then, reason or conscience is mistaken through voluntary error, whether directly or from negligence, then because it is on a matter a person ought to know about, it does not excuse the will from evil in following the reason or conscience thus going astray."<sup>59</sup> The difficulty is that one has no assurance that one's conscience is unerring when making a moral decision. However, Aquinas offers certain resources for the conscience to assist in alleviating that concern: prudence and its accompanying virtues, the gifts of the Holy Spirit, and connaturality. Those three resources bridge the gap between the unerring synderesis and fallible act of conscience.

The assisting virtues of prudence are the ability to take counsel, sound, or practical judgment according to accepted rules of conduct and the intelligence to judge exceptional cases outside of the norm.<sup>60</sup> The gifts of the Holy Spirit incorporate wisdom, knowledge, understanding, counsel, fortitude, piety, and fear, which corresponded to and assist the fundamental element of conscience—prudence. Connaturality includes all ways of knowing beyond the intellectual and as Aquinas says:

[W]isdom denotes a certain rightness of judgment in accord with divine principles. Now rightness of judgment is twofold: first, in accord with the complete use of reason, second, on account of a

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<sup>56</sup> St. Thomas Aquinas, *Debated Questions*, *supra* note 54, at 135.

<sup>57</sup> *Id.* at 134.

<sup>58</sup> *SUMMA THEOLOGIAE*, *supra* note 55, pt. I-II, Q. 19, art. 5.

<sup>59</sup> *Id.* pt. I-II, Q. 19, art. 6.

<sup>60</sup> *Id.* pt. II-II, Q. 51, art. 4.

certain connaturality with the matter about which one has to judge. Thus, about matters of chastity, a man after inquiring with his reason forms a right judgment, if he has acquired the knowledge of ethics, while the one who has the virtue of chastity judges of such matter by a kind of connaturality. Accordingly, it belongs to the wisdom that is an intellectual virtue to pronounce right judgment about divine things after reason has made its inquiry, but it belongs to wisdom as a gift of the Holy Spirit to judge aright about them on account of connaturality with them.<sup>61</sup>

As May states, “connatural knowledge is . . . a knowledge resulting from an interaction between sensitivity and affectivity, intellect and will, knowing and loving.”<sup>62</sup>

In sum, for Aquinas the inherent and unerring synderesis acts in conjunction with prudence, which produces the act of conscience in order to produce a morally inculpable decision. Honest error does not make that decision culpable.

If, notwithstanding the above, the individual comes to a conscientious decision that seems in error to others, even the *Catholic Magisterium*, then Aquinas says, “anyone upon whom the ecclesiastical authorities, in ignorance of the true facts, impose a demand that offends against his clear conscience, should perish in excommunication rather than violate his conscience.”<sup>63</sup> That statement was grist for the topic of conscience at Vatican II, the documents of which indicate that Aquinas’s view of conscience has been interpreted, in part, in different ways.

### C. *The Documents of Vatican II*

The term conscience was frequently referred to in the documents of Vatican II although its meaning varied upon the intention of the Church Fathers and at times within the context of the purpose of the documents.<sup>64</sup>

<sup>61</sup> *Id.* pt. II-II, Q. 45, art. 2.

<sup>62</sup> W.E. May, *Knowledge, Connatural*, in 8 NEW CATHOLIC ENCYCLOPEDIA 205 (Berard L. Marthaler ed., 2d ed. 2003).

<sup>63</sup> ST. THOMAS AQUINAS, LECTURA ROMANA IN PRIMUM SENTENTIARUM PETRI LOMBARDI, dist. 38, Q. 2, art. 4 (J.F. Boyle & L.E. Boyle eds., 2006).

<sup>64</sup> JAMES HALSTEAD, CONSCIENCE, THE AMERICAN BISHOPS AND THE RENEWAL OF MORAL THEOLOGY: THE NOTION OF CONSCIENCE IN THE PASTORAL LETTERS OF THE AMERICAN BISHOPS 110–11 (1986).

Certainly conscience was on the mind of the Church Fathers, as in *Gaudium et Spes* they noted that:

In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths.<sup>65</sup>

This theme on the “reciprocity of conscience and the inviolable dignity and freedom of the individual conscience”<sup>66</sup> was also reflected in the *Declaration on Religious Freedom*, which stresses inquiry and dialogue within the community of believers in the individual’s search for truth:

Truth, however, is to be sought after in a manner proper to the dignity of the human person and his social nature. The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth. Moreover, as the truth is discovered, it is by a personal assent that men are to adhere to it.<sup>67</sup>

Again, the Church stresses both the freedom and the binding nature of the individual’s conscience:

On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious. The reason is that the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No

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<sup>65</sup> PAUL VI, *GAUDIUM ET SPES* ¶ 16 (1965).

<sup>66</sup> Jayne Hoose, *Conscience in the Roman Catholic Tradition*, in CONSCIENCE IN WORLD RELIGIONS, *supra* note 45, at 62, 72.

<sup>67</sup> PAUL VI, *DECLARATION ON RELIGIOUS FREEDOM DIGNITATIS HUMANAЕ* ¶ 3 (1965).



merely human power can either command or prohibit acts of this kind.<sup>68</sup>

Yet the Church Fathers went on to say in Article 14 that the correct formation of the individual conscience is crucial:

[I]n the formation of their consciences, the Christian faithful ought carefully to attend to the sacred and certain doctrine of the Church. For the Church is, by the will of Christ, the teacher of the truth. It is her duty to give utterance to, and authoritatively to teach, that truth which is Christ Himself, and also to declare and confirm by her authority those principles of the moral order which have their origins in human nature itself.<sup>69</sup>

As Gleeson notes, one finds in *Gaudium et Spes*, Article 16—and one could argue Articles 3 and 14 of *Dignitatis Humanae Personae*—that those texts

[i]nvoke[] both legalistic and religious understandings of conscience. It directs our attention both to the objectivity of the moral law and to the unique and inviolable character of a person's response to God's call. What the text does not do is explain how these two realities are to be understood in relation to each other.<sup>70</sup>

Speaking further on conscience, in *Lumen Gentium* the Fathers noted in Article 16 that those who are open to synderesis and yet who do not know the Gospel are not culpable for their lack of belief. The Fathers said:

Those . . . who through no fault of their own do not know the Gospel of Christ or His Church, yet sincerely seek God and moved by grace strive by their deeds to do His will as it is known to them through the dictates of conscience. Nor does Divine Providence deny the helps necessary for salvation to those who, without blame on their part, have not yet arrived at an explicit knowledge of God and with His grace strive to live a good life. Whatever good or truth is found amongst them is looked upon by the Church as a preparation for the Gospel. She knows that it is given by Him who enlightens all men so that they may finally have life.<sup>71</sup>

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶ 14.

<sup>70</sup> Gerald Gleeson, *Conscience and Conversion*, AUSTL. EJOURNAL THEOLOGY, Aug. 2003, [http://dlibrary.acu.edu.au/research/theology/ejournal/aet\\_1/GGleeson.htm](http://dlibrary.acu.edu.au/research/theology/ejournal/aet_1/GGleeson.htm).

<sup>71</sup> PAUL VI, *LUMEN GENTIUM* ¶ 16 (1964).

The Fathers further restated Aquinas's position that listening to conscience develops an abiding moral sense of right and wrong which becomes habitual and may be known as the Christian Conscience ("*conscientia Christiana*"), which is then manifest in certain behaviors—love of neighbor, service projects, and the like—and forbids others.<sup>72</sup>

It is of significance for the aspect of this Paper on Catholic education that the Vatican II document *Gravissimum Educationis*, should be noted. In that document the Church Fathers stressed both students' and parents' freedom of conscience declaring "that children and young people have a right to be motivated to appraise moral values with a right conscience, to embrace them with a personal adherence, together with a deeper knowledge and love of God."<sup>73</sup> It went on to say that it was this freedom that "contributes in the highest degree to the protection of freedom of conscience, the rights of parents, as well as to the betterment of culture itself. . . . Let them do all they can to stimulate their students to act for themselves. . . ."<sup>74</sup>

Another Vatican II document, *Apostolicam Actuositatem*, stressed the importance for the individual of not a specific moral decision, but rather "a general moral outlook"<sup>75</sup> and "not as some bishops wished, the reality of the objective world and the objective moral order."<sup>76</sup>

As Halstead correctly points out the documents of Vatican II do not reduce the apparent ambiguity between the personal duty in the individual to form her or his own conscience and the individual's responsibility to listen to the Church, its tradition, and Magisterium. It is certainly correct to say that "the Council fathers . . . were willing to tolerate two different visions of the moral life."<sup>77</sup> Cardinal Ratzinger points to the conundrum when speaking of the two interpretations:

One is a renewed understanding of the Catholic essence, which expounds Christian faith from the basis of freedom and as the very principle of freedom itself. The other is a superseded, 'pre-conciliar' model, which subjects Christian existence to

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<sup>72</sup> HALSTEAD, *supra* note 64, at 114.

<sup>73</sup> PAUL VI, *GRAVISSIMUM EDUCATIONIS* ¶ 1 (1965).

<sup>74</sup> *Id.* ¶ 8.

<sup>75</sup> HALSTEAD, *supra* note 64, at 119–20.

<sup>76</sup> *Id.* at 120.

<sup>77</sup> *Id.* at 133.

authority, regulating life even in its most intimate preserves, and thereby attempts to maintain control over people's lives. Morality of conscience and morality of authority, as two opposing models, appear to be locked in struggle with each other. Accordingly, the freedom of the Christian would be rescued by appeal to the classical principle of moral tradition: that conscience is the highest norm that man is to follow, even in opposition to authority. Authority—in this case, the [M]agisterium—may well speak of matters moral, but only in the sense of presenting conscience with material for its own deliberation. Conscience would retain, however, the final word. Some authors reduce conscience in this, its aspect of final arbiter to the formula conscience is infallible. . . . But . . . if this were the case, it would mean that there is no truth—at least not in moral or religious matters, which is to say, in the areas that constitute the very pillars of our existence.<sup>78</sup>

Further attempts by the Church were made to clarify the issues, and perhaps to resolve at least one problem. *Veritatis Splendor* dealt with the difficulty with proportionalism, which states that “whether there are some kinds of action (such as the use of contraception) which are ‘always wrong,’ no matter what the circumstances or intentions of the people . . . involved,”<sup>79</sup> but the tension remained between the two quite different interpretations of conscience both claiming the Aquinas’ inheritance. In particular, one author saw *Veritatis Splendor* as attempting to reinforce the Magisterium’s primacy.<sup>80</sup>

The documents of Vatican II state that the Catholic Church’s position is that there is an objective moral truth based upon natural law provided by God, which can provide guidance to human action. That truth is known through reason, the tradition of the Church, and the Magisterium, which is guided by the Holy Spirit. The individual desires (synderesis) to seek the truth in moral deliberations by applying reason and prudence, with its various assistants, to the contextualized situation within which the moral decision is to be made. The individual conscience may

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<sup>78</sup> JOSEPH RATZINGER, *Conscience and Truth* [hereinafter RATZINGER, *Conscience and Truth*], in ON CONSCIENCE: TWO ESSAYS 11, 11–12 (2007) (internal quotation marks omitted) [hereinafter ON CONSCIENCE].

<sup>79</sup> Gleeson, *supra* note 70.

<sup>80</sup> See Nicholas Peter Harvey, *Comment on Veritatis Splendor*, 7 STUD. CHRISTIAN ETHICS 14, 14 (1994).

err and not be morally culpable but she or he must have applied prudence both to the content and decision-making process.

Nevertheless, the issue of authority versus autonomy and freedom remains a question on the Catholic Church's understanding of conscience. Fundamentally, the difficulty was with what Smith calls the revisionist and neo-revisionist approaches to conscience. It is to a brief overview of those two positions that this Paper now turns.

#### *D. The Revisionist and Neo-Revisionist Approaches*

Two Catholic writers, Germain Grisez and Bernard Häring, each represent a differing view of conscience, both claiming the Aquinas inheritance.

##### 1. The Man-in-Relation-to-Law Model (Germain Grisez)

Grisez's non-revisionism has been called the "man-in-relation-to-law" approach.<sup>81</sup> Grisez begins with the notion that no action has moral praise or culpability in terms of the individual, unless it is freely chosen. It is the radical freedom of the autonomous individual to freely choose which makes the actor's action, in terms of the actor, moral or immoral. Indeed, for Grisez, conscience is "an awareness of mortal truth."<sup>82</sup> He suggests that the colloquial understanding of conscience is in three parts, which is consistent with Aquinas' understanding: an awareness of moral principles, the analysis of a particular situation based upon those principles, and the action or inaction taken. Further, he is in agreement with Aquinas that conscience must be followed, but suggests that the Magisterium of the Catholic Church has bridged the gap between the mortal principles written on the soul by natural law and their application in the contextually created lives of individuals. Hence, the individual conscience should follow all particulars of action and inaction as delineated by the Magisterium. Connaturality has its place if a person is mature and prudent, which in turn will bring that person to accept the teachings of the

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<sup>81</sup> ROBERT J. SMITH, CONSCIENCE AND CATHOLICISM: THE NATURE AND FUNCTION OF CONSCIENCE IN CONTEMPORARY ROMAN CATHOLIC MORAL THEOLOGY 45 (1998).

<sup>82</sup> 1 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES 76 (1983).

Magisterium teachings.<sup>83</sup> As the Catholic Church is guided by the Holy Spirit, the “faithful and clearheaded Catholic [has] . . . no right to follow a judgment of conscience against the teaching of the [M]agisterium.”<sup>84</sup>

## 2. The “Restless-Heart-Toward-God” Model (Bernard Häring)

Häring’s revisionism has been called the “Restless-Heart-Toward-God” model.<sup>85</sup> His moral framework is complex and goes well beyond this Paper, but the major elements of his view of conscience should be mentioned. For Häring, the human conscience appears to be an innate human capacity, which is oriented towards the good and is driven by its freedom to search for the truth of that good within relationships—indeed, within community—while employing prudence in actions within particular circumstances. The importance of the community is that “man’s conscience is unthinkable without an active sharing of experiences and insights with others searching for truth in mutual responsibility.”<sup>86</sup> It is prudence, which is developed through a relationship with God, that provides a clear view of that which is the instant case facing the person and which suggests the correct course of action. He states: “The virtue of prudence can flourish only in the soil of sound conscience.”<sup>87</sup> For Häring, conscience is “the inner core, the deepest wellspring of integration and wholeness.”<sup>88</sup>

His view is that the “mere inculcation of various doctrines, without a synthesis in Christ and without a sharing of the faith, does nothing to help the formation of a distinctly Christian conscience [and] can become an obstacle to an integrated faith.”<sup>89</sup> He goes on to say that “it staggers the imagination to think that an earthly authority or an ecclesiastical Magisterium could take away from man his own decision of conscience.”<sup>90</sup>

<sup>83</sup> See *id.* at 566.

<sup>84</sup> Germain Grisez, *The Duty and Right to Follow One’s Judgment of Conscience*, 56 LINACRE Q. 13, 17 (1989).

<sup>85</sup> SMITH, *supra* note 81, at 73.

<sup>86</sup> BERNARD HÄRING, *A THEOLOGY OF PROTEST* 69 (1970).

<sup>87</sup> 1 BERNARD HÄRING, *THE LAW OF CHRIST: MORAL THEOLOGY FOR PRIESTS AND LAITY* 510 (E.G. Kaiser trans., Newman Press 1963) (1954).

<sup>88</sup> 1 BERNARD HÄRING, *FREE AND FAITHFUL IN CHRIST: MORAL THEOLOGY FOR CLERGY AND LAITY* 259 (1978).

<sup>89</sup> *Id.*

<sup>90</sup> BERNARD HÄRING, *THE CHRISTIAN EXISTENTIALIST: THE PHILOSOPHY AND THEOLOGY OF SELF-FULFILLMENT IN MODERN SOCIETY* 63 (1968).

Although Häring appreciates the significance of the Magisterium, he takes the position that the Church has long sought obedience before conscience and that “in the face of such authority . . . a considerable distrust of any command is an obligation in conscience.”<sup>91</sup>

### 3. Pope Benedict XVI

Cardinal Ratzinger, as earlier stated, weighed into the discussion saying that the “[m]orality of conscience and morality of authority, as two opposing models, appear to be locked in struggle with each other.”<sup>92</sup> His concern seems to be that a “firm, subjective conviction and the lack of doubts . . . do not justify man [in that] the Pharisee no longer knows that he too has guilt. He has a completely clear conscience . . . . Their consciences no longer accuse them but justify them.”<sup>93</sup>

His understanding is that:

Two standards become apparent for ascertaining the presence of a real voice of conscience. First, conscience is not identical to personal wishes and taste. Second, conscience cannot be reduced to social advantage, to group consensus, or to the demands of political and social power.<sup>94</sup> Historically considered, morality does not belong to the area of subjectivity, but is guaranteed by the community and has a reference to the community.<sup>95</sup>

Ratzinger seems to answer the question of the conscience in apparent conflict with the Magisterium by conflating the two through the concept of truth. That is, neither conscience nor the teachings of the Church are in conflict with the truth. The former looks to remembrance “not only of the moral law written on our hearts but also to a teaching on conscience that is true to our deepest traditions and to our own humanity.”<sup>96</sup>

It appears that Ratzinger offers that *synderesis* directs one towards the truth, and that *prudence* and its associates orient one towards the truth, which involves the freedom to search within the tradition of the faith and the faith community in

<sup>91</sup> BERNARD HÄRING, *CHRISTIAN MATURITY* 60 (Arlene Swidler trans., 1967).

<sup>92</sup> RATZINGER, *Truth and Conscience*, *supra* note 78, at 12.

<sup>93</sup> *Id.* at 17, 19.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> JOSEPH RATZINGER, *Bishops, Theologians, and Morality*, in *ON CONSCIENCE*, *supra* note 78, at 43, 53.

<sup>96</sup> John Haas, *Foreword* to *ON CONSCIENCE*, *supra* note 78, at 1, 10.

dialogue with a mature, respectful, serious, and hence bona fide consideration of the teachings of the Magisterium. Once the search is complete the individual's conscience must act in accord with its own understanding, whatever the cost. That cost may be high and will not necessarily bring the conscience into conflict with the Magisterium but when that is so,

one's own conscience . . . must be obeyed before all else, if necessary even against the requirement of ecclesiastical authority. This emphasis on the individual, whose conscience confronts him with a supreme and ultimate tribunal, [is] one which in the last resort is beyond the claim of external social groups, even of the official Church.<sup>97</sup>

Cardinal Ratzinger's position is in accord with that of Cardinal Newman who, when in a letter to the Duke of Norfolk, wrote: "If I am obliged to bring religion into after-dinner toasts (which indeed does not seem to be quite right) I shall drink to the Pope, if you please—still, to conscience first, and to the Pope afterwards."<sup>98</sup>

In conclusion, although there appears to be a conflict within the Catholic idea of conscience between authority and autonomy, that dichotomy may be an error. What appears to be at issue is neither the conscience as action, nor the specific content upon which that action is based, but rather the importance of prudence and its associates in the selection of the contents of one's conscience and the mature reflective process through which the individual arrives at a consciously held decision.

### III. CATHOLIC SCHOOLS AND FREEDOM OF CONSCIENCE

Part III summarizes the juridical and current Catholic views of freedom of conscience and describes the difficulties that Catholic school administrators face in applying a Catholic definition of conscience within Catholic schools.

#### A. *The Juridical Concept*

The juridical concept of freedom of conscience in the Canadian Charter of Rights and Freedoms offers a view founded

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<sup>97</sup> Joseph Ratzinger, *The Dignity of the Human Person*, in 5 COMMENTARY ON THE DOCUMENTS OF VATICAN II, 115, 134 (Herbert Vorgrimler ed., W.J. O'Hara trans., 1969).

<sup>98</sup> RATZINGER, *Conscience and Truth*, *supra* note 78, at 23.

upon a free, democratic, pluralistic, and liberal society, which requires its citizens to make their own choices about fundamental matters involving how they wish to live their lives within that society. The State is committed to the protection of citizens' consciences from the tyranny of the majority, if the beliefs that underlie those choices are "conscientiously-held beliefs" and do not, in their expression, deleteriously affect others.

Moreover, freedom of conscience may also be derived, in part, from the legal right to liberty and security of the person under section 7 of the Charter. The individual's conscience is thus viewed externally by the State as the necessary motor for individual choice, not to be restricted by the State except in balancing others' rights (under section 1) or in temporary suspension (under section 33).<sup>99</sup>

### B. *The Sacred Concept*

The Catholic Church's view of conscience as articulated in the writings of St. Thomas Aquinas and the documents of Vatican II can be interpreted as incorporating two models: "Man in Relation to Law" and "Restless-Heart-Toward-God".<sup>100</sup> The distinction between the models is the extent of the authoritative role of the Magisterium not only in the formation of the individual's antecedent conscience, but also in the culpability of the consequential conscience.

### C. *Freedom of Conscience and Catholic Schools: The Legal Issue*

In Canada, there are three provinces that have constitutionally protected Catholic schools, which receive funding from those provinces: Ontario, Alberta, and Saskatchewan. The rights and privileges of Catholic schools in those provinces, which were acknowledged in law prior to each province entering confederation, are constitutionally entrenched and may only be abrogated through a constitutional process.<sup>101</sup> Further, those rights and privileges may not be deleteriously affected by the rights and freedoms within the Canadian Charter of Rights and

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<sup>99</sup> See *supra* note 6 and accompanying text.

<sup>100</sup> See *supra* notes 81–88 and accompanying text.

<sup>101</sup> Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 93 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). See generally Canada Act, 1982, ch. 11 (U.K.) (granting the Constitution Act "the force of law in Canada").



Freedoms as section 29 of the Charter states “[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”<sup>102</sup> This section of the Charter refers to legal rights that existed prior to the geographical area becoming a province. Therefore, the right of Catholic schools to demand remediation or to seek dismissal of non-conformists is arguably constitutionally entrenched within the Dominion’s constitution.

The legal difficulty arises when a non-conformist student or teacher claims the “Restless-Heart-Toward-God” justification for such non-conformity. In the past, Catholic schools have sought successfully to dismiss teachers for non-conformity. In particular, Catholic teachers who married only in civil ceremonies were dismissed;<sup>103</sup> a Catholic teacher who married a non-Catholic, whose divorced marriage had not been annulled was dismissed;<sup>104</sup> and an unmarried Catholic teacher who became pregnant was dismissed for non-conformist behaviour.<sup>105</sup> Moreover, even in non-constitutionally protected Catholic schools in provinces and territories not mentioned above, the Catholic school board has the right to demand denominational conformity and to monitor conformity on a continuous basis.<sup>106</sup>

Given, however, the two interpretations of conscience within the Catholic Church—a non-conformist, for some acts of non-conformity that are not contrary to the Church’s dogma—may claim not only the Church’s guaranteed freedom of conscience, but also that the conscientious choice—which albeit is not in accord with the teachings of the Magisterium—is nevertheless a choice that does not exclude them from the Church. Hence, remediation of the non-conformity is not appropriate as a demand from school administration, nor is dismissal based upon a warranted denominational cause. Arguably, it is not open to Catholic school administrators to say that their decision is defensible by the fact that a majority of the school’s Catholic parents do not accept the non-conformity as the religious aspects

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<sup>102</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 29 (U.K.).

<sup>103</sup> See *Essex Roman Catholic Separate Sch. Bd. v. Porter*, [1977] 16 O.R.2d 433 (Ont. Div. Ct.).

<sup>104</sup> See *Caldwell v. Stuart*, [1984] 2 S.C.R. 603.

<sup>105</sup> See *Casagrande v. Hinton*, [1987] 51 Alta. L.R.2d 349 (Alta. Ct. Q.B.).

<sup>106</sup> *Caldwell v. Stuart*, [1984] 2 S.C.R. 603.

of the Catholic school fall under the aegis of the Church<sup>107</sup> and its definition of freedom and conscience. According to this argument, what is at issue is the individual's exercise of her or his freedom of conscience not the perception of the majority of the laity within a school community.

If the above analysis is correct, then a Catholic school administrator's decision to demand remediation or to dismiss a non-conformist is not denominationally based, and therefore must be founded in civil law. Such a conclusion means that the decision is not constitutionally protected from scrutiny, and that the Charter rights of the non-conformist are in full force. As the Charter is interpreted using the purposeful method and on a secular basis, non-conformity to a religious creed is not an operative claim, nor can it be claimed to be so by the Catholic Church's own definition of freedom and conscience. Although there are some common law precedents in labor law that provide for the remediation of employees' behaviors, which draw the employer's business reputation into disrepute and deleteriously affect the business, such do not stand against a constitutional (Charter) right, which applies to organs of the state such as the institution of education. Moreover, section 1 of the Charter is not arguable by the school employer as by the Catholic Church's own definition, students and others have freedom of conscience that may be expressed in the "Restless-Heart-Toward-God" model. An example of such a conundrum has been provided by the recent case of Marc Hall, a gay Catholic high school student who sought to attend his Catholic school's grade twelve prom with his boyfriend.<sup>108</sup> The Catholic school board objected on the basis, amongst other things, that to allow such attendance would condone the gay lifestyle. The local Catholic Bishop testified in court that if permission were granted to Mr. Hall it would represent "clear and positive approval not just of the boy's 'orientation' but of his adopting a homosexual lifestyle."<sup>109</sup>

Hall successfully sought injunctory relief. Mr. Justice MacKinnon stated that "[t]here is no evidence of a single position within the Catholic faith community about what constitutes the

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<sup>107</sup> CODEX IURIS CANONICI ch. 803-04 (Canon Law Soc'y of Am. trans., 1983) (1917).

<sup>108</sup> See Hall (Litig. Guardian) v. Powers, [2002] 213 D.L.R.4th 308.

<sup>109</sup> *Id.* at 320.

most appropriate pastoral response to [homosexuality].” He went on to state, however:

It is not the task of a civil court to direct the Principal, the Board, the Roman Catholic Church or its members, or indeed any member of the public as to what his or her religious beliefs ought to be. The separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law.<sup>110</sup>

It has been argued elsewhere that the *Hall* decision was wrongly decided on the grounds that the court misconstrued the teachings of the Catholic Church as being necessarily majoritarian in order to be authoritative.<sup>111</sup> If Hall had claimed that the expression of his sexual orientation was a choice made in good conscience in accord with the “Restless-Heart-Toward-God” model, however, he would ostensibly have had a legally unassailable argument. His action, although non-conformist in expression, was within the ambit of denominationally protected freedom of conscience in the Catholic Church.

Traditionally, one might argue that, because the local Bishop gave evidence against Hall’s request, a voice of the Magisterium had determined in favor of the school district. Indeed, a local bishop does have authority over Catholic education to ensure “the authentic Christian character of the Catholic school”<sup>112</sup> but he does not necessarily always speak as the authoritative voice of the Catholic Church. A local bishop speaks with authority on an issue as a result of, and when in concurrence with, the contents of the official Church documents.<sup>113</sup> As Feuerherd states, “Under this 1998 papal apostolic letter, bishops’ conference statements that seek to bind the faithful must be approved unanimously, or, with a two-thirds vote, submitted to Rome for approval.”<sup>114</sup> Moreover, although the Code of Canon Law speaks of children and young persons that are to be cared for so they may achieve

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<sup>110</sup> *Id.*

<sup>111</sup> See J. Kent Donlevy, *Re-Visiting Denominational Cause and Denominational Breach in Canada’s Constitutionally Protected Catholic Schools*, J. EDUC. & L. 15(3) (2005).

<sup>112</sup> GABRIEL-MARIE CARDINAL GARRONE, THE SACRED CONGREGATION FOR CATHOLIC EDUCATION, *THE CATHOLIC SCHOOL* ¶ 73 (1977).

<sup>113</sup> See JOHN PAUL II, APOSTOLIC LETTER *APOSTOLOS SUOS* ¶ 14 (1998).

<sup>114</sup> Joe Feuerherd, *Crafting a Vision of a Bishops’ Conference, Then Unmaking It*, NAT’L. CATHOLIC REP., Oct. 4, 2002, [http://www.natcath.com/NCR\\_Online/archives/100402/104002m.htm](http://www.natcath.com/NCR_Online/archives/100402/104002m.htm).

freedom, that does not discount the warrant for non-conformity, which is within the "Restless-Heart-Toward-God" model. Although many in the Catholic Church might disagree with a non-conformist, the Catechism of the Catholic Church provides that "[a] human being must always obey the certain judgment of his conscience."<sup>115</sup>

If that is correct, then the question becomes: Are the actions of students and teachers who act in accord with their conscience yet contrary to the normally espoused values of Catholic schools subject to administrative remediation and or dismissal? The answer may arguably be no. Why?

The Catholic school is bound to protect the individual's freedom of conscience in terms of religion and the "Restless-Heart-Toward-God" model provides for a reasonable basis for the non-conformist's action. By the Church's definition, the non-conformist teacher or student acts within the terms of the denomination and not in conflict with it. Hence the administrative demand for remediation must be based on civil law. That is problematic, because once outside of the area of constitutional protection for administrative action, it is arguable that the student or teacher's section 2(a) right and all other Charter and civil rights are fully operative in defending non-conformist actions.

### CONCLUSION

This conference Paper provides a summary of the relevant Canadian case law dealing with freedom of conscience under section 2(a) of the Canadian Charter of Rights and Freedoms as well as a brief summary of the two major schools of thought regarding conscience in the Catholic Church.

In the former case, the argument was made that, although section 2(a) was secular in a juridical sense, the operation of section 29 of the Charter and section 93 of the 1867 Constitution Act provided for a sacred or religious definition of conscience to be read into those constitutional documents. However, it was further argued that by operation of the two interpretations of the Catholic Church's definition of conscience, the Catholic school administrator may not claim such a constitutional shield for the remediation and/or dismissal of non-conformist teachers or

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<sup>115</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1790 (2d ed. 1997).

students. If that is the case, the ordinary public law applies, which provides the non-conformist with a defense utilizing section 2(a) freedom of conscience in a secular sense under the Charter.