

The Communitarian Conscience: A Theological Response to Legal Debates about Religious Freedom

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ABSTRACT:

This dissertation examines current legal and moral debates about religious liberty and the sanctity of conscience in light of the Christian tradition's understanding of both. It is important for strong respect for a pluralistic array of consciences to be grounded internally within the Christian tradition, not just based in secular public reason. This dissertation thus develops a Christian understanding of the conscience that can provide this justification, referred to as the "open communitarian conscience." Specifically, the dissertation analyzes various understandings of the person within the Christian tradition, explores how these have affected political discussions about religious liberty, including sometimes giving support to an excessive individualism, and shows how there are contrasting understandings in the tradition which can be drawn on to better theorize the person's relationship to her or his communities. It also develops a pneumatological understanding of the conscience to provide theological support for this personalist anthropology and explains how the conscience can be reconceived to better describe the relationship between a person and their moral actions. The dissertation includes a discussion of six key U.S. Supreme Court cases which address issues pertaining to religious liberty and the religious conscience, as well as the Religious Freedom Restoration Act, and suggests how an understanding of the open communitarian conscience might shift Christians' understanding of how best to protect *everyone's* rights of conscience while maintaining the First Amendment's specific protection for rights of free exercise also.

DEDICATION

For my loved and loving family—
parents Betty and Charlie, brother Charles, and aunt Patricia;

And in loving memory of my grandparents,
Muriel, whose love for God and theology was inseparable from her own love for
persons, and John Buford, for whom I'm named and whose will and
determination remain a well I draw on still,
and Nile and Linden, who I never knew but whose toil and sacrifice in times of
extreme hardship remain a debt that can never be repaid, that can only be paid
forward—
They would be so proud, and in the great cloud of witnesses that is with us all,
they are.

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INTRODUCTION

Underlying the notion of religious freedom as it has evolved in United States law is an individualist understanding of the religious conscience which is often presumed but seldom acknowledged. This understanding, refined in seventeenth-century Puritan disputes and influenced by an early twentieth-century form of personalism which values subjectivity and experience, has resulted in an inability on the part of the legal system to respond to claims that the religious conscience must be exempted from “secular” legal requirements without the situation devolving into one of conflicting individual “religious” subjectivities, essentially the danger traditionalists say they seek to avoid. The solution must come, at least for Christians, from a development in the Christian understanding of the conscience, however, since any remedy imposed from outside the tradition or framed solely in terms of law or public reason risks exacerbating the divide. The solution I propose in this project—framed within the Christian tradition, though there is nothing precluding adoption or adaptation of many of its elements by others—is the development of the “open communitarian” model of the conscience, or simply “the communitarian conscience.”

This model is a development of theological ethicist Linda Hogan’s personalist model of the conscience. It is the “internal forum” described in *Gaudium et Spes* no. 16,¹

¹ “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. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor. In fidelity to conscience, Christians are joined with the rest of men in the search for truth, and for the genuine solution to the numerous problems which arise in the life of individuals from social relationships.” Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World], December 7, 1965, Vatican.va, 16.

a moral decisionmaking capacity which resides inside each person but which serves as a point of intersection with others, including one's family, friends, and primary moral communities. There is also a temporal dimension to the conscience—looking back in the light of gained moral wisdom to evaluate past actions and commitments, looking forward with hope and concern regarding one's responsibility to others. And this decisionmaking process is always in light of the loving call God has placed upon the heart, allowing the conscience to remain open and listening for the Spirit of God.

The problem with previous conceptions of the personalist conscience is that they failed to adequately account for the function of the conscience at the intersection of religious moral worldviews and legal systems of accountability. That is, the conscience was conceived of as the *religious* conscience, mediating between the person and the moral law; the person might *choose* to take account of other factors besides church teaching, but from the perspective of the legal system the process remained opaque, and dictates of the conscience were expected to receive legal deference.

In contrast, I propose that the conscience be understood as mediating between religious and legal systems, so that the person is trusted to prudentially resolve the tensions between these moral traditions within the “internal forum” described in *Gaudium et Spes*. And by rebalancing the relationship between the person and the moral and legal traditions in which she may be embedded, this open communitarian conscience can be clearly differentiated from an individualist understanding (which resists being answerable to any external authority) by acknowledging that limited, reasonable measures of accountability can be imposed on the personal conscience—by both the church and the state. In the religious tradition, accountability may be according to church

teaching regarding violations of the moral law. With regard to the legal system and a person's public acts, the individual may have to choose between compliance and civil disobedience.

In its simplest form, then, the thesis of this dissertation may be stated as follows: The current legal inability in the U.S. to respond to claims that compliance with generally applicable laws may violate the individual religious conscience can be addressed, at least for Christians, by developing a new communitarian understanding of the conscience within the Christian tradition. As described more fully below, four key elements for this constructive proposal are: (1) developing an understanding of the relationship between religious worldviews and legal systems of accountability where neither receives absolute superiority over the other, with the personal conscience as the mediating agent between them; (2) building on and developing Catholic personalism as a basis for this model in order to reject the explicit subjectivism of an alternate form of personalism which underlies the individualist conscience (often associated with theologians at Boston University in the early twentieth century); (3) developing a robust understanding of the pneumatology of the conscience, to rebut understandings which contemplate either the church or the individual as the primary conduit for the action of the Holy Spirit in the moral life of the church and broader society; and (4) developing a more nuanced account of the relationship between a person's conscientious moral acts and the moral traditions in which a person is acting.

The audience for this project is primarily Christians, both conservative and progressive, and secondarily jurists and legal scholars. For conservative Christians, this project will serve as an explanation of Christian participation and involvement in civil

society which does not respond to fears about the degrading of the religious conscience or loss of Christian distinctiveness by advising retreat. For progressives, conversely, the explanation of Christian participation and involvement in civil society provided here will serve as an alternative to explanations which appeal to public reason—a route which, like conservatives, I consider unwise. For jurists and legal scholars, this project provides an explanation of the religious conscience which does not require exemption from legal analysis and interrogation; to the contrary, it invites it. And by insisting that, as a default, the legal inquiry be focused on the justice of the act at issue in any particular case rather than on the justice of an in-group/out-group distinction based on beliefs about the act, this proposal clarifies the nature of the legal inquiry; it also supports an inclusive vision of civil society which is otherwise threatened when any person has the right to exempt their conduct from scrutiny by opting out of generally applicable laws based on religious beliefs.

In chapter 1, I examine the current state of free exercise jurisprudence in the United States and the presumptions about the nature of the religious conscience reflected in it. This chapter furthers my overall argument by surfacing exactly what assumptions are being made in the legal tradition about the nature of the religious conscience, a necessary step before developing a response in later chapters. I discuss six key U.S. Supreme Court cases as a concise way to illustrate the trajectory of this problem. I also discuss the circumstances surrounding the passage of the federal Religious Freedom Restoration Act and its amendments and examine the ways in which this alleged solution has made the situation worse. Ultimately, this chapter corroborates James Keenan's

diagnosis of the U.S. American “opt-out” conscience² and illustrates in brief outline, from a legal perspective, how it came to be.

The first case, because it provides important framing for more recent religious freedom jurisprudence, is *Reynolds v. United States* (1879), in which the court held that a federal law that prohibited polygamy in federal territories (implicitly directed against members of the Church of Jesus Christ of Latter-day Saints) was not unconstitutional on grounds of religious free exercise. The court stated, “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”³ This belief/practices distinction was the binding authority on the issue for over one hundred years.

The second case is *United States v. Seeger* (1965), which involves the application of a statute allowing exemption from military service based on pacifist religious beliefs. The court interpreted the statute which allowed exemption from military service based on “religious training and belief” to include pacifist beliefs not grounded in any traditional religious language or formulation—quoting theologian Paul Tillich, “If that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any*

² James F. Keenan, SJ, “Redeeming Conscience,” *Theological Studies* 76, no. 1 (2015): 134–35.

³ *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879).

reservation.”⁴ The court also quoted ethicist David Saville Muzzey, “Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience.”⁵

The third case is *Wisconsin v. Yoder* (1972), where the court allowed exemption for Amish children from Wisconsin’s compulsory school attendance law on religious freedom grounds—in effect, allowing a community-wide version of the “opt out” conscience.

Fourth is *Employment Division v. Smith* (1990), which is notable for its *rejection* of the opt-out conscience. Here, Justice Scalia, writing for the court, affirmed the reasoning of *Reynolds*, quoted above, holding that it was not a violation of the Free Exercise Clause for an individual to be rejected for unemployment benefits after his “for cause” firing for peyote use, despite the fact that the peyote use occurred as part of a religious observance. Scalia’s approach was not widely accepted, however, and the belief/practices distinction triggered a backlash from religious groups. In response, the federal government and many states passed “Religious Freedom Restoration Acts” (RFRAs) meant to undo Scalia’s 1990 opinion.

And fifth and sixth are *Burwell v. Hobby Lobby Stores* (2014) and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), the two cases much discussed in recent legal and religious discourse which have to do with whether an employer can be required to provide health insurance which covers contraception and whether a baker can

⁴ *United States v. Seeger*, 380 U.S. 163, 187 (1965), quoting Paul Tillich, *The Shaking of the Foundations* (New York: Scribner’s, 1948), 57 (emphasis added by the court).

⁵ *Seeger*, 183, quoting David Saville Muzzey, *Ethics as a Religion* (New York: Simon and Schuster, 1951), 95.

be required to bake and decorate a cake for a same-sex wedding, where those activities violate the religious beliefs of the employer and baker, respectively.

It is these last two cases which most clearly demonstrate the nature of the problem, where religious conservatives have convinced the legislatures and courts that in order to participate in contemporary civil society, they must be allowed to exempt themselves from certain of its requirements, posited as their only option short of retreat. As a matter of legal protection for religious free exercise, however, allowing this individualized “opting out” based on religious freedom seems unsustainable at a large scale, and as a matter of a theological understanding of the conscience, as explained in subsequent chapters, there is room for developing an alternate model which avoids the impasse that the current legal assumptions about the religious conscience seem to encourage.

In the second chapter, I rehearse the development of the conscience in the Christian tradition, tracing the trajectory of the conscience from Paul to Origen to Jerome to the anonymous medieval scribe who distinguished *synderesis* from the conscience proper, a distinction adopted by Lombard and developed by Aquinas and others. Subsequently, during the period of high casuistry, “cases of conscience” were collected into *Summa Casuum Conscientiae*, which became the basis for the moral manuals used by priests in assigning penance, the bedrock of Catholic moral theology through to the beginning of the twentieth century. It is this understanding of the conscience, where it functions as a moral syllogism, that moral theologian Linda Hogan refers to as the “legalist conscience.”

Meanwhile, in 1215 the Fourth Lateran Council determined that every Catholic was required to attend mass at least once a year (the “Easter duty”), which meant that every Catholic was also required to attend confession once a year as well. Combined with other emerging understandings of the human person in European thought, this had the effect of internalizing the conscience in a way that was substantially new. Three hundred years later, Augustinian priest Martin Luther was so plagued by his conscience that he took the language of conscience and turned it back against the institution that he felt had corrupted it, citing his conscience as the force commanding his acts that led to the Reformation. With Luther, the Protestant conscience became just as splintered as it had in Catholicism, though in very different ways: on one hand it was affirmed as an irrefutable dictate on a person’s actions, and on the other denounced as a sign of the individual’s inadequate faith (and residual belief in “works righteousness”) if it betrayed any sign of uncertainty.

In the North American context, rival seventeenth-century Puritan ministers John Cotton and Roger Williams argued strenuously over understandings of conscience. Cotton believed that the legal system could be used to prosecute heterodox religious beliefs and unauthorized private worship without violating individual conscience, since once the individual had been informed of church teaching, any continued dissent was against the offender’s own conscience—quite precisely, the legalist understanding of the conscience. Williams found this abhorrent and turned the religious conscience into a matter of political philosophy. He argued that a “wall of separation” between church and state was necessary, both to protect individual liberty of conscience from the coercive

power of the state as well as to protect the church from the corruption of the state.⁶ Over a century later, in 1802, Thomas Jefferson cited William's "wall of separation" (without attribution) as the animating metaphor for considering the relationship between church and state, and implicitly the First Amendment's Religion Clauses also,⁷ and in 1879 the U.S. Supreme Court explicitly adopted it as the correct way to interpret those clauses. And thus the notion of the individual conscience underlying Williams' metaphor became the operative one in U.S. jurisprudence, until nearly the end of the twentieth century.

Recounting this historical context establishes several points which further my argument. First, the conception of the religious conscience underlying the Religion Clauses of the First Amendment was a snapshot of an evolving concept in theology, in response to specific controversies of the time which are different from the controversies and tensions of today. Second, the individualist conception of the conscience reflected in recent U.S. Supreme Court jurisprudence is an impoverished one, in the context of the concept's rich history. And third, the legalist understanding of the conscience was the product of a specific time as well, when the dangers posed by established religion were less well understood; moreover, any attempt to return to a legalist religious conscience which had the practical effect of making moral decisionmaking, from the perspective of the broader community, the outcome of a personal subjectivity runs contrary to the communitarian goals of the natural law schema of which the legalist conscience was understood to be a part.

⁶ Roger Williams, "Mr. Cottons Letter Lately Printed, Examined and Answered," in *The Complete Writings of Roger Williams* (New York: Russell & Russell, 1963), 1:392.

⁷ The term "Religion Clauses" is used to refer collectively to the No Establishment Clause and the Free Exercise Clause, both located in the First Amendment.

Chapters 3, 4, 5, and 6 address the four key axes of investigation for this project: the nature and role of traditions, the person, the Holy Spirit, and the act. Regarding traditions, philosopher Alasdair MacIntyre in his book *After Virtue* argues that liberalism has led to incoherence in moral discourse, because liberalism presumes that it has to exist in the space above moral traditions when in fact it merely functions as one more moral tradition itself. If MacIntyre's view of liberalism is correct, the conundrum becomes manifest: if liberalism is rightly understood as being in competition with the moral traditions which depend on religious faith commitments, is liberalism incommensurable with religious faith? If not, how are we to understand the relationship between them?

The parties bringing the religious freedom cases to the courts generally assume incommensurability, forcing them to conclude that the only alternatives to the moral relativism and atomized individualism of the broader secular culture are either complete Amish-like retreat or else the sort of individualized “bubble wrap” that they believe religious freedom protection ought to afford, where each person is permitted to engage in public activity and commerce such as operating hospitals and bakeries (and more recently, designing wedding websites) while retaining the right to effectively veto generally applicable laws on an ad hoc basis, in a way that is answerable to no external authority beyond the person alleging violation of their religious conscience.

The thesis of this chapter, however, is that it is not an all-or-nothing question of capitulation to moral relativism or retreat—retreat either in the form of actual communal retreat or the bubble-wrap insulation of religious freedom protection. Rather, there is a way to stabilize the relationship by constructing a middle ground. Drawing on MacIntyre, whose work I argue has been incorrectly interpreted by some, I describe how multiple

traditions of rational enquiry might coexist by distinguishing between “open” and “closed” forms of communitarianism.

Specifically, in his book *Whose Justice? Which Rationality?*, MacIntyre proposes that stability or equilibrium between moral traditions may be possible for prolonged periods of time if certain conditions are satisfied—the most important of which is that the basis for that coexistence is internally understood and justified within each of the traditions—that is, it *cannot* merely be imposed from the outside. I describe moral traditions which are able to satisfy this internal criteria as “open communitarian,” as opposed to the “closed communitarianism” of traditions where such criteria have not been developed.

From the religious side, this new understanding allows Christians to engage in public activity, even under conditions with which they might disagree, without fearing the dissolution of their Christian identity absent the protections of an automatic right to opt out of laws and court rulings. From the legal side, this understanding allows courts to not be helplessly stymied in response to claims of religious belief, instead allowing courts to do what they routinely do as a matter of course: consider the facts of the case and the significance of the claims at issue. It also recognizes that many people belong to multiple communities and that claiming membership in a religious tradition does not automatically exempt a person from the responsibilities that may be associated with membership in a legal-political one. This understanding thus replaces and updates the assumptions about the relationship between church and state which are behind the First Amendment’s Religion Clauses, which were designed to solve the seventeenth-century problem of

established religion rather than the current problem of maintaining a common civil society under conditions of religious and secular pluralism.

In this chapter, I also discuss the oversimplification between liberalism (and atomized individuals) versus the thoroughly communally socialized being. I compare the two-part typologies of Linda Hogan (who discusses the legalist and personalist models of the conscience) and communitarians such as Stanley Hauerwas (who emphasizes the dichotomy between the individualized self of liberalism versus a communitarian self) with the three-part typology of legal scholar Samuel Moyn (where Catholic personalism is situated between the individualism of capitalism and the collectivism of communism). I argue against those partisans who, on the conservative side, conflate Hogan's personalist conscience with liberal individualism and, on the progressive side, conflate communitarianism with Hogan's legalist conscience.

In the fourth chapter, I address the second axis of the investigation, the human person, and endorse a personalist anthropology rather than the liberal individualist anthropology presumed, for the sake of legal analysis, to underlie the religious conscience. In this context, I discuss two different types of "personalism" which are brought up in discussions regarding the conscience but not often contrasted directly, namely, the Catholic personalism of Jacques Maritain and the early twentieth-century personalism associated most closely with theologians at Boston University which emphasized individual experience and subjectivity. For just as Roger Williams's individualist understanding of the religious conscience, combined with the individual of liberal modernity more broadly, underlay the original legal understanding of religious freedom in the United States, so too has the BU-style personalism which emphasized

experience and subjectivity implicitly influenced the legal understanding of the religious conscience over the past sixty years.

For example, in *United States v. Seeger* (1965), as noted above, the court interpreted the statute which allowed exemption from military service based on “religious training and belief” to include pacifist beliefs not grounded in any traditional religious language or formulation, quoting theologian Paul Tillich, “And if that word [God] has not much meaning for *you*, translate it, and speak of the depths of *your* life, of the source of *your* being, of *your* ultimate concern, of what *you* take seriously without any reservation.”⁸ The court also quoted David Saville Muzzey, “Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human *experience*.”⁹ This language reflects BU-style personalism almost exactly.

This understanding of the conscience has understandably met with strong resistance from traditional religious believers, who maintain that it resulted in a social miasma of conflicting individual subjectivities. Ironically enough, however, their litigation strategy in recent religious liberty cases is vulnerable to the same critique. By arguing that their religious communities ought not to be forced to interact with the broader society, they are advocating a “closed” form of communitarianism, which from the perspective of the legal analysis ends up looking just like another form of subjectivism writ large. In contrast, I will argue for a median—and mediating—position

⁸ *Seeger*, 187, quoting Tillich, 57 (emphasis added).

⁹ *Seeger*, 183, quoting Muzzey, 95 (emphasis added).

between assimilation to the broader culture and retreat into a closed community, which is based in Catholic personalism and an “open” form of communitarianism.

The fifth chapter will develop a pneumatological understanding of the conscience, drawing on the selected work of theologians Jürgen Moltmann, Elizabeth Johnson, Anselm Kyongsuk Min, and Michael Welker. Between the two poles of individualism and closed communitarianism, I contend there is room to develop a pneumatological understanding of the open communitarian conscience which emphasizes the role of the Spirit of God in “differentiating and uniting simultaneously.”¹⁰

This pneumatological aspect of the conscience is important to address directly, because it highlights just how much previous understandings of the conscience have implicitly relied on pneumatology as well. As Johnson recounts, for example, in Catholicism the role of the Spirit has often been understood as channeled through “ecclesiastical office and ordained ministry,”¹¹ an important backdrop for the church’s insistence that its moral teachings be followed by individual persons under a legalist conception of the conscience. Conversely, looser, experience-based understandings of the Spirit often underlie the individualist conscience for many Protestants. The goal of this chapter is to develop a pneumatology of the conscience which allows for more freedom and creativity than the ecclesiastically channeled Spirit of the legalist conscience but which offers more guidance for persons than the purely experience-driven pneumatologies underlying the individualist conscience.

¹⁰ Elizabeth A. Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (New York: Herder & Herder, 1992), 147.

¹¹ *Ibid.*, 129.

Additionally, the pneumatological understanding of the conscience proposed in this section can help Christians understand their position mediating between religious moral worldviews and the broader society regulated by legal systems of accountability without positing it as an either/or proposition. With such a clarified understanding, many Christians might no longer be susceptible to the straw argument that Christian values are under threat from a super-subjectivism based in a BU-style personalism, a fear which has led them to agitate for the heightened level of protection that religious freedom restoration acts have afforded. Allaying conservative concerns, then, relieves the law from having to give religious conservatives the unconditional bulwark they have sought. This, in turn, stops conservatives from feeding into a form of subjectivism even as they have putatively argued against it.

In chapter 6, I bring together several strands of this analysis to clarify the significance of the morally contested act. Contrary to constitutions and legislation written in other parts of the world in the postwar period, there is no mention of conscience or human dignity as the basis of religious freedom in the U.S. Instead, the debate is carried out in terms of the rights guaranteed by the No Establishment and Free Exercise Clauses. As described in chapter 2, protecting the right to hold heterodox beliefs and to worship with a dissenting church (or none at all) was central to Roger Williams's understanding of the conscience. As described in chapter 1, however, as individuals have pursued their individual legal right to sue for violations of religious free exercise, as the country has become more pluralist and secular, and as legislation has been passed which discards certain traditional notions of sexual morality, the distinction reflected in *Reynolds v.*

United States (1879) which allowed religious practices to be legally regulated while religious beliefs were protected has broken down.

A failure to explicitly address the role of the conscience as mediating between religious beliefs and actions has contributed to this breakdown. Going back to the *Reynolds* analysis that describes a religious practice/religious belief distinction, the word “conscience” is barely mentioned outside a scant couple of references. And so even as the court presumed a distinction could be made beliefs and actions, by failing to address the role of the conscience, the court failed to identify the mechanism by which the distinction might be made, resulting ultimately in the inability to clearly justify any distinction at all.

Making explicit the role of the conscience makes it easier to understand the relationship between beliefs, practices, and acts. It also clarifies the understanding of the person as moral agent by helping individual Christians understand that they are not automatons that must act out everything that they “sincerely” categorize as “religious beliefs” and, moreover, that not every restriction on their “sincerely held religious beliefs” is a potential act of religious discrimination. Likewise, it enables the legal system to treat Christians as discriminating moral agents on whom reasonable expectations may be placed.

A person who argues, for example, that they should not be forced to bake and decorate a cake for a same-sex wedding or to provide employee health insurance that covers contraception may frame their legal argument as a violation of their “free exercise” rights, and the courts may analyze “sincerely held beliefs,” but from an ethical perspective the issue is what demands may reasonably be placed upon the conscience. In this example, other things being equal, the act of conscience would either be to

prudentially comply with the law based on deference to the outcome of a participatory democratic process or to act in civil disobedience (that is, to refuse to bake the cake or provide the insurance) and incur legal penalty. Framing the question as one of conscience (rather than of free exercise) thus clarifies whether it is fair to punish a person who chooses the path of civil disobedience for sake of conscience in such cases.

When the role of the conscience in mediating between beliefs and acts is omitted, as traditional legal analysis has done, imposing a penalty seems unreasonable, as religious beliefs and acts seem so directly bound to one another. Similarly, imposing a penalty also seems unfair if the religious and legal moral traditions are presumed to be incommensurable. The analysis is changed, however, when the conscience is understood as capable of mediating between religious moral worldviews, on one side, and the expectations that might reasonably be placed on citizens to abide by the outcomes of democratic processes, on the other.

Admittedly, these debates raise important questions about whether compliance with morally flawed secular law adversely shapes the character of those who comply. To this point, I will draw on the work of Josef Fuchs, Klaus Demmer, James Keenan, and Darlene Fozard Weaver to demonstrate that the relationship between act and character can be understood in a more nuanced manner than many conservative religious accounts suggest.

Finally, in the conclusion, I return to the legal cases discussed in the first chapter and describe how my proposal of a communitarian conscience can change the analysis. I argue that the while sometimes the question may be properly framed in terms of sincerely held religious beliefs or free exercise rights, in other cases the issue is the conscience

more generally. Any applicable legislation or constitutional case law which requires the latter category of cases to be framed as the former should be reformed or amended, to be replaced with language which frames the matter in terms of rights of conscience.

This change may seem semantic, but it would accomplish the important goals of recognizing the role of the conscience as mediating between beliefs and acts, and between religious moral worldviews and legal systems of accountability, thereby enabling a clearer legal analysis and aligning legal and theological ethical discourse.

1.0 CHAPTER 1: THE CONSCIENCE IN KEY SELECT U.S. SUPREME COURT CASES AND THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

This chapter will provide an overview of six key select U.S. Supreme Court cases and the Religious Freedom Protection Act (RFRA). The thesis of this chapter is that underlying much if not all legislation and jurisprudence pertaining to religion liberty in the United States—with the important exception of *Employment Division v. Smith* (1990)—is a specific individualist understanding of the conscience which must be surfaced so that it may be interrogated. As developed in subsequent chapters of this dissertation, this liberal individualist understanding of the conscience has roots within some parts of the Christian tradition but is at odds with other parts of the tradition. Those roots must be examined—exhumed, really—and a more communitarian Christian understanding of the conscience retrieved and developed.

Elements of this critique of the individualist conscience may sound familiar. However, the contribution of this dissertation is to provide an alternative to other frameworks put forward by religious liberty apologists which argue against the individualist conscience but which, in the process, end up pitting Christians with their communitarian understandings of the conscience against the “secularists” who urge an individualist approach. Instead, this project puts forward an understanding of the conscience that allows Christians to understand themselves as *connected* to their fellow citizens rather than alienated from them.

As illustrated in this chapter, while the existing approaches to religious liberty and the conscience to which I refer may espouse a “communitarian” conception of the conscience within the religious tradition, so that the person’s conscience is formed by

their religious beliefs, they fail to adopt that same communitarian spirit with respect to their non-Christian fellow citizens. Ironically, many end up availing themselves of the protections provided to the individual conscience extended by the U.S. legal system even as they denounce the philosophical basis for that protection. In the process, these “communitarians” are dissolving the very civic bonds that hold us together as a nation that consists of more than our coreligionists.

From the perspective of the legal and political systems, such approaches encourage the belief that the legal system lacks the ability or right to inquire into a person’s religious beliefs once the person has asserted them. From the perspective of the religious traditions, as explained in chapters 2 through 6, they oversimplify and in many respects misinterpret the theoretical framework for considering Christians’ relationships to their fellow citizens—whether those citizens be Christians who share their particular moral beliefs, Christians who hold substantially different moral beliefs, or those who either belong to other religious traditions or to no such tradition at all. Another fruitless approach, however, comes from the opposite side, where it is presumed that secular justifications for democratic pluralism should be sufficient to compel compliance among Christians. In keeping with the principles *of* pluralism, support for pluralism needs to be justified within those religious traditions of which the specific pluralism of a particular nation consists, the constructive work with which chapters 2 through 6, with respect to the Christian tradition, is concerned.

1.1 General Background

In conventional discussions of religious liberty in a U.S. American context, it is common to analyze only one area of the relevant jurisprudence, such as that pertaining to

specific constitutional provisions (typically, the No Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution) or specific legislation (that pertaining to military service, compulsory education, or more recently, the Religious Freedom Restoration Act of 1993 or the Religious Land Use and Institutionalized Persons Act of 2000). But as we will see, this piecemeal approach fails to give adequate scope to the inquiry, thus missing the larger themes of the development of the place of the religious conscience in legal discussions of religious liberty.

That said, it is nonetheless helpful to begin with a review of the Constitution and the specific constitutional provisions that give animating spirit to the issue.

The U.S. Constitution and its amendments are of remarkably straightforward design. The Constitution itself consists of seven articles. Articles 1 through 3 are the most important, arranging the structure of the federal government into three “branches,” the legislative, the executive, and the judicial, respectively. Article 4 ensures that each state gives legal weight, as appropriate, to the rulings of courts in other states and outlines the procedure for admitting new states to the nation.¹² Article 5 outlines the process for amending the Constitution. Article 6 ensures that the preexisting debts of the nation will be honored and specifies that the Constitution and duly enacted federal laws are the “supreme Law of the Land,” and Article 7 outlines the process for ratifying the Constitution.

The Bill of Rights consists of ten amendments upon whose passage the ratification of the Constitution was for many conditioned. This set of amendments

¹² It must not be erased through failure to note, though unrelated to this dissertation, that this Article also includes a provision prohibiting escaped enslaved persons from obtaining their legal freedom by availing themselves of the protection of the laws of the state to which they have escaped.

contains, of course, the most important amendment for purposes of providing legal protection for religious liberty, the First Amendment. But it also contains several important provisions pertaining to the military, protections pertaining to civil and criminal legal procedure and conditions of imprisonment, and certain catch-all provisions ensuring that the powers of the federal government do not enlarge through a process of creeping accretion: any personal rights not listed in the Constitution remained unaffected by its provisions, and any powers not delegated to the federal government nor prohibited to the states by the Constitution, as stated in the Tenth Amendment, “are reserved to the States respectively, or to the people.”

The so-called Religion Clauses of the First Amendment are the most well-known provisions pertaining to religious liberty in the Constitution. However, before moving to a discussion of those provisions specifically, it is worth stepping back for a moment to take in the structure of the Constitution overall. The original Constitution itself contains few if any substantive rights. A handful are set forth in the Bill of Rights. But overall, taking the Constitution and Bill of Rights together, there seems to be a sort of Enlightenment confidence pervading the document, a sense that if the structure of the government can be gotten right, the actual process of governing may, to a considerable extent, take care of itself, in a self-righting sort of way.

That said, there is a considerable undercurrent of pessimism in the document as well. As first-year law students are well aware, if there is one overarching theme of the Constitution, it is that the Constitution sets up a complicated set of “checks and balances”—of various sorts, but most obviously between each of the branches of government and between the federal government and the states. More broadly, one can

say that there is a suspicion of government overreach but that there is also a strong belief in the importance of a strong federal government, particularly given the problems which arose from the weak federal government of the Articles of Confederation—thus the imperative before the Founders to design a strong federal government whose propensity for overreach could be contained.

The First Amendment itself is one sentence:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Within this sentence are many of the bedrock rights popularly associated with the Bill of Rights: freedom of speech, freedom of the press, the right to assemble, and of course freedom of religion. The provisions pertaining to religious freedom are further broken into two separate clauses, the Establishment Clause (better referred to as the *No Establishment Clause*) and the Free Exercise Clause.

The No Establishment Clause prohibits the federal government from selecting a single religion (such as Christianity) or religious institution (such as the Church of England, the Catholic Church, or the Congregational Church) as the official or “established” church or religion. Note that it does not prohibit the *states* from adopting an established religion, and many states did in fact continue to have established churches for some time, until the Supreme Court decided to apply the clause to the states via the Fourteenth Amendment—an amendment which was adopted in 1868 in the aftermath of the Civil War—pursuant to what is referred to as the “incorporation doctrine.”¹³ The Free

¹³ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Exercise Clause, by contrast, prohibits the legal suppression of any religion or religious institution such as had occurred, for example, with respect to Catholics and Protestants in many countries in Europe in the aftermath of the Reformation or for Jews or Muslims in the many centuries before that. But of course neither “establishment” or “free exercise,” much less “religion,” is defined by the provision.

One last point bears noting. In the U.S. legal system, the courts are prohibited from issuing advisory opinions either supporting or refuting some particular interpretation of the Constitution or federal statute. Rather, courts are constrained by the Case or Controversy Clause of Article III of the Constitution which limits the jurisdiction of the judiciary. This is the constitutional provision which mandates the procedural posture by which claims are heard and decisions rendered by the courts. Thus, an argument regarding the alleged unconstitutionality of some state or federal law or regulation must pertain to a specific criminal charge against a specific criminal defendant, or alternatively a specific civil cause of action against a specific party. As we will see, this “case or controversy” requirement will sometimes affect the way courts frame the legal issues.

1.2 *Reynolds v. United States* (1879)

The first case to be discussed, *Reynolds v. United States* (1879), was in fact one of the very first federal cases to take up the issue of religious free exercise under the First Amendment. At its most basic level, the case is straightforward. A man was convicted of bigamy, which was against the law, even though he had asserted that polygamy was mandated by his religious beliefs. (The criminal defendant, George Reynolds, was a member of the Church of Latter-day Saints, which until 1890 commended the practice.)

At his criminal trial, Reynolds asked the judge to instruct the jury “that if they found that he had married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be ‘not guilty,’” a request the judge denied.¹⁴ On appeal, Reynolds alleged that the judge committed reversible error in denying this instruction and further alleged that the criminal statute itself was unconstitutional based on the Free Exercise Clause of the First Amendment. The court, however, affirmed Reynolds’s conviction.

In its opinion, the Supreme Court cited a letter written by Thomas Jefferson to a group of Baptists headquartered in Danbury, Connecticut, which had sought Jefferson’s support in their fight to repeal Connecticut’s laws pertaining to religious establishment.

As quoted by the court, the letter states:

Believing with you that religion is a matter which lies solely between man and his god; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, —I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.¹⁵

The court continued, “Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power

¹⁴ Reynolds v. United States, 98 U.S. 145 (1879).

¹⁵ Reynolds, 98 U.S. at 164. Jefferson borrowed—given his audience, this was likely knowingly—the phrase “wall of separation” from the writings of Roger Williams, a founding figure for American Baptists. For Williams’s original use of the phrase, see *The Complete Writings of Roger Williams*, 1: 392.

over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”¹⁶

The court reviewed the social and legal opprobrium associated with polygamy in English law and stated that “it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.”¹⁷ Then, in a passage that has echoed through the cases in this area of jurisprudence ever since, the court stated:

Laws are made for the government of actions, and *while they cannot interfere with mere religious belief and opinions, they may with practices*. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? *To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself*. Government could exist only in name under such circumstances.¹⁸

It is important to note that the case arose in the federal territory of Utah and was decided under the federal law applicable to such territories, outside the jurisdiction of any state. It was only this circumstance that allowed the U.S. Supreme Court to consider the application of the Free Exercise Clause to the case, as the First Amendment had not yet been applied to the states. This limiting circumstance notwithstanding, however, under the interpretative principle of *stare decisis*, the “beliefs/practices” distinction announced

¹⁶ *Reynolds*, 98 U.S. at 164.

¹⁷ *Reynolds*, 98 U.S. at 165.

¹⁸ *Reynolds*, 98 U.S. at 166–67 (emphasis added).

by the court in its interpretation of the Free Exercise Clause has continued to govern, or at least influence, how courts have considered the application of this clause through to the present day.

Similarly, there was obviously nothing about the letter that Jefferson wrote the Danbury Baptists which would give it any legally binding weight whatsoever; it was, after all, merely a statement of his personal opinion, even though he was the sitting president at the time. Nonetheless, once it was quoted and endorsed by the court in *Reynolds* as the operative statement of intent behind the Free Exercise Clause, it acquired the weight of Supreme Court precedent—another statement which many courts since 1879 have been forced to grapple with if not, in recent decades, honored.

1.3 *United States v. Seeger* (1965)

The second case is *United States v. Seeger* (1965). This is actually a set of cases, referred to by the name of just one of the criminal defendants, Daniel Seeger, all pertaining to the assertion by certain individuals that their pacifist beliefs should exempt them from being conscripted into military service, persons commonly referred to as conscientious objectors. The problem was that the federal statute at issue only allowed conscientious objector status for those whose objections to military service were grounded in “religious training and belief,” though it had lately been amended to require that belief be related only “in a relation to a Supreme Being” rather than any conventionally theistic understanding of “God.”¹⁹ Note that this meant the case was a question of statutory interpretation, *not* a question of interpreting either of the First Amendment’s Religion Clauses. Under the statute, those whose objections were rooted in

¹⁹ *United States v. Seeger*, 380 U.S. 163, 165.

a “personal moral code” were not eligible for the exemption, nor were those whose objections were “essentially political, sociological, or philosophical,” rather than religious.²⁰

In its opinion allowing Seeger to qualify for conscientious objector status, the court outlined the history of such exemptions under U.S. law and custom and found them to be of longstanding and common acceptance. But the evolution of the nature of religious beliefs created a two-fold problem. First, membership in a religious organization had become more fluid than it was in earlier eras, thus making it harder for persons to point to, say, their membership in “religious denominations opposed to the bearing of arms” as evidence they were “prohibited from . . . [military service] by the articles of faith of their denominations,” as had been required by the relevant law during the Civil War.²¹

But secondly, the nature of religious belief itself had evolved away from the classical theism that was presumed by earlier exemptions for conscientious objectors. The court quoted directly from Paul Tillich’s *The Shaking of the Foundations*, “And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation.*”²² The court also favorably quoted ethicist David Saville Muzzey, “Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience.”²³

²⁰ *Seeger*, 380 U.S. at 165.

²¹ *Seeger*, 380 U.S. at 171.

²² *Seeger*, 380 U.S. at 187, quoting Tillich, 57 (emphasis added by the court).

²³ *Seeger*, 380 U.S. at 183, quoting Muzzey, 95.

For considering future cases under the conscientious objector statute, the court announced an “objective” test, namely, “does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”²⁴ Moreover, the court expressly prohibited distinguishing between “externally and internally derived beliefs.”²⁵ In the case of Seeger himself, raised Catholic and an active volunteer for Quaker causes, the court held that it was sufficient that “he did not disavow any belief ‘in a relation to a Supreme Being’ . . . [and] indeed . . . stated that ‘the cosmic order does, perhaps, suggest a creative intelligence.’”²⁶

It is easy to be sympathetic to the dilemma facing the court, forced to apply an exemption only eligible to religious persons during an era when the nature of religious belief and church membership was changing dramatically. As if to highlight the tension inherent in the age, the court quoted from the Vatican II declaration *Nostra aetate* [Declaration on the Relation of the Church with Non-Christian Religions], still in draft form at the time: “The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men.”²⁷ If the Catholic church is moving towards respecting the sincerely held beliefs of all persons, the court seemed to be saying, surely we should be moving in that direction as well.

But already we can see the tension between *Reynolds* and *Seeger*. The danger identified by the court in *Reynolds*, that each person might become a law unto himself,

²⁴ *Seeger*, 380 U.S. at 184.

²⁵ *Seeger*, 380 U.S. at 186.

²⁶ *Seeger*, 380 U.S. at 187.

²⁷ *Seeger*, 380 U.S. at 182.

was a real one. As long as the courts had been able to identify some religious institution to which the individual was asserting a loyalty superior to that owed the government, the courts could hope that at least *some* institution was providing a check on the individual, even if it wasn't the state. With the membership boundaries of religious institutions becoming more permeable and religious belief itself becoming more subjective, however, such hopes were becoming more illusory by the decade if not the year.

The opinion in *Seeger* began with a soaring paean to the conscience, affirming that “in the forum of conscience, duty to a moral power higher than the State has always been maintained”²⁸ and quoting an essay written in 1919 by Harlan Fiske Stone, who later would serve as chief justice from 1941 to 1946:

Both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.²⁹

In the face of such powerful rhetoric, it would soon be questionable whether any institution could hold the specter of moral solipsism raised by the *Reynolds* court at bay.

1.4 *Wisconsin v. Yoder* (1972)

The third case is *Wisconsin v. Yoder* (1972), where the court allowed an exemption for Amish children from Wisconsin's compulsory school attendance law on

²⁸ *Seeger*, 380 U.S. at 170, quoting Chief Justice Charles Evans Hughes's dissenting opinion in *United States v. Macintosh*, 283 U.S. 605, 633 (1931).

²⁹ *Seeger*, 170, quoting Harlan Stone, “The Conscientious Objector,” *Columbia University Quarterly* 21, no. 4 (October 1919): 269.

religious freedom grounds. (This case again involved multiple criminal defendants, all parents, though the case is collectively named for just one of them, Jonas Yoder.) While on its face, this case may seem as straightforward as the conscientious objector cases in *Seeger*, in fact the issues presented are substantially more complex.

Just the year prior, the court had decided the highly controversial case *Lemon v. Kurtzman* (1971), striking down laws in Rhode Island and Pennsylvania which allowed state funding to pay at least some of the salary of teachers who taught secular subjects in religious schools. Based on the specific issues presented in *Lemon*, the test the court devised in reaching this result was designed for application in deciding whether a law or practice ran afoul of the No Establishment Clause. The specific language of the test will sound familiar to anyone already familiar with the principle of “double effect”: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”³⁰

Over time, the “*Lemon* test” came under critique, often scathing, from conservatives who felt that it interpreted a constitutional provision meant merely to prohibit establishmentarianism instead to favor secularism.³¹ At the same time, however, we can see how it is essentially an outgrowth of the public action/private beliefs distinction made in *Reynolds*. If the public square is “neutral,” then people with their private beliefs can move around it more or less on equal footing. More broadly, if “free

³⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

³¹ Years later, Justice Antonin Scalia memorably referred to the *Lemon* test as “a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993).

exercise” is understood merely as the right to hold private beliefs and to meet at the religious institution of one’s choice several times a week, a neutral public square actually helps *protect* free exercise. Thus the *Lemon* test, if one views free exercise so narrowly, can be understood as an attempt to protect free exercise as much as to prohibit established religion. Thus, for many Protestants living in largely religiously homogeneous settings, this intuitively made sense.

The problem, of course, is that because our lives are not neatly segregated into non-religious and religious spheres, it can be difficult for the state to take account of the very practical aspects of the central role of religion in many people’s lives without appearing to support or endorse religion.³² As a case in point, in applying this test to the facts of *Lemon* itself, the court turned the test into a Catch-22: because the state governments had erected a substantial bureaucratic overview process to ensure that the government did not pay for any religious instruction, the state had inadvertently created an excessive entanglement between the state and religion; the statutes were therefore

³² The history of this tension goes back to the founding era, when many political leaders agreed that established religion, as exemplified by the “Church of England,” should be rejected but could not agree on the alternative schema. There seem to have been advocates for two distinct positions alternative to establishmentarianism: accommodationist and separationist. The accommodationist position advocated a sort of benevolent toleration of religion, where the government supports religion but does so in a neutral way. By contrast, in the view of separationist Thomas Paine, for a government to “tolerate” religion is to presume that a government has the power to tolerate it or not. Writing in 1791, he stated, “Toleration is not the opposite of Intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it.” Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution* (Dublin: 1791), 31. Thus the separationist position, exemplified by Jefferson’s phrase “wall of separation,” held that the government should stay out of the matter completely, not even presuming to “tolerate” religion, and leave the matter to individual person’s (and their consciences) entirely. That said, while it seems clear based on the historical record that Madison and Jefferson endorsed the strict separationist stance, it is not clear whether this position should be read into the Constitution and First Amendment clauses that Madison wrote and Congress and the states adopted and ratified.

struck down. With regard to *Yoder*, however, the court reached (at least in some respects) an apparently opposite result.

During the period from 1852 to 1918, the various states adopted laws requiring compulsory attendance in primary and secondary schools. The law in Wisconsin at the time of *Yoder* required parents to send their children to state schools until the age of 16. Certain Amish families, however, insisted on keeping their children from attending state schools after the eighth grade, and so the parents were convicted of violating the statute. In its simplest terms, there was a set of parents who didn't want to do what the state said they had to, and they cited their religious beliefs as the reason for their non-compliance.

As I say, on its face, a strikingly similar set concerns as the conscientious objector cases in *Seeger*, and as we will see, with a similar outcome. A major difference, however, is that instead of being called on to interpret a federal statute, as in *Seeger*, the court had to interpret the First Amendment Religion Clauses in order to decide if the state statutes at issue were unconstitutional.

In finding that the statutes *were* unconstitutional, the court first stated that “the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”³³

“Thus,” the court continued,

if the Amish 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.³⁴

³³ Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

³⁴ *Yoder*, 406 U.S. at 216.

The court went on to state that this was not the case with the Amish parents who refused to send their children to state schools, citing the “uncontradicted” testimony of “expert witnesses [who were] scholars on religion and education” who had testified at the trial level as to the history of the Old Amish and their “fundamental [religious] belief that salvation requires life in a church community separate and apart from the world and worldly influence.”³⁵ Thus the court found that

the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents’ entire mode of life support the claim that enforcement of the State’s requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents’ religious beliefs.³⁶

Note the last word in this quotation, *beliefs*, and remember the distinction the *Reynolds* court had made between actions, which could be constrained or compelled by state laws, and beliefs, which could not. Here, though, the court admitted that this distinction was not always clear-cut.³⁷ The court also admitted that the statute at issue was “neutral on its face” and therefore did not “discriminate against religions or a particular religion” and did not appear to be “motivated by legitimate secular concerns.”³⁸

So in *Reynolds*, the court refused to allow an exemption to the federal statute prohibiting polygamy despite the conflicting religious beliefs of adherents of the Church of Latter-day Saints, but in *Yoder* the court did allow an exemption to a state statute requiring children to be sent to school through the age of 16, based on the conflicting beliefs of adherents of the Old Order Amish and the Conservative Amish Mennonite

³⁵ *Yoder*, 406 U.S. at 209, 210.

³⁶ *Yoder*, 406 U.S. at 219.

³⁷ *Yoder*, 406 U.S. at 219–20.

³⁸ *Yoder*, 406 U.S. at 220.

Church. Certainly the interests involved are different, between a state interest not just in regulating the marriage relationship but also in combatting the practices of polygamous sects perceived as exploitative—examples ranging from John Humphrey Noyes’s Oneida Community in upstate New York in the mid-nineteenth century to the recent NXIVM movement of Keith Raniere come to mind—versus the state’s interest in compelling an additional several years of attendance at state schools beyond the eighth grade.³⁹ Moreover, given the cynicism, often justified, that seems ubiquitous in political, legal, and religious analysis, it may be easy to attribute the different outcomes to the different degrees of social acceptance accorded respectively to the Church of Latter-day Saints and the Amish, with the former subject to a far more hostile, often fatal, degree of discrimination—or persecution—in the United States.

But in the context of the current discussion, another factor seems equally at play: *the emergence of the “opt-out” conscience*—allowed on an individual basis in the consideration of conscientious objectors under a federal statute in *Seeger* and allowed on a community-wide basis in exempting Amish and Mennonite parents from state compulsory education statutes under the First Amendment’s Religion Clauses. One senses that the proverbial “camel’s nose” may have entered the tent, with the rest of the camel likely to soon follow.

1.5 *Employment Division v. Smith* (1990)

The fourth case to be discussed in this chapter is *Employment Division v. Smith* (1990). With this case, if *Seeger* and *Yoder* represent the camel’s nose of the opt-out

³⁹ The court actually spends a considerable amount of time discussing the state interest at issue. See *Yoder*, 406 U.S. at 221–29.

conscience obtaining recognition in federal law, Justice Scalia, the author of the opinion, comes onto the scene as a camel-herder determined to get the camel out of the tent. As we will see, his efforts in the long term had the opposite effect.

The facts in *Employment Division v. Smith* provide yet another example of the types of cases in which religious liberty issues are adjudicated. Here, individuals asserting their free exercise rights were not criminal defendants but rather persons (Alfred Smith and Galen Black) denied unemployment benefits after having been fired from their jobs as drug rehabilitation counselors for their off-work sacramental ingestion of peyote. Smith and Black's use of peyote was in conformance with their Native American religious beliefs but because the behavior that led to their employment termination, illegal drug use, could be labelled as "misconduct," they were ineligible for the benefits under state law.

In his typically pithy style, Justice Scalia, writing for the majority, addressed the beliefs/acts distinction, stating:

The "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think . . . , that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.⁴⁰

But Smith and Galen, he argued, sought to extend the protection of the Free Exercise Clause "one large step further. They contend," he argued,

⁴⁰ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877–78 (1990).

that their religious motivation . . . places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning.⁴¹

As an example, Scalia stated:

It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.⁴²

Rejecting Smith and Galen’s request for the protection of the Free Exercise

Clause, Scalia held that the clause does not prohibit “application of a neutral, generally applicable law to religiously motivated action” unless that action is “in conjunction with other constitutional protections, such as freedom of speech . . . [or] of the press, . . . or [an otherwise fundamental but unenumerated right such as, citing *Yoder*,] the rights of parents . . . to direct the education of their children.”⁴³

In perhaps the most important—or at least the most quoted—part of the opinion,

Scalia stated:

We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595 (1940): “Conscientious scruples have not, in the course of the long struggle

⁴¹ *Employment Division v. Smith*, 494 U.S. at 878.

⁴² *Employment Division v. Smith*, 494 U.S. at 878

⁴³ *Employment Division v. Smith*, 494 U.S. at 881.

for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).” We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Id.*, at 166-167.⁴⁴

On one hand, one can take Scalia’s analysis of the relevant legal history—which as discussed below, is itself suspect—at face value, as he attempts to draw a straight line from *Reynolds* to the cases of *Smith* and *Galen*, and allow that in the specific area of Free Exercise cases, there is some consistency. Nonetheless, when other areas of the law are placed in the same landscape, a different consistency emerges, one which favors the ability of persons or groups to opt-out of generally applicable laws if they can cite their religious beliefs as the basis.

And just several pages later, sure enough, Scalia admits that even the limited area of Free Exercise cases is not as simple as he has attempted to describe it. From 1963 until the time Scalia was writing this opinion, there existed another legal test, almost a corollary to the *Lemon* test, for application in Free Exercise cases, announced in the case of *Sherbert v. Verner*.⁴⁵ Under *Sherbert*, instead of looking at whether the law was facially neutral, the rule was that “governmental actions that substantially burden a religious practice . . . [had to] be justified by a compelling governmental interest.”⁴⁶

⁴⁴ *Employment Division v. Smith*, 494 U.S. at 887–79.

⁴⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁴⁶ *Employment Division v. Smith*, 494 U.S. at 883.

Scalia tried to marginalize the *Sherbert* test, pointing out that it had only been invoked by the Supreme Court to actually invalidate a law on three occasions, and those only in the context of “state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion.”⁴⁷ He had to admit, however, that the test had actually been used in other cases, even if in those the statute was not invalidated. He also tried to argue that in recent years the test had fallen into disuse.

Nonetheless, Scalia also took aim at the test directly, contending that in the case of Free Exercise cases, it just made no sense. In the context of free speech cases, for example, requiring a “compelling government interest” for the state to justify restricting speech has the laudatory effect of “an unrestricted flow of contending speech”; requiring a “compelling government interest” for a state to justify disparate treatment on the basis of race has the effect of promoting “equality of treatment.”⁴⁸ In situations such as that before the court in *Employment Division v. Smith*, however, regardless of the constitutional garb it was attempting to disguise itself with, what was actually at issue was a pernicious “constitutional anomaly,” namely, “a private right to ignore generally applicable laws.”⁴⁹ But requiring a “compelling state interest” to preclude such private right of exemption from a generally applicable law leads to nothing good.

Moreover, Scalia argued that such an effect could not be precluded by requiring the conduct at issue to be “central” to the person’s religion. “Repeatedly and in many different contexts,” he emphasized, “we have warned that courts must not presume to

⁴⁷ *Employment Division v. Smith*, 494 U.S. at 883.

⁴⁸ *Employment Division v. Smith*, 494 U.S. at 886.

⁴⁹ *Employment Division v. Smith*, 494 U.S. at 886.

determine the place of a particular belief in a religion or the plausibility of a religious claim.” Presciently, he warned that “any society adopting such a system [of allowing exemptions based on individual assertions of subjective religious belief] would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”⁵⁰ And whereas *Seeger* had quoted from Stone’s paean to the individual conscience, here Scalia comes close to countering with a paean of his own, to a pluralist nation of laws:

Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment’s protection of religious liberty does not require this.⁵¹

Nor, one might argue depending on the specific circumstance of the issue, does the Christian conception of the conscience.

1.6 The Religious Freedom Restoration Act (RFRA) and the Religious Land Use Protection and Institutionalized Persons Act (RLUIPA)

Scalia may have won the day with his fellow justices with this legal argument and may even have been right in all the particulars of his warnings, but a number of important constituencies outside that chamber were not persuaded. Groups such as the Baptist Joint

⁵⁰ *Employment Division v. Smith*, 494 U.S. at 888.

⁵¹ *Employment Division v. Smith*, 494 U.S. at 889 (internal quotation marks, citations omitted).

Committee for Public Affairs⁵² began mobilizing in support of legislation to nullify the effect of *Employment Division v. Smith*. James M. Dunn, executive director of the Baptist Joint Committee, known for his bombastic rhetoric, decried the case as an “outburst of judicial activism” whereby the court had “gutted the Free Exercise Clause from the First Amendment.”⁵³ Other groups supporting the effort to reverse *Employment Division v. Smith* legislatively included the National Association of Evangelicals, the American Civil Liberties Union, and Concerned Women for America, soon joined by prominent legal scholars such as Douglas Laycock.⁵⁴

The resulting legislation, known as the Religious Freedom Restoration Act⁵⁵ and referred to by the acronym RFRA, sought to overrule *Employment Division v. Smith* by reinstating through federal legislation the *Sherbert* test used in Free Exercise Clause cases. The problem, however, in colloquial terms, is that the U.S. Supreme Court does not appreciate being told how to do its job. In more formal terms, as the court held in *City of Boerne v. Flores* (1997), in an opinion written by Justice Anthony Kennedy, attempts by Congress to limit how the Supreme Court may interpret the Constitution run afoul of the Constitution’s separation of powers among the branches of government.

So Congress tried again and in 2000 passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), along with amendments to RFRA intended to cure the defects cited by the Supreme Court in *City of Boerne v. Flores* to justify its

⁵² In 2005, the group changed its name to the Baptist Joint Committee for Religious Liberty.

⁵³ Aaron Weaver, “RFRA at 20 Years: Baptist Joint Committee Remains Faithful to Legacy of Ensuring Freedom for All,” *CBF Blog*, June 10, 2014, cbfblog.com/2014/06/10/rfra-at-20-years-baptist-joint-committee-remains-faithful-to-legacy-of-ensuring-freedom-for-all/.

⁵⁴ Robert F. Drinan and Jennifer I. Huffman, “The Religious Freedom Restoration Act: A Legislative History,” *Journal of Law and Religion* 10, no. 2 (1993–1994): 533–34.

⁵⁵ 42 U.S.C. §§ 2000bb–2000bb-4.

invalidation. This time, instead of purporting to instruct the Supreme Court on how to interpret the Constitution—and specifically in what manner or to what extent the Free Exercise Clause limits state laws—Congress limited the application of RLUIPA and the RFRA amendments to areas more specifically under federal jurisdiction, such as federal agencies.

As amended, the operative section of RFRA, 42 U.S.C. § 2000bb-1 (“Free exercise of religion protected”), states in pertinent part:

- (a) In general. Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
- (b) Exception. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
 - (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling governmental interest.⁵⁶

Note the phrases borrowed from the *Sherbert* test: “government shall not substantially burden a person’s exercise of religion” unless there is “a compelling governmental interest” and the method chosen by the government is “the least restrictive means of furthering that compelling governmental interest.” The act further states, “Nothing in this Act shall be construed to authorize any government to burden any religious belief”⁵⁷ and adopts the definition of “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁵⁸

On its face, there is nothing objectionable about this language, and the codification of a preexisting judicial test gives the patina of time-tested wisdom. The

⁵⁶ 42 U.S.C. § 2000bb-1.

⁵⁷ 42 U.S.C. § 2000bb-3(c).

⁵⁸ 42 U.S.C. § 2000cc-5(7)(a). See 42 U.S.C. § 2000bb-2(4).

problems created by RLUIPA and the amended RFRA are subtle ones and not entirely amenable to easy description; nonetheless an attempt at description will be made here in broad strokes. With the *Lemon* and *Sherbert* tests, the Supreme Court attempted to devise analytic tools which, while each one was limited to a specific area of law (the No Establishment and Free Exercise Clauses, respectively), had implicitly grappled with the tension *between* the clauses. In so doing and in furtherance of this attempt at balancing, the court adopted the separationist framework attributed to Madison and Jefferson and first endorsed in constitutional jurisprudence in *Reynolds*.

With the “camel’s nose” of the opt-out individual conscience taking over the area of Free Exercise Clause jurisprudence, Scalia attempted to discard these judicially created tests, so that the Free Exercise Clause could be more directly limited, specifically to those cases where a state law had singled out a religious action for discrimination or suppression. But by this point the opt-out conscience was so entrenched in the social imaginary, and in fact religious belief had become so personalized for many Christians, that popular reaction against Scalia’s rebuffing of the right to “opt-out” under the guise of religious liberty had an inescapable appeal. The original RFRA passed unanimously in the House and 97-3 in the Senate.

But as we will see, as a practical matter, RFRA (either in its original or amended form) acknowledges no such healthy tension between the Religion Clauses but instead tries to tilt the balance as far towards the “free exercise” side of the spectrum as constitutionally permissible. The perversity of how this has played out—predictable to those attentive to the ways religious institutions crave political power and, conversely, politicians seek to leverage the ability of religious institutions to turn out reliable bases of

electoral support—is that under the guise of endorsing the individual religious conscience, RFRA has actually enabled the establishment of majoritarian religion in all but name only.

1.7 *Burwell v. Hobby Lobby Stores* (2014)

With the final two cases, *Burwell v. Hobby Lobby Stores* (2014) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), we enter the last decade and more familiar territory. *Burwell v. Hobby Lobby* involved the collision of interests between, in one corner, several national retailers operated by closely-held corporations whose owners were opposed to certain forms of contraception which prevented an ovum from being implanted (and therefore could be considered moral equivalents of abortion) and, in the other corner, the mandates of the Affordable Care Act that required employers with 50 or more employees to provide employee health insurance and further required that the insurance, among other minimum standards of care, cover the costs of contraception. The court held that under RFRA, the free exercise rights of the employers were violated by the AHA’s contraception mandate, and thus the relevant regulations of the Department of Health and Human Services were struck down.

As a threshold matter, it bears noting that much of the negative public reaction to *Burwell v. Hobby Lobby Stores* was based in incredulity that a corporation could be deemed to have religious free exercise rights, when RFRA itself only refers to the rights of “persons.” For many lawyers, however, this did not seem a great leap. There are many areas of law where the word “person” can be interpreted to mean other than a single human being—in civil rights law, it can mean an entire municipal government—and in fact in deciding this point, the court cited the Dictionary Act of the U.S. Code, an

introductory section of the entire code which provides the default meaning of terms not otherwise defined in specific sections. I do not mean to suggest this point was clearly established, merely that it was not as a general matter a sharp departure.

Relatedly, the court placed great weight on the fact that the corporations at issue were “closely held” corporations, meaning that they were not publicly traded. Specifically, the corporations at issue were owned by families. Granted, the corporations at issue had multi-million dollar annual revenues and employed around 14,000 employees between them.⁵⁹ But from a legal perspective, the corporate form is sometimes understood as little more than a shell that provides certain legal protections in exchange for being subject to tax liability and a few other types of regulations. If, for example, the families ran the businesses as simple partnerships, the default legal form, it seems likely they would have free exercise rights no matter how large they were. Again, the issue is not clear-cut either way.

More important to the relevant discussion, however, is that the case was decided not under the Religion Clauses of the First Amendment but rather under the relevant provisions of RFRA, precisely because the contraception mandate was contained in a federal agency regulation adopted pursuant to the ACA, an act of Congress, and thus was within the permissible jurisdiction of Congress to regulate.⁶⁰ Thus, under the lower standards of RFRA, in contrast to *Yoder*, where the court cited the uncontested expert testimony of scholars of Amish and Mennonite religious history, in *Burwell v. Hobby*

⁵⁹ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 700, 702 (2014).

⁶⁰ *Burwell v. Hobby Lobby Stores*, 573 U.S. at 696.

Lobby Stores the court only cited a website and a corporate mission statement as sufficient proof of the employers' sincere religious beliefs.⁶¹

To be fair, the court placed great weight on the fact that HHS had set up a regime for accommodating the objections of non-profit corporations to the contraception mandate and thus held that, regardless of any balancing of the personal or governmental interests at stake, HHS had failed to provide the employers with the “least restrictive means” for effecting the government interest in providing reproductive health care. In this case, the “least restrictive means,” according to the court, would simply have meant making the same accommodation already available to non-profit corporations available to closely held for-profit ones also.

It also seems at least plausible that the court's decision was affected by the fact that many in the United States continue to oppose abortion on religious grounds; the court may have been informally but dispositively taking judicial notice of this fact without saying so. That is, the court may have been acknowledging that opposition to abortion remains a core religious belief for many Christians, despite the lack of any expert testimony to that effect and despite any requirement in RFRA that the religious belief at issue be central. But the court did nothing to rein in concerns about making the invocation of “free exercise” rights completely subjective, raising the question of whether RFRA is anything other than a license for the Supreme Court to decide without any substantive guardrails what constitutes acceptable religiously based actions and what does not. Writing for the majority, Alito scoffed at the idea, but he failed to answer the

⁶¹ *Burwell v. Hobby Lobby Stores*, 573 U.S. at 700 n12, 701–3.

question either, instead deflecting attention to the exemption HHS allowed for non-profits.⁶² The question remains, then, for another day.

1.8 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018)

Fortunately, with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), we return to the relatively more defined area of the First Amendment jurisprudence. Like *Burwell v. Hobby Lobby Stores*, the facts of *Masterpiece Cakeshop* are widely known. A same-sex couple visited a bakery in Colorado to order a wedding cake, but the owner of the bakery refused the request based on his religious objections to same-sex marriage. The baker's refusal to bake and decorate the cake, however, was in violation of a prohibition on discrimination based on sexual orientation applicable to "public accommodations" contained in Colorado's Anti-Discrimination Act. Following the process set forth in that act, the same-sex couple filed a complaint with the Colorado Civil Rights Commission, which referred the matter to an administrative judge for a hearing. The judge ruled in favor of the couple, finding that the shop owner's conduct had been discriminatory, a ruling affirmed on review by the Civil Rights Commission (in two separate hearings) and subsequently by a Colorado appellate court. The U.S. Supreme Court reversed, finding that the shop owner's constitutional rights had been violated.

It bears noting that the court's opinion in *Masterpiece Cakeshop* was written by Justice Anthony Kennedy, the same justice who wrote the majority opinion in *Obergefell v. Hodges*, the case which recognized a constitutionally protected fundamental right to

⁶² *Burwell v. Hobby Lobby Stores*, 573 U.S. at 692–93.

marry for same-sex couples just three years prior.⁶³ With *Masterpiece Cakeshop*, Kennedy was placed in the position of dealing with the fallout of his earlier opinion, and he struck an open-minded tone in doing so.

In finding for shop owner Jack Phillips, Kennedy emphasized several salient factors that, taken together, have the effect of limiting the holding to the facts of the case. First, Kennedy suggested that the nature of providing a custom-decorated cake, even without any writing, is a creative act implicating the First Amendment's free speech protections, not just Phillips's free exercise rights.⁶⁴ Second, and perhaps most importantly for Kennedy, the court found that Phillips was subjected to explicit religious discrimination at his hearing before the Civil Rights Commission which, regardless of whether it affected the outcome of the hearing, was sufficient to render the process constitutionally deficient.⁶⁵ Third, Kennedy noted that the Civil Rights Commission had allowed other bakers to refuse to sell cakes based on personal objections to the cake being sought, in those cases, cakes with writing opposed to same-sex marriage.⁶⁶ And fourth, at the time Phillips declined to provide the requested cake in 2012, same-sex marriages could not be legally performed in Colorado, and so Phillips's religious objections were in keeping with the laws of the state pertaining to marriage, even if they were contrary to the laws pertaining to discrimination.⁶⁷

⁶³ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁶⁴ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, — U.S. —, 138 S.Ct. 1719, 1723 (2018).

⁶⁵ *Masterpiece Cakeshop*, 138 S.Ct. at 1729–30.

⁶⁶ *Masterpiece Cakeshop*, 138 S.Ct. at 1730–31.

⁶⁷ *Masterpiece Cakeshop*, 138 S.Ct. at 1728.

Throughout the opinion, Kennedy makes clear that there are multiple perspectives worth respecting. For example, early in the opinion he states:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.⁶⁸

Later in the same section, he states:

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. . . .

. . . Any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons.⁶⁹

He concludes the opinion by emphasizing that the case arises in a transitional phase with respect to same-sex marriage:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.⁷⁰

This opinion by Kennedy is thus the perfect note on which to close this chapter.

For setting aside the legal arguments, one is struck by the good faith attempt by Kennedy to encourage all the parties to seek accommodation with one another. Completely absent is the dismissive tone of *Employment Division v. Smith*, where Scalia argued that persons

⁶⁸ *Masterpiece Cakeshop*, 138 S.Ct. at 1727.

⁶⁹ *Masterpiece Cakeshop*, 138 S.Ct. at 1728–29.

⁷⁰ *Masterpiece Cakeshop*, 138 S.Ct. at 1732.

with minority religious beliefs should engage with the political process to seek protection for their religious free exercise or otherwise not be surprised to find themselves out of luck. Also absent is the condescension of Alito in *Burwell v. Hobby Lobby Stores*, where he refused to admit that he was giving weight to subjectively asserted religious objections to abortifacient contraceptives under a statute lacking any meaningful constraints on such assertions, implicitly because they accorded with religious beliefs he shared or at least to which he was sympathetic.

In this light, *Masterpiece Cakeshop* can be read as an attempt by Kennedy to move beyond the individualist understandings of the conscience and the problems created by such understandings for religious liberty jurisprudence—though unfortunately he fails to conclusively resolve those problems, either. It is the project of the chapters that follow to construct a theological understanding of the conscience that might support the path Kennedy began to clear.

2.0 CHAPTER 2: AN OVERVIEW OF THE HISTORY OF THE CONSCIENCE IN WESTERN CHRISTIANITY UP TO THE MID-EIGHTEENTH CENTURY

In this second chapter, we turn to the history of the conscience in the Western Christian tradition, from the biblical tradition through to the mid-eighteenth century and the founding of the United States. As discussed in chapter 1, references to the conscience in current legal discourse have become almost shorthand for unapologetic individualism demanding the garb of religious protectionism. But as discussed in this chapter, the historical understanding of the conscience is different than this legal usage suggests. Whereas previous understandings of the conscience postulated its authority to *bind* the will, claims of conscience are now often the scrim used to *shield* the will, resulting in the individual's unchallengeable right to "opt-out" of otherwise generally applicable requirements.⁷¹

In the United States, this "opt-out" conscience is largely a post-World War II development, though to be fair, this individualist understanding of the conscience does have roots in older notions of conscience, including those that informed the understanding of religious liberty enshrined in the Constitution and First Amendment. That said, the historical development of the conscience in the Christian tradition does not provide the unambiguous support for the individualist conscience that is often assumed.

For example, Martin Luther and the Protestant Reformation are often cited as the originating source for an individualist understanding of the conscience in the theological tradition. But as historical theologian Christine Helmer has persuasively argued,

⁷¹ James F. Keenan, SJ, "Redeeming Conscience," *Theological Studies* 76, no. 1 (2015): 134–35 (critiquing this "opt-out" understanding of the conscience).

contemporary observers must not be too quick to identify “Luther’s breakthrough to be a distinctive Protestant approach, carrying the weight of the history of the Lutheranism that follows.”⁷² He was, after all, an Augustinian monk prior to leaving the Catholic church, and his conception of both the conscience and church-state relations are better understood as developments of rather than a complete break from what came before.⁷³ Given this disconnect between historical assumption and the actual historical development, a reexamination of this development thus seems apt.

Accordingly, this chapter will attempt such a reconstruction, discussing first the biblical tradition and then addressing briefly the contributions of Origen, Jerome, Lombard, Aquinas, the revisions of Luther, and the dispute between Puritan ministers John Cotton and Roger Williams. From here, various parts of the history of the conscience will be taken up as appropriate in subsequent chapters of this dissertation.

To be clear, the aim of this chapter is not to provide a comprehensive history of the conscience for the period at issue. Rather, it is to provide a glimpse of the variety of understandings of the conscience that existed in the Christian tradition prior to the time the conscience became stabilized in the Protestant tradition as the individual conscience or, alternatively, in the moral manuals of the Catholic tradition in its syllogistic function.

This reconstruction is admittedly a mix of synthesis and analysis. Any of these developments considered alone could fruitfully be the object of extended analysis, but there is also value in placing them in a concise trajectory to help understand the overall contours of the relevant concerns at issue as theories pertaining to the conscience were

⁷² Christine Helmer, *The Trinity and Martin Luther*, rev. ed. (Bellingham, WA: Lexham, 2017), 8.

⁷³ *Ibid.*, 8–9.

successively revised over time. Motivating this effort is the belief that before attempting to construct an understanding of the conscience which moves beyond the individualism that has become its signal feature in the modern era, it is helpful (and methodologically important) to revisit certain significant steps that led to the modern era's threshold—to lay the groundwork for determining what might be retrieved, what might be improved, and what might be intentionally pruned away.

2.1 The Biblical Tradition

In the biblical tradition, explicit references to the conscience are sporadic, but when they do occur, the conscience is often—with notable exceptions in the writings of Paul, discussed below—a source of distress for one who has acted wrongly, which in turn helps determine the wrongness of the act. But it was not a source of prospective moral guidance; for that, one should look to heaven.

In the Hebrew Bible, there isn't even a word for the conscience. Instead the focus is on the heart (Hebrew לב or לבב, vocalized as *lēv* or *lēvāv*) as the seat of morality. In his study of theological anthropology in the Old Testament, German Hebrew Bible scholar Hans Walter Wolff describes the heart as “the organ of knowledge, with which is associated the will, its plans, decisions and intentions, the consciousness, and a conscious and sincerely devoted obedience.”⁷⁴ Similarly, *The Hebrew and Aramaic Lexicon of the Old Testament* lists thirteen separate meanings of לב, including “one's inner self,” “inclination, disposition,” determination, courage,” “will, intention,” “attention,

⁷⁴ Hans Walter Wolff, *Anthropology of the Old Testament*, trans. Margaret Kohl (Philadelphia: Fortress, 1974), 55.

consideration, reason,” and “mind in general,” before coming to “conscience.”⁷⁵

Conversely, there is more than just the heart that is involved in moral discernment.

According to Wolff, other important elements of theological anthropology in the Hebrew Bible include the soul, the flesh, the spirit, and the gut.

Nonetheless, without engaging in an exhaustive word study, it is helpful to review just a few examples of how the “heart” is understood in the Hebrew Bible. The first of these occurs in Genesis, before God destroys human civilization by sending a horrific flood to cover the land. The text says that God saw that “every inclination of the thoughts of their hearts [of the humans living before the flood] was only evil continually” (Gen. 6:5). Here, the phrase “thoughts of their hearts” indicates something closer to the intellect than the conscience as those terms are used in contemporary moral nomenclature, but there is obviously a moral valence to this “thinking.”

Later in Genesis, during the sojourns of Abraham and Sarah, Abimelech, referred to as the king of Gerar, “took” Sarah into his household, believing her to be single based on Abraham’s representation (20:2). That night, the text says that “God came to Abimelech in a dream,” informing him that he was about to die for taking a married woman as his own (20:3). Abimelech demurred, stating, “I did this in the integrity of my heart and the innocence of my hands” (20:5). And in response, God relents, admitting the truth of Abimelech’s words and thus sparing his life. Here, the concept of the “heart” is closer to the sense we think of as the conscience, the inner moral judge capable of validating one’s intentions and acts.

⁷⁵ Ludwig Koehler and Walter Baumgartner, *The Hebrew and Aramaic Lexicon of the Old Testament*, study ed. (Boston: Brill, 2001), 1:514–15.

In Exodus, the writer shifts the metaphor, referring to the pharaoh's heart as "hardened"—literally, "clined" (Exod. 7–11, 14). This usage conveys a lack of empathy, interestingly echoed in the modern phrase "hard-hearted," but it is something different from a deficient conscience or moral faculty per se.

We get closer to an understanding of the heart as a source of distress for those who have committed some wrong in 1 Samuel, where in a speech to David, Abigail tries to persuade him to spare the lives of the men of her house by suggesting that David not kill them so that he will not be encumbered by a "stumbling block of the heart," or as the translators of the NRSV straightforwardly render the phrase, "pangs of conscience" (1 Sam. 25:31), once he becomes ruler of Israel. This seems very precisely what we think of as the conscience, and Abigail's reasoning will sound familiar to any reader of *The Brothers Karamazov*, where the theme of avoiding some path in order to avoid the future feelings of a guilty conscience is explored in various permutations by Dostoevsky. This exception in 1 Samuel notwithstanding, however, the lack of any consistently significant role for the conscience in the Hebrew canon, as evidenced by even the lack of a word for it, has led many to describe Jewish ethics as theonomous, without any significant role for the conscience as such.⁷⁶

There is, by contrast, a word for the conscience in Greek, συνείδησις, transliterated as *syneidēsis*, from which the word "conscience" comes via its literal Latin translation, *conscientia*. Accordingly, in the Hellenistic period references to the conscience in religious texts begin to take more recognizable form. But at least at first,

⁷⁶ Christian Maurer, "σύννοια, συνείδησις," in *Theological Dictionary of the New Testament* (Grand Rapids, MI: Eerdmans, 1971), 7:908; Gilbert S. Rosenthal, "Is the Concept of Conscience Found in Judaism?" *Conservative Judaism* 64, no. 2 (Winter 2013): 3n.2.

there is no strong sense of the conscience as a source of prospective moral guidance, merely as a retrospective indicator of guilt.

The first century Wisdom of Solomon, for example, refers to the conscience in the typical sense of a source of distress to the wicked (Wis. 17:11). And while the NRSV translators of the Susanna addition to Daniel try to force the link between the conscience and prospective moral guidance when they translate a verse describing the actions of the two lustful elders as “They suppressed their consciences and turned away their eyes from looking to Heaven or remembering their duty to administer justice” (Sus. 1:9), the word συνείδησις does not appear in the Greek, which simply states, “They turned themselves and closed their eyes so as not to see heaven or remember to make right judgment.”⁷⁷ Again, theonomous ethics seems to be the rule.

Of course, συνείδησις also appears in the New Testament, often in this retrospective sense. The writer of Acts, for example, has Paul use the word when he states before the Sanhedrin, “Brothers, up to this day I have lived my life with a clear conscience before God” (Acts 23:1), and later before the Roman procurator, “Therefore I do my best always to have a clear conscience toward God and all people” (Acts 24:16). This sense of a “clear conscience” also appears in 1 Peter (3:16, 3:21), as well as in several of Paul’s pastoral epistles (for example, 1 Tim. 3:9 and 2 Tim. 1:3), though whether Paul himself wrote the pastoral epistles is often disputed.

In Paul’s uncontested letters, though, he seems to understand the conscience slightly differently, as the location of an individual’s moral evaluative capacity which is

⁷⁷ “καὶ διέστρεψαν τὸν ἑαυτῶν νοῦν καὶ ἐξέκλιναν τοὺς ὀφθαλμοὺς αὐτῶν τοῦ μὴ βλέπειν εἰς τὸν οὐρανόν, μηδὲ μνημονεύειν κριμάτων δικαίων.”

not merely restricted to guilt or innocence regarding past actions.⁷⁸ In several instances, he credits the conscience with being able to discern the sincerity and goodness of another *person*, as when he commends himself to the “consciences” of those to whom he is writing (2 Cor. 4:2, 5:11). Other times, he refers to the conscience as the moral guide for present and future *action*, as in the passage most dense with references to the conscience, in 1 Corinthians when discussing food sacrificed to idols (1 Cor. 8, 10).

Paul also contemplates the conscience as strengthening as one grows in Christian faith, but this strength is not related to the steadfastness with which it binds one’s will as today one might assume. Rather, it is related to the fine distinctions in discernment of which it is capable. For example, in the passage just referenced regarding food sacrificed to idols, Paul makes repeated reference to the “weak” conscience of those new to the faith who would be troubled by consuming such food (8:7, 8:10, 8:12), a concern Paul specifies as erroneous (10:25). He further states that there will be times when one should defer to another person’s weaker conscience, though—importantly—the sense of the broader passage implies that Paul would not allow weaker consciences to hold sway always if to do so resulted in a one-way ratcheting towards moral stricture, since to do so would be to abandon one’s freedom in Christ.

At the same time, Paul seems aware of the dangers of relying too heavily on one’s own conscience to acquit oneself, as when he implies in the same letter that judgments of conscience regarding oneself are of limited value. In a sentence using a relatively rare (in New Testament usage) verb form related to συνείδησις, σύννοια, he states, “I am not

⁷⁸ See generally Philip Bosman, *Conscience in Philo and Paul: A Conceptual History of the Synoida Word Group*, Wissenschaftliche Untersuchungen zum Neuen Testament 2, bk. 166 (Tübingen: Mohr Siebeck, 2003), 191–275.

aware of anything [in my conscience] against myself, but I am not thereby acquitted. It is the Lord who judges me” (4:4).⁷⁹ And in the pastorals (whose authorship, as noted above, is contested), Paul makes clear that just as a conscience is strengthened through growing in faith, it can likewise be deadened by one who prefers to act unencumbered by moral guidance (1 Tim. 1:19, 4:2; Titus 1:15).

Turning to Paul’s letter to the Romans, this epistle has only three references to the conscience, and yet each is significant in its own right. The three occurrences are as follows:

- (1) “They show that what the law requires is written on their hearts, to which their own conscience also bears witness” (2:15).
- (2) “I am speaking the truth in Christ—I am not lying; my conscience confirms it by the Holy Spirit” (9:1).
- (3) “Therefore one must be subject, not only because of wrath but also because of conscience” (13:5).

The first is interesting because it both differentiates between and yet relates together the heart and the conscience, the former being so important in the Hebrew Bible. The second is notable as an expansion of the use in 2 Corinthians where Paul commended himself to others’ consciences. Here, in a converse use, he commends his own conscience to confirmation by the Holy Spirit as evidence that others should find him truthful. The third use is perhaps the most remarkable, since here he relates the individual conscience to the secular government authority, which he allows can properly *bind* the conscience. Paul

⁷⁹ This is one of only four occurrences of the verb σύννοια and its related forms in the New Testament. The others are in Acts 5:2, 12:12, and 14:6, where the meaning is “to be privy to information known by another,” a common meaning of the verb in Greek, without the connotation of the conscience implied by the reflexive sense of Paul’s usage. Paul is alluding here to the word’s older meaning in Greek, the knowledge of some fact based on being an eyewitness which would qualify one to testify in a court action. Maurer, 7:899–900. This same sense may be seen as carrying over into Lombard’s understanding of Judgment Day, when the consciences of all will be opened and known to all. *Sent.* IV, dist. 43, c.4; trans. Giulio Silano (Toronto, ON: Pontifical Institute of Mediaeval Studies, 2008), 235.

avoids any problem of conflict between the individual conscience and government authority by specifying that all government authorities have been instituted by God (13:1)—a specification that many later theologians would find vexing.⁸⁰

The difficulties of Paul's resolution to this particular dilemma notwithstanding, however, we see in all these occurrences the tensions and ambiguities that would continue to be present in almost every consideration of the conscience since: the nature of the individual conscience with regard to others in one's community, to God, and to government authority; the relationship between moral evaluation of one's past actions and future moral choices; and the degree to which one's own conscience should bind one's actions when another's conscience or the government authority differs.

2.2 The Early and Medieval Church

Given its roots in a Greek rather than Hebrew linguistic worldview,⁸¹ it is perhaps no surprise that among the first writers in the Christian tradition to build on Paul's description of the role of the conscience was Origen. As a general matter, Origen has been shown to have a tripartite understanding of human nature divided between the *body* and the *soul*, adopted from Plato, to which he added the *spirit* from his understanding of Paul. The soul itself also had three categories for Origen—the Platonic categories of the reason, the irascible part, and the concupiscible (or desiring) part—and is pulled between the body on one hand and the spirit on the other.⁸² To this point, he states in his Romans

⁸⁰ See, e.g., Bernd Wannenwetsch, "Soul Citizens: How Christians Understand Their Political Role," *Political Theology* 9, no. 3 (2008): 373–94.

⁸¹ Bosman, 76–105. See also, e.g., Linda Hogan, *Confronting the Truth: Conscience in the Catholic Tradition* (Ottawa, ON: Novalis, 2000), 38–42; Joyce S. Shin, "Accommodating the Other's Conscience: Saint Paul's Approach to Religious Tolerance," *Journal of the Society of Christian Ethics* 28, no. 1 (2008): 6–9.

⁸² Douglas Kries, "Origen, Plato, and Conscience (*Synderesis*) in Jerome's Ezekiel Commentary," *Traditio* 57 (2002): 73–76.

commentary (written around 246), “Either [the soul] gives assent to the desires of the spirit or it is inclined toward the lusts of the [bodily] flesh.”⁸³

Somewhat remarkably, Origen then goes on to explicitly identify Paul’s category of spirit with the conscience itself. He states:

It appears necessary to discuss what the Apostle is referring to by “conscience,” whether it is something substantially different from the heart or the soul. . . . I perceive here such great freedom [of conscience] that indeed it is constantly rejoicing and exulting in good works but is never convicted of evil deeds. Instead it rebukes and convicts the soul to which it cleaves. In my opinion the conscience is identical with the spirit, which the Apostle says is with the soul as we have taught above. The conscience functions like a pedagogue to the soul, a guide and companion, as it were, so that it might admonish it concerning better things or correct and convict it of faults.

It is of the conscience that the Apostle can say, “For no one among men knows the things of man, except the spirit of man that is in him” [1 Cor. 2:11]. And that is the spirit of the conscience, concerning which he says, “The Spirit himself testifies with our spirit” [Rom. 8:16]. Perhaps this is also the spirit who is united with the souls of the righteous which have shown themselves to be obedient in all matters, on account of which it is written, “Praise the Lord you spirits and souls of the just” [Dan. 3:86 (LXX)]. . . . Perhaps it is the spirit about which it is written, “an incorruptible spirit is in all” [Wis. 12:1].⁸⁴

This certainly qualifies as one of the more robust understandings of conscience in the early Christian tradition about which a great deal might be said, but for present purposes a few observations must suffice. First, Origen’s identification of the conscience with the spirit makes it a primary external interface of the person, with regard both to the Holy Spirit, since the Holy Spirit “testifies with our spirit,” and to the cloud of witnesses comprised of “the souls of the righteous which have shown themselves to be obedient in all matters.” This role of interface is generally consistent with Paul’s understanding of the conscience also, as noted above. And second, by understanding the conscience-spirit as

⁸³ Origen, *Commentary on the Epistle to the Romans: Books 1–5*, 1.18.5; trans. Thomas P. Scheck, FOTC 103 (Washington, DC: Catholic University of America Press, 2001), 94.

⁸⁴ Origen, 2.9.3–4; 132–34.

distinct from and yet at the same level as the soul, Origen places equal if not greater value on the conscience as a guide to moral action—he calls it a “pedagogue to the soul” which “rebukes and convicts the soul to which it cleaves”—than on the rational capacity which obtains within the soul and which will come to such prominence in the later theological tradition.

Jumping forward over a century and a half in time, to around 410 to 414, Origen’s understanding of the conscience is preserved almost perfectly in writings of Jerome, specifically in—of all things—his commentary on Ezekiel.⁸⁵ In fact, it is precisely the vivid symbolism of Ezekiel that triggers Jerome to discuss the conscience, in terms that will prove challenging for later commentators to unscramble.

In Ezekiel 1, Ezekiel describes a near-psychedelic vision of four creatures, each with four faces, that of a human, a lion, a bull, and an eagle. Jerome accordingly begins his commentary on Ezekiel by recounting existing interpretations of the four-faced creatures. Jerome describes the interpretation of those “who follow the foolish wisdom of the philosophers” which understands the human face of the creatures to represent “reason, reflection, mind, and counsel,” the lion face to represent “fierceness, anger, and violence,” and the calf face (since that animal “sticks to the works of the earth”) to represent “lust, excess, and the desire for all pleasures is in the liver.”⁸⁶ Jerome then describes “a fourth principle above and beyond these [first] three,” namely,

⁸⁵ Jerome’s description is so similar to Origen’s that some scholars believe that Jerome may be describing the interpretation contained in a now lost commentary of Origen’s on Ezekiel. Kries, 77–79.

⁸⁶ Jerome, *Commentary on Ezekiel*, 1.6–8a; trans. Thomas P. Scheck, *Ancient Christian Writers* 71 (New York: Newman Press, 2016), 22. Parenthesis in original; bracketed material has been added. For a reprint of the original Latin, see Jerome, *Commentariorum in Hiezechielem libri XIV*, ed. François Glorie, *Corpus Christianorum Series Latina* 75 (Turnhout, Belgium: Brepols, 1964), 11–12.

what the Greeks call συνείδησις.⁸⁷ This is the spark [*scintilla*] of conscience that is not even extinguished in the heart (*pectore*) of Cain after he was expelled from paradise [cf. Gen. 4:12, 16]. By means of it, we perceive that we are sinning when we are overcome by pleasures or by rage, sometimes when we are misled by something that closely resembles reason. They assign this particularly to the [fourth face of the] eagle, which does not mingle with the other three but corrects them when they go astray. Sometimes we read that the eagle is called the “spirit” that “intercedes for us with unutterable groanings” [Rom. 8:26]. “For no one knows what are the things of a man but the spirit which is in him” [1 Cor. 2:11]. And Paul, when he writes to the Thessalonians, prays that this spirit be kept whole and intact along with the soul and body [cf. 1 Thess. 5:23]. And yet, in accordance with what is written in the Proverbs, “When an ungodly man comes into a depth of sins, he despises [them]” [Prov. 18:3], we see that this very conscience falls and loses its place in some people, who are not embarrassed and ashamed even of their transgressions and who deserve to hear, “You had the face of a prostitute, you do not know shame” [Jer. 3:3]. Therefore God guides this four-horse team like a charioteer, and he holds in check the one that runs with steps that are out of control, making it docile and compelling it to obey his command.⁸⁸

Because Jerome seems to be criticizing this interpretation by associating it with “the foolish wisdom of philosophers,” it is difficult to determine whether he is endorsing the understanding of the conscience included here. But regardless, the strength of the imagery is striking.⁸⁹ He describes the conscience as helping us “perceive that we are sinning when we are overcome by pleasures or by rage” or else “misled by something that closely resembles reason”—the eagle face of conscience watching over human rationality and the irascible and desiring passions, an elaboration and elevation in rhetoric from that expressed by Origen in his Romans commentary.⁹⁰

⁸⁷ The accusative case of συνείδησις.

⁸⁸ Jerome, *Commentary on Ezekiel*, 1.6–8a; 22–23; Jerome, *Commentariorum in Hiezechielem libri XIV*, 12.

⁸⁹ If he is responding to Origen’s Ezekiel commentary, this ambiguity may be symptomatic of Jerome’s ambivalence towards Origen more generally, of whom he could be an ardent critic and yet from whom, in the words of his translator, Jerome “seems to have drawn tremendous inspiration. Thomas P. Scheck, introduction to *Commentary on Ezekiel*, by Jerome (New York: Newman Press, 2016), 5.

⁹⁰ Again, if Jerome is responding to Origen’s Ezekiel commentary, this could accord with the fact that Origen wrote his Ezekiel commentary later than his Romans one.

Unfortunately, as Jerome was using a Greek word, συνείδησιν (the accusative case of συνείδησις), in an otherwise Latin text, apparently an anonymous medieval scribe either translated or glossed the word in such a way that it came to be understood as a different word, *synderesis*, a neologism, instead of *syneidēsis/conscientia*.⁹¹ This reading seems to have been based in the (mistaken) belief that Jerome meant some approximation of συντήρησις (*syntērēsis*), from the Greek verb συντηρέω (*syntēreō*), rare in the New Testament, which means “to keep safe, preserve, or treasure.” Regardless, the misreading was not detected for centuries and Jerome’s “watching eagle” took on a life of its own as *synderesis*, dissociated from its symbolic meaning as the conscience proper.

Of course, what is curious about this splintering of meaning is that from the perspective of a contemporary reader aware of this history, it seems obvious from the context of Jerome’s discussion that he was describing the conscience proper, the faculty charged with watching over reason and the violent and lustful appetites. But because of the error that was created in the manuscripts, interpreters were forced to strain to discern a distinction between *synderesis* and the conscience where, of course, Jerome had not intended one.

By the twelfth century, the error had been incorporated into the *Glossa ordinaria*⁹² where it influenced Lombard, who in his *Sentences* understands Jerome as referring to an aspect of reason and not the conscience at all. Discussing the problem of

⁹¹ Michael B. Crowe, “The Term *Synderesis* and the Scholastics,” *Irish Theological Quarterly* 23 (1956): 154–55.

⁹² Crowe, 155; E. Anne Matter, “The Church Fathers and the *Glossa Ordinaria*,” in *The Reception of the Church Fathers in the West: From the Carolingians to the Maurists*, ed. Irena Backus (New York: Brill, 1997), 1:102–3. For a later edition preserving this tradition, see *Biblia latina cum glossa ordinaria: Facsimile Reprint of the Editio Princeps Adolph Rusch of Strassburg 1480/81* (Turnhout, Belgium: Brepols, 1992), 3:224.

whether humans naturally will the good, Lombard refers to “the higher spark of reason [*scintilla rationis*], which, as Jerome says, even in Cain could not be extinguished [and which] always wills the good and hates evil.”⁹³ A near-contemporaneous commentary on Lombard’s *Sentences* by Udo explicitly refers to this *scintilla rationis* as *synderesis*, and by 1217 it was identified with Augustine’s *ratio superior*.⁹⁴ In terms of Augustine’s two-part anthropology of body and soul, this is probably the correct correspondence,⁹⁵ but it is some distance from the position that Jerome himself was describing. It also undoes the work which had been so important to Origen, keeping the Pauline category of spirit (which was externally oriented) distinct from the Platonic body and soul, in favor of Augustine’s deep interiority.

According to Odon Lottin’s influential historical reconstruction, there was also heightened interest during this period in the natural law and how it interacts with reason and the will, starting with Anselm of Laon’s work in the early twelfth-century. These concerns coincided nicely with the split in the understanding of the conscience between *synderesis*⁹⁶ and the conscience proper, so that *synderesis* came to be identified with that inherent orientation to do good and avoid evil, the same orientation that Anselm located in the natural law, while the conscience came to be identified with the syllogistic act of

⁹³ Lombard, *Sent.* II, dist. 39; 197–98.

⁹⁴ Udo, *Summa super Sententias Petri Lombardi* (Paris: [1160–1165?]). See Odon Lottin, *Psychologie et morale aux XIIe et XIII siècles*, vol. 2, *Problèmes de moral* (Louvain, Belgium: Abbaye du Mont César, 1948), 106–22; Crowe, 156.

⁹⁵ On Augustine’s *ratio superior*, see Stephen J. Duffy, “Anthropology,” in *Augustine Through the Ages: An Encyclopedia*, ed. Allan D. Fitzgerald (Grand Rapids, MI: Eerdmans, 1999), 27; Crowe, 156–58.

⁹⁶ As the word “*synderesis*” has been accepted into English as a loan word from Latin, references to *synderesis* in the text are not italicized unless referring to the Latin word specifically.

applying the rationally derived principles of the natural law to the decision at hand.⁹⁷ It was essentially this understanding of synderesis and conscience that Aquinas codified in his *Summa Theologiae*.⁹⁸

Thus, in essence, while theologians of the medieval era may not have replaced Origen and Jerome's faculty of the conscience with reason and the natural law outright, by severing the conscience in two and then identifying one of those derivative parts (synderesis) as the first principle of the natural law and the other (conscience) as its executor, they did reduce the conscience to, respectively, an entry point and auxiliary to reason and the natural law—or more precisely, to the natural law's rationally derived principles—and de facto the church teaching it underlay.⁹⁹ Thus, Aquinas, in his schema for how human anthropology interacts with the natural law, maintains the significance which Origen had given (and Jerome seems have criticized) to the irascible and desiring passions, but he essentially displaces the guardian of the conscience as a check over these passions with the virtue of prudence, the only virtue that is both moral and intellectual, governed by reason.¹⁰⁰ That is, having reducing synderesis to a habit and conscience to an act, for Aquinas only reason-governed prudence could serve as internal maestro and moral guide.

This is not to say that the conscience had only marginal significance for Aquinas, and to be clear, the conscience for Aquinas was not *only* the syllogistic or antecedent

⁹⁷ Lottin, 71–72, 105–8, and 138–57. See Crowe, 161–64; Mary Jo Iozzio, *Self-Determination and the Moral Act: A Study of the Contributions of Odon Lottin, O.S.B.* (Leuven, Belgium: Peeters, 1995), 131–32.

⁹⁸ *ST I*, Q. 79, Arts. 12 (synderesis) and 13 (conscience); *I-II*, Q. 94, Art. 1 (the first precept of the natural law: “good is to be done and pursued, and evil is to be avoided”). See also Aquinas, *De Veritate* Q. 16 (synderesis) and Q. 17 (conscience).

⁹⁹ This was substantially the result of Albert the Great's reliance on Aristotle. See Crowe, 163–64.

¹⁰⁰ *ST I-II*, Q. 58, Art. 3.

conscience, though it was primarily these two. Actually, Aquinas distinguishes three functions of conscience: (1) the “witness” that “recognize[s] that we have done or not done something,” (2) the antecedent “judge that something should be done or not done” which “incite[s] or bind[s]” to action, and (3) the consequent “judge that something done is well done or ill done” which “excuse[s], accuse[s], or torment[s].”¹⁰¹ Thus, while Aquinas did adopt Lombard’s distinction between synderesis and the conscience and, along with many of his time, placed a preeminent significance on reason vis-à-vis the conscience, he still maintained much of the variety that had characterized understandings of the conscience, from Paul to Origen to Jerome.

Moreover, Aquinas had one of the stronger views on the binding nature of conscience for his time, leading to a rare instance of his disagreeing with Lombard. The question was whether one is obliged to follow an erroneous conscience when it disagrees with church teaching. Lombard had argued that one is not obliged to follow one’s conscience in such circumstances; to the contrary, the teaching should be followed. In response, in his commentary on the *Sentences*, Aquinas noted, “Here the Master is wrong.”¹⁰² Instead, he insisted that, in the words of James Keenan, “we ought to die excommunicated rather than violate our conscience.”¹⁰³ Though even here the question is complicated. In the *Summa Theologiae*, for example, when Aquinas was affirming the importance of obeying one’s conscience, he refers to the conscience as “a kind of dictate

¹⁰¹ *ST I*, Q. 79, Art. 13.

¹⁰² “*Hic Magister falsum dicit.*” Aquinas, *Super Sent.*, lib. 4, d. 38, q. 2, a. 4, qc. 3, expos.

¹⁰³ James F. Keenan, SJ, “Conscience,” in *Dictionary of Scripture and Ethics*, ed. Joel B. Green (Grand Rapids, MI: Baker Academic, 2011), 168. See also James F. Keenan, SJ, *Moral Wisdom: Lessons and Texts from the Catholic Tradition*, 2nd ed. (Lanham, MD: Sheed & Ward, 2010), 36n.5; James F. Keenan, SJ, “The Problem with Thomas Aquinas’s Concept of Sin,” *Heythrop Journal* 35, no. 4 (1994): 411.

of the reason” and consistently conflates the difference between “erring reason” and “conscience.”¹⁰⁴

Separately, however, another development—itsself quite major—was occurring which would further tie the individual conscience to church teaching and practice and which over time would elevate the syllogistic role of the conscience above the others. In 1215, the Fourth Lateran Council established the requirement that all Catholics attend priestly confession at least once a year.¹⁰⁵ Previously, confession for laity was encouraged and in some areas required, but it was unclear exactly what the relationship between confession and a person’s justification was—that is, was contrition alone sufficient to justify a person after having sinned, or was confession also required. With the new requirement, the ambivalence was clarified. In the words of religious historian Thomas Tentler, “the sacramental character of penance was emphasized,” and “by the end of the century all the canonists and theologians agreed that sacramental confession was obligatory, divinely instituted, and necessary . . . for the remission of sins, even when the major part of them at the same time held that contrition was the most important and effective part of the Sacrament.”¹⁰⁶

There is wide consensus that this new requirement had a profound impact on a person’s interior understanding of their sinfulness, though different scholars frame the shift slightly differently. Tentler, for example, has identified the two main social and psychological functions of confession and penance during this era as “discipline (or

¹⁰⁴ *ST I-II*, Q. 19, Art. 5.

¹⁰⁵ Fourth Lateran Council (1215), canon 21.

¹⁰⁶ Thomas N. Tentler, *Sin and Confession on the Eve of the Reformation* (Princeton, NJ: Princeton University Press, 1977), 22.

social control) and consolation (or cure of anxiety).”¹⁰⁷ He observes that, to this dual end, “sacramental confession was designed to cause guilt as well as cure guilt.”¹⁰⁸ Theologian Stephen Pattison makes a similar observation but differentiates between the roles of shame (which is about the person) and guilt (which is about the act).¹⁰⁹ He argues that the “system of confession and penitence [is] fuelled by *shame* but articulated as guilt.”¹¹⁰ That is, while the sacrament offers the possibility of forgiveness of a sinful act, it implicitly depends on leaving the underlying feelings of shame intact as an impetus for the believer to constantly examine his or her conscience and return to confession as needed accordingly.

Similarly, Hungarian philosopher Ágnes Heller relates shame to the external authority of community but relating guilt to the internal authority of conscience. Thus, the rise of mandatory confessional practice during the Middle Ages, with its *externally* imposed emphasis on *internal* monitoring of moral behavior, represented a leveraging of one mechanism (shame) to induce the other (conscience). As a result, she argues, individuals “learned to concentrate on the internal voice and to listen to it.”¹¹¹

To be sure, the church tried to train the individual conscience to stay within reasonable limits. The “serious spiritual vice” of an overactive conscience was described

¹⁰⁷ Ibid., xvi.

¹⁰⁸ Ibid., xiii.

¹⁰⁹ Carl D. Schneider, “Shame,” in *Dictionary of Pastoral Care and Counseling*, expanded ed., ed. Rodney J. Hunter (Nashville: Abingdon, 2005), 1160–63.

¹¹⁰ Stephen Pattison, *Shame: Theory, Therapy, Theology* (New York: Cambridge University Press, 2000), 245 (*italics added*).

¹¹¹ Ágnes Heller, “Five Approaches to the Phenomenon of Shame,” *Social Research* 70, no. 4 (Winter 2003): 1028. For a discussion of the concomitant twelfth-century discoveries of the self and of consciously chosen community, arguably conditions precedent for the rise of the inner conscience during the thirteenth, see Caroline Walker Bynum, “Did the Twelfth Century Discover the Individual?” *Journal of Ecclesiastical History* 31, no. 1 (January 1980): 1–17.

as “scrupulosity,” and excessive frequency of confession was discouraged,¹¹² though many understood scrupulosity signaled the need for consolation more than reprimand. Nonetheless, the church, having established that the “promptings [of the conscience] constitute moral obligation,”¹¹³ allowed that if a person felt obligated by conscience to confess immediately they were generally permitted to do so. According to Tentler, the net outcome was a plethora of “scrupulous monks who ran to [confession] continually, . . . and [the] worldly laymen who stayed away” except once a year.¹¹⁴ More broadly, having formalized the role of the individual conscience with an authorized mandate, it was unclear whether the church could keep an effective check on what it had started. Discouraging scrupulosity may have been the best it could do.

Thus to summarize, what began for Paul as a dynamic, multifaceted, somewhat ambiguous conscience had, by the end of the Middle Ages, mostly been broken down into three parts: *synderesis* (the basic human inclination to obey the natural law), the *sylogistic antecedent conscience* (responsible for the prospective application of natural law principles), and the *consequent conscience* (responsible for monitoring one’s actions and behaviors for the need to attend priestly confession). There was also a decreased emphasis on the difference between an erroneous conscience and a true one or on the importance of strong (as opposed to weak or “tender”) conscience, as Aquinas had determined that in any case a conscience had the same binding effect.

Regulating these functions was the institution of the Catholic Church. Looking ahead to Martin Luther, however, we can see that it was an open question as to whether

¹¹² Tentler, 76.

¹¹³ *Ibid.*, 74.

¹¹⁴ *Ibid.*, 78.

(or more accurately, for how long) this regulating effect was sustainable. The effects of an increased attentiveness to the interior voice of conscience encouraged by the requirement for private confession, combined with the decreased effectiveness of penance in ameliorating the consequent conscience and the underlying feelings of shame that it triggered, seemed to invite substantive theological response. Meanwhile, the allowance that even an erroneous conscience must be followed, combined with decreasing deference to the Church as legitimate instructor of the conscience—a result of the Church’s perceived political machinations, as well as its debt-driven interest in allowing indulgences—opened the possibility that this theological response might come from someone at least slightly outside the structures of power. The concept of the conscience was thus about to strain the bounds of the theological tradition that had given it shape and trajectory.

2.3 Martin Luther

Martin Luther presents a conundrum for those interested in the historical development of the conscience. On one hand, his famous (and possibly apocryphal) declaration at the Diet of Worms in 1521, “It cannot be either safe or honest for a Christian to speak against his conscience. Here I stand; I cannot do otherwise,” resulted in his becoming a “poster boy” for freedom of individual conscience. On the other, he is widely regarded as having marginalized the significance of the conscience in the life of believers, insofar as he emphasized that a “troubled conscience” was a sign that one was still looking to be saved by works rather than faith.

Making the matter more complex, scholars have recognized that while the concept of the conscience does a considerable amount of theological work for Luther in various

aspects of his thought, he seems to have never made it the direct object of significant study.¹¹⁵ Thus, to come to terms with this absence, and to make sense of the work that the concept does for him, scholars have attempted to “piece together in some sort of systematic way” the disparate ways that Luther uses the conscience “in order to come to a coherent picture of [its] nature and function.”¹¹⁶

The problem with such a speculative endeavor is filtering out one’s own theological presupposition to read Luther one way or another. Historical theologian Christine Helmers has attempted to recover the “medieval Luther” and to move away from understanding Luther as a prototypical Modern producing Protestant theology out of whole cloth. A starting hermeneutic for interpreting Luther, then, might be to assume that he is medieval or scholastic in his theological worldview except when he explicitly isn’t—analogous to legal canons of construction such as the “clear statement” rule which presume a general principle of conservation with regard to common law precedent unless a legislature or court provides a clear statement to the contrary¹¹⁷—understanding that during this period of “punctuated equilibrium” in the history of Christianity, Luther’s theology was a moving target.

A more obvious but, counterintuitively, also more overlooked point is that Luther’s theological worldview was traditionally *Catholic* except when it wasn’t, even when he was reacting to numerous aspects of received orthodoxy. After all, Luther

¹¹⁵ Randall C. Zachman, *The Assurance of Faith: Conscience in the Theology of Martin Luther and John Calvin* (Minneapolis: Fortress, 1993), 20.

¹¹⁶ Ibid.

¹¹⁷ On looking to the legal tradition for guidance on methodological guidance in theology, see M. Cathleen Kaveny, “Law and Christian Ethics: Signposts for a Fruitful Conversation,” *Journal of the Society of Christian Ethics* 35, no. 2 (Fall/Winter 2015): 3–32.

wasn't excommunicated until he was aged thirty-seven, more than fifteen years after entering the monastery at Erfurt, by which time he had two degrees in theology and had been teaching at Wittenberg for nine years.

The current consensus regarding Luther's overall understanding of the conscience in rough outline—and thus the starting point for our inquiry—is as follows. Rather than being justified through confession and penance, believers are justified by faith in Christ alone—thus no indulgences, and no purgatory. A troubled conscience may be triggered by a sinful action, but this is not an indication of the need to attend confession; rather, this is an indication of one's persisting belief in the type of judging god that the judging conscience imagines God to be, one who is satisfied through good works. But this is precisely who God as revealed in Christ and as given theological description in the New Testament, especially the Gospels and the writings of Paul, is understood *not* to be. As summarized by Randall Zachman:

The conscience cannot help but picture God as one who is wrathful to those who feel their sins but merciful to those who are aware of their righteousness. . . . However, the notion that the conscience invents about God is a false and empty one. The truth is that God is only merciful to those who feel and confess their sins, while God is wrathful toward those who attempt to justify themselves on the basis of works. . . . Such a thought could never arise from the conscience's own testimony to itself concerning the will of God toward it. . . . The trust that God has mercy on those who feel and confess their sins can neither arise from nor be grasped by the testimony of the conscience. It must be revealed to the conscience by the external testimony of the Word of God and sealed on the conscience by the internal testimony of the Holy Spirit.¹¹⁸

In Zachman's description, for Luther it is not so much that the conscience is unreliable as that its function is more oblique than direct. That is, its purpose is not to help a person follow the law but rather to lead to an understanding of the futility of seeking justification

¹¹⁸ Ibid., 39.

through the law—thus helping one to see the need to seek justification through faith in Christ instead.

There is, however, another strain of Luther's thought regarding the conscience in tension with the dominant strain described by Zachman. In this strain, identified by religious historian Michael Baylor, Luther should be understood as maintaining many aspects of the traditional understanding of the conscience but shifting its object from the act to the person.¹¹⁹

A central text for Baylor is Luther's 1521 "A Sermon on the Three Kinds of Good Life for the Instruction of Consciences"¹²⁰ delivered shortly before he appeared at the Diet of Worms. In the sermon, Luther describes three kinds of consciences—really, stages in the development of the conscience—corresponding to the courtyard, nave, and sanctuary, respectively, of the tabernacle God instructed Moses to build. Starting with the outermost area, Luther compares the courtyard to that kind of conscience concerned with external works and argues that this approach cannot help but create a rough equivalence among categories of acts. This is because the set of heuristic concerns for this kind of conscience occludes estimation of the relative moral value of different types of human acts. Moreover, the courtyard *may* serve as the staging area for proceeding inward, but there is nothing intrinsic to it that makes further procession necessary or even likely,

¹¹⁹ Michael G. Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* (Leiden: Brill, 1977), 200–1.

¹²⁰ Martin Luther, "A Sermon on the Three Kinds of Good Life for the Instruction of Consciences," (1521), in *Luther's Works* (American Edition), vol. 44, ed. James Atkinson (Philadelphia: Muhlenberg, 1966), 231–42.

since one is just as likely to become preoccupied with trivial matters and proceed no further.¹²¹

The second kind or stage of the conscience, the nave, is properly considered within the domain of faith, unlike the courtyard. This type of conscience is concerned with “teaching, works, and concepts of conscience which are really good,” which Luther specifies to include virtues such as “humility, meekness, gentleness, peace, fidelity, love, propriety, purity, and the like.”¹²² He states:

It is here that a man gathers up the corn and casts away the chaff. . . . It is here that a man must fight against pride, avarice, immodesty, anger, hatred, and the like. . . . Here we see what is the proper road to piety and holiness, for we see for ourselves that those who practice this become truly righteous, but those who practice “churchyard” piety do not. That proves that this way and not the other must be the right way.¹²³

Luther’s third area, the sanctuary or “holy of holies,” is the location of one’s personal encounter with God. It is where Christ has been set before us, and where we have the opportunity to respond to God’s promise that whoever “denies himself and calls upon Christ in genuine trust is certain to receive the Holy Spirit.”¹²⁴ Luther states, “This shows what a conscience is and what good works are! It is to go into the *Sanctum sanctorum*, to pass into the sanctuary. That is the last thing on earth that any man can do. This is the road to heaven.”¹²⁵ Luther insisted on the interrelatedness and indivisibility of the second (the nave) and third (the sanctuary) types of conscience and explicitly avoided the implication that, having reached the *Sanctum sanctorum*, there was no more need for

¹²¹ Ibid, no. 3–7.

¹²² Ibid., no. 8.

¹²³ Ibid.

¹²⁴ Ibid., no. 11.

¹²⁵ Ibid.

the virtues of the nave. Rather, regarding the “teaching, works, and concepts of the conscience” associated with the nave, Luther said, “Here must we keep ourselves fully occupied as long as we live, so as to forget the churchyard altogether and not want it.”¹²⁶

Baylor describes the distinction between the first two kinds of consciences as a distinction “between external and internal works, between outward actions and the interior intentions which motivate them,” and asserts that Luther “stressed that it is about the quality of the intention that the conscience ought to be occupied.”¹²⁷ Perhaps a better description, however, might be to say that Luther is rejecting a deontological approach unable to distinguish moral laws from ceremonial laws pertaining to “sacred foods, sacred garments, sacred times, sacred places”¹²⁸ in favor of a teleological virtue approach to moral actions which *can* make such distinctions—an approach which includes internal elements but to which it is not reducible.

It is important, however, to not read this sermon of Luther’s as privileging the internal to the *exclusion* of the external. Unfortunately, in the centuries after Luther, in light of his marginalization of the consequent conscience, discussed by Zachman, it became possible to do just that, essentially negating the importance of the “nave” function of the conscience. In many ways, such negation was the result of reading Luther through the lens of the “warmhearted” spirituality associated with German Pietism that came a century later. But such a reading obscures the enactedness of the virtues which Luther associates with the “nave” and which he credits as leading the way to the fundamental response made in the *Sanctum sanctorum*.

¹²⁶ Luther, “Sermon for the Instruction of Consciences,” no. 8.

¹²⁷ Baylor, 198.

¹²⁸ Luther, “Sermon for the Instruction of Consciences,” no. 12.

Stepping back for a moment, we can see that while Luther's primary interest in rethinking the conscience may have been remedying his dissatisfaction with the mechanisms of confession and penance as they implicated the consequent conscience, in reconfiguring this particular aspect of the conscience, he was implicitly rethinking the other aspects also, including the antecedent conscience and its relationship to the natural law. Synderesis as that concept had been understood by the scholastics no longer had any notable role to play, since Luther came to believe that humans naturally seek personal advantage—*this* is the natural law—not the good, even in its natural (as opposed to supernatural) form.¹²⁹

Seemingly to compensate, Luther understood the conscience, “the source of the most powerful emotional experiences,” as including both cognitive and affective elements—the affective elements being principally the inclination to be “received and embraced by God,” and the shame and guilt experience by a troubled or bad conscience.¹³⁰ And while the antecedent conscience was endorsed by Luther in terms of virtue and one's fundamental response to God, any understanding of the conscience as an act resulting from a syllogistic conclusion from rationally derived principles (as it was for the scholastics) was upended, leaving the conscience without any clearly identified external referent other than the Holy Spirit and the Word of God.

Calvin would later call this understanding of the conscience “unbound,”¹³¹ and for both Luther and Calvin, the necessity of preserving the individual conscience's ability to respond to God without coercion necessarily required some degree of church-state

¹²⁹ Baylor, 185–86.

¹³⁰ Baylor, 208, 158, 210.

¹³¹ Calvin, *Instit.* 3.19.16.

separation—though it would be anachronistic to refer to their position as “church-state separation” as that is understood today. Thus, freedom of conscience became the essential basis of Luther’s two kingdoms doctrine, as when he states, “How [each person] believes or disbelieves is a matter for the conscience of each individual, and since this takes nothing away from the temporal authority the latter should be content to attend to its own affairs and let me believe this or that as they are able and willing, and constrain no one by force.”¹³² By the same token, as Brent Sockness has observed, Luther’s two kingdoms doctrine is “notoriously difficult and controversial,” “lack[ing] a stable referent in Luther’s writings,”¹³³ and this is likely due at least in part to the underlying instability in his conception of the conscience.¹³⁴

2.4 The Aftermath of Luther’s Conscience

Over the next century, as the translation of the Bible into the vernacular became an increasingly important engine of the Reformation, the Reformers’ belief that the Holy Spirit and the Word of God were the only things that could bind the individual conscience continued to ensconce itself as a central element in Protestantism. The precise mechanism of this binding, however, continued to be ambiguous and contested, a

¹³² Martin Luther, *Temporal Authority: To What Extent It Should Be Obeyed*, in *Luther’s Works* (American Edition), vol. 45, ed. Walther I. Brandt (Philadelphia: Muhlenberg, 1962), 108.

¹³³ Brent W. Sockness, “Luther’s Two Kingdoms Revisited: A Response to Reinhold Niebuhr’s Criticism of Luther,” *Journal of Religious Ethics* 20, no. 1 (Spring 1992), 93, 99–101.

¹³⁴ On Calvin’s views, which are akin to Luther’s, see William R. Stevenson, Jr., “Calvin and Political Issues,” in *The Cambridge Companion to John Calvin*, ed. Donald K. McKim (New York: Cambridge University Press, 2004), 173–87; Christoph Strohm, “Calvin and Religious Tolerance,” in *John Calvin’s Impact on Church and Society, 1509–2009*, ed. Martin Ernst Hirzel and Martin Sallmann (Grand Rapids, MI: Eerdmans, 2009), 175–91; Mario Turchetti, “The Contribution of Calvin and Calvinism to the Birth of Modern Democracy,” in Hirzel and Sallmann, *John Calvin’s Impact on Church and Society*, 192–217; and Matthew J. Tuininga, *Calvin’s Political Theology and the Public Engagement of the Church: Christ’s Two Kingdoms*, Cambridge Studies in Law and Christianity (New York: Cambridge University Press, 2017).

theological flashpoint that was brought to North America by the English Separatist Puritans who settled here.

Two primary combatants in this dispute were Puritan ministers John Cotton and Roger Williams. Cotton, who coined the term “Congregationalist” to signify that North American Puritans should define themselves not by their desire to “purify” the Church of England but rather by their preferred form of polity,¹³⁵ insisted that it was not only permissible but vital for the government to punish religious dissent. In fact, argued Cotton, such efforts were an attempt to *protect* the dissenter’s conscience by properly informing it, not to suppress it. He stated:

First, it is not lawful to persecute any for conscience sake rightly informed; for in persecuting such, Christ himself is persecuted in them, Acts 9:4.

Secondly, for an erroneous and blind conscience (even in fundamental and weighty points), it is not lawful to persecute any, till after admonition once or twice: and so [does] the Apostle direct[] (Tit. 3.10, and give[] the reason, that in fundamental and principal points of doctrine or worship, the Word of God in such things is so clear, that he cannot but be convinced in conscience of the dangerous error of his way, after once or twice admonition, wisely and faithfully dispensed. And then if any one persist, it is not out of conscience, but against his conscience, as the Apostle saith, vers. 11. He is subverted and [does] sin[], being condemned of Himself, that is, of his own conscience. So that if such a man after such admonition shall still persist in the error of his way, and be therefore punished, he is not persecuted for cause of conscience, but for sinning against his own conscience.¹³⁶

In reply, Roger Williams decried as “monstrous” this “partiality” towards those of one’s own persuasion and persecution of those different.¹³⁷

¹³⁵ John M. Barry, *Roger Williams and the Creation of the American Soul: Church, State, and the Birth of Liberty* (New York: Viking, 2012), 306.

¹³⁶ John Cotton, “The Answer of Mr. John Cotton of Boston in New-England,” in *The Complete Writings of Roger Williams*, 3:42.

¹³⁷ Roger Williams, *The Bloody Tenent Yet More Bloody*, in *The Complete Writings of Roger Williams*, 4:44.

The merits of Williams' critique aside, we can see how easily the conflict arose. Luther and Calvin had reconfigured the conscience, largely decoupling it from all but the Holy Spirit and the Word of God. Neither Reformer had elaborated in theological terms how differences in inspiration or interpretation among Christians were to be resolved, but certainly the church had a central role in this determination. Similarly, they had insisted that the government had no authority to bind individual consciences—only God could do this—but they obviously had not assumed that this equated to disestablishmentarianism either, as Calvin's role in the handling of Michael Servetus's case makes clear. The point for now is not to suggest that Williams' position, the position most congruent with modern liberal sensibilities, was "correct" or not, so much as it is to show that Cotton's position was not at the time inscrutable or patently wrong, given the significant areas of scholastic theology which Luther and Calvin had razed and not fully reconstructed.

The particular thread of Roger Williams and the important role he played in the evolution of rhetoric of conscience (and his disputes with John Cotton) will be picked up again in chapter 4. For now, it is enough to highlight that once the conscience became yoked to the issue of the separation of church and state, as it did for Williams—and a century after him, for Madison and Jefferson—the understanding of the conscience became almost exclusively individualist. Or stated in different terms, the concept of the conscience became useful for the work it did, as the justification of separation of church and state, but there was remarkably little inquiry into how the individual conscience should work—from the perspective of the individual, or much less from the perspective of the community. It increasingly became, so to speak, a "black box."

The point need not be overstated. Certainly, discussion of the conscience in the context of moral discernment did not disappear. Even among Baptists, moral manuals such as Ezekiel Robinson's *Principles and Practices of Morality: Or, Ethical Principles Discussed and Applied*, published in 1896, with its implicitly legalist understanding of the conscience, were not uncommon in the context of moral instruction. But it is nonetheless fair to say, for most North American Protestants, that the theological significance of the conscience and the particulars of how it functions receded in importance compared to the rhetorical invocation of the "individual right of conscience" as a basis for religious liberty and specifically what was often referred to as "separation of church and state." By the time the U.S. Constitution and—for our purposes, more importantly—the Religion Clauses of the First Amendment were written and adopted, the unquestionable individualist conscience was in full sway.

3.0 CHAPTER 3: MORAL TRADITIONS AND “OPEN COMMUNITARIANISM”

To recapitulate, chapter 1 discussed the concept of the conscience implicitly operating in six major U.S. Supreme Court cases, starting with the background 1879 case *Reynolds v. United States* and then focusing on the period from 1965 to 2017, culminating in *Burwell v. Hobby Lobby Stores* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. While the conscience is sometimes mentioned in these cases, there is not consistent emphasis on the conscience per se; rather, issues of religious liberty are often discussed in terms of the distinction between a person’s private religious beliefs, her public actions, and how much deference the law must provide to allow beliefs and actions to align. This belief/act framing was stated explicitly and paradigmatically in *Reynolds* but substantially revised by the Religious Freedom Restoration Act of 1993 (RFRA), passed in the aftermath of *Employment Division v. Smith*.¹³⁸ While the Supreme Court has often refused to question the validity of the religious belief at question—and has suggested it may be impermissibly intolerant to do so—the cases from 1965 to 2017, with the exception of *Employment Division v. Smith*, have presumed that a person cannot legally be asked to regularly act in violation of their religious beliefs (implicitly equated with their conscience) without coming into conflict with constitutional and statutory protections for religious free exercise.

Chapter 2 then examined the history of the concept of the conscience in the Christian theological tradition and found an understanding of the conscience both more

¹³⁸ RFRA was amended in 2000 by the Religious Land Use and Institutionalized Persons Act (RLUIPA). Because of the relationship between the two acts, they are referred to collectively throughout as RFRA.

diverse at any given time and subject to evolving over time than recent legal discussions suggest. The Greek concept of the conscience was largely introduced into the Christian tradition by Paul, whose usage included an emphasis on the consequent or judicial conscience (the clear or guilty conscience arising from one's reflection on one's past actions) and also the antecedent or legislative conscience (the sense in which Paul considered Roman law to be "binding" on the personal conscience with respect to one's civic responsibilities). He was also pragmatic regarding differences in personal consciences and advised that Christians should submit their own conscience to that of others, for the sake of the common good and promoting the other's growth and development—even if this might look to a bystander like one was deferring to a person with a deficient understanding of Christian moral truth. Subsequent developments split and tangled these already varied meanings of the term, obstructing any long-term coherent approach to understanding the conscience.

We turn now in the next four chapters to the four axes of investigation for a retrieved theological understanding of the conscience: moral traditions, the person, the Holy Spirit, and the act. Part one of the current chapter on moral traditions will begin by discussing the work of Alasdair MacIntyre, who provides the understanding of moral traditions adopted in this dissertation. After outlining MacIntyre's use of this concept, I will discuss how his work has been interpreted by theological ethicist Stanley Hauerwas and writer Rod Dreier, who see an incommensurability between liberalism (exemplified by the individualist conscience) and the communitarianism of the Christian faith. I contrast this approach with that of Jefferson Powell and Cathleen Kaveny, both theological ethicists as well as legal scholars, who see the relationship between liberalism

and Christianity differently, at least in the context of the U.S. legal tradition. I will argue that contra Hauerwas, MacIntyre's work on moral traditions does allow for more than one moral tradition to exist in equilibrium for quite long periods of time, implying that liberalism—or at least a secular legal-political system that presumes religious pluralism—and Christianity are not incommensurable. This equilibrium, however, must be internally justified within each moral tradition.

In the second part of this chapter, I will discuss John Rawls's understanding of “political liberalism” and the subsidiary concepts of “overlapping consensus” and “public reason.” While Rawls has been an object of attack for Hauerwas and those inclined to be critical of the liberal tradition more broadly, I will argue that when viewed through a MacIntyrean lens, Rawls's concepts are not contrary to a sound Christian moral tradition at all. Instead, Rawls's political liberalism describes what a robust political tradition which presumes religious pluralism can look like, as described from the perspective of that political tradition. In fact, Rawls explicitly states that the terms of his political liberalism must not be imposed on any religious tradition (which he includes within his category of “reasonable comprehensive doctrines”) from the outside but rather must be internally justified from within the religious tradition itself—an invitation for cooperation that dovetails with the “juridical” understanding of religious freedom described by Catholic political theorist John Courtney Murray, SJ, and adopted by the Catholic Church at Vatican II in *Dignitatis humanae*, the Declaration on Religious Freedom.¹³⁹

The problem with Rawls's description is that he has failed to sufficiently justify

¹³⁹ See Leslie Griffin, “Commentary on *Dignitatis humanae* (Declaration on Religious Freedom),” in *Modern Catholic Social Teaching: Commentaries and Interpretations*, ed. Kenneth R. Himes, OFM, 2nd ed. (Washington, DC: Georgetown University Press, 2018), 255–74.

the claim the political tradition might have on individual persons when their religious and political values come into conflict. To address this, I introduce the work of legal scholar Jed Rubenfeld and his theory of commitmentarianism as an account of constitutional self-government. Of special interest to my argument, Rubenfeld highlights that the claim to exist as a “nation of laws” can only be understood as a continually remade *commitment* on the part of the citizens of a nation, if it is to have any substantial claim on citizens at all. By adding Rubenfeld’s understanding of commitment to MacIntyre’s understanding of moral traditions, the nature of the person’s relationship to these multiple moral traditions—for our purposes, primarily religious and legal-political—is reconfigured, so that the person is understood as having commitments to multiple moral traditions at any given time. Conversely, the moral traditions are no longer understood as static repositories of received “truth” but rather as ongoing conflicts, as arguments, occurring over time. Most of the time, the person’s commitments will not come into conflict, but when they do, the person resolves these conflicts not primarily through her beliefs, but rather through her moral acts.

In the third part of this chapter, I will discuss the significance of this MacIntyrean-Rawlsian synthesis for understanding the conscience. Specifically, I will describe how different understandings of the place of Christian communities within a pluralist or secular society and whether one believes in the incommensurability of the Christian and liberal traditions implicate different understandings of the conscience. In this context, I will discuss the tendency in religious discourse to speak in terms of liberalism versus communitarianism and argue for replacing this two-part typology with a three-part typology, adopted in modified form from legal scholar Samuel Moyn—the

sectarian (or closed communitarian), the open communitarian, and the liberal—and describe how each of these aligns with a different form of the conscience—the legalist, the personalist, and the individualist.

This three-part frame has multiple benefits. First, it allows us to see MacIntyre's work in a new light and understand that while he is regarded by writers such as Hauerwas and Dreyer as a closed communitarian, he can also be read as an open communitarian where more than one moral tradition is able to exist in equilibrium for a prolonged period of time—though this equilibrium may admittedly be difficult to maintain, as it is difficult for conflicting moral traditions to maintain stable internal justifications for coexistence through periods of conflict.

3.1 Alasdair MacIntyre and the Moral Tradition

According to philosopher Alasdair MacIntyre, liberalism began as an attempt “to provide a political, legal, and economic framework in which assent to one and the same set of rationally justifiable principles would enable those who espouse widely different and incompatible conceptions of the good life for human beings to live peaceably within the same society, enjoying the same political status and engaging in the same economic relationships.”¹⁴⁰ He states:

The liberal norm is characteristically . . . one according to which different types of evaluation, each independent of the other, are exercised in these different types of social environment. The heterogeneity is such that no overall ordering of goods is possible. And to be educated into the culture of a liberal social order is, therefore, characteristically to become the kind of person to whom it appears normal that a variety of goods should be pursued, each appropriate to its own sphere, with no overall good supplying any overall unity to life.¹⁴¹

¹⁴⁰ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 335–36.

¹⁴¹ *Ibid.*, 337.

But as MacIntyre goes on to explain, this is itself its own conception of the good, and so “while initially rejecting the claims of any overriding theory of the good, [liberalism] does in fact come to embody just such a theory.”¹⁴²

As an integral part of this argument, beginning in his book *After Virtue*, MacIntyre develops a reconfigured understanding of a tradition, which for him is specified as a “living” tradition, defined as “an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.”¹⁴³ He distinguishes this notion of a living tradition from the Burkean “dead” one, in the sense that Burke (according to MacIntyre) described tradition as a positive source of stability and contrasted it with the conflict generated by Enlightenment “reason.” Turning this contrast on its head, MacIntyre argues that traditions are actually *characterized* by conflict and define the rationality that will govern them. If a contrast can be made between what “tradition” and “reason” hold, then the identified tradition is no longer the operative one. In MacIntyre’s words, “Traditions, when vital, embody continuities of conflict. Indeed when a tradition becomes Burkean, it is always dying or dead.”¹⁴⁴ In *Whose Justice? Which Rationality?*, he then refines and expands this understanding of tradition as follows:

A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.¹⁴⁵

¹⁴² Ibid., 345.

¹⁴³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, IN: University of Notre Dame Press, 2007), 222.

¹⁴⁴ Ibid.

¹⁴⁵ MacIntyre, *Whose Justice? Which Rationality?*, 12.

From this definition, MacIntyre is then able to construct an understanding of stages through which a tradition develops¹⁴⁶ and a model for how rival traditions encounter and confront one another.¹⁴⁷ This definition also allows him to discuss the challenges posed to rational enquiry in contemporary discourse by moral relativism and explain why the presumptions associated with relativism are false.¹⁴⁸

Central to MacIntyrean traditions are the “shared beliefs, institutions, and practices”¹⁴⁹ necessary for rational enquiry to be conducted, as well as another feature which Jefferson Powell seizes on and whose importance he expands on: the text. There is also a subsidiary concept essential to understanding MacIntyrean traditions, the “problematic,” which he defines as “that agenda of unsolved problems and unresolved issues by reference to which its success or lack of it in making rational progress toward some further stage of development will be evaluated”¹⁵⁰— essentially the tradition’s primary heuristic concerns.

MacIntyrean traditions are thus, by definition, traditions of rational enquiry which set the epistemological and heuristic priorities for the society in that tradition to engage with historical circumstances and survive them. Traditions are not opposed to rationality but rather define it, whereby all valid conclusions are arrived at “rationally” within the terms of that tradition’s rationality. Of course, there will also be explicit appeals to tradition as well as to reason, which are according to MacIntyre necessary because “we

¹⁴⁶ Ibid., 354–56.

¹⁴⁷ Ibid., 166–67.

¹⁴⁸ Ibid., 352–53, 365–69.

¹⁴⁹ Ibid., 373.

¹⁵⁰ Ibid., 361.

cannot adequately identify either our own commitments or those of others in the argumentative conflicts of the present except by situating them within those histories which have made them what they have now become.”¹⁵¹

MacIntyre allows that these mechanisms may fail.

Methods of enquiry [may] become sterile. Conflicts over rival answers to key questions [may] no longer be [able to be] settled rationally. Moreover, it may indeed happen that the use of the methods of enquiry and of the forms of argument . . . have the effect of . . . disclosing new inadequacies, hitherto unrecognized incoherences, and new problems for the solution of which there seem to be insufficient or no resources within the established fabric of belief.¹⁵²

A tradition in such “epistemological crisis,” if it wants to survive it, has two options: it may develop the additional resources internally, or it may look outside itself to a different tradition. Regardless, the tradition must come to terms with the fact that the epistemological crisis occurred in the first place and provide some type of account of it that is internally satisfactory. In MacIntyre’s words, “[the tradition] must . . . provide an explanation of just what it was which rendered the tradition before it had acquired these new resources, sterile or incoherent or both,”¹⁵³ and it must do so in a way that “exhibits . . . fundamental continuity [between] the new conceptual and theoretical structures [and] the shared beliefs in terms of which the tradition of enquiry had been defined up to this point.”¹⁵⁴

In this context, MacIntyre is wrongly read as implying that if adherents of the original tradition are forced to look to a rival tradition for the resources to solve an epistemological crisis, the adherents will eventually choose the rival tradition, and that

¹⁵¹ Ibid., 13.

¹⁵² Ibid., 361–62.

¹⁵³ Ibid., 362.

¹⁵⁴ Ibid.

any borrowing from outside a tradition will necessarily undermine the terms of rational enquiry within the tradition. Thus any tradition of rational enquiry would have to presume itself to be self-sufficient in all respects, with no internally justifiable reasons for coexistence with a rival tradition or for occasional borrowing when needed.

Such a reading is not correct. True, MacIntyre insists that there is no neutral place from which to judge the truth-claims of rival moral traditions. But his framework still allows for the possibility of a tradition which *does* have internally justified reasons for borrowing from outside itself—so long as those within the original tradition understand they are doing so not from a neutral position but actually from within the tradition, and so long as the internally justified explanation within the original tradition for borrowing from outside itself is more persuasive than switching allegiance to the rival tradition altogether. In fact, MacIntyre allows that coexistence between rival traditions may exist over long periods of time,¹⁵⁵ implicitly reflecting a high degree of stability in the equilibrium between the rival traditions. And, importantly, framing it this way highlights the importance of the original tradition's having a clear and persuasive justification for the borrowing (if any borrowing is indeed going to occur), since this justification will always be weighed against the argument for “converting” to the rival tradition entirely.

As discussed in a subsequent part of this chapter, my term for the theory whereby a tradition is persuasively able to internally justify coexistence with other traditions, including acts of borrowing, is “open communitarianism,” as opposed to the “closed communitarianism” that believes that any acts of borrowing terms of rational enquiry from a rival tradition will inevitably lead to deterioration of the original tradition.

¹⁵⁵ Ibid., 366.

3.1.1 Stanley Hauerwas and Rod Dreher

This clarification between open and closed communitarianism is important, because a primary translator of MacIntyre's ideas in theological ethics has been Stanley Hauerwas, who throughout his work endorses (rhetorically if not actually) a closed communitarianism as I have defined it. For example, in his 1979 paper "Theological Reflections on *In Vitro* Fertilization," prepared for the Ethics Advisory Board of the U.S. Department of Health Education and Welfare, Hauerwas emphasizes "the particularity of Christian convictions"¹⁵⁶ and therefore specifies that he will not frame his argument in terms of public reason, analytical principles, or even biblical exegesis, stating, "I [do not] think you can show any direct connection between theological claims about God's creative and redemptive purposes and *in vitro* fertilization. There may be theologians who think this can be done, but I am skeptical whether they can make such arguments work."¹⁵⁷ Then, in an argument couched in MacIntyrean terms but whose logic seems fuzzy, he states:

The primary function of religious belief is not to describe the world or to determine the rightness or wrongness of particular actions, rather, it is to form a community that understands itself as having a particular mission in the world. To be sure, that mission involves claims about the nature of the world and what one should and should not do, but those judgments are mediated by the practices established essential to being a people of a particular sort. Put starkly, for the Christian the question of the use or non-use of *in vitro* fertilization will be determined primarily by whether such a procedure is appropriate to our understanding of what kind of community we should be and in particular what kind of attitudes about parenting we should foster. In other words, it is not a question of whether *in vitro* fertilization is right or wrong, but rather it is a practical judgment of whether this kind of technique furthers or is compatible with our community's understanding of itself. Put bluntly, issues such as *in vitro*

¹⁵⁶ Stanley Hauerwas, "Theological Reflections on *In Vitro* Fertilization," in appendix to *HEW Support of Research Involving In Vitro Fertilization and Embryo Transfer* (Washington, DC: U.S. Government Printing Office, 1979) (hereinafter *HEW Report*), 198.

¹⁵⁷ Ibid.

fertilization are fundamentally symbolic issues that are primarily determined by the wisdom of a community.¹⁵⁸

But this pugilistic if eloquent deflection, in contrast to other papers presented to the panel by Charles Curran (the perspective of Catholic moral theology),¹⁵⁹ Sid Leiman (a Jewish perspective),¹⁶⁰ and Paul Ramsey (a theological analytical perspective),¹⁶¹ begs a question it never acknowledges. That is, Hauerwas emphasizes the “shared beliefs, institutions, and practices” essential to the functioning of traditions, and he insists on the Christian tradition’s maintaining its distinctness, but his refusal to engage the biblical (or any other) text leaves the “beliefs, institutions and practices” that he extols without any particular referent by which they might be determined. This slight-of-hand seems to be because Hauerwas is preoccupied with the relationship between the rival traditions of Christianity and liberalism, without much thought or attention paid to how conflict or argument proceeds internal to the Christian tradition itself—an inherent part of a MacIntyrean tradition.

Unsurprisingly, then, Hauerwas is forced in his other works to fall back on the role of church authority in maintaining the viability of Christianity as a tradition. In his essay “The Interpretation of Scripture: Why Discipleship is Required,” for example, he argues that Christians can only understand the relationship between the prophetic texts of Isaiah and the life of Jesus not in terms of any hermeneutical theory but only “under the

¹⁵⁸ Ibid., 198–99.

¹⁵⁹ Charles E. Curran, “*In Vitro* Fertilization and Embryo Transfer: From a Perspective of Moral Theology,” in appendix to *HEW Report*, 158–92.

¹⁶⁰ Sid Z. Leiman, “Human *In Vitro* Fertilization: A Jewish Perspective,” in appendix to *HEW Report*, 216–31.

¹⁶¹ Paul Ramsey, “Testimony on *In Vitro* Fertilization,” in appendix to *HEW Report*, 232–64. Hauerwas critiques Ramsey’s argument directly. See Hauerwas, “Theological Reflections on *In Vitro* Fertilization,” 207–9.

authority of the Church.”¹⁶² And in his 1993 book *Unleashing the Scripture: Freeing the Bible from Captivity*, he goes so far as to say, “No task is more important than for the Church to take the Bible out of the hands of individual Christians in North America.”¹⁶³ He states that he is not bothered by being characterized as “authoritarian and elitist” because “from the perspective of liberal political practice, any authority appears ‘authoritarian.’”¹⁶⁴ He goes on to assert that “Stanley Fish and Pope John Paul II are on the same side when it comes to the politics of interpretation” since “both men assume that the text, and in this case the text of Scripture, can be interpreted only in the context of an ‘interpretative community’” such as that provided by “the Roman Catholic Church, which includes the Office of the Magisterium.”¹⁶⁵

Along a similar line, in his essay “Casuistry in Context: The Need for Tradition,” a response to Albert Jonsen and Stephen Toulmin’s book *The Abuse of Casuistry*,¹⁶⁶ Hauerwas severely criticizes casuistry, which he conceives of as an inappropriate explication of ethical principles based on experience¹⁶⁷—experience being a particular

¹⁶² Stanley Hauerwas, “The Interpretation of Scripture: Why Discipleship is Required,” in *The Hauerwas Reader*, ed. John Berkman and Michael Cartwright (Durham, NC: Duke University Press, 2001), 262.

¹⁶³ Stanley Hauerwas, *Unleashing the Scripture: Freeing the Bible from Captivity to America* (Nashville: Abingdon, 1993), 15.

¹⁶⁴ *Ibid.*, 17–18.

¹⁶⁵ *Ibid.*, 21. More recently Hauerwas has stated with pride that many of his students over the years have converted to Catholicism and that “they are not wrong” to do so. The few things that keep him from converting to Catholicism are that his wife is an ordained minister and the need “to keep Catholics honest about their claim to the title of the one true Catholic Church,” but he makes these comments without any admission that the failure of Catholicism to recognize the ordination of women such as his wife is directly related to the very structures of church authority in Catholicism (and the biases endemic to those structures) for which he professes admiration. Stanley Hauerwas, “What’s the Point of Protestantism?,” *Washington Post*, October 29, 2017, B3.

¹⁶⁶ Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988).

¹⁶⁷ Stanley Hauerwas, “Casuistry in Context: The Need for Tradition,” in *The Hauerwas Reader*, 267–68.

bête noire of his—and as an heir to other ethical approaches which are, in the most damning words Hauerwas has, “free from any concrete traditional and corresponding moral practices.”¹⁶⁸ Hauerwas argues that casuistry should instead be subordinated to the practice of virtues as they are understood in the Christian community, going so far as to suggest that “casuistry and virtue necessarily presuppose one another.”¹⁶⁹ Thus, he states, “The ultimate test of casuistry in the Christian community is how well our reasoning embodies as well as witnesses to the lives of the saints.”¹⁷⁰

The saints? Which ones? Or to paraphrase MacIntyre, one might puckishly ask: Whose saints? Which process of sainthood?¹⁷¹ Hauerwas never specifies, though his critiques obviously implicates strong church authority. Instead he writes as if invocations of virtue, community, and Christian practice were self-explanatory concepts for those inside the tent, and if you don’t understand them as well, well, you must have been corrupted by something called “liberalism.” And as if on cue, his discussion of Jonsen and Toulmin’s book soon preoccupies itself with differentiating the Christian tradition from Western liberalism.¹⁷²

But as casuistry is just another form of case-based reasoning, lawyers recognize it for what it is, namely, a case-based traditioning method whereby new situations and the

¹⁶⁸ Ibid., 270.

¹⁶⁹ Ibid., 281.

¹⁷⁰ Ibid., 282.

¹⁷¹ For an example of the deep moral theological problems posed by categorically deferring to “the lives of the saints” without interrogating the selection process, criteria for sainthood, the structures of church authority which govern the process, and the broader culture among traditional Catholics which supports it, see B. D. McClay, “Problems Like Maria: A Saint for (Another) Sexual-Abuse Crisis,” *Commonweal*, July 31, 2018, www.commonwealmagazine.org/problems-maria, discussing the sainthood of Maria Goretti, “an eleven-year-old girl who was stalked, assaulted, and murdered by the twenty-year-old son of the family her own family lived with.” Goretti was canonized in 1950 for her devotion to her own chastity and virginity, as shown in her resisting her attacker, as well as for her generosity in granting forgiveness to her attacker on her deathbed.

¹⁷² Stanley Hauerwas, “Casuistry in Context: The Need for Tradition,” 278.

tradition are placed in conversation with one another—tradition as exemplified or embodied in some set of texts, the interpretation of which is necessary in light of the new experience. The “text” can be written or unwritten, as it is in U.S. and British forms of constitutionalism, respectively¹⁷³—and in this respect the biblically focused mode of much Protestant ethical analysis versus the Catholic tradition-based mode are roughly analogous to written versus unwritten constitutions—but regardless, there is some form of a text.

By minimizing the significance for individual ethical discernment of both the text of the Bible (the biblical tradition) and the texts of analogous cases (the casuistical tradition), then, Hauerwas is not rejecting all texts but rather implicitly privileging within the Christian tradition the texts of the magisterium which codify its authority with respect to the individual. But by always insisting that the primary threat is liberal individualism, Hauerwas frames the debate in such a way that the implied solution is a revanchist authoritarianism within the church, without exploring what some type of reworked relationship between the individual and community—or between the church and pluralist society—might entail.

In the eyes of defenders and some critics, Hauerwas’s influence on political theology and theological ethics has been outsized, partly due to the large number of students he influenced during his long teaching career.¹⁷⁴ Beyond his own students,

¹⁷³ H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* (Durham, NC: Duke University Press, 1993), 28n61. But see Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001), 164–65.

¹⁷⁴ For an analysis of the work of a select group of Hauerwas’s students, see Charles Pinches, “Hauerwas and Political Theology: The Next Generation,” *Journal of Religious Ethics* 36, no. 3:513–42. Pinches quotes Jeffrey Stout’s suggestion that “no theologian has done more to inflame Christian resentment of secular political culture” than Hauerwas, whose “followers” are “more radically

Hauerwas's influence on public theological discourse is seen especially clearly in the work of popular writer and Orthodox convert Rod Dreher, who has taken up advising the outright withdrawal of Christians from mainstream U.S. society. He terms this withdrawal "The Benedict Option," based on his reading of the closing passage of MacIntyre's *After Virtue*.¹⁷⁵ In so doing, Dreher makes frequent comparisons between current Western society and the fall of Rome. The very name "Benedict Option" is drawn from the example of St. Benedict, who in the early sixth century was "so shocked and disgusted by the vice and corruption in the city [of Rome] that he turned his back on the life of privilege that awaited him there" and took up the life of a first a hermit and then a monk.¹⁷⁶ Dreyer states:

[D]espite our wealth and technological sophistication, we in the modern West are living under barbarism [comparable to that of post-fall Rome], though we do not recognize it. Our scientists, our judges, our princes, our scholars, and our scribes—they are at work demolishing the faith, the family, gender, even what it means to be human. Our barbarians have exchanged the animal pelts and spears of the past for designer suits and smartphones.¹⁷⁷

But the particularities of Dreher's argument suggest that his complaint is not so much incommensurability as it is the loss of hegemony of a particular 1950s lifestyle, and the folksiness of numerous passages—"Growing up in south Louisiana, whenever a hurricane was coming, somebody would take out the cast-iron kettle, make a big pot of gumbo and after battening down the hatches, invite the neighbors over to eat, tell stories, make merry, and ride out the storm together"¹⁷⁸—heighten the sense that Dreher is driven

Hauerwasian" than Hauerwas himself. Ibid., 513–14, citing Jeffrey Stout, *Democracy and Tradition* (Princeton, N.J. Princeton University Press, 2004), 140, 75.

¹⁷⁵ Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (New York: Sentinel, 2017), 16–18.

¹⁷⁶ Ibid., 14.

¹⁷⁷ Ibid., 17.

¹⁷⁸ Ibid., 19.

by a nostalgia for lost origins that mistakes the origins of Christianity for the origins of Dreher's childhood experience of it.

In an insightful interview with Dreher by Joshua Rothman of *The New Yorker* published shortly after Dreher's book on the topic was released, however, two points about the Dreher's "Benedict Option" become clearer than they do in the book itself. The first is Dreher's failure to meaningfully come to terms with the tension between the individual and the community inherent in the closed communitarianism which he endorses. As recounted in the interview, after the death of his sister in 2011, Dreher became disenchanted with his cosmopolitan existence in Brooklyn and decided to move back with his family to the south Louisiana hometown he waxes nostalgic about in the above passage—but as many who have attempted such a homecoming have experienced, things didn't go as planned.

"The thing that I dreamed of and hoped for didn't work out," he said. "They just wouldn't accept me—not my sister's kids, and not my dad and mom. They just could not accept that I was so different from them. I worshipped my dad—he was the strongest and wisest man I knew—but he was a country man, a *Southern* country man, and I just wasn't. All that mattered was that I wasn't like them. It just broke me."¹⁷⁹

Dreher moved away soon after. But even before his sister's illness and death, there were signs of incompatibility:

His father, a health inspector, had never forgiven him for moving away; his nieces found his urbanity condescending. During one New Year's visit, Dreher made bouillabaisse for his parents and his sister; they watched him cook the stew and let him serve it, then declined to eat any: they preferred meals made by a "*country* cook." Later, Dreher learned that [his sister] Ruthie and her husband were struggling financially and resented the fact that he made twice their combined salaries for reviewing movies. His father considered him a "user"—someone who

¹⁷⁹ Joshua Rothman, "The Seeker: Rod Dreher Think We've Lost Our Religion. Do We Want it Back?" *New Yorker*, May 1, 2017, 48.

succeeded by flouting the rules. Dreher loved his father and sister for their rootedness and their vibrancy. He longed for their approval with painful intensity.

On Mardi Gras, 2010, Ruthie was diagnosed with Stage 4 lung cancer. She was forty years old and had three daughters. Dreher began visiting St. Francisville as often as he could, and discovered that she was a pillar of the community that he had left behind. She gave Christmas gifts to the poorest neighbors and mentored the most difficult kids in school; she was a joyful presence at bonfires, creek parties, and crawfish boils. Though exhausted by chemotherapy, she drew up a list of friends in need and prayed for them every night. She made a new rule for her family: “We will not be angry at God.” When friends threw her a benefit concert, a thousand people came. To Dreher, a devout Christian, she seemed beatific in her suffering. He wondered, Why does she like everybody but me?¹⁸⁰

That a wonderful, vibrant, caring community can, at the very same time, also foster intolerance towards outsiders and resentment towards those who have left seems all too familiar to many who have experienced small-town life (or even read a book about it), but the cautionary lessons of conformism and his own rejection seem lost on Dreher, who in his recommended “Benedict Option” seems to think that while the people of the authentic St. Francisville were intolerant towards him, his franchise versions of St. Francisville will be more inclusive—at least towards people like him, his primary concern. Elsewhere Dreher states, “I think there’s an individualism at the center of both parties—the economic individualism of the Republicans and the secular, social individualism of the Democrats—that I find really incongruous with what I believe to be true because of my religion,”¹⁸¹ without his own individualism—as evidenced concisely in his hurt feelings at his family’s refusal to eat his French stew which he insisted on preparing for them without apparently consulting them—ever seeming to dawn on him.

¹⁸⁰ Ibid., 46. The attempt to find a new family that might accept him seems inherent even in Dreher’s conversion to Catholicism at twenty-six. He describes how after a childhood and adolescence of indifference to religion, despite its ubiquity in St. Francisville, he went to see Pope John Paul II at the New Orleans Superdome when he was nineteen. “The Pope appeared, and a thought flashed in Dreher’s mind: ‘I wish he were my dad.’” Ibid., 48.

¹⁸¹ Ibid., 48.

After all, the idea that one might react to persecution, interpreted as religious persecution, by seeking to found a new religious community that will understand itself as being more faithful to Christianity's origins is hardly an original idea; it is, rather, among the original *American* ideas, borne of the very individualism (and liberalism) which Dreher claims to decry.

The second point about the “Benedict Option” that the interview reveals is in some ways a corollary to the first. For if Dreher has failed to acknowledge the tension between the individualism in the society-at-large which he rejects and the collectivist approach to the individual in the communitarian society which he would create—and which is really motivated by an exceptionalist individualism that he fails to acknowledge—he has similarly failed to understand what the available options are for Christians living in contemporary U.S. American culture. Rothman states:

[Many] Christians have sought to make America itself one big Christian community. Dreher thinks that this effort, most recently associated with the religious right, has been a disastrous mistake—it has led Christians to worship the idol of politics instead of strengthening their own faith. “I believe that politics in the Benedict Option should be localist,” he said. The idea was not to enter a monastery, exactly. But Christians should consider living in tight-knit, faith-centered communities, in the manner of Modern Orthodox Jews. They should follow rules and take vows. They should admit that the culture wars had been lost—same-sex marriage was the law of the land—and focus on their own spiritual lives. . . . They should pray more often. Start their own schools. Move near their church. St. Benedict, Dreher said, didn’t try to “make Rome great again.” He tended his own garden, finding a way to live that served as “a sign of contradiction” to the declining world around him.¹⁸²

Thus framed, there are only two options for Christians: attempting to “make America itself one big Christian community” or the “Benedict Option,” with each of these framed in opposition to the liberal individualism that Dreher’s communitarianism imagines as its

¹⁸² Ibid., 50.

enemy. Like Hauerwas, then, Dreyer imagines an incommensurability between the Christian tradition and liberalism where the alternatives are either hegemony or retreat. The possibility of a stable *open* communitarianism, where Christians are able to exist within multiple moral traditions as long as they are able to understand their respective commitments, remains for them unexplored.

3.1.2 Jefferson Powell and Cathleen Kaveny

The work of Jefferson Powell and Cathleen Kaveny provide ideal points of comparison here, as both Powell and Kaveny argue that the U.S. legal system can itself be understood as a moral tradition, a framing that will aid the current discussion about how the religious and political traditions can be understood as relating together and which represents a development beyond the incommensurability argument of Hauerwas and Dreher. To some degree these two sets of approaches are the result of a development within MacIntyre's own philosophical thought, with Hauerwas and Dreher influenced only by *After Virtue* and Powell and Kaveny influenced by both *After Virtue* and the later *Whose Justice? Which Rationality?*¹⁸³ Thus, Powell and Kaveny's analyses of the U.S. legal system through a MacIntyrean lens—informed by development in MacIntyre's thought—is especially helpful.

Looking first at Powell's book *The Moral Tradition of American Constitutionalism*,¹⁸⁴ Powell argues that American constitutionalism can be understood as

¹⁸³ See Powell, *The Moral Tradition of American Constitutionalism*, 38; Cathleen Kaveny, *A Culture of Engagement: Law, Religion, and Morality* (Washington, DC: Georgetown University Press, 2016); Cathleen Kaveny, *Prophecy Without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016), 32–33; Cathleen Kaveny, *Ethics at the Edges of Law: Christian Moralists and American Legal Thought* (New York: Oxford University Press, 2018), 67.

¹⁸⁴ The book is a version of Powell's PhD dissertation in theological ethics at Duke University, for which Hauerwas was the supervisor.

a MacIntyrean moral tradition insofar as, contrary to popular American understanding, the Constitution functions less as a source of positive truth than as a lexicon and arena for the working out of truth over successive generations. It does this both by providing language whose interpretation and application will provide the terms of discourse for ongoing political debates and also by constructing a process within which this discourse can take place. Powell contends that the outcome of these debates is not fixed in the Constitution's wording but rather changes through time, allowing the necessary flexibility for the system to function and adapt. So, for example, instead of arguing about the relationship between the church and the state in the abstract, we argue about the meaning and applicability of two very specific clauses in the First Amendment, the Free Exercise Clause and the No Establishment Clause. This focuses the debate, gives it shape. It also defines us as a nation as a people who are dedicated to solving our disputes through interpretations of a specific, binding text.

Drawing from both *After Virtue* and *Whose Justice? Which Rationality?*, Powell identifies four key characteristics of a MacIntyrean moral tradition. First, "a tradition is historical in nature, 'extended in time.'"¹⁸⁵ Powell explains this characteristic by observing the inherent historicity and narrativity of a tradition, stating, "In order to describe human actions we must locate them in a history or narrative that renders them intelligible."¹⁸⁶ (As discussed below in part two with respect to the work of Jed Rubenfeld, there is more to be said about temporal extension.) The second characteristic Powell discusses is a tradition's social character, its social embodiment. Due to the

¹⁸⁵ Powell, *The Moral Tradition of American Constitutionalism*, 20.

¹⁸⁶ *Ibid.*, 20–21.

context-dependent nature of “language, argument, and understanding,” Powell states, “the social embodiment of tradition thus is not merely an external prerequisite to its existence”¹⁸⁷ but is essentially constitutive.

So far, there is nothing in Powell’s understanding of moral traditions to distinguish it from that of Hauerwas. With the third and fourth characteristics, however, that traditions are “fundamentally interpretative in nature”¹⁸⁸ and “rather than being bastions of immobile stability, ‘embody continuities of conflict,’”¹⁸⁹ Powell begins to emphasize the centrality of a *text* in a MacIntyrean tradition, something that Hauerwas does not and would never do. Powell notes, “MacIntyre gives critical weight to the role of canonical texts in traditions,”¹⁹⁰ and then quotes MacIntyre himself, “For such a tradition, if it is to flourish at all has to be embodied in a set of texts which function as the authoritative point of departure for tradition-constituted enquiry and which remain as essential points of reference for enquiry and activity, for argument, debate and conflict within that tradition.”¹⁹¹ Powell continues:

Conflict and the interpretive disagreement over the meaning of the tradition’s texts and practices constitute the ongoing life of the tradition. A tradition, in other words, is an argument, and arguments proceed by arguing. Participation in a tradition requires involvement in disagreement, for it is in the clash of interpretations that the tradition “progresses,” overcomes difficulties and resolves inconsistencies. Understanding a tradition requires one to make sense of its internal conflicts.¹⁹²

¹⁸⁷ Ibid., 25, 27.

¹⁸⁸ Ibid., 27.

¹⁸⁹ Ibid., 29, quoting MacIntyre, *Whose Justice? Which Rationality?*, 222.

¹⁹⁰ Powell, 28.

¹⁹¹ Ibid., quoting MacIntyre, *Whose Justice? Which Rationality?*, 355.

¹⁹² Powell, 29.

Thus, Powell makes clear that having something to argue *about* is an essential part of what a tradition *does*; it's the only way the tradition ever makes progress on the problematic. In fact, Powell makes this point so convincingly and seem so self-evident that he makes the omission of any serious discussion about a text in Hauerwas's work (other than outright dismissal) seem all the more glaring.

In his trenchant concluding chapter, Powell observes that “the relationship between Christian commitments and American politics has dominated American Christian ethical discussion.”¹⁹³ He states:

Clearly, however, the framework of most such Christian-American ethics is what contemporary theologians often call the Constantinian paradigm, the assimilation of Christian social thought and action to the supposed constraints of political realism. . . . The result, which is somewhat ironic given the stringency of the formal constitutional separation of church and state, has been a strong tendency to see in the American political system a precursor or embodiment of the kingdom of God.¹⁹⁴

By contrast, Powell describes the purpose of his book as “to describe and evaluate American constitutionalism from a Christian perspective that is self-consciously anti-Constantinian.”¹⁹⁵ But Powell argues against any sectarian retreat from society. While describing American constitutionalism as “a MacIntyrean tradition of rational inquiry that has entered into an epistemological crisis it is unlikely to overcome,”¹⁹⁶ he insists that “its present crisis demands a response [from Christians] . . . because constitutionalism is the most fundamental mode by which the American republic attempts to channel and mitigate the violence of the state and . . . society.”¹⁹⁷ More specifically, Powell focuses

¹⁹³ Ibid., 260.

¹⁹⁴ Ibid., 260–61.

¹⁹⁵ Ibid., 261.

¹⁹⁶ Ibid., 274.

¹⁹⁷ Ibid., 264.

on the rule of “judicial power [exercised] on behalf of political minorities because constitutional rhetoric about political speech and political participation rights enhances the ability of the victim and the stranger to be heard,”¹⁹⁸ a use of state power to restrain majoritarian tyranny which Christians should support.

Similarly, Cathleen Kaveny in her work also views the U.S. legal tradition through the frame of MacIntyre’s theory of moral traditions, though for Kaveny the tradition at issue is the Anglo-American common law tradition broadly considered, not just that area of law concerned with interpreting the U.S Constitution. Like Powell, Kaveny emphasizes the role of texts, though she is less concerned with the role of a single “foundational” text. For her, “a tradition is not only composed of and carried forward by its philosophical and legal treatises, but also by its symbols, stories, and practices.”¹⁹⁹ Thus, “to fully understand the values embedded in the American moral and political tradition means knowing what the Statue of Liberty has come to symbolize in our nation’s self-understanding as a nation of immigrants. To fully understand Catholic sensibilities about welcoming and protecting unwanted babies requires imaginative attention to liturgical and familial practices around the crèche at Christmas time.”²⁰⁰

Discussing her legal teaching specialty, contract law, Kaveny emphasizes tradition-dependent forms of analysis. While it may be that contract law cases are seldom decided straightforwardly through the blind application of “general principles and rules under which . . . [practitioners] can subsume cases,” neither is it true that the law is “completely malleable to the purposes of the lawyers and judges who [might] use it to

¹⁹⁸ Ibid., 11.

¹⁹⁹ Kaveny, *A Culture of Engagement*, 254.

²⁰⁰ Ibid., 254–55.

achieve their own ends.”²⁰¹ Rather, in the common law tradition, “new scenarios [are placed] into the normative worldview intricately woven by the legal cases.” Cases, then, are less about the formal legal holdings and more about the paradigmatic characters, either more sympathetic—such as “little old ladies, charities of all stripes, and homeowners struggling to maintain the family home”—or less so—including “insurance companies, banks (particularly in transactions with clients who are individuals and not corporations), and bugs (particularly when they infest a family homestead)”—who constitute the actual warp and weft of the weaving.²⁰²

Accordingly, Kaveny teases out a slightly different set of distinguishing factors of MacIntyrean moral traditions which for her are especially important. First, similar to Powell, Kaveny emphasizes that internal narration with respect to the internal goods of the tradition (and its development) matters. As Kaveny states, “An understanding of judicial decision making rooted in the common law . . . requires the judge to situate his or her opinion in the context of relevant precedent.”²⁰³ This is another way to say, with Powell’s first characteristic, that moral traditions are historical in nature. Second, in keeping with her emphasis on argumentation, Kaveny highlights that the precise linguistic formulation of arguments is highly significant, as are the particular identities and circumstances of the parties asserting the arguments. “[T]o argue that a particular decision rendered in the past should serve (or not serve) as precedent for the case to be decided here and now,” she explains, “[one] must learn to parse judicial formulations of legal doctrines, to make explicit the background assumptions tacitly held by those who

²⁰¹ Kaveny, *Ethics at the Edges of Law*, 69, 74.

²⁰² *Ibid.*, 71.

²⁰³ *Ibid.*, 67.

first articulated those doctrines, and to articulate in a nuanced way how those assumptions hold or do not hold with respect to the case at hand.”²⁰⁴ Third, Kaveny observes that moral traditions are non-exclusive, insofar as at any given time there may exist alternative systems of morality and justice. Kaveny states, “In deciding cases in contract law, for example, most judges are aware that they are developing a rich and nuanced understanding of commutative justice that is embedded in *our* culture, *our* tradition, which may not reflect the tradition and culture of others on every point.”²⁰⁵ And fourth, extrapolating from MacIntyre’s belief that “tradition-constituted inquiry . . . cannot be understood without taking specific traditions as examples,” Kaveny argues that the same principle applies within the tradition as well, “that what counts as rational inquiry *within* a particular tradition cannot be understood without looking at the particular questions and issues that its adherents have pondered within the course of its development.”²⁰⁶

As noted above, we can thus see that Kaveny’s discussion of U.S. contract law and the common law tradition more broadly has a different tenor than Powell’s discussion of how the Constitution’s text determines both the content and the process by which courts address the most fundamental questions our country faces. But insofar as Powell and Kaveny each illustrate how the legal tradition functions as a moral tradition, they each provide a thick demonstration of how the difference between the Christian theological ethical tradition and the U.S. legal tradition is the difference between two moral traditions, rather than the difference between a moral tradition proper on one side

²⁰⁴ Ibid.

²⁰⁵ Ibid., 67.

²⁰⁶ Ibid., 69.

and a legal discourse irretrievably suffused with liberal principles inimical to moral traditions as such on the other, as Hauerwas and Dreher argue.

Helpfully, Kaveny expands on this exact point in her book *Prophecy Without Contempt*. Here, Kaveny looks specifically at what some describe as a breakdown in our ability to conduct moral deliberation in the Western context due to the allegedly pernicious effects of liberalism. In so doing, she offers a MacIntyrean analysis of U.S. religious discourse around disputed moral issues and highlights precisely the ambiguity in MacIntyre under discussion here, pertaining to the coexistence of more than one moral tradition at any given time.

As Kaveny points out, according to MacIntyre's critique of liberalism, even religious traditions that retain a strong central authority like Catholicism, though better off than traditions which lack such an authority, are still hindered in their ability to conduct moral deliberation as they are still tainted by Western liberalism. But "MacIntyre *also* makes it clear," Kaveny argues, "that well-functioning moral traditions are not hermetically sealed from one another. Adherents of one tradition regularly encounter adherents of different traditions and even draw from them in addressing their own 'epistemological crises,' situations in which a tradition, by its own standards, ceases to make progress on its own path of inquiry."²⁰⁷ And so the mere exposure of one moral tradition to another, or even active engagement with another, cannot fully explain the breakdown of moral discourse within that tradition.

²⁰⁷ Kaveny, *Prophecy Without Contempt*, 33.

Having put her finger on this tension, Kaveny lists three reasons that what she calls “the ‘secular taint’ theory of contentiousness within religious communities”²⁰⁸ must fail. First, historically speaking, “many of our key liberal democratic values were originally advanced by religious believers on explicitly religious grounds.”²⁰⁹ Second, even just looking at the contemporary debates, “the most divisive arguments are cast in distinctively religious terms,”²¹⁰ such as the Gospel-based arguments against torture made by some evangelicals. And third, because Roman Catholicism as well as many forms of Protestantism still place considerable weight on the natural law as a source (and method) of moral reasoning, “the arguments for or against the morality of a particular practice are in principle accessible not only to members of that community but also to all people of goodwill,” and thus, “the religious tradition renders *itself* vulnerable . . . to challenges that are based on practical reason and put forward by any and all persons of goodwill.”²¹¹

As Kaveny explains, the prescription for the breakdown in moral deliberation that would presume to solve the problem by eliminating the “secular taint” from moral discourse is wrong because the diagnosis of the underlying problem is wrong. Specifically, Kaveny questions the premise that recourse to language of moral indictment (as opposed to formal moral deliberation) represents a breakdown in the functioning of America’s legal-political moral tradition, as MacIntyre would suggest. Rather, Kaveny argues that these two genres of moral rhetoric—moral indictment and moral

²⁰⁸ Ibid., 35.

²⁰⁹ Ibid., 34.

²¹⁰ Ibid., 35.

²¹¹ Ibid., 35 (italics added).

deliberation—each have distinct functions, and that a first step to deploying them productively is to recognize their equal values but distinct purposes. Thus, for Kaveny, moral deliberation may be the better genre for considering the reasons for or against some moral issue *within* the tradition and will most often be conducted in terms of relevant virtues. In contrast, moral indictment is properly involved at the boundary *between* moral traditions, where its role “is to defend the boundaries of the shared commitment that makes communal moral deliberation possible”²¹² and its discursive mode will thus often be in terms of absolute moral laws. As Kaveny states, “Some commitments must be taken as bedrock, as the touchstone for moral enquiry on particular points. They cannot be called into question without undermining the basis of the community.”²¹³

Kaveny’s identification of moral indictment as distinct from moral deliberation is insightful and her assertion that moral indictment is more concerned with boundary maintenance than actual moral deliberation convincing. But perhaps more can be said about this. For as Kaveny is able to tease out distinct genres of moral rhetoric, it is also important to tease out the relationship between the political and religious/philosophical moral traditions in which we are embedded. As Kaveny’s separate analyses in *Ethics at the Edges of Law* and *Prophecy Without Contempt* make clear, there is more than one moral tradition implicated in current U.S. moral discourse.

Thus understood, the issue of moral indictment becomes less about the boundaries of a single moral tradition and more about the boundaries at the intersection of two. Which is to say, the invocation of moral indictment is a sign—a symptom, if you will—

²¹² Ibid., 43.

²¹³ Ibid., 44.

that there is a lack of clarity about the relationship between two moral traditions. As discussed throughout this chapter, simply because there is overlapping participation by individuals in more than one tradition does not mean the boundaries must be locked down and those individuals be forced to choose between one tradition or the other. But it *does* mean that the nature of the overlapping participation needs to be clarified in terms internal to each of the respective traditions—and moral indictment is a sign that work has not yet occurred. As discussed in the next part of this chapter, the work of political philosopher John Rawls can help, though not fully resolve, the problem.

3.2 John Rawls, John Courtney Murray, SJ, and Jed Rubenfeld

With his 1971 book *A Theory of Justice*, political philosopher John Rawls sought to interrupt a political consensus that he took to be a murky blend of utilitarianism and intuitionism, summarized as “a variant of the utility principle circumscribed and restricted in certain ad hoc ways by intuitionistic constraints.”²¹⁴ He did this by retrieving the social contract theory of Locke, Rousseau, and Kant, but to insulate it from “the more obvious objections often thought fatal to it”²¹⁵—namely, primarily, that there was no original act of assent of the general will—Rawls developed a politically constructed notion of the “original position,” an imagined position behind a “veil of ignorance” so that no one might know whether they would benefit from any particular political arrangement. In such a state of ignorance, Rawls argued, the most reasonable arrangement would be based on the bedrock notion of “justice as fairness.”²¹⁶

²¹⁴ John Rawls, *A Theory of Justice* (New York: Oxford University Press, 1971), viii

²¹⁵ Ibid.

²¹⁶ For Rawls’s discussion of the “original position” in his later book *Political Liberalism*, see John Rawls, *Political Liberalism*, exp. ed. (New York: Columbia University Press, 2005), 22–28.

Within several years after the publication of *A Theory of Justice*, however, Rawls realized he had made a major mistake, or rather several related ones. Rawls had pitched his argument against the “comprehensive philosophical doctrine” of utilitarianism essentially by countering it with a contrasting comprehensive philosophical doctrine which supported a conception of justice as fairness. (A “reasonable comprehensive doctrine” is a category Rawls uses to describe both religious worldviews such as Christianity and moral philosophical worldviews such as utilitarianism or idealism. A comprehensive doctrine is “reasonable” for Rawls if it is able to accept “the fact of reasonable pluralism” which characterizes all modern democratic societies.) But of course Western society already includes a number of comprehensive doctrines, both religious and philosophical, even the “reasonable” of which are often incompatible with each other, and Rawls realized he had inadequately accounted for this.²¹⁷ As Rawls states in his introduction to the follow-up book *Political Liberalism*, “The fact of a plurality of reasonable but incompatible comprehensive doctrines—the fact of reasonable pluralism—shows that, as used in *Theory*, the idea of a well-ordered society of justice as fairness is unrealistic.”²¹⁸

But instead of being defeated by this recognition, or alternatively of pressing the argument that his comprehensive doctrine is superior to the others, Rawls argues that this multiplicity of reasonable comprehensive doctrines should be *accepted* and, moreover, that a framework could be developed whereby this coexistence could be *stabilized*. The

²¹⁷ Ibid., xvi.

²¹⁸ Ibid., xvii.

framework which Rawls designs to accomplish this is the “political liberalism” of the book’s title.

Under this new approach of political liberalism, instead of including justice as fairness within a full-blown philosophical doctrine, Rawls relocates his principle of justice within a “special domain” of the political, supported by an “overlapping consensus” of *existing* “reasonable comprehensive doctrines.” Rawls frames this approach as an accommodation of his theory of justice to “the fact of reasonable pluralism,”²¹⁹ but just as important is the book’s underlying premise that pluralism *can*, for the most part, be so accommodated. He states:

Political liberalism assumes that . . . a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime. Political liberalism also supposes that a reasonable comprehensive doctrine does not reject the essentials of a democratic regime. Of course, a society may also contain unreasonable and irrational, and even mad, comprehensive doctrines. In their case the problem is to contain them so that they do not undermine the unity and justice of society.²²⁰

Political liberalism is thus *political* in that it resides in the “political” domain and is not, in Rawls’s terms, a “comprehensive” liberalism, as philosophical or classical liberalism is.²²¹ In fact, political liberalism makes no attempt to argue the foundational truth of liberalism at all and, moreover, is not interested in the “truth” of any comprehensive doctrine but is rather avowedly neutral among them, at least to the extent they are amenable to reasonable pluralism.²²² And it is *liberal* in that it consists of the participation of individual persons and assumes that moral truth is available on the

²¹⁹ Ibid., xvii.

²²⁰ Ibid., xvi–xvii.

²²¹ Stated differently, Rawls says it is “political not metaphysical.” Ibid., 10.

²²² Ibid., 94.

individual level²²³—although it also assumes individuals are participating in robust communities holding reasonable comprehensive doctrines. And so political liberalism is not *so* tilted towards the individual that it assumes they have direct access to truth unmediated by traditions or communities; indeed, it explicitly depends upon the flourishing of such communities.

Nonetheless, the political domain remains “freestanding,” apart from these comprehensive doctrines.²²⁴ And thus an integral part of Rawls’s framework in *Political Liberalism* is differentiating between the “special domain of the political”²²⁵ and what he refers to as “reasonable comprehensive doctrines,” a differentiation that is necessarily counterintuitive. As Rawls explains in an important passage:

A distinguishing feature of a political conception is that it is presented as freestanding and expounded apart from, or without reference to, any such wider background. . . . [T]he political conception is a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it. This means that it can be presented without saying, or knowing, or hazarding a conjecture about, what such doctrines it may belong to, or be supported by.²²⁶

Later, in describing a political conception of justice, Rawls emphasizes that “we do not look to the comprehensive doctrines that in fact exist and then draw up a political conception that strikes some kind of balance of forces between them.”²²⁷ According to Rawls, to do that “would make it political in the wrong way.”²²⁸ Rather than start from existing comprehensive doctrines and then draw key principles from them, Rawls thinks

²²³ Ibid., xxvi–xxvii. As to the first point here, Rawls states, “It is a relationship of persons.” Ibid., 135. As to the second, Rawls vests in the individual two “moral powers,” “namely, a capacity for a sense of justice and a capacity for a conception of the good.” Ibid., 19. See also *ibid.*, 107–10, 140, 150, 269, 476.

²²⁴ Ibid., xxx. See also *ibid.*, 98, 115

²²⁵ Ibid., 137.

²²⁶ Ibid., 12–13.

²²⁷ Ibid., 39.

²²⁸ Ibid., 39–40.

it better to start almost from scratch in conceiving of what a fully pluralistic political domain can look like, drawing only from “the fundamental idea of society as a fair system of cooperation and its companion ideas,” thus ensuring “a freestanding view.”²²⁹ He explains that rather than looking to “conceptions of the good associated with such [existing] doctrines” and “striking a fair balance among them,” he believes the better course is focus on the individual persons and considering what would be “fair to free and equal citizens” specifically as persons who have conceptions of the good drawn from those existing comprehensive doctrines.²³⁰

Elsewhere, Rawls differentiates a political conception of justice as fairness from a “modus vivendi,” described as a compromise position that does not consist of true consensus—that is, a position that is agreed to by opposing parties because it is in their respective self-interest to reach a compromise but not because either side actually believes the substance of the compromise position.²³¹ An example of a such a modus vivendi might be a legal settlement where each of the litigants agrees to hold the other harmless for damages, despite each side continuing to believe that the other is at fault, or something like the “One China” policy in international diplomacy, where different countries affirm that there is only one legitimate government for China but disagree as to whether that government is based in Beijing or Taiwan.

To the contrary, for Rawls it is important that the individuals who affirm any of the various reasonable comprehensive doctrines in a society actually believe in the principle of justice as fairness—though he does not interrogate how deeply they must

²²⁹ Ibid., 40.

²³⁰ Ibid., 40.

²³¹ Ibid., 147.

believe it—for reasons internal to each of the respective reasonable comprehensive doctrines.²³² Moreover, Rawls understands that the respective power balances between the comprehensive doctrines in the society might shift, and that as a result of this shift, whatever justification which existed internal to any given comprehensive doctrine for the principle of justice as fairness may no longer obtain. In such a case, for justice as fairness to perdure, there must be some development within the comprehensive doctrine.²³³ Otherwise, support for justice as fairness (and the political constructivism that supports it) will collapse—an outcome which Rawls admits is always a possibility. As he states, “[T]he repeated failure to formulate the procedure so that it yields acceptable conclusions may lead us to abandon political constructivism. It must eventually add up or be rejected.”²³⁴

3.2.1 The juridical right of religious freedom in *Dignitatis humanae* and the problems of political liberalism

As mentioned above, the differentiation between the “special domain” of the political and “reasonable comprehensive doctrines” can seem counterintuitive. Certainly, in societies that are not in some stage of pluralism, it can seem “natural” that political and religious/philosophical value systems should align under a common understanding of truth in such a way that this differentiation is not necessary or, if it endorsed, is not difficult to maintain, precisely because there is so much religious/philosophical homogeneity among the constituents. Conversely, in situations where pluralism does exist, the idea that such pluralism could or should be stabilized rather than resolved

²³² Ibid., 143, 169.

²³³ Ibid., 160, 483.

²³⁴ Ibid., 96n8.

through conflict among the dominant comprehensive doctrines can seem strange and even naive to political reality—here “political” being understood in a rather different way than Rawls uses the term.

But it bears noting that Rawls’s understanding of political constructivism, and the differentiation of the “political domain” and “reasonable comprehensive doctrines” that his constructivism makes possible, is not as unusual as it sounds. In fact, it bears similarity to the understanding of the political domain in the Vatican II declaration *Dignitatis humanae* and the related writings of its primary author, American Jesuit John Courtney Murray. It also bears important dissimilarities as well, primarily in point of view, which highlight deficiencies in Rawls’s schema and the need for revision. After all, as noted above, Rawls was trying to provide a satisfactory account of how political constructivism *could* work; if it cannot, it should be rejected. The animating concerns of Rawls—stability and accommodating “the fact of reasonable pluralism”—are important ones, and so even if his account fails, his overall quest must not.

In his 1864 *Syllabus of Errors*, Pope Pius IX had endorsed the governmental establishment of Catholicism and condemned separation of church and state, liberalism, and indifferentism, understood as “the belief that all religions are equal, that is, indifference to the truth that Catholicism is the one true religion.”²³⁵ The premise of these pronouncements was that “[i]f Catholicism is the one true religion, it should be the established religion of the state,”²³⁶ and thus the underlying principle was commitment to the truth. Over time this led to the perverse situation where, in the words of scholar Leslie

²³⁵ Griffin, 254.

²³⁶ Ibid.

Griffin, the establishment of Catholicism in Franco's Spain was "the ideal form of government while the separation of church and state in the United States was an evil to be tolerated until it could be changed."²³⁷ Against this backdrop, Murray argued that while endorsing official establishment of Catholicism may have been the correct remedy to the liberalism of the nineteenth century, because any remedy must depend upon the historical circumstance of the wrong to be addressed, what was an appropriate remedy in the nineteenth century was no longer appropriate in the twentieth.²³⁸ The list of reasons the older consensus view could no longer hold included "a realization of the need of a spiritual effort exerted on society [to be] from the bottom up, so to speak, rather than an influence brought to bear on it from the top down, through the state and government"; the rise of "the totalitarian threat [which] is dispelling certain naïve illusions which Catholics are perhaps prone to cherish with regard to the whole fact and concept of 'power,' especially in its relations to the things of the spirit"; and "a sense of the significance of human personality more acute and profound than the nineteenth century knew."²³⁹

It is the responsibility of the church, Murray explained, to promote "harmony between the legal order of society and the moral and canonical norms of the Church, in all the matters on which the state is competent to legislate . . . chiefly those which concern the structure and processes of domestic society."²⁴⁰ The question is whether the church can best promote this harmony "through the agency of a jurisdiction of the Church

²³⁷ Ibid., 255.

²³⁸ John Courtney Murray, "Current Theology: On Religious Freedom," *Theological Studies* 10, no. 3 (September 1949), 420–26.

²³⁹ Ibid., 421–22.

²⁴⁰ Ibid., 423.

over the *state* itself,” or alternatively, through the “indirect power” of maintaining authority over “the conscience of the community.”²⁴¹

Murray thus argued that harmony between society and the moral and canonical norms of the church is best promoted not through conflating “the dogmatic concept, ‘the freedom of the Church,’” with “the constitutional concept, ‘religion of the state,’”²⁴² but rather through emphasizing the two-fold freedom of individual persons—to be free from coercion to act against one’s conscience, but also to be free from restraint against acting according to one’s conscience.²⁴³ He states, “It is through the freedom of the citizen that the freedom of the Church is actively and effectively defended. In turn, the freedom of the citizen finds its surest warrant in the freedom of the Church; for where the state closes itself against the Church, it likewise closes down on the freedom of the citizen.”²⁴⁴

Note that while the significance of truth is maintained for Murray, it is reoriented on the person. It is also given social/political context, so that ensuring the freedom to seek the truth is a necessary corollary to the imperative to do so.²⁴⁵ Murray’s approach thus seemed to thread the needle, a way to avoid requiring official establishment without explicitly endorsing the U.S. American style of separation of church and state, while also providing a clear theoretical bulwark against a French-style *laïcité* that formally limits religious arguments in the public sphere.

²⁴¹ Ibid., 423–24.

²⁴² Ibid., 425.

²⁴³ Griffin, 262.

²⁴⁴ Murray, “Current Theology: On Religious Freedom,” 421.

²⁴⁵ “[I]f, as a matter of moral principle, a man has the duty to follow his conscience, he must also somehow have, as a matter of moral-juridical principle, the right to do his duty, that is, to follow his conscience.” John Courtney Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” in *Religious Liberty: An End and a Beginning* (New York: Macmillan, 1966), 23.

At Vatican II, the arguments of Murray and like-minded theologians eventually carried the day, and as noted above, Murray was one of the primary drafters of *Dignitatis humanae*, along with Italian priest and scholar Pietro Pavan.²⁴⁶ Murray having laid out a theological framework in his earlier writings, however, the problem remained for the drafters of how to understand the interface between theological concepts and legal/constitutional ones, once the endorsement of official establishment was no longer deemed historically necessary.

The concept settled on was understanding religious freedom as a “juridical” right, to be accorded the individual by the political order as a necessary acknowledgment of the moral order within which all persons live and seek the truth, rather than directly as an intrinsic moral right.²⁴⁷ Speaking of the juridical order, to which this right belongs, Murray states in a separate essay:

This [juridical] order, which is the order of rights, has to do with intersubjective relations among men. Within it, a man does not face—looking upward—the objective order of truth and morality. He faces—looking outward—“the others,” who also have their duties and rights. No one may ever urge “rights” against the truth; the very notion is nonsensical. Rights are urged against the others. And when validly urged, they induce in the others an obligation to render what is due, to perform the action called for, or to omit an action for whose omission the claim is made. The others are obliged to acknowledge my claim; they may not reject it; and they can have no grounds on which to make a counterclaim that would invalidate my claim. . . .

²⁴⁶ Griffin, 258. Also, the role of Jesuit Cardinal Augustin Bea in successfully negotiating a turf battle on behalf of the Secretariat for Christian Unity over which Vatican bodies could address religious liberty in preconciliar document drafts in the first place should not be overlooked. Had Bea’s efforts been unsuccessful and the topic remained under the exclusive aegis of the rival body headed by Cardinal Alfredo Ottaviani, the Theological Commission, as originally planned, the outcome would have been drastically different. See *ibid.*, 256.

²⁴⁷ For Murray the moral principle that a person has a duty to follow their conscience is “inseparable” from the juridical principle that one must be afforded the freedom to do so, but they are distinct, belonging to the moral order and juridical order, respectively. Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” 23. See also Griffin, 258, 263.

It is the nature of a juridical formula—in this case, religious freedom—simply to set outside limits to a sphere of human activity, and to guarantee this sphere against forcible intrusion from without, but not to penetrate into the interior of this sphere and to pronounce moral or theological judgments of value on the activity itself. Such judgments exceed the category of the juridical, which is concerned with interpersonal relationships. They likewise exceed the competence of the forces of juridical order—the forces of law and of political authority.²⁴⁸

Thus, a primary difference between the moral and political (or juridical) orders is the purchase of truth. Arguments within the moral order must be rooted in truth; lacking truth, any argument must fail. But in the juridical order, the truth is not implicated one way or another, and a right may have just as much validity whether rooted directly in truth or not, since the duty to do the morally “true” thing implies the juridical right to be given the freedom to pursue it—or not to.

The parallel here with Rawls’s political constructivism is intriguing. Just as with political liberalism, *Dignitatis humanae* understands the search for truth as one conducted at the personal level within the context of a comprehensive religious doctrine—in *Dignitatis humanae*, of course, the comprehensive doctrine being the teaching of the Catholic church—which is distinct from the political order. As Murray states:

[I]n its juridical sense as a human right, religious freedom is a functional or instrumental concept. . . . This too is the function of religious freedom as a legal institution embodying a civil right. It is to create and maintain a constitutional situation, and to that extent to favor and foster a social climate, within which the citizen and the religious community may pursue the higher ends of human existence without let or hindrance by other citizens, by social groups, or by government itself.²⁴⁹

Thus the role of the political order is merely to manage the society within which that search may occur, without doing anything that might be perceived as coercing the

²⁴⁸ Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” 24, 29.

²⁴⁹ Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” 29.

individual to accept any particular understanding of truth over another and thereby violating the dignity and respect which must be accorded to that search.

Moreover, not only is religious freedom understood in *Dignitatis humanae* as a juridical right, but the declaration also states that the basis of the right is not the conscience but rather human dignity.²⁵⁰ To be clear, the conscience is still important in *Dignitatis humanae*—specifically, the Declaration predominantly (though not unambiguously) employs the legalist understanding of the conscience, where the conscience is formed through church teaching and the person is then charged with working to order society according to that teaching.²⁵¹ But the difference between basing religious freedom on universal human dignity versus basing it on the conscience directly is significant, a distinction which allows its authors to avoid giving too much authority to the conscience itself, which might be prone to “the subjective disposition of the person.”²⁵² As Murray states in a 1968 essay defending *Dignitatis humanae*:

[M]an is duty-bound always to follow his conscience. From this follows the moral-juridical principle that man has the right to fulfill his duty. No difficulty arises if the conscience in question is right and true. This is evident. But if the conscience in question is right but erroneous, it cannot give rise to a juridical relationship between persons. From one human being’s erroneous conscience no duty follows for others to act or perform or omit anything.²⁵³

Elsewhere in that essay, Murray refers to human dignity as the “ontological” basis of religious freedom, in that it is “grounded upon the very existence of the human person,

²⁵⁰ Second Vatican Council, *Dignitatis humanae* [Declaration on religious freedom], December 7, 1965, Vatican.va, no. 2.

²⁵¹ Ibid., no. 3.

²⁵² Ibid., no. 2.

²⁵³ John Courtney Murray, “Arguments for the Human Right to Religious Freedom,” in *Religious Liberty: Catholic Struggles with Pluralism*, edited by J. Leon Hooper (Louisville, KY: Westminster/John Knox, 1993), originally published as “De argumentis pro iure hominis ad libertatem religiosam,” in *Acta Congressus Internationalis de Theologia Concilii Vaticani II*, edited by A. Schönmetzer (Rome: Vatican, 1968), 233.

or, if one prefers, in the objective truth about the human person.”²⁵⁴ But while the concept may seem to be ontological from inside the religious tradition, from outside it, it is undeniably a theologically constructed concept, even if it is a well-constructed one, thoroughly grounded in the internal goods of the Catholic theological tradition—precisely as Rawls would have comprehensive doctrines have internal justifications for an overlapping consensus in support of the political domain.

But the use of human dignity here also highlights a drawback in Rawls’s schema. That is, the nature of Murray’s framework means that human dignity functions as a concept by allowing the moral/religious and civic/political traditions to interface without actually intersecting. The person is only shaped by the Catholic tradition; in MacIntyrean terms, the person only *belongs* to one moral tradition, the Catholic theological one. The political sphere is merely the proving ground where the person’s faith is tried and tested. As a result, under both Rawls’s schema and that of *Dignitatis humanae*, there is an overwhelming imbalance between the person’s allegiances.

So why is this a problem? The answer has to do with the key priorities of Rawls noted above, stability and accommodating “the fact of reasonable pluralism”—the latter being the reason Rawls developed his theory of political liberalism in the first place. But in the schema that Rawls worked out, the nature of the individual’s tie to the political domain is insufficient to counterbalance the strong tie to the comprehensive doctrine. And this in turn means that the political domain will always devolve to being an arena where comprehensive doctrines vie for supremacy rather than ever achieving the stability that Rawls believed it capable of.

²⁵⁴ Ibid., 240.

Of course, Rawls *thought* he had an answer to this problem. Primarily, Rawls thought that once established, the institutions would engender some sort of self-perpetuating legitimacy, both for themselves as neutral political institutions and for the constraints on political discourse that Rawls's conception of "public reason" requires, as when he states, "[G]iven certain assumptions specifying a reasonable human psychology and the normal conditions of human life, those who grow up under just basic institutions acquire a sense of justice and a reasoned allegiance to those institutions sufficient to render them stable."²⁵⁵ As he states in his lecture on public reason, "[G]iven that the doctrines actually held support a reasonable balance, how could anyone complain?"²⁵⁶

Rawls's incomprehension notwithstanding, as many others have noted, Rawls's concept of public reason is riddled with problems.²⁵⁷ As originally envisioned by Rawls, public reason was supposed to have a narrow scope of applicability, both with regard to subject and actors affected; it was supposed to apply only to government officials, judges, and those running for office, and pertain only to "constitutional essentials," a minimalist understanding of justice as fairness, and the procedural requirements appurtenant thereto. And the *idea* was that it would be a form of reason neutral with regard to reasonable comprehensive doctrines that yielded more consistent results than the moral intuitionism that Rawls took to be rampant. But it was not supposed to pertain to *all* public discourse. Moreover, despite the commonsense meaning of the term, for Rawls the opposite of public reason is not private reason, as one might assume, but something he calls

²⁵⁵ Rawls, *Political Liberalism*, 142; see also 143–44.

²⁵⁶ *Ibid.*, 244.

²⁵⁷ See, for example, Cathleen Kaveny, "John Rawls: Contests of Public Reason," in *Prophecy Without Contempt: Religious Discourse in the Public Square*, 46–84.

“nonpublic reason,” which actually *is* public, as it includes most all of the public discourse not included within the narrow topics or conducted by the specified actors to whom the limits of “public reason” applies.²⁵⁸ As he states:

[The judiciary] is the only branch of government that is visibly on its face the creature of that reason and of that reason alone. Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions. The role of the justices is to do precisely that and in doing it they have no other reason and no other values than the political. Beyond that they are to go by what they think the constitutional cases, practices, and traditions, and constitutionally significant historical texts require.²⁵⁹

He also explicitly distinguishes public reason from “secular reason,” since public reason is supposed to be independent from all comprehensive doctrines not just religious ones.²⁶⁰

The problems which arise are two-fold. Practically, Rawls’s concept of public reason in a well-ordered society is “highly idealized”²⁶¹—he admits this—but he fails to account for the consequence, that it bears little resemblance to the reality onto which his theoretical framework must map and therefore is of questionable explanatory or stabilizing power. Especially relevant to the current discussion, this disparity is due at least in part to the formative effect on public discourse that legal and political debates about disestablishment and protecting free exercise have had—debates which most always occur in terms of the distinction between private religious beliefs and public actions. Which is to say, Rawls’s schema is too close to an already existing tension—

²⁵⁸ Rawls semantically states, “This way of reasoning is . . . nonpublic with respect to political society and to citizens generally” but public with respect to members of “churches and universities, scientific societies and professional groups. . . . These reasons are social, and certainly not private.” Rawls, *Political Liberalism*, 220.

²⁵⁹ *Ibid.*, 235–36.

²⁶⁰ *Ibid.*, 452.

²⁶¹ *Ibid.*, 35.

where secular arguments are more easily allowed in the pluralistic public sphere than religious arguments—for Rawls to effectively avoid either the favoritism for secularism that he tries to evade or the unfair exclusion of religious arguments that many religious adherents are already sensitive to.

But theoretically, and more problematically, Rawls fundamentally misconstrues the primary function of moral traditions (whether labelled in Rawls’s schema a comprehensive doctrine or the special domain of the political), which is facilitating effective arguments—MacIntyre’s key insight, as discussed in part one of this chapter—not minimizing them, as Rawls seems to assume. Rawls rushes to argue for the stability of his overlapping consensus in support of the political domain, but in so doing, he overlooks the importance of conflict, and by failing to understand the centrality of conflict—which inevitably and appropriately will at times be extremely heated and exert polarizing stress to the point of disunion—he underestimates the nature of what is required to contain it. Rawls thinks “civic friendship,” “the duty of civility,” and “the criterion of reciprocity”²⁶²—at base, what is the obvious long-term self-interest of political detente between factions holding different comprehensive doctrines—are enough to prevent any faction from working to obtain power for itself over its rivals and, once achieved, subverting the neutrality of the political domain to maintain it; at any rate, they “may be the best we can do.”²⁶³ As fictitious claims of electoral fraud by then-sitting U.S. president Donald Trump intended to undermine faith in the legitimacy of the 2020 presidential election, the expedited elevation to the Supreme Court of Amy Coney Barrett

²⁶² Ibid., 253, 446–47.

²⁶³ Ibid., 253. Perhaps it is more accurate to say that Rawls *hopes* these are sufficient. See *ibid.*, 233, 252. In any case, they are all that he can offer.

(a nominee expected to advance a conservative Catholic agenda) by the Republican-controlled Senate in 2020 after having denied any hearing to the nomination of Merrick Garland in 2016, as well as the explicit manipulation of scientific data by the Trump administration to corrupt the public policy debates about climate change and the Covid pandemic—all either explicitly or tacitly approved by all but a small number of national Republican political leaders—it seems they are not enough.

Moreover, not only does Rawls's failure to adequately account for the importance of conflict in moral traditions mean that he underestimates the stress placed on the political domain, he also underestimates the effects of conflict within the moral traditions that he calls reasonable comprehensive doctrines. This means that rather than support for a neutral political domain becoming more entrenched over time, it will more likely experience subsidence, given that any dominant comprehensive doctrine which is experiencing a decline in political power will find it increasingly difficult to justify foregoing use of the power still at its disposal to maintain its superior position. Effectively, there is no way to stop this, since from the perspective of the political domain, the individual's allegiance is still primarily to the comprehensive doctrine and only secondarily to the political domain, to the extent the person's understanding of the good, as supported by the comprehensive doctrine, allows it.²⁶⁴

And so because Rawls's account is inadequate and there remains a lack of clarity about the tension between one's religious or philosophical beliefs (and the moral traditions within which those beliefs are formed) and "the fact of reasonable pluralism," public discourse degrades to the point that it is little more than disingenuous feints

²⁶⁴ See *ibid.*, 246, 249.

towards neutral public reason, where political debates no longer occur in good faith, private religious communal resentments about exclusion are stoked, and everyone starts to believe that anyone not acting out of Machiavellian power politics to promote their own comprehensive doctrines is a sucker.²⁶⁵ At which point, even Rawls allows those acting in opposition to those nakedly promoting their own comprehensive doctrines in the political sphere to use like methods “in self-defense.”²⁶⁶ Essentially, under such conditions, even for Rawls, no holds are clearly barred.

3.2.2 Jed Rubenfeld’s notion of “commitmentarianism”

By now it should be coming into view, in the way that I offered this overview of Rawls’s political liberalism and some of its problems, the ways in which political liberalism might map onto a MacIntyrean understanding of moral traditions, where both Rawls’s “comprehensive doctrines” and the “special domain” of the political (wherein Rawls locates his principle of justice as fairness) can be understood as moral traditions. Similarly, one can see the similarity between Rawls’s understanding of what makes a comprehensive doctrine “reasonable” and the idea of an “open communitarian” moral tradition described above, in that they are both attempts to grapple with—and stabilize—what Rawls calls “the fact of reasonable pluralism.”

So the question is raised, if Rawls’s political liberalism is insufficient as a way to stabilize this reasonable pluralism (for the reasons argued in the previous section), is there a way to do so, one that allows persons to understand their participation in and formation by more than one moral tradition, a way that can act as a counterbalance to the

²⁶⁵ See Kaveny, *Prophecy Without Contempt*, 58–65.

²⁶⁶ Rawls, *Political Liberalism*, 247.

robust conflict and argument essential to a healthy moral tradition and can also help persons understand how to deal with occasions when moral traditions inevitably come into conflict?

The argument of this section is that Jed Rubenfeld's understanding of what he calls "commitmentarianism" may be able to do that. Because Rubenfeld formed his theory in a different context, however, it will be helpful first to sketch an outline of his theory and then to explain how it may solve the problems raised by Rawls and ultimately stabilize a form of open communitarianism for Christians which helps them understand their relationship to—and navigate their place within—the moral traditions of which they are a part.

In his 2001 book *Freedom and Time: A Theory of Constitutional Self-Government*, legal scholar Jed Rubenfeld addresses a central problem in legal philosophy, namely, the "logical dilemma" posed by conceptions of democratic self-government that privilege the popular will while also purporting to be bound by a written constitution. Drawing inspiration from the work of philosopher Jacques Derrida, as well as the emphasis placed on freedom of speech as a signifying right of democracy, Rubenfeld describes current attempts at understanding democratic self-government as "speech-modeled," likening expressions of the popular will to speech-acts. Generally, this tension between the popular will and a written constitution is examined as a tension between democratic self-government and the fundamental rights of individuals, with a focus on why fundamental rights should be respected when a majority might at any time

be opposed—the so-called counter-majoritarian problem.²⁶⁷ But Rubenfeld argues that this focus approaches the dilemma from the wrong direction. He states, “The real question is not whether the speech-modeled conception of self-government offers a satisfactory account of fundamental rights, but whether it offers a satisfactory account *of self-government*.”²⁶⁸

Rubenfeld describes four different speech-modeled approaches and explains how current theories fall into one or another of these categories. The first approach, dominant among constitutional theorists today—Rubenfeld lists Jürgen Habermas as its most prominent proponent—is to place emphasis on the *present* popular will. Here, in order to be maintained, counter-majoritarian constitutional commitments are reduced to procedural commitments which are deemed necessary for the current popular will to most effectively be expressed. (These commitments are sometimes called “normatively democratic,” if not functionally so.) Second is the approach which emphasizes the *past* popular will, usually some form of textualism or originalism, where the past is honored as “the democratic will of the ‘founding’ social compact.”²⁶⁹ Here, though, there is no real continuity between the past founding community and the one that exists today beyond the coincidental, and the past will can always be overturned by the present will through such expressions as constitutional amendment or legislative override. The third approach is to emphasize ratification by a *predicted or imagined* popular will, as Justice William Brennan would do on occasion in his opinions denouncing the death penalty, when he

²⁶⁷ Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven, CT: Yale University Press, 2001), 47–52.

²⁶⁸ *Ibid.*, 74.

²⁶⁹ *Ibid.*, 62.

wrote from an imagined future perspective looking back rather than from a present or past one. Another example here, though, is the imagined popular will of Rawls's original position, which imagines assent to a freestanding form of reasonable justice, "without being the least bit troubled by any contrary views in fact held by real people."²⁷⁰ The fourth category is what Rubenfeld describes as a "flight from temporality,"²⁷¹ which is to say, an appeal to some sort of timeless rights—for the framers, provided by "some version of 'natural law.'"²⁷² By the nineteenth century, however, there was

a special reconciliation that . . . emerged between natural-law thinking and the speech-modeled conception of self-government [of Rousseau and Jefferson]. . . . This transformation took place when natural law and speech-modeled self-government converged on the supremacy of the voice of the *individual*: on individual autonomy, on each individual's right to act according to his own free will, provided only that he respect the right of other individuals also to act on theirs.²⁷³

The fatal flaw of the first three of these speech-modeled approaches is their privileging of a particular moment in time over any other, or really, their failure to grapple with how self-government is affected by time at all. The flaw of the fourth approach is that it abandons the ideal of collective self-government altogether, as Rubenfeld explains in this trenchant passage that resonates with the writings of both MacIntyre and Rawls:

Liberalism remained, in this way, dedicated to an ideal of self-government, but the self that was to govern itself was the individual, not the people. . . . This transposition of self-government from the domain of a people to that of the individual made possible a reconception of democracy wholly stripped of the ideal of collective self-government. A democratic politics, from the liberal perspective, becomes definable in terms of electoral competition, then in terms of interest-group competition for goods, and finally in terms of an immense network

²⁷⁰ Ibid., 67.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid., 68.

of individual-wealth-maximizing rational-choice operations. Here, . . . the notion of a collective will or popular voice is wholly exploded, and democracy ends as an essentially economic enterprise, whose principle is or ought to be efficiency.

He continues:

The very premises of speech-modeled self-government inaugurate a transition away from political self-government toward individual self-government. The nation gives way to the generation, and the generation gives way to those alive at the present moment. At this point politics can be only an exercise in counting and reconciling individual wills, and self-government can be understood only as “the government of each by himself.”²⁷⁴

Rubinfeld contrasts these approaches with what he calls a text-based understanding of constitutional self-government and argues that a nation can only truly be understood as a collective body existing over time, a “temporal extension” that is provided by the very nature of collectively self-given commitments—commitments embodied in some form of a text in the past, which can only be fulfilled in the future. Thus, he states, “Constitutional law is a set of substantive, foundational commitments [and not merely procedural or juridical]—commitments to principles of justice and liberty and power—laid down by the nation to govern itself.”²⁷⁵

For Rubinfeld, the ability to commit oneself, whether as a person or as a nation, is a *sine qua non* for meaningful freedom; the uncommitted self is free only to do nothing.²⁷⁶ Rubinfeld is careful, however, to distinguish his understanding of commitmentarianism from more common forms of communitarianism put forward by those who argue that “the communal memberships most central to our identity make claims on us antecedent to any act of will on our part,” because they “omit[] a feature

²⁷⁴ Ibid., 69.

²⁷⁵ Ibid., 73.

²⁷⁶ Ibid., 141.

critical to commitments . . . : their self-givenness. If commitments are not self-given,” Rubinfeld states, “they do not bind. They create no obligations and provide no reason to act.”²⁷⁷

There are two shifts going on here. The first is the shift from intention to commitment. Intention may wander over time, and there is no strong reason for privileging one’s intention at any given time over another—that is, there is no reason to forego doing something I didn’t think I ever wanted to do again a week ago if I want to do it today. Commitments on the other hand, as noted above, are made in the past and can only be fulfilled in the future, hence the “temporally extending” meaning that they provide. Relatedly, the second is the shift from a population at some snapshot in time—either in the past, present, future, or an imagined original position—to the idea of a nation or community that exists *over* time. This is what makes constitutional commitments self-given, that those of us comprising the nation today are contiguous in some meaningful, historical sense with the nation at its founding. The commitments may need to be reinterpreted, and importantly “[t]here is always the freedom to repudiate, to walk away.”²⁷⁸ If nothing else, it is the choice to continue to be bound by past commitments, even reinterpreted, that makes them “recognizable as self-given, [a necessity] if they are to be normatively forceful at all.”²⁷⁹ But it is the choice to continue to be bound by a set of substantive, specifically historical commitments that gives us identify as a nation at all.

As discussed above, in *Political Liberalism* Rawls sought to accommodate his theory of justice as fairness to “the fact of reasonable pluralism” by describing how

²⁷⁷ Ibid., 93.

²⁷⁸ Ibid., 96.

²⁷⁹ Ibid., 97.

citizens of a single nation are simultaneously adherents of various conflicting comprehensive religious and philosophical doctrines. But his citizen participants in the political domain were never engaged in any actual collective national self-government. Rather, at least from the perspective of the political domain, they remained individuals whose primary loyalties lay elsewhere, and their support of the political domain was always as individuals and always contingent on its finding support within those comprehensive doctrines.

By contrast, by activating a moral vocabulary centered around “commitment” in the context of the national political and constitutional legal discourse, Rubenfeld *is* able to explain the nature of one’s ties to the political domain, which importantly prevents the national polity from being theorized as consisting merely of individuals whose primary loyalties lie elsewhere. As Rubenfeld states:

We cannot help ourselves: we are self-interested; we want what is best for ourselves, and we typically want it now. But we are also capable of commitment. Commitments can be shared by those whose wills are widely divergent. They can even be shared by those who radically disagree about their meaning in this or that circumstance. The holding of common principles and the engagement in commitments by a large number of persons does not “constitute” those persons as a people. It is not even a necessary condition of their being a people. But if a sufficient number of individuals in a given people share the same general principles over a sufficient period of time, and if they are prepared to create and live under institutions that preserve these principles, then it becomes possible . . . to speak of popular, national commitments to these principles. The disagreement about meaning precludes the possibility of governance by popular will, but it does not preclude the possibility of governance by popular commitment.²⁸⁰

Moreover, Rubenfeld provides a central concept, commitment, that when combined with MacIntyre’s understanding of moral traditions allows us to recognize the place of commitments in other moral traditions as well, not merely the national legal-political one.

²⁸⁰ Ibid., 156.

Thus understood, the relationship between the person and the moral traditions is clarified, so that each person is understood as being committed to the moral tradition represented by one's "reasonable comprehensive doctrine" as well as to the moral tradition represented by the "political domain."

Of course, this raises the question of which commitment takes precedence—a question that Hauerwas himself likes to press. When the FBI was conducting a background check of Jefferson Powell as part of his taking a job in the Justice Department, he was informed that Stanley Hauerwas had said something to an investigating agent that was of concern. As Powell tells the story, the excited agent said,

"Mr. Powell, one person we spoke to about you gave us an answer that caused us some pause. When we asked Stanley Hauerwas whether there were circumstances in which you would be disloyal to the United States of America, Mr. Hauerwas said, 'Yes.' What did he mean?" I replied, "Well, what Stanley was saying is that I am a Christian and therefore if I had to choose between obeying God and obeying the State, I would choose to obey God."²⁸¹

According to Powell, the agent responded, "Oh, it's about religion. Never mind"²⁸²—precisely the type of response that rankles Hauerwas and which he tries to disturb.

But this seems to approach the problem from the wrong direction, since most people lead their lives and make their moral decisions in such a way as to be consistent with *both* commitments²⁸³—the same way that persons try to fulfill duties to both family (including varying commitments to spouse, children, and parents) and employer. The person is defined by how they seek to fulfil these respective commitments, even as (from

²⁸¹ H. Jefferson Powell and Stanley Hauerwas, "A Dialogue Between a Theologian and a Lawyer," *Law and Contemporary Problems* 75, no. 4 (January 2012), 221.

²⁸² Ibid.

²⁸³ William T. Cavanaugh calls this the "complex space" within which most persons in a democracy will lead their lives. "A Politics of Vulnerability: Hauerwas and Democracy," in *Unsettling Arguments: A Festschrift on the Occasion of Stanley Hauerwas's 70th Birthday*, ed. Charles R. Pinches, Kelly S. Johnson, and Charles M. Collier (Eugene, OR: Cascade, 2010), 104.

the opposite perspective) the moral tradition is defined by the actions of the persons who comprise the community which embodies the moral tradition in time.

Located as it is precisely at the intersection of one's commitments and one's actions, the conscience is thus directly implicated in this process, and by exploring the relationship between moral traditions in terms of the conscience, we might help Christians understand that it is possible to have respective commitments to each, to *belong* to each, in a properly ordered way, in a way that stabilizes a Christian understanding of participation in pluralism better than Rawls could account for.

3.3 Locating the Conscience in the Liberalism vs. Communitarianism Debate

In this concluding part of the chapter, I will connect the preceding discussion on moral traditions and the communitarian critiques of liberalism with three models of the conscience, the individualist, the personalist, and the legalist. First, I will briefly describe these models and discuss the relevance of the debate between liberalism and communitarianism for how the conscience is understood. Then, I will describe Samuel Moyn's three-part typology of liberal individualism, communitarianism, and collectivism, which moves beyond the liberalism/communitarianism binary, and explain how these three models of the conscience line up with Moyn's typology. Finally, I will explain how the personalist conscience connects to the preceding discussions of Alasdair MacIntyre and John Rawls and specifically discuss the relationship between the conscience and the Rubinfeld's notion of commitment, insofar as the multiple moral

traditions of which one may be a part can each be understood as “binding” the conscience, placing the conscience in the role of ordering these commitments.

As discussed throughout this chapter, many ethicists recognize significant problems with any purely individualized notion of human flourishing and the minimalist, highly fragmented society thought to result from it. MacIntyre, Hauerwas, and Murray, as well as Powell, Kaveny, and Rubenfeld all frame this critique as one of liberalism and often discuss the remedy in terms of some form of communitarianism. But seldom do the discussants place their understanding of liberalism and communitarianism in relation to others’ use of the terms, or to understandings of the conscience. I will do so here.

Religious studies scholar Mark Cladis has summarized the difference between liberalism and communitarianism in the simplest possible terms: “The former views the individual as a radically autonomous, discrete self; the later views the individual as socially determined.”²⁸⁴ Cladis himself finds the liberalism/communitarian binary to be an overstated if not false dichotomy. He states, “Liberals and communitarians are ideal types found in journals and books, each type defined by its adversary. . . . Straw men abound,” and both types “are characterized by mutual caricature.”²⁸⁵ What is not often recognized is that the distortions associated with this dichotomy have also had negative implications for developing a clear understanding of the conscience.

In her book *Confronting the Truth: Conscience in the Catholic Tradition*, theological ethicist Linda Hogan describes two models of the conscience present in Catholic moral theology, the legalist and the personalist. The legalist conscience is the

²⁸⁴ Mark S. Cladis, *A Communitarian Defense of Liberalism: Emile Durkheim and Contemporary Social Theory* (Stanford, CA: Stanford University Press, 1992), 1.

²⁸⁵ *Ibid.*, 4.

neo-scholastic or manualist understanding, drawn from Aquinas (discussed in chapter 2), where the individual is instructed in moral truth through church teaching and then is responsible for applying that teaching to the circumstance or dilemma at hand, in a sort of moral syllogism. This is sometimes referred to as the “moral science” approach.

The personalist understanding, by contrast, vests the conscience with greater autonomy; it has greater internal resources to draw upon, including reason, intuition, emotion, and, imagination, and is more attuned to practicing the virtues than applying the law.²⁸⁶ The personalist conscience thus moves the person to

center stage. . . . [T]he actions and choices of the individual are a reflection of the kind of person one is and one will become. Actions are not conscience in isolation from the person performing them. . . . As a result the relationships and circumstances which go to make up the subject’s experience do have real and enduring moral significance. . . . [T]he person is the source of ethical discernment and action.²⁸⁷

This is the “inner forum” described in the Vatican II pastoral constitution *Gaudium et Spes* no. 16, which though distinguished from the “voice of God” is nonetheless where the person is alone with God, even as she is also “joined with the rest of men in the search for truth.”²⁸⁸ While this understanding of the conscience still involves “formation” of the conscience, the personalist understanding is more identified with application of the moral virtues to the ethical situation at hand rather than any absolute rule or law.²⁸⁹

²⁸⁶ Linda Hogan, *Confronting the Truth*, 137–49; Linda Hogan, “‘Synderesis, Suneidesis’ and the Construction of a Theological Tradition,” *Hermathena*, special issue, *In Honour of George Huxley*, no. 181 (Winter 2006), 127.

²⁸⁷ Hogan, *Confronting the Truth*, 108.

²⁸⁸ Second Vatican Council, *Gaudium et Spes*, 16.

²⁸⁹ Hogan, *Confronting the Truth*, 107–15, points out that both legalist and personalist models of the conscience were employed in the Vatican II documents that address the conscience, *Dignitatis humanae* and *Gaudium et Spes*, without distinguishing between them, leading to a confusing ambiguity about which model is the better one. Given the overall moral framework reflected in the documents of Vatican II, as well as the trajectory in Catholic theological ethics away from a manualist perspective, Hogan argues for “explicitly situating conscience within the personalist paradigm.” *Ibid.*, 110.

Given the everyday meaning of the terms “person” and “individual” as synonyms, it might be easy to presume that Hogan’s legalist and personalist models of the conscience correspond with the communitarian and liberal individualist categories, respectively. As discussed in section one of this chapter, defenders of communitarianism such as Hauerwas often endorse communal (instead of individualist) determinations of truth—which at least implies the deference to hierarchically determined moral laws which Hogan’s legalist model of the conscience contemplates. Likewise, the personalist model of the conscience, with its moving the person to “center stage,” would seem to be the conscience of liberal individualism. Moreover, the fact that Hogan herself discusses only two models of the conscience makes this a facile correspondence near inescapable with regard to each pole of the respective binaries.

But that would not be accurate. Rather, there are significant distinctions between Hogan’s personalist conscience and the liberal individualist model which should not be glossed over. A key early passage in *Dignitatis humanae*, for example, illustrates this distinction. The document states, “[T]he right to religious freedom has its foundation not in the subjective disposition of the person [i.e., the conscience], but in his very nature [as a bearer of human dignity].”²⁹⁰ In a commentary on the legislative history of the Declaration, Murray elaborates:

The phrase, “freedom of conscience,” is laden with historical connotations. It came into currency in the post-Reformation era, when it carried overtones of “private judgment” in some Protestant sense. Even more serious, the phrase was part of the vocabulary of nineteenth-century Continental laicism, which connoted the reactionist dogma of the “lawless conscience,” absolutely autonomous in its individual judgments, not subject to a transcendental order of truth. . . . Efforts have been made to endow the phrase with a true sense and with a valid standing—

²⁹⁰ *Dignitatis humanae*, no. 2. See also Griffin, 262, discussing John Courtney Murray, “This Matter of Religious Freedom,” *America*, January 9, 1965: 40–43.

to transform the phrase into the symbol for the rightful freedom of man as a moral subject. Symbols, however, are not easily manufactured or manipulated. The phrase, “freedom of conscience,” has not yet won an undisputed place in the Catholic vocabulary.²⁹¹

This passage indicates that it is the unfettered liberal individualist conception of the conscience that *Dignitatis humanae* rejects as the basis of religious freedom.²⁹²

But this model is markedly different from Hogan’s description of the personalist conscience, as highlighted in Hogan’s discussion of four areas in which the personalist conscience represents an innovation vis-à-vis the legalist paradigm. The first is with regard to historical consciousness. Hogan states, “The classical understanding of reality [was] based on immutable and fixed essences, with the controlling norms being universal and fixed for all time.”²⁹³ The newer understanding recognizes that “change and evolution comprise part of the natural condition of human beings. . . . This involves respecting human experience as a crucial source of moral insight and discernment. It takes account of social, scientific and psychological as well as biological data when assessing the meaning of actions. In addition it recognizes the indeterminacy and complexity of many moral situations.”²⁹⁴ The second area involves the recognition that “the moral meaning of an act cannot be determined by examining the object alone” and that “the intention, circumstances and consequences also have a direct bearing on the nature of the act performed.”²⁹⁵ This is not the radical subjectivism that Murray rejected in *Dignitatis humanae*, but it is admittedly a reorientation with “far-reaching

²⁹¹ Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” 26

²⁹² Griffin 262, 26.

²⁹³ Hogan, *Confronting the Truth*, 118.

²⁹⁴ *Ibid.*, 118–19.

²⁹⁵ *Ibid.*, 119.

consequences,” since it means that “one cannot judge [the morality of] acts . . . independent of the circumstances in which they are performed.”²⁹⁶ Hogan addresses these consequences more directly in her third area, norms and principles, emphasizing that norms and principles are retained in a personalist model of the conscience, though they are relativized, and material norms specifically can no longer “be said to be universal in their scope, that is, true always and everywhere.”²⁹⁷ She states:

Moral norms perform a valuable task in helping us to discern the right thing to do in each situation. But in themselves they are no substitute for the serious, honest and personal judgment of conscience, which must be at the center of any genuine moral decision making. . . .

There are no shortcuts for conscience. There are no mechanisms for bypassing the duty to assess every decision in relation to all the morally relevant features. Norms and principles are important sources of moral wisdom and guidance. Traditional principles such as intrinsic evil remind us that we are dealing with very grave situations. They retain a very important role in informing and educating our consciences in moral sensitivity. However, they do not replace the conscience, nor do they provide us with shortcuts to making the right decision. The conscience remains the center of moral discernment and decision making.²⁹⁸

In the fourth area, moral authority, Hogan makes explicit that “the new paradigm is neither individualistic nor isolationist.”²⁹⁹ She lists “moral principles and norms,” “sacred texts and traditions of the church,” and “the community in which we live and worship” as essential sources of moral authority, but also specifies that “they do not in any sense replace the activity of the conscience, which is an essential dimension of the moral life of the individual.”³⁰⁰

²⁹⁶ Ibid., 120–21.

²⁹⁷ Ibid., 122.

²⁹⁸ Ibid., 123, 124.

²⁹⁹ Ibid., 125.

³⁰⁰ Ibid.

So Hogan's model is personalist and not individualist—but what's the significance of the distinction? The answer has to do with the importance of tying the debates about the conscience to the wider debate between communitarianism and liberalism at the heart of disputes about how to understand the place of the church (and its constitutive member adherents) within a pluralist society. Too often, the liberal individualist conscience has been the bogeyman for those urging some sort of communitarian option, without any clear discussion or elucidation of what alternative options for understanding the conscience *are*. As described in part one of this chapter, Hauerwas seems to pair a rejection of liberalism (and its individualist conscience) with tacit endorsement of a strong, regulating central religious authority, and Dreyer goes even further and advises withdrawal from pluralist civil society—each implicating a legalist understanding of the conscience (though Hauerwas and Dreyer never admit this), where the individual merely applies a fixed set of church teachings and the ability to interpret those teachings according to individual circumstance is constrained. Powell and Kaveny are sympathetic to communitarian concerns while remaining committed to engaging pluralist society, but they leave questions about the nature of the conscience unexplored. I would suggest that clarifying the nature of the conscience associated with Powell and Kaveny's communitarian option is actually key to understanding what a successful resolution to the liberalism/communitarianism debate should be.

So returning to the question at hand: how should we understand Hogan's personalist understanding of the conscience (which rejects both legalist and individualist options) within the context of the liberalism-communitarianism binary, a binary within which the debate about the church's place in pluralist society most often occurs? The

answer, I propose, is to expand the diptych consisting of liberalism and communitarianism into a triptych, based on the work of legal scholar Samuel Moyn.

As a general matter, in his 2015 book *Christian Human Rights*, Moyn is interested in liberalism and communitarianism only tangentially; his primary concern is exploring the genealogy of the human rights tradition in international law and specifically its Catholic origins. According to Moyn, the concept of human dignity (the theoretical basis for human rights) originated with Catholic social theory and *Divini Redemptoris*, Pope Pius XI's 1937 encyclical denouncing communism. From there, the concept migrated to law with the Preamble to the Irish Constitution adopted later that year. It then found its way into the Bavarian Constitution, West German Basic Law, and in 1948, the Universal Declaration on Human Rights. (Of course, as discussed already in this chapter, human dignity went on to become the foundational concept in *Dignitatis humanae*, as well.)

During this period, Catholic social theory—starting with *Rerum novarum* (1891) and continuing with *Quadragesimo anno* (1931)—was charting a middle course between Western liberalism and more revolutionary alternatives such as communism. As part of this middle course, there developed a broader set of theological understandings of the human known as Catholic personalism.³⁰¹ This personalism contrasted with liberal individualism in the degree to which it emphasized the interdependency and solidarity of persons, but it likewise contrasted with communism by making the person the carrier of a minimal set of rights considered to be necessary for human flourishing. At its core, the

³⁰¹ As discussed in chapter 4 (and acknowledged by Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), 68–69), there were multiple forms of personalism during this era. The most important for Moyn, however, is the Catholic form of personalism, the same strain which Hogan engages and would be located in herself, so connecting Moyn to Hogan is appropriate. But because this is a distinct form among alternatives, the qualified term *Catholic* personalism is used in the current discussion.

basis for human dignity was the theological tenet that humans are created as *imago Dei*, the image of God. But Catholic personalism went beyond this, connecting the social understandings of the late nineteenth and early twentieth centuries with a longstanding emphasis in the Catholic tradition on the inherent sociality of human beings that could be traced backwards through Vitoria and before him Aquinas.

It is in *this* context, of discussing Catholic personalism, that Moyn engages the terms “liberalism” and “communitarianism,” but he does so in a way that remaps the territory, by placing collectivism/communism on the same continuum as liberalism and communitarianism, explicitly linking Catholic personalism and communitarianism, and then locating personalist communitarianism as the middle option, all of which he bases in original understandings of the concepts. He states:

Personalism . . . meant a repudiation of the rival materialisms of liberalism and communism. In the first place, then, personalism was different than individualism, for it championed a figure who was supposed to overcome the destitute atomism in the politics and economics of the nineteenth century. If, however, the person provided a connection to community that individualism ruled out, it also provided the key source of value omitted in, and a political bulwark against, communism. Most boldly, personalists claimed that capitalism and communism, apparently foes, deserved each other, and canceled each other out, in their common materialism.³⁰²

Or as one political manifesto from 1931 stated, “We are neither individualists nor collectivists, we are personalists!”³⁰³

Moyn’s discussion of the three ways of liberalism, communitarianism, and collectivism/communism is intriguing, as is the connection he draws between communitarianism and personalism, largely because of the ways Moyn’s use of these

³⁰² Moyn, *Christian Human Rights*, 69–70.

³⁰³ *Ibid.*, 68.

terms both does and does not track with others'. Specifically, Moyn uses the term communitarian to describe a median third way of societal organization which corresponds to this personalist understanding of the human, between liberal individualism and collectivism/communism rather than simply positing it in opposition to liberalism.³⁰⁴ Moyn's categories, then, can be placed in the context of Hogan's personalist and legalist models of the conscience as represented in the following table:

Traditional categories (first used by Durkheim)	Liberalism	Communitarianism	
Associated forms of conscience	Individualist	(not identified by critics of liberalism)	
Hogan's models of conscience	(does not explicitly discuss)	Personalist	Legalist
Moyn's categories	Liberalism	Personalist communitarianism	Collectivism/communism

Table 1

This table allows us to see several things. First, for each form of societal organization—liberal, communitarian, or collectivist—there is a corresponding understanding of the human. In liberalism, the human is understood as an atomized unit and moral decisionmaking is largely solipsistic, caught in the vise between what MacIntyre terms relativism (being unable to judge between competing traditions) and perspectivism (being unable to determine moral truth within a single tradition, due to the known existence of competing traditions) and in practice often looking like the opportunistic intuitionism that critics of liberalism decry. At the other end, what Moyn calls collectivism or communism but what since Durkheim has often been called communitarianism, the human is substantially sublated within the collective. In this context, the role of the individual is to apply group determinations of morality and ethics

³⁰⁴ Ibid., 73, 86.

to whatever facts arise, what Hogan calls the legalist conscience. Moreover, this model of the conscience is operative whether the group determinations are based in a magisterium-authenticated natural law or a politburo-determined “greater good” based on act consequentialism.

Between these two extremes, however, is a median option, identified by both Moyn and Hogan as personalist, which understands the human being neither as atomized and self-contained, with complete autonomy and free of socially binding moral rules, nor as sublated into the group, with moral agency largely restricted to obedience in executing the group’s moral dictates. Instead, this understanding of the human is inherently relational, even as the person maintains her distinct identity vis-à-vis the community. It is here that one can differentiate a robust notion of the Catholic “*common* good” from the collectivist notion of the “*greater* good,” as the former, rooted in Catholic personalism, gives value to the individual person as constitutive (and not merely instrumental) to the community.

This table also allows us to see what is at stake for the individual in differentiating between the models of conscience operative in the Hauerwas/Dreyer rejection of liberalism and pluralism versus the Powell/Kaveny engagement with pluralism, since both of Hogan’s models, the personalist and the legalist, can rightly be called “communitarian,” broadly considered. Which is to say, there are actually *two* “communitarian” options which may be considered as alternatives to liberal individualism.

Moreover, there is a strong relationship, not immediately obvious, between which of these understandings of the conscience one chooses and which version of the church’s

engagement with pluralist society one ultimately adopts. One may go further and suggest that these are simply two ways of addressing the same question: one top-down, and the other bottom-up. In a homogeneous society, it is hard to conceive of the conditions which would give rise to a personalist understanding of the conscience, since there would only be one moral value system for the individual to draw on. Conversely, a personalist conscience presumes that there is more than one value system, that there is indeed tension between two or more value systems (or moral traditions), and that responsibility for resolving this tension through one's actions is precisely the source of one's moral agency. Because the personalist conscience is associated with pluralism and conflicting moral traditions while the legalist conscience is not, but both are properly understood and described as communitarian, I describe the form of communitarianism associated with pluralism and the personalist conscience as "open communitarianism" and the form associated with an exclusivist moral tradition and the legalist conscience as "closed communitarianism." Accordingly, my revised categories can be represented as follows:

Models of conscience	Individualist	Personalist	Legalist
Understanding of the human	Self-contained "individual"	Relational "person"	Sublated into group
Understanding of relation to society	Weak tie to community/liberalism	More than one moral tradition/ "open" communitarianism	Homogeneous (either sectarian or hegemonic)/ "closed" communitarianism

Table 2

Of course, moral decisionmaking is *easier* if one is not placed in such a dilemma. It is *easier* to live in a homogeneous, closed communitarian society. It is *easier* to not question a moral code (or even have the power to) and merely to follow it obediently. Except that, precisely as Dreyer's own history in his hometown illustrates, this invariably translates to pressures to conform and a rejection of outsiders. And ultimately, it can lead

to such an emphasis on group loyalty and obedience to group morality that robust personal agency is all but eliminated.

This is where Rubenfeld's emphasis on commitment is important, as having a clear understanding of the nature of one's commitments—the objects of one's commitments as well as their relative order—is essential to remaining in this tension, which otherwise is too easily resolved through adopting one or the other value systems, or in MacIntyrean terms, “converting” to a new moral tradition in response to an insufficiency in addressing the tradition's problematic in the former one.

As I argued in part one of this chapter, essential to maintaining an equilibrium between coexisting religious and political moral traditions is a clear internal justification within one's primary moral tradition for acts of borrowing from or participation in another. Specifically, it must be clear, in terms internal to the Christian theological ethical tradition, why one is participating in the pluralist political moral tradition. As I have suggested here, a commitment to pluralism is an integral part of the understanding of personal agency associated with Hogan's personalist conscience.

And as I explore in greater depth in the next chapter, this personalist conscience is based in the Christian understanding of the person. This understanding is represented by the Catholic personalism of the early twentieth century, but this tradition must be retrieved and integrated with the work of contemporary Christian theologians in order to adequately support a Christian understanding of the conscience, in a time when the coherence of Christian commitment to pluralism is under greater threat than it has been at any point in living memory.

4.0 CHAPTER 4: ORGANIZING UNDERSTANDINGS OF THE PERSON

Writing soon after the conclusion of the Second Vatican Council in December 1965, in the same passage as that quoted in the previous chapter, John Courtney Murray, SJ, described the central obstacle in drafting *Dignitatis humanae* as follows:

This, in brief, was the major objection encountered by the first two conciliar texts. It encountered an unresolved dispute within the Church with regard to the “rights of conscience.” There was no clear tradition on the issue. In fact, the history of the doctrine of conscience as the source of duties and rights has been marked by controversy, from the days of Aquinas through the days of Suárez to the present time. . . .

. . . Efforts have been made to endow the phrase with a true sense and with a valid standing—to transform the phrase into the symbol for the rightful freedom of man as a moral subject. Symbols, however, are not easily manufactured or manipulated.³⁰⁵

Taking Murray’s words as both sharp caution and tacit challenge, the second of our four axes of investigation is the *person*, insofar as a theological understanding of the conscience is necessarily tied up in questions of theological anthropology. Specifically, this chapter will discuss how the conscience relates to other aspects of the person as understood in the Christian tradition.

Of course, the topic is complicated by several factors, the first being how various understandings of the conscience (and the person) are to be understood vis-à-vis each other. For those such as Stanley Hauerwas who view the Christian tradition as incommensurable with Enlightenment and post-Enlightenment liberalism, the relationship is often posited as religious versus secular understandings of the conscience and the person. But as noted in the previous chapter, in the words of Cathleen Kaveny,

³⁰⁵ Murray, “The Declaration on Religious Freedom: A Moment in its Legislative History,” in *Religious Liberty: An End and a Beginning* (New York: Macmillan, 1966), 26–27.

“many of our key liberal democratic values were originally advanced by religious believers on explicitly religious grounds.”³⁰⁶

Similarly, recent scholarship such as Nicholas Miller’s book *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* establishes that “James Madison’s promotion of the First Amendment owed as much to dissenting Protestant convictions about the right of private judgment as to principles of the eighteenth-century Enlightenment or to the pragmatic necessities of constitution building in a religiously plural new nation.”³⁰⁷ Even John Locke, the Enlightenment philosopher often taken as the primary influence for Madison, was as influenced by “dissenting principles about the right of private judgment for scriptural interpretation” as he was by the secular philosophical tradition.³⁰⁸ Which is to say, we are dealing not with secular versus religious understandings of the conscience but rather with different religious understandings of the conscience, some of which are reflected in the legal-political tradition and some of which are not.

Methodologically, it has been easiest (and therefore common) to describe the conscience as a stable, almost static concept. When U.S. religious liberty is understood as having a theological and not just legal or politically pragmatic basis, however, and when the Christian theological tradition is understood in MacIntyrean (that is, evolving through time in the context of a moral tradition) rather than absolutist terms, the challenge

³⁰⁶ Kaveny, *Prophecy Without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016), 34.

³⁰⁷ Mark Noll, foreword to *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State*, by Nicholas P. Miller (New York: Oxford University Press, 2012), x.

³⁰⁸ Ibid.

becomes to not posit the Christian tradition's understanding of the conscience and the individualist conscience as opposites or the Christian tradition and liberalism as incommensurable (which in this view is just lazy polemics) but instead to describe how these different *theological* understandings relate to one another.

More broadly, the challenge, if one is interested in constructing a new theological understanding of the conscience which will commend itself to Christians in the U.S. invested in both religious and political moral traditions (the explicit goal of this project), is to work backwards from the legal-political understanding of the conscience (described in chapter 1) to its theological bases in dissenting Protestantism in such a way that one can then move forward with modifications and construct a coherent theological anthropology of the conscience which would support a non-hegemonic *and* non-sectarian understanding of Christian religious liberty.

But how to choose *which* understandings of theological anthropology to place in conversation with one another to best lay the groundwork for new understanding? The approach taken in the current chapter does not replicate the work of historians such as Miller, or make arguments about historical causes as such. Rather, as explained below, the Baptist tradition and specifically the work of Baptist theologian E. Y. Mullins are chosen as illustrative and fairly representative of the theological underpinnings of contemporary approaches to religious liberty. Admittedly, the Baptist tradition is not monolithic. Many of the ideas discussed below are contested within the Baptist tradition, which is partly why I have chosen it here—it means there is recent scholarship on the topic.

Another problem is that the Baptist tradition is itself in disarray on many of the relevant points, and not just because of recent contestations. In contrast to Murray's nuanced analysis, quoted above and discussed in the previous chapter, the Baptist tradition has often not clearly distinguished between the conscience itself and the rights which should be accorded it. Terms such as "rights of conscience" and "liberty of conscience" have been used interchangeably, as have "soul liberty" (sometimes called "soul freedom") and "soul competency"—each invoked over the Baptists' four-hundred-year history as the basis of religious freedom depending on the preference of the person writing. And of course all of this discussion occurs for Baptists within the context of Luther's doctrine of "the priesthood of all believers," another concept that often gets used loosely and sometimes interchangeably with those listed. To some degree, then, not only will putting the Baptist and Catholic concepts in conversation with one another bring clarity to the current discussion regarding religious liberty, it will also serve as an opportunity for bringing some order to these concepts within the Baptist tradition itself.³⁰⁹

Accordingly, in first part of the current chapter, the historical development of the Baptist understandings of the conscience, soul liberty, soul competency, and the Protestant doctrine of the priesthood of all believers will be described, and the concepts will be placed into conversation with Catholic understandings of the conscience, human dignity, and synderesis. This will clarify the nature of the debate.

³⁰⁹ In placing the Baptist and Catholic concepts in conversation with one another, I have taken inspiration from the legal canon of construction known as *in pari materia*, where similar laws in different jurisdiction (usually parallel provisions in federal and state statutes) are interpreted or at least conceptually arranged similarly.

It is well known that Murray relied on the early-twentieth-century form of Catholic personalism identified most often with Jacques Maritain. As it happens, Baptist Mullins also drew heavily on personalist philosophy, but the personalism at issue for him was not the Maritain-style Catholic personalism so prominent in twentieth-century Catholicism but rather a form identified with Boston University and the work of Borden Parker Bowne. Thus in the second part of this chapter, I will juxtapose these two forms of personalism directly. I will argue that much of the difference between individualist and personalist understandings of the conscience is exemplified by the differences between these very distinct forms of personalism. This in turn will allow me to pivot from the descriptive to the proscriptive, as I will argue that the Maritain-style of personalism is the more coherent with the Christian tradition, and that supplanting the BU-style with the Maritain-style of personalism, even in the theoretical framework of the Baptists, actually results in an understanding of soul competency closer to Mullins' original usage (and likely his intent).

This chapter grows out of the central insight of my early research into the religious conscience. To oversimplify, I realized that while Baptists talk a lot about the conscience, they mostly just use the concept to do certain work for them in the context of their overall argument for strict separation of church and state, but they do not generally have a good idea of what the conscience is or how it works. Catholics, by contrast, have a long and developed understanding of what the conscience is, but instead of using the concept to keep church and state separate, they have tended to use the concept as a way to undermine separation of church and state, at least insofar as Catholic (legalist) understandings of the conscience are used to protect religiously motivated acts in the

otherwise neutral public square—an understandable inclination considering the pre-Vatican II history of Catholic support for Catholicism as an established religion. In various other parts of the dissertation, I analyze the problems associated with the Catholic side of this divide; in the current chapter, I analyze the issues from the Baptist side.

Baptists could benefit greatly by distinguishing between the conscience *per se* and the theoretical (juridical) basis for religious freedom such as exists in the Catholic distinction between the conscience and human dignity. And as serendipity would have it, a concept with such a function already exists in the Baptist tradition, albeit in a neglected state: “soul liberty.” Similarly, the excessive individualism that many have noted in the Baptist tradition, exemplified in the doctrine of “soul competency,” could be remedied by reconsidering the nature of the personalism underlying that doctrine. And by placing the Baptist and Catholic traditions in closer dialogue than they have been in the past on these matters, the potential coherence of Catholic personalism with the rest of the Baptist tradition will hopefully become apparent.

The goal of this chapter is not to create a synthesis *per se* around notions of the person. It is rather to set up a healthier tension which might better support an open communitarian-personalist position—a tension between *theological* positions, not just the tired binary of secular versus religious.

4.1 Conscience, Soul Liberty, and Soul Competency

As noted above, the Baptist tradition is selected for discussion here due to its illustrative and representative value; I am not making an explicitly historical argument for its precedence in U.S. history to the exclusion of other religious or philosophical traditions. This choice is not, however, without critical warrant. Philosopher Martha

Nussbaum, for example, devotes an entire chapter in her book *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* to Roger Williams, who sailed to the Massachusetts Bay Colony in 1631 as a Puritan minister but ended up founding the first Baptist church in North America, in Providence, Rhode Island, around 1638. While Williams did not remain a Baptist long—probably for under a year—before becoming an unaffiliated Protestant,³¹⁰ his influence reverberated via John Clarke, founder of the Baptist church in Newport, Rhode Island, and author of the 1663 Rhode Island charter which guaranteed religious liberty,³¹¹ as well as through eighteenth-century Baptist ministers Isaac Backus and John Leland, who in turn influenced James Madison and Thomas Jefferson.³¹²

Nussbaum understands Williams as inaugurating a “distinctively American” tradition marked by, first, “a distinctive emphasis on the importance of a mutually respectful civil peace among people who differ in conscientious commitment” and, second, “a personal, and highly emotional, sense of the preciousness and vulnerability of each individual person’s conscience, that seat of imagination, emotion, thought, and will through which each person seeks meaning in his or her own way.”³¹³ In Nussbaum’s reading, “[Williams’s] important writings of the 1640s anticipate Locke’s 1689 *A Letter*

³¹⁰ See Roger Williams, *George Fox Digg’d out of his Burrows, Or an Offer of Disputation* (1676), in *The Complete Writings of Roger Williams*, 5:102–3, 5:342–43.

³¹¹ As summarized by Clarke biographer Sydney James, “Williams had the better mind and pen,” while “Clarke built much more that lasted and set a course for the future.” *John Clarke and His Legacies: Religion and Law in Colonial Rhode Island, 1638–1750* (University Park: Pennsylvania State University Press, 1999), 2.

³¹² See Bill J. Leonard, “Baptists, Church, and State: Rejecting Establishments, Relishing Privilege,” in *Through a Glass Darkly: Contested Notions of Baptist Identity*, ed. Keith Harper (Tuscaloosa: University of Alabama Press, 2012), 17–19; James P. Byrd, “Persecution and Polemics: Baptists and the Shaping of the Roger Williams Tradition in the Nineteenth Century,” in Harper, 56–61.

³¹³ Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 36, 37.

Concerning Toleration in every major point.”³¹⁴ “In effect,” she concludes, “he already has hold of the whole family of principles that form what I have called the distinctive American approach to religious fairness.”³¹⁵

Longtime Yale scholar Harold Bloom pursues different concerns than Nussbaum’s in his book of religious criticism *The American Religion: The Emergence of the Post-Christian Nation*, but he too gives Baptists center stage in the history of American religion, describing the Southern Baptists as one of the two paradigmatic U.S. religious traditions along with Mormonism. For Bloom, members of these groups may “call themselves Christians, but like most Americans they are closer to ancient Gnostics than early Christians.”³¹⁶ Bloom is using the term “Gnostic” loosely here, for a kind of transcendental individualism if not narcissism. “We are a religiously mad culture,” he states, “furiously searching for the spirit, but each of us is subject and object of the one quest, which must be for the original self, a spark or breath in us that we are convinced goes back to before the Creation.”³¹⁷

Thus, for Bloom, the pivotal figure is not Roger Williams but E. Y. Mullins (1860–1928), early twentieth-century Baptist theologian, president of the main (and until 1908, only) Southern Baptist seminary (1899–1928), president of the Southern Baptist Convention (1921–1924) and Baptist World Alliance (1923–1928), and originator of a

³¹⁴ Ibid., 41.

³¹⁵ Ibid., 68–69. See also William G. McLoughlin’s study of the role Baptists played in the history of religious liberty in the U.S., *Soul Liberty: The Baptists’ Struggle in New England, 1630–1833* (Hanover, NH: Brown University Press/University Press of New England, 1991), as well as Kyle G. Volk’s *Moral Minorities and the Making of American Democracy* (New York: Oxford University Press, 2014), which notes Baptist involvement but does not focus on it.

³¹⁶ Bloom, *The American Religion: The Emergence of the Post-Christian Nation* (New York: Simon & Schuster, 1992), 22.

³¹⁷ Ibid.

doctrine known as “soul competency,” a robust understanding of the individual’s ability to have a direct relationship with God. “An endlessly subtle and original religious thinker,” Bloom declaims, “Mullins is the most neglected of major American theologians. Pragmatically he is more important than Jonathan Edwards, Horace Bushnell, and the Niebuhrs.”³¹⁸

It is not clear to me that Bloom’s understanding of soul competency is correct; he divorces it from the theological context Mullins was at pains to develop in order to advance his thesis about American individualism being the true American religion.³¹⁹ That notwithstanding, Bloom’s argument supports the point being made here—namely, that Mullins’s soul competency is an important articulation of the theology which has been used as the underpinning of American individualism, and so if the goal is to transmute that individualism (and the concomitant moral solipsism Bloom identifies) into a personalist communitarianism, Mullins’s doctrine is an appropriate focus of study.

4.1.1 Early Baptist rhetoric of conscience

As noted in the introduction to this chapter, the Baptist understanding of the conscience and the distinctive Baptist concepts of soul freedom and soul competency

³¹⁸ Ibid., 199.

³¹⁹ Several Baptist writers cite the importance Bloom gives to Mullins and soul competency, without seeming to acknowledge that Bloom was not being complementary, as least not in terms Baptists should appreciate. For example, James Dunn, “Church, State, and Soul Competency,” *Review and Expositor* 96, no.1 (Winter 1999): 61–62; Timothy D. F. Maddox, “E. Y. Mullins: Mr. Baptist for the 20th and 21st Century,” *Review and Expositor* 96, no.1 (Winter 1999): 87. Conservative critics of Mullins and his successors, meanwhile, seize on Bloom’s appraisal with alacrity. See R. Albert Mohler, Jr., introduction to *The Axioms of Religion*, by E. Y. Mullins, ed. Timothy and Denise George (Nashville: Broadman & Holman Publishers, 1997), reprinted as “Baptist Theology at the Crossroads: The Legacy of E. Y. Mullins,” *Southern Baptist Journal of Theology* 3, no. 4 (Winter 1999): 17; Russell D. Moore and Gregory A. Thornbury, “The Mystery of Mullins in Contemporary Southern Baptist Historiography,” *Southern Baptist Journal of Theology* 3, no. 4 (Winter 1999): 51. Curtis Freeman, a communitarian influenced by James Wm. McClendon and Stanley Hauerwas, describes Bloom’s understanding of Mullins as “not inappropriate.” Curtis W. Freeman, “E. Y. Mullins and the Siren Songs of Modernity,” in Harper, 101.

have sometimes been treated loosely and, at their worst, interchangeably. Accordingly, historical narration of the evolution of these terms in the Baptist tradition is helpful.

Lacking any singular “founder,” the origins of the Baptist movement belie any depiction of its founding era as occurring in linear fashion. We can say, though, that the movement began with a group of English Separatist Puritans who fled religious persecution in England in 1608 and sought refuge in Amsterdam. There, in the political context of Dutch religious tolerance and the theological context of a pre-Synod-of-Dordt Calvinism—meaning the tension between Arminians (who in 1619 would be expelled from the established Dutch state church as heterodox) and Gomarists (who upon gaining control of the established church defined orthodox Calvinism as Gomarism) was still unresolved—these English Separatist Puritans, under the influence of the Anabaptists and other Radical Reformers,³²⁰ founded a church in 1609 they called “Baptist.”

Within several years, however, this first “Baptist” church had split. One group returned to England around 1612, where they become known as General Baptists, for their belief in Christ’s “general” atonement, while another group remained in Amsterdam and sought membership among the Waterlander Mennonites. Separately, sometime during the 1630s another group in London founded a church that they also labeled “Baptist,” a group known as Particular Baptists for their belief in the limited or

³²⁰ The extent of Anabaptist influence among both General and the Particular Baptists is debated. Glen H. Stassen is probably the most prominent maximalist on this point, as outlined in his essay “Anabaptist Influence in the Origin of the Particular Baptists,” *Mennonite Quarterly Review* 36, no. 4 (October 1962): 322–48. For a sample of contrary treatments, see Timothy George, “Between Pacifism and Coercion: The English Baptist Doctrine of Religious Toleration,” *Mennonite Quarterly Review* 58, no. 1 (January 1984): 34n20, and authorities cited therein. See also Steve Wright, “Leonard Busher: Life and Ideas,” *Baptist Quarterly* 39, no. 4 (2001): 176–78.

“particular” atonement of Christ, in line with the canons adopted at Dordt in 1619.³²¹

Also separately, in the North American colonies, Baptist churches were founded in Providence and Newport around 1638 under the leadership of Roger Williams and John Clarke, respectively, in what became the Colony of Rhode Island and Providence Plantations in 1663, with a royal charter written by Clarke guaranteeing religious freedom. Here, the churches were founded somewhat less in opposition to the Anglican Church than to the established Puritan (later known as Congregationalist) church of Massachusetts, though one of the reasons for the split with the Congregationalists was precisely over the legitimacy of the Anglican Church, another being the issue of having a state-established church itself.³²²

It would be tempting to maintain the distinctions between these different historical lineages, and certainly some historians have attempted to do so,³²³ but the reality was more fluid than such an approach would admit. Due to the lack of any institutional oversight beyond the local church, any church could call itself “Baptist,” and Baptists in any one group might be heavily influenced by reading the Baptists in another. Indeed, a commonsense epistemology among Baptists *encouraged* such borrowing, precisely because truth was truth. As a confessional statement written by London Particular Baptists in 1646 stated, “[W]e confess, that we know but in part, and that we are ignorant of many things which we desire and seek to know; and if any shall do us that

³²¹ See generally Bill J. Leonard, *Baptists in America* (New York: Columbia University Press, 2005), 7–10; Bill J. Leonard, *Baptist Ways: A History* (Valley Forge, PA: Judson, 2003), 23–26, 28–29.

³²² See Leonard, *Baptists in America*, 13–14; Leonard, *Baptist Ways*, 72–77.

³²³ Those, mostly Particular Baptist partisans, attempting to marginalize the importance of the group of Baptists that returned from Amsterdam to London have emphasized that many later General Baptists merged with a unitarian group. Likewise, those attempting to marginalize the importance of Roger Williams among American Baptists have highlighted that his church was reorganized as a different church after his departure. See Byrd, 78, describing attempts to diminish Williams’s legacy.

friendly part to show us from the word of God that which we see not, we shall have cause to be thankful to God and them.”³²⁴ Thus there is more similarity among these early Baptist churches than their differing origins might suggest.³²⁵

As a result, many historians who study the Baptist tradition take a descriptive approach instead of a rigidly genealogical one. As summarized by one such historian, Bill Leonard, “Early Baptist identity was characterized by emphasis on biblical authority, regenerate church membership, believer’s baptism by immersion, congregational church polity, religious liberty, and the priesthood of all believers.”³²⁶

While Leonard lists six characteristics, however, they are all interrelated. For example, one of the characteristics, the practice of restricting baptism to those who, having reached an age of accountability, profess faith in Christ (“believer’s baptism”), obviously gave the Baptists their name. But it also represented Baptist emphasis on biblical authority, since it was understood as a return to New Testament practice. Similarly, it was also a commitment to religious liberty, since it functioned as a rejection of automatic membership in an established church by virtue of one’s citizenship and of

³²⁴ *First London Baptist Confession of Faith* (1646), www.reformedreader.org/ccf/16461bc.htm.

³²⁵ James, 40, even argues that any distinction between General and Particular Baptists in this era is misplaced, anachronistically introduced by eighteenth-century writers such as Isaac Backus. In the Baptist church at Newport, for example, Clarke believed in predestination (like the Particular Baptists) but did not insist that others in the church agree. “Far from being a hallmark of their fellowship,” James writes, “the doctrine was not a subject of debate and was all but forgotten by the eighteenth century.” Clarke himself “favored a churning discussion of religion, not a procrustean creed,” and “[e]xaggerating the distinction between Particular and General Baptists obscure[s]” the important point that of far greater significance than any difference among Baptists was their decisive break with the Congregationalists. Because the use of these categories when discussing this period is still convention, however, they are maintained in this discussion.

³²⁶ Bill J. Leonard, “Conscience and Dissent in a Believers’ Church: Renewing Baptist Global Identity,” in *Baptists and the World: Renewing the Vision; Papers from the Baptist Historical Society Conference, Prague, Czech Republic, July 2008*, edited by John H. Y. Briggs and Anthony R. Cross (Oxford: Centre for Baptist History and Heritage, Regent’s Park College, 2011), 4.

the union of church and state which that represented—precisely Baptists’ charge against infant baptism.

From the beginning, Baptists defended their religious freedom by invoking the rhetoric of conscience, as shown in this passage written by Thomas Helwys, the leader of the Baptist group that returned to London from Amsterdam, in his book *A Short Declaration of the Mystery of Iniquity*, written as an open letter to King Charles I of England:

We still pray our lord the king that we may be free from suspect, of having any thoughts of provoking evil against them of the Romish religion, in regard of their profession, if they are the true and faithful subjects of the king. For we do freely profess that our lord the king has no more power over their conscience than over ours, and that is not at all. For our lord the king is but an earthly king, and he has no authority as a king but in earthly causes. And if the king’s people be obedient and true subjects, obeying all human laws made by the king, our lord the king can require no more. For men’s religion to God is between God and themselves. The king shall not answer for it. Neither may the king be judge between God and man. Let them be heretics, Turks, Jews, or whatever, it appertains not to the earthly power to punish them in the least measure. This is made evident to our lord the king by the scriptures.³²⁷

Two years later, Leonard Busher, an expatriate Londoner connected to the Amsterdam Baptists, continued this theme in his impassioned pamphlet addressed to the English king and parliament, *Religion’s Peace; or, a Plea for Liberty of Conscience*, which again argued for religious liberty for everyone, not merely toleration for specific groups.³²⁸

This framing in terms of conscience carried over to the North American debates between Puritan minister John Cotton and Puritan-turned-Baptist-turned-unaffiliated

³²⁷ Helwys, *A Short Declaration of the Mystery of Iniquity* (1612; repr., Macon, GA: Mercer University Press, 1998), 53.

³²⁸ Busher, *Religion’s Peace; or, a Plea for Liberty of Conscience* (London, 1614), reprinted in E. B. Underhill, ed., *Tracts on Liberty of Conscience and Persecution, 1614–1661* (London: J. Haddon, 1846). See also Wright, “Leonard Busher: Life and Ideas,” 175–92; Stephen Wright, “Leonard Busher: An Additional Note,” *Baptist Quarterly* 39, no. 7 (2002): 360.

minister Roger Williams. Cotton represented the faction of Puritans that, while anxious that the Church of England be reformed, recognized its legitimacy and the importance of maintaining an established church. Williams did neither, and so for these and other reasons was banished from the Bay Colony in 1636, leading him to found Providence Plantation on land he purchased from Narragansett native Americans to serve as a refuge for those “destitute (especially for Conscience).”³²⁹ A private admonishment Cotton wrote to Williams soon after the banishment was published years later in 1643 in London without Cotton’s consent, and in 1644 Williams published a reply. This initiated a lively back and forth between the men, carried out in classic seventeenth-century fashion—by means of more published pamphlets.³³⁰

In these pamphlets, rhetoric of “liberty of conscience” is all through Williams’s writings against Cotton, easily interpreted in individualist terms. But the nature of the debate between Cotton and Williams makes it unclear exactly how individualist Williams’ understanding actually was. In his 1644 *Mr. Cottons Letter Examined and Answered*, Williams accused Cotton of “that body-killing, soul-killing, and State-killing doctrine of not permitting, but persecuting all other consciences and ways of worship but his own in the civil State, and so consequently in the whole world, if the power of Empire thereof were in his hand.”³³¹ Intriguingly, Cotton responded that governments which suppressed religious dissent did, in fact, protect rights of conscience. Cotton’s reasoning

³²⁹ Williams to Assembly of Commissioners, Nov. 17, 1677?, in *The Correspondence of Roger Williams*, ed. Glenn W. LaFantasie (Hanover, NH: Brown University Press, 1988), 2:751; see also LaFantasie, 1:56n4.

³³⁰ See Reuben Aldridge Guild, introductory remarks to “Letter of John Cotton,” in *The Complete Writings of Roger Williams*, 1:292.

³³¹ Williams, *Mr. Cotton’s Letter Examined and Answered* (1644), in *The Complete Writings of Roger Williams*, 1:328 (altered to modern spelling).

was that once the dissenter had been properly informed of official church teaching on a matter, the dissenter's conscience was then properly formed, and while it might be wrong to prosecute an "erroneous" conscience, it was not wrong to prosecute a true one, i.e., one duly admonished regarding church teaching. In such situations, any continued dissent was against the dissenter's *own* conscience, and thus "he is not persecuted for cause of Conscience, but for sinning against his Own Conscience."³³²

Cotton was describing nearly the exact same understanding of conscience used in Catholic moral manuals, where the conscience is responsible only for helping the individual know how best to apply church teachings through application of a deductive syllogism, the type referred to as "legalist" by theologian Linda Hogan as discussed in chapter 3, where the conscience is "formed" by church teaching, which contrasts with the "personalist" model, where the person has more agency in her own conscience development. In *The Bloody Tenent, of Persecution, for Cause of Conscience, discussed in A Conference between Truth and Peace* (1644), Williams argued that Cotton's position was the height of arrogance and in a later work, *The Bloody Tenent Yet More Bloody* (1652), referred to such partiality towards one's own perspective of the truth as "monstrous."³³³ Thus it is clear that Williams was rejecting a legalist understanding of the conscience, but whether he was proposing an understanding of the conscience better described as individualist or personalist is not, and certainly Williams would have rejected the idea that unchecked individual subjectivism was a good thing, as his

³³² Cotton, *A Reply to Mr. Williams* (1644), in *The Complete Writings of Roger Williams*, 2:30.

³³³ Williams, *The Bloody Tenent Yet More Bloody* (1652), in *The Complete Writings of Roger Williams*, 4:44. See also John M. Barry, *Roger Williams and the Creation of the American Soul: Church, State, and the Birth of Liberty* (New York: Viking, 2012), 324–26.

condemnation of George Fox and the Quakers during his August 1672 public debate with leading Quakers demonstrates.³³⁴

Williams's condemnation of the Quakers sees him struggling with much the same issue as John Courtney Murray three hundred years later, namely, how to speak of liberty of conscience while avoiding "the 'lawless conscience,' absolutely autonomous in its individual judgments, not subject to a transcendental order of truth."³³⁵ Or as Williams argued the matter in seventeenth-century terms, "the Quaker doctrine of the Christ within tended to obscure or destroy the Christ without"³³⁶—which is to say, the Quaker divinization of one's inner voice had the potential to drown out Christ as witnessed in the Christian tradition. Highlighting the twin dangers of individualism and legalist adherence to a magisterium, he continued, "The doctrine of the Inner Light, as held by the Quakers, was no less fatal to the authority of Scripture than the Papal theory of Infallibility."³³⁷

Williams considered Quaker beliefs an "arrogat[ion] [of] [personal] infallibility"³³⁸ and argued that "Quakerism would logically result in arbitrary government."³³⁹ Explaining this point, Williams later wrote:

[B]y an *Arbitrary Government* I did not intend a Government ruling by *Force* (for there could be no Government in the world without the *Sword*) but *Arbitrary* I said came from *Arbitrium* which signified *Will* or pleasure: and so my *Argument* was, that [for] Persons immediately speaking from God, it was impertinent and profane to clog and cumber them with *Laws*, for the Voice of God (the *Law* of all

³³⁴ The four-day debate between Williams and several leading Quakers took place over three days in Newport and another day a week later in Providence, following which Williams published his account of the debate as *George Fox Digg'd out of his Burrows*, in *The Complete Writings of Roger Williams*, vol. 5. See J. Lewis Diman, introduction to *George Fox Digg'd out of his Burrows* (1872), in *The Complete Writings of Roger Williams*, 5:xxx, xliii.

³³⁵ Murray, "The Declaration on Religious Freedom: A Moment in Its Legislative History," in *Religious Liberty: An End and a Beginning* (New York: Macmillan, 1966), 26.

³³⁶ Diman, 5:xxxiii.

³³⁷ Diman, 5:xxxvi.

³³⁸ Diman, 5:xxxviii. See Williams, *George Fox Digg'd out of his Burrows*, 5:247–57.

³³⁹ Diman, 5:xliv–xlv.

Laws) proceeded out of their mouth, than which there could be none more Just, more Wise, more Holy.³⁴⁰

Strikingly, this was the same point raised by the *Reynolds* and *Employment Division v. Smith* courts two hundred and three hundred years later: “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”³⁴¹ Williams went on to insist that forcing the Quakers to comply with civil order was not religious discrimination, and moderate punishment against disruptive acts “pretending Conscience” was not persecution.³⁴² But Williams’s denunciation of the Quakers notwithstanding, Williams never resolved the matter theologically, instead simply arguing with the Quakers over the biblical basis for their doctrines.

During the debates with the Quakers, Williams was regularly disparaged by his opponents as “Old Man,” “(among other angry insultings)”—he was by then in his seventies—and as a general matter had little influence.³⁴³ Within several decades after his death in 1683, “Williams’s reputation in New England . . . was that of an unstable religious radical.”³⁴⁴ By the time of the United States’ founding, however, his legacy had been rehabilitated, in large part due to efforts by Baptist ministers John Leland and the prolific Isaac Backus. Backus wrote a popular history of New England in which Williams featured prominently, as well as a 1770 work on liberty of conscience, *A Seasonable Plea*

³⁴⁰ Williams, *George Fox Digg’d out of his Burrows*, 5:312–13 (altered to modern spelling).

³⁴¹ *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879), quoted in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

³⁴² Williams, *George Fox Digg’d out of his Burrows*, 5:307. Nussbaum notes that Williams was on the whole “sympathetic to the idea of [religious] accommodation, where peace and safety interests are not at stake.” Nussbaum, 61; see also Nussbaum, 67.

³⁴³ Williams, *George Fox Digg’d out of his Burrows*, 5:421, 318. See also *ibid.*, 5:47; Dimon, 5:xvi, xxxv.

³⁴⁴ Byrd, 57.

for Liberty of Conscience, and it is likely that both Backus and Leland helped shape the thinking behind James Madison’s 1785 “Memorial and Remonstrance against Religious Assessments” as well as the religious freedom provisions of the Virginia and U.S. constitutions.³⁴⁵

4.1.2 The shift to “soul liberty”

For Williams, Cotton, Leland, Backus, Madison, and the others discussed in the previous subsection, in keeping with the times, the rhetoric of religious freedom was primarily in terms of liberty of *conscience*. Williams did mention another concept, *soul liberty*, but the phrase shows up only a couple of times in his writing—in a 1652 letter to John Winthrop and a 1672 letter to a neighbor inclining to Quakerism sent in the run-up to the debate with the Quakers³⁴⁶—and it is never explained. It would be left to later writers to come back to the concept and expand it.

A comprehensive investigation of the concept’s early development is beyond the scope of this discussion, but it can be said that by the middle of the nineteenth century, use of the phrase “soul liberty” as a close but imprecise synonym for liberty of conscience and religious liberty—a sort of associated corollary—was widespread.

It shows up, for example, in an 1847 address to the Rhode Island Historical Society on the historical significance of Roger Williams by Job Durfee, chief justice of Rhode Island, where “soul-liberty” is contrasted with the “soul-oppression” of being

³⁴⁵ Ralph L. Ketcham, “James Madison and Religion: A New Hypothesis,” *Journal of the Presbyterian Historical Society* 38, no. 2 (June 1960): 77–78; Byrd, 56–61; Miller, 101–13; Leonard, “Baptists, Church, and State,” 18–19.

³⁴⁶ Williams correspondence, in *The Complete Writings of Roger Williams*, 6:234 and 5:29.

forced to attend worship against one's beliefs.³⁴⁷ In the address, Durfee compared the understanding of conscience and soul liberty of Roger Williams with that of Williams's contemporary, Pawtuxet (now Cranston, RI) resident William Harris, who, "[b]asing his theories, for a time, at least, on conscience, . . . contended that any person who could conscientiously say that he ought not to submit to any human authority, should be exempt from all law."³⁴⁸ Durfee states, "You will perceive that he [Harris] bases this proposition upon the liberty-element of the fundamental idea — that he would transmute the relation which subsists between the secret conscience and God, and with which no human law should interfere, into the relations between man and man, citizen and State, and thereby dissolve the government, establish the sovereignty of each individual, and terminate all law."³⁴⁹

For Durfee, liberty and law are in constant tension and even struggle, and yet they each depend on one another, "each is necessary to the proper existence of the other."³⁵⁰ Citing Williams's response to Harris, Durfee insisted on a distinction between "the absolute liberty of conscience, and the civil government": "each individual [may] worship God in his own way," but against the commands of civil government, "they must set up no pretence of soul-liberty—no affected conscientious scruples—do their duty they must, each as one of the crew enlisted for the voyage, on peril of suffering the penalties of mutiny."³⁵¹

³⁴⁷ Durfee, *A Discourse Delivered Before the Rhode-Island Historical Society* (Providence, RI: Charles Burnett, Jr., 1847), 5–10.

³⁴⁸ Durfee, 11.

³⁴⁹ *Ibid.*, 15.

³⁵⁰ *Ibid.*, 13.

³⁵¹ *Ibid.*, 15. Almost forty years later, in 1886, Durfee's son Thomas, who by then was serving as chief justice of the Rhode Island Supreme Court himself, touched on the theme of soul liberty as well, for

In 1860, in a work entitled *The Price of Soul-Liberty, And Who Paid It*, New Jersey Baptist minister Henry C. Fish defined soul liberty simply as “the liberty to think and act in religious matters without human diction or control” based on “direct personal and individual responsibility to God.”³⁵² “Everything pertaining to religion, must be a matter of intelligent conviction and voluntary choice,” Fish continued. “To God each man, for himself, either stands or falls.”³⁵³

Later that same year, Boston pastor Daniel Eddy expanded on Fish’s short definition in an address which Eddy framed as “a defense of, and a plea for, soul liberty.”³⁵⁴ Eddy stated:

The Baptists contend that no human being has a right to interfere between the soul and God; that no man can believe for another, or do the duties of another; that the parent has no right to commit the child to any line of conduct, or to any moral position whatever, before God. . . . Each soul occupies dependent position before the Almighty, is responsible for own baptism and its own faith. This view Baptists hold against all those sects that practise infant baptism, that rite takes from the child all opportunity of deciding what is right and what is wrong in relation to that ordinance, and commits him to forms which intelligent conviction may lead him to repudiate; takes away his free agency, and places him under obligations he never assumed. . . . Against this Baptists utter their solemn protestation. They declare that no man can stand sponsor to another; that no man can possess faith for another; that no man has a right commit another. Baptism binds the conscience of the child, imposes responsibility, and whether administered by Catholic or Protestant, in Rome or Geneva, is an unwarrantable interference with the soul’s relation to God.³⁵⁵

an address given during the two-day celebration of the two-hundred-fiftieth anniversary of the founding of Providence. Given the context, however, his address was more of a narrative history and did not discuss the concept to any meaningful degree. See Thomas Durfee, “Oration,” in *Two Hundred and Fiftieth Anniversary of the Settlement of Providence, June 23 and 24, 1886* (Providence, RI: Providence City Council, 1887), 115–59.

³⁵² Henry C. Fish, *The Price of Soul-Liberty, And Who Paid It* (1860; repr., Rochester, NY: Backus, 1983), 19, 20.

³⁵³ *Ibid.*, 20.

³⁵⁴ Eddy, *Roger Williams and the Baptists: An Historical Discourse Delivered Before the Young Men’s Christian Union, in Hollis Street Church, Dec. 2, 1860* (Boston: Andrew F. Graves, 1861), 10.

³⁵⁵ *Ibid.*, 20–22.

Interestingly, Eddy describes the conscience as “bound” in baptism in a holistic sense, exactly as it is in personalist understandings of the conscience, where the context is responsibility and relationship to another and not merely the individual’s own will—or something indistinguishable from that from the perspective of others—as Williams accused it of being for the Quakers.

In the twentieth century, several Baptist authors seemed to lose the thread of soul liberty and confuse it with the distinct concept of soul competency, discussed below. Baptist historian Walter Shurden, for example, in his book *The Baptist Identity: Four Fragile Freedoms* conflates “the competency of the soul before God” and “believer priesthood” along with many other terms under his heading of “soul freedom” for the sake of a mnemonic built around “four freedoms” (without apparent apology to Franklin Roosevelt): Bible freedom, soul freedom, church freedom, and religious freedom.³⁵⁶ Similarly, James M. Dunn, leader (1981–1999) of the then-titled Baptist Joint Committee on Public Affairs, in Washington, DC,³⁵⁷ also preferred the term soul freedom and similarly subsumed the substance of soul competency within it.³⁵⁸ Both Shurden and Dunn, however, were more concerned with exhorting Baptists to be consistent with their understanding of Baptist history and practice—especially that history and practice which

³⁵⁶ Shurden, *The Baptist Identity: Four Fragile Freedoms* (Macon, GA: Smyth & Helwys Publishing, 1993), 23. On his selection of freedom as the central motif of this mnemonic, Shurden later stated that while he personally preferred other terms such as voluntarism, he felt freedom was more widely understood among Baptists. Shurden, *Not an Easy Journey: Some Transitions in Baptist Life* (Macon, GA: Mercer University Press, 2005), 26n8.

³⁵⁷ In 2004, the name was changed to the Baptist Joint Committee for Religious Liberty.

³⁵⁸ See *A Baptist Vision of Religious Liberty & Free and Faithful Politics: The Words and Writings of James M. Dunn*, ed. Aaron Douglas Weaver (Macon, GA: Smyth & Helwys Publishing, 2018), 28–29, 36, 39–41, 54–56, 67–69; Aaron Douglas Weaver, *James M. Dunn and Soul Freedom* (Macon, GA: Smyth & Helwys Publishing, 2011), 67–73.

they understood soul freedom to refer to—than with developing the theological content of that phrase, perhaps explaining their affinity for soul freedom as a Baptist shibboleth.

By contrast, Baptist historian E. Glenn Hinson persisted in using soul liberty in its distinct meaning in his book *Soul Liberty: The Doctrine of Religious Liberty*, where he defined soul liberty as “the freedom of every human being, whether as an individual or in a group, from social coercion in religious matters.”³⁵⁹ Hinson continued, still speaking of soul liberty:

It is not to be equated with freedom of choice or will or freedom of conscience. It includes these, but it is broader. Both of these have to do with interior matters over which society can exercise no control. . . . Further, soul liberty is not the same as religious toleration. A tolerant person may permit someone to exercise his faith, but he does not recognize this as an inherent right. Governmentally, toleration is a policy of permitting forms of religious belief and worship not official favored, established, or approved.

Soul liberty defined in this manner encompasses several freedoms. One is freedom of conscience, the right freely to determine what faith or creed one will follow. Others are freedom of religious expression, freedom of association, and freedom for corporate and institutional activities.

“Freedom of conscience” is an absolute, pure freedom. It concerns religion in its essence. God alone can exercise authority over the conscience. The state may inform the conscience of its citizens and limit immoral or injurious behavior, but it cannot presume to know what their consciences hold with respect to religion. It must grant liberty even to erroneous conscience.³⁶⁰

In this context, Hinson is saying that because the conscience is an “interior matter,” the state cannot compel anyone to hold (or not hold) any belief held in sincere conscience—God has authority over the conscience, but the state does not. Soul liberty, by contrast,

³⁵⁹ Hinson, *Soul Liberty: The Doctrine of Religious Liberty* (Nashville: Convention, 1975), 12 (italics omitted). Hinson also kept the concepts distinct in his later essay on Mullins, discussing soul competency largely without reference to soul liberty. See E. Glenn Hinson, “E. Y. Mullins as Interpreter of the Baptist Tradition,” *Review and Expositor* 96, no.1 (Winter 1999): 109–22.

³⁶⁰ Hinson, *Soul Liberty*, 12.

refers to those freedoms which any person has vis-à-vis the state or one's fellow citizen as pertains to religion.

More recently, religious historian Nicole Myers Turner in her book *Soul Liberty: The Evolution Of Black Religious Politics in Postemancipation Virginia* has used soul liberty, which she defines as “a combination of religious freedom, righteousness, equity, and justice,”³⁶¹ as the key motif in her exploration of how newly emancipated Black people in the Reconstruction Era drew on their theological context “to carve out a meaningful freedom in the landscape that emancipation brought to them.”³⁶² As they navigated their “simultaneous spiritual exultation over emancipation and material concern for the social, political, and economic aspects of freedom,” Turner writes, “[African Americans'] gaze shifted to realizing the soul freedom they had dreamed, prayed, and fought for.”³⁶³

Describing Black Baptists' connection to the concept, Turner explains:

At the 1871 Consolidated American Baptist Missionary Convention—the first attempt to create a national Baptist convention—attendees placed themselves within the historical lineage of Baptists in America by likening their postemancipation struggle to Roger Williams's pursuit of “soul liberty” in colonial Rhode Island. Paramount in the attendees' consideration was how they could freely live their religious lives. . . . [T]his pursuit of soul liberty took black Christians through the thickets of government agencies, through negotiations within churches and church convention leadership, and ultimately into the realm of electoral politics, where the pursuit and realization of soul liberty was fully amplified.³⁶⁴

³⁶¹ Turner, *Soul Liberty: The Evolution Of Black Religious Politics in Postemancipation Virginia* (Chapel Hill: University of North Carolina Press, 2020), 2.

³⁶² Turner, interview by Elaine Maisner, University of North Carolina Press, May 28, 2020, YouTube video, 16:09, youtu.be/6zdCuPMo5XE.

³⁶³ Turner, *Soul Liberty*, 2, 4.

³⁶⁴ *Ibid.*, 9.

She continues, “Soul liberty is the balancing task that postemancipation African Americans engaged in and pursued. They sought freedom to worship—soul freedom down to the very core of their being, where nothing could hinder them.”³⁶⁵

In essence, then, Baptist soul liberty can be understood as a right to individual existential self-determination in political, ecclesiastical, and social contexts, a relative of conscience but better understood as a distinct concept with distinct implications. Moreover, despite the informal slippage between conscience and soul liberty among many Baptists, the distinction nonetheless maps roughly onto the same terrain as Murray’s distinction between conscience and human dignity. One (conscience) is the “internal forum” oriented to the objective order of truth; the other (soul liberty or human dignity) is the ontological basis for one’s claims against (and protection from) the government and one’s fellow citizen, the basis for the juridical right of religious freedom, among many others. For Baptists, of course, soul liberty goes even further, also providing the basis for the rejection of infant baptism, creedalism, sacramentalism, and clericalism—thus tying religious freedom to other first-order Baptist tenets, all unified (and therefore mutually reinforcing) under a single precept.³⁶⁶

But it is remarkable the degree to which, in writing about the human freedom underlying the right to religious freedom, Murray sounded Baptist themes, as this passage eloquently illustrates:

Inherent in *the dignity of man* as a moral subject is the exigence to act on his own initiative and on his own personal responsibility, especially in that vital area in

³⁶⁵ Ibid.

³⁶⁶ Of course, in the Catholic tradition human dignity is also much more than the ontological basis for religious freedom, as it underlies many if not all of the rights accorded the person in Catholic social teaching. Moreover, human dignity and soul liberty are not necessarily mutually exclusive, though they have developed along different paths with different primary concerns.

which the sense of his own existence and his necessary pursuit of it, are at stake—that is to say, especially in matters religious. This exigence is a thing of the objective order; it is rooted in the given reality of man as man. Therefore, this exigence is permanent and ineradicable and altogether stringent. It is identically the basic imperative requirement that man should act in accordance with his nature. In the name of this objective exigence man asserts, in the juridical order and over all “the others,” his right not to be hindered in acting according to his nature. He asserts his right to immunity from coercion, especially in matters religious. This is man’s fundamental moral claim on others.³⁶⁷

Writing in the Catholic tradition in 1966, Murray specifies that the exigence he is referring to “is an exigence of his [the human’s] dignity as a moral subject”³⁶⁸; for Baptists, the exigence has since the seventeenth century been discussed in terms of soul liberty. But as noted at the beginning of the chapter, Murray also admitted that human dignity was functioning somewhat as (to overstate the matter slightly) a placeholder concept for those rights which must be accorded to one’s fellow person as part of the objective order of truth when he justified its usage in the final schema of *Dignitatis humanae* as due to inadequacies in the development and disputes over the meaning of “freedom of conscience” in the Catholic tradition. Regardless, Baptist historian Hinson had no problems translating this back into Baptist terms when he wrote in 1975, speaking of *Dignitatis humanae*: “With this shot in the arm from Roman Catholicism, soul liberty has the strongest support from Christians it has ever had.”³⁶⁹

³⁶⁷ Murray, “The Declaration on Religious Freedom: A Moment in Its Legislative History,” in *Religious Liberty: An End and a Beginning* (New York: Macmillan, 1966), 39–41 (italics added).

³⁶⁸ Ibid., 40. As described by legal historian Samuel Moyn, dignity was only assigned to the individual person in the Catholic tradition in 1937, with the papal encyclical *Divini redemptoris*. Prior to this, “dignity was still attached primarily to collective entities such as workers and religious sacraments such as marriage.” Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), 34; see also *ibid.*, 33–39.

³⁶⁹ Hinson, *Soul Liberty*, 119.

4.1.3 E. Y. Mullins's doctrine of soul competency

The beginning of the twentieth century was a challenging time for Baptists. After the rapid expansion of Protestantism during the previous two centuries, the rise of historical consciousness (and the specter of historical relativism) led to a crisis in the primitivism—the attempt to return to New Testament form and practice—which had been the premise of much Protestant thought.³⁷⁰ For Baptists in the United States specifically, the threat came in the form of the nineteenth-century splinter group known as the Stone-Campbell movement, named for its leaders Barton Stone (a Presbyterian) and Alexander Campbell (a Baptist). These leaders maintained that “the true church had been lost in the din of denominational voices and the hegemony of Roman Catholic dominance.”³⁷¹ They thus founded a movement intended to supersede all such divisions, a “restoration” of the New Testament church, but instead the movement devolved into a new set of denominations and various unaffiliated churches.³⁷²

That this “restorationist” option would be attractive for many Baptists is hardly surprising. A flight to historical precedence (and the authority it putatively conferred) was apparent in the interest of many members of the original Baptist church in Amsterdam in joining the Waterlander Mennonites—the Mennonites had a claim to historical baptismal succession that the Baptists lacked. Similarly, Roger Williams’s resistance to affiliating with any church “now extant” was rooted in concerns over

³⁷⁰ Of course, the Reformation began as a rejection of (Catholic) “tradition,” in favor of the Biblical witness. Protestants thus had little internal resources for considering the development of differences among different Protestant denominations as those developments inevitably occurred.

³⁷¹ Leonard, *Baptists in America*, 25.

³⁷² Among these denominations were the Church of Christ, the Disciples of Christ, and (through later merger with German Reformed and New England Congregationalist church associations) the United Church of Christ.

historical authenticity—he professed doubt as to which church “[came] nearer to the first primitive Churches, and the Institutions and Appointment of Christ Jesus . . . [which is] the true matter of a Christian Congregation, Flock or Society.”³⁷³

To stave off the restorationist threat, some Baptists responded by developing a theory of their historic origins that allowed them to argue, in the words of Baptist historian Bill Leonard, “that they did not need to restore anything.”³⁷⁴ This theory, known as Landmarkism, traced a lineage completely (and ahistorically) independent of Catholicism. These Baptists did not claim that there was a continuous community explicitly known as Baptists but rather that they were heirs to an identifiable succession of communities which represented “the only true church, possessing the ‘landmarks’ of the New Testament community,”³⁷⁵ in some versions, going all the way back to Jesus’s baptism by John the Baptist in the Jordan (the “Jerusalem-John-Jordan” theory).³⁷⁶

The tension between Landmarkists and their critics came to a head in the final years of the nineteenth century, when William H. Whitsett, president of the Southern Baptist Theological Seminary, was forced out in 1899 due to his rejection of Landmarkism. According to Landmarkism’s proponents, “‘marks’ of the true church included regenerate church membership, immersion baptism, congregational autonomy,

³⁷³ Williams, *George Fox Digg’d out of his Burrows*, in *The Complete Writings of Roger Williams*, 5:103 (emphasis omitted).

³⁷⁴ Leonard, *Baptists in America*, 25.

³⁷⁵ Ibid.

³⁷⁶ Hinson, “E. Y. Mullins as Interpreter of the Baptist Tradition,” 113. See Hinson, 110–13; Leonard, *Baptist Ways*, 182–85. Similar attempts to identify a historical lineage independent of Catholicism were made by some Presbyterians of the era as well. For an example that has survived within a book otherwise dedicated to family history, see Edith F. Stormont, “A History of the Covenanters,” in *The Creswell Notebook: A Family History; The American Ancestry and Descendants of Samuel Creswell (1820-1912), of Greene County, Ohio, who Married Eliza Jane (Huffman)* (Lake Alfred, FL: Creswell Family, 1979), 26–41 (citing church histories written in the nineteenth and early twentieth centuries).

and closed communion.”³⁷⁷ But Whitsett challenged this thesis, “produc[ing] research indicating that Baptists did not begin the practice of immersion until 1641, some thirty years after their beginnings in Amsterdam.”³⁷⁸ E. Y. Mullins, the theologian chosen by the seminary’s governing board to succeed Whitsett, did not subscribe to Landmarkism either—in fact, he was an ardent defender of Whitsett—but his supporters at the seminary were evasive on this point during the selection process, and once installed, Mullins’s practical temperament and gift for finding common ground while eschewing confrontation made his presidency a successful one.³⁷⁹

Mullins accomplished his immediate task, mollifying the Landmarkists who had the ability to channel donations to the seminary—or to block them—by reframing the debate and affirming a commitment to New Testament principles. Insisting to one Landmarkist correspondent that “[n]othing would rejoice me more than to believe that it is possible to trace back through the Christian centuries a continuous line of Baptist churches to the Apostles” and “[i]t is quite possible that historical research in the future may discover such a line,” he then demurred by stating, “I do not think it has yet been discovered. . . . This is why I am unwilling to recognize alleged proofs which do not prove.” Mullins continued, “My own judgment is that the strongest Baptist position is to plant ourselves on the New Testament teaching, and to show the conformity of Baptist

³⁷⁷ Leonard, *Baptists in America*, 25.

³⁷⁸ *Ibid.*, 26.

³⁷⁹ William E. Ellis, “*A Man of Books and a Man of the People*”: *E. Y. Mullins and the Crisis of Moderate Southern Baptist Leadership*, (Macon, GA: Mercer University Press, 1985), 32–40; Bill J. Leonard, *God’s Last and Only Hope: The Fragmentation of the Southern Baptist Convention* (Grand Rapids, MI: Eerdmans, 1990), 49–51; Phyllis Rodgerson Pleasants, “E. Y. Mullins: Diplomatic Theological Leader,” *Review and Expositor* 96, no.1 (Winter 1999): 44; Fisher Humphreys, “Edgar Young Mullins,” in *Theologians of the Baptist Tradition*, ed. Timothy George and David S. Dockery, rev. ed. (Nashville: B & H Academic, 2001), 184–85.

churches to-day to the New Testament.”³⁸⁰ But this statement to his correspondent notwithstanding, Mullins’s methodology was *not* merely to rehash arguments about the biblical text itself as applied to contemporary practice. Instead, over the course of his writings, especially his books *The Axioms of Religion* (1908), *Freedom and Authority in Religion* (1913), *The Christian Religion in Its Doctrinal Expression* (1917), and *Christianity at the Cross Roads* (1924), Mullins came to argue for something more interesting.³⁸¹

Of these four books, most important to the present discussion is *The Axioms of Religion*, in which Mullins purported to distill the historical significance of the Baptists into six axioms:

1. The theological axiom: The holy and loving God has a right to be sovereign.

³⁸⁰ E. Y. Mullins, Letter to Rev. W. A. Jarrell, D.D., December 31, 1906, quoted in Hinson, “E. Y. Mullins as Interpreter of the Baptist Tradition,” 111.

³⁸¹ On Mullins’s *Axioms* as representing a methodological shift in response to the Landmarkists, see William D. M. Carrell, “Edgar Young Mullins and the Competency of the Soul in Religion” (PhD diss., Baylor University, 1993), ProQuest (AAT 9332910), 28–30; Hinson, “E. Y. Mullins as Interpreter of the Baptist Tradition,” 115. Timothy Donald Fletcher Maddox, *Revisioning Baptist Principles: A Ricoeurian Postmodern Investigation*, NABPR Dissertation Series 12 (1997; n.p.: National Association of Baptist Professors of Religion, 2006), 70–71, by contrast, argues that while responding to the Landmarkists may have been a factor, Mullins had already developed *Axioms*’s major lines of thought in other contexts. Maddox is concerned that framing the development of Mullins’s thought as a response to the Landmarkists undermines the legitimacy of Mullins’s reasoning and insight, see *ibid.*, 70–71n31, a concern I find unwarranted.

It should be noted that as much as Mullins’s method may have been a response to the Landmarkists, he also built on their approach as well. The Landmarkists used the identification of Baptist distinctives (as described in the discussion above) as a way of discerning which Christian communities represented the “true church” *in history* since the time of the New Testament; for them, the identification of Baptist distinctives was the means to the end of identifying a historical succession independent of Catholicism. See Ellis, 33. But for Mullins, this was reversed, insofar as he was concerned with articulating a recognizable and meaningful *contemporaneous* identity that was *rooted* in the past. In this way, *Axioms* can be read as the mirror image of Fish’s *The Price of Soul-Liberty, And Who Paid It*. For Fish, soul liberty was the defining Baptist belief, which he then used as a lens for examining church history: “It will be well, therefore, to verify what has been said above, as to the existence of Baptists in primitive times, and their pleas for Soul-Liberty. . . . On this account, the Baptists may be considered as the only Christian community which has stood since the days of the Apostles, and as a Christian society which has preserved pure the doctrines of the Gospel through all ages.” Fish, 23. Mullins, for whom reasoned fidelity to New Testament principles and theoretical coherence were more important in establishing validity than identifying a historical succession (or in this case, giving support to a false historical account), reverses the analysis.

2. The religious axiom: All souls have an equal right to direct access to God.
3. The ecclesiastical axiom: All believers have a right to equal privileges in the church.
4. The moral axiom: To be responsible man must be free.
5. The religio-civic axiom: A free Church in a free State.
6. The social axiom: Love your neighbor as yourself.³⁸²

For Mullins, these axioms underlay all the key Baptist commitments, including rejection of sacramentalism and its attendant clericalism, rejection of infant baptism, and insistence on limiting church membership to the regenerate (that is, those who had been baptized, having made a public profession of faith after having reached an age of accountability). While Luther and the other Reformers had gone a great distance in furthering these axioms, for Mullins their failure to cast off the constraints of establishmentarianism and their retention of infant baptism were fatal flaws in their reform efforts, with only Baptists carrying out the logical conclusions of the principles that Luther had announced at the start.³⁸³

Mullins admitted that these axioms were, from a biblicist perspective, deductive principles, what he termed “implicit teaching,” “[f]or Scripture nowhere enjoins in so many words[,] [for example,] separation of Church and State.”³⁸⁴ Nonetheless, Mullins insisted that “these universal and self-evidence truths are simply the expression of the universal elements in Christianity and thus serve as the best statement of what the religion of Christ is in its essential nature.”³⁸⁵

³⁸² Mullins, *The Axioms of Religion: A New Interpretation of the Baptist Faith*, ed. C. Douglas Weaver (Macon, GA: Mercer University Press, 2010), 76. Mullins later added a seventh, “the civic axiom: The sovereignty of the State resides in the citizen.” Mullins, “Why I Am a Baptist,” *Forum* 75 (May 1926), 732.

³⁸³ Mullins, *Axioms*, 70–71, 96–102.

³⁸⁴ *Ibid.*, 60.

³⁸⁵ *Ibid.*, 62. See also *ibid.*, 47, where Mullins insists that “[t]he authority of Scripture lies at the basis of our plea.”

To go even further, Mullins argued (in almost Rahnerian fashion), the bedrock on which *these* principles are built is the personal relationship by each person with God, as taught and modeled by Jesus in the New Testament and as experienced by each believer. This personal relationship, in turn, depends on a personal capacity for such a relationship to exist. In fact, the very nature of the biblical witness itself, revelation, is proof of this capacity for direct relationship, since “[r]evelation implies the kindship between God and man, that God can communicate and man can receive messages. Revelation implies human capacity for God.”³⁸⁶

This capacity is necessary for persons to respond to God in faith,³⁸⁷ just as a capacity for auditory sense perception is necessary for responding to another’s spoken word. By the same token, this capacity also implies responsibility—in Mullins’s words, “the truth that all souls are free and individually responsible to God.”³⁸⁸ Mullins referred to this capacity as “the competency of the soul in religion,” though he emphasized that competency did not equate to “human self-sufficiency” or “independence of the Scriptures,” nor did it affect the doctrine of sin or need for atonement in “the person of Christ,” doctrines regarding which “Baptists are in substantial agreement with the evangelical world in general.”³⁸⁹

³⁸⁶ Mullins, *Axioms*, 50. In his essay “Theology of Freedom,” in *Theological Investigations*, vol. 6, *Concerning Vatican Council II*, trans. Karl-H. and Boniface Kruger (Baltimore, MD: Helicon, 1969), 178, 179, Karl Rahner argued that the human ability to conceive of oneself as a “free being,” “unique and of eternal value,” is due to God’s personal love for each person. Rahner also argued for an “anthropological turn,” similar to that described here by Mullins. More broadly, Rahner was known for inquiring into the necessary conditions for belief, a comparable approach to that which led Mullins to deduce a human competency to respond in faith to God, as discussed here.

³⁸⁷ Mullins, *Axioms*, 52.

³⁸⁸ *Ibid.*, 58.

³⁸⁹ *Ibid.*, 64.

Mullins argued that soul competency was both implied by but also necessary for the two widely accepted Reformation doctrines of justification by faith and the priesthood of all believers,³⁹⁰ though here he made a careful distinction. “Justification,” said Mullins, “asserts man’s competency to deal directly with God in the initial act of the Christian life.”³⁹¹ As such, it is a universal competency that “assumes that man is made in God’s image, and that God is a person able to reveal himself to man.”³⁹² The priesthood of all believers, however, is rooted in regeneration, “the blessing which follows close upon the heels of justification or occurs at the same time with it, as a result of the soul’s direct dealing with God. . . . [In this context,] [t]he competency of the regenerated individual implies that at bottom his competency is derived from the indwelling Christ.”³⁹³ Thus, Mullins concluded, “[n]o human priest may claim to be mediator between the soul and

³⁹⁰ Each of these doctrines is described in Martin Luther’s *On Christian Liberty* (1520). On justification by faith, Luther states, relying on Paul’s letter to the Romans, “Faith alone is the saving and efficacious use of the Word of God. . . . The Word of God cannot be received or cherished by any works whatever but only by faith. Therefore it is clear that, as the soul needs only the Word of God for its life and righteousness, so it is justified by faith alone and not by any works When you have learned this you will know that you need Christ, who suffered and rose again for you so that, if you believe in him, you may through this faith become a new man in so far as your sins are forgiven and you are justified by the merits of another, namely, of Christ alone.” Martin Luther, *On Christian Liberty*, trans. W. A. Lambert, rev. by Harold J. Grimm (Minneapolis: Fortress, 2003; excerpted from *Luther’s Works*, vol. 31, ed. Harold J. Grimm and Helmut T. Lehmann, Minneapolis: Fortress, 1957), 7–9. Luther’s doctrine of priesthood of all believers is based on the brotherhood of Christ, the “true king and priest, but not after the fashion of the flesh and the world,” with all humanity. *Ibid.*, 23–24. As Luther states, citing 1 Peter 2:9, “Now just as Christ by his birthright obtained these two prerogatives, so he imparts them to and shares them with everyone who believes in him.” *Ibid.*, 25. “[A]s priests we are worthy to appear before God to pray for others and to teach one another divine things,” Luther says, but he also admits, “Although we are all equally priests, we cannot all publicly minister and teach.” *Ibid.*, 27, 29–30. In one sense, then, Luther’s doctrine of priesthood of all believers can be understood as functioning primarily as a formal alternative to the clericalism that existed in Luther’s time and which he denounced throughout his writings. At the same time, Luther sincerely wanted to democratize the responsibilities which had formerly been the exclusive province of the clergy, and even feels compelled to do so based on his reading of Paul, from whom he draws his understanding of freedom. Indeed, both of these concerns are present in the famous two-part thesis of the work: “A Christian is a perfectly free lord of all, subject to none. A Christian is a perfectly dutiful servant of all, subject to all.” *Ibid.*, 2. Later in the work he states, “Insofar as he is free he does no works, but insofar as he is a servant he does all kinds of works.” *Ibid.*, 34.

³⁹¹ Mullins, *Axioms*, 65.

³⁹² *Ibid.*, 67.

³⁹³ *Ibid.*, 65.

God because no possible reason can be assigned for any competency on his part not common to all believers.”³⁹⁴ Likewise, Mullins explained, “Man’s capacity for self-government in religion is nothing more than the authority of Christ exerted in and through the inner life of believers, with the understanding always, of course, that he regulates that inner life in accordance with his revealed word. . . . Democracy in church government is simply Christ himself animating his own body through his Spirit.”³⁹⁵ Thus, soul competency has two components: one is common to all, the other only to the regenerate.

Note that in the sense of the priesthood of all believers and democracy in church life, the competency is in the context of social relations and not just individual, as Mullins states:

The doctrine of the soul’s competency . . . goes further than individualism in that it embraces capacity for action in social relations as well as on the part of the individual. The church is a group of individuals sustaining to each other important relations, and organized for a great end and mission. The idea of the soul’s competency embraces the social as well as the individual aspect of religion.³⁹⁶

Thus, believers are to be priests for one another, not merely for oneself individually. Similarly, ecclesiastical matters are to be decided collectively through a democratic process—by definition, these could not be resolved by individuals each for themselves—and regarded as a “consensus of the competent.”³⁹⁷

Mullins was certainly aware of the concept of soul liberty, and he mentions soul liberty (or soul freedom) at various points throughout *The Axioms of Religion*, most often

³⁹⁴ Ibid., 66. Elsewhere Mullins states, “If personal faith is the cardinal principle of the Reformation there is no standing room for a rite which completely ignores it.” Ibid., 100.

³⁹⁵ Ibid., 65–66.

³⁹⁶ Ibid., 65.

³⁹⁷ Mullins, *Axioms*, 66.

when describing the Baptists' historic commitment to separation of church and state.³⁹⁸ But he also recognized that as stated, soul liberty was an incomplete justification for all the propositions that Baptists used it to support, hence his restatement of these propositions as axioms and his investigation into what underlay them.³⁹⁹ Nonetheless, in the years since Mullins articulated his understanding of soul competency, the distinction between soul liberty, soul competency, and the priesthood of all believers was obscured by those coming after him.

Among Southern Baptists, the confusion was exacerbated in the early 1960s as part of a controversy over the book *The Message of Genesis*, written by a Baptist seminary professor of Old Testament, Ralph H. Elliott, which questioned the historicity of the Genesis account of creation.⁴⁰⁰ When the book was attacked by conservatives as impermissibly heterodox, the doctrines of soul competency and “priesthood of *the* believer”—notice the shift to the individual—were invoked by Elliott and his defenders as warrant for Baptist individualism in beliefs.⁴⁰¹ In his presidential speech at the 1962 annual convention, New Testament scholar and president (1961–1963) of the Southern Baptist Convention Hershel H. Hobbs described the priesthood of all believers as a basis for individual interpretation of the Bible, and while he did not mention soul competency, he did include it prominently in the primary Baptist statement of belief, “The Baptist

³⁹⁸ See *ibid.*, 59–60, 66, 148, 153.

³⁹⁹ See *ibid.*, 62–63.

⁴⁰⁰ Ralph H. Elliott, *The Message of Genesis* (Nashville: Broadman, 1961).

⁴⁰¹ Ralph H. Elliott, “The Message of Genesis: The Author Speaks,” *Arkansas Baptist Newsmagazine*, February 1, 1962, 17 (*italics added*). Appearing in the same issue was the most well-known of the attacks on Elliott’s book, K. Owen White’s essay ““Death in the Pot,”” *Arkansas Baptist Newsmagazine*, February 1, 1962, 19, where the author states, “The book from which I have quoted is liberalism, pure and simple!” See generally Jerry L. Faight, II, “The Ralph Elliott Controversy: Competing Philosophies of Southern Baptist Seminary Education,” *Baptist History and Heritage* 34, no. 3 (Summer/Fall 1999): 7–20.

Faith and Message,” written the next year by a committee that he headed.⁴⁰² Hobbs later stated that it was only his coming across a copy of Mullins’s *Axioms* in a used bookstore that piqued his interest in soul competency. To Hobbs, it seemed that “the idea needed to be revived in light of the . . . controversy [over Elliott’s book] and in light of the fact that Mullins’s ideas had been largely forgotten or ignored.”⁴⁰³

While soul competency had always had an individualist aspect, one emphasized by Mullins in his later writings in the context of his advocacy for democracy on the global stage,⁴⁰⁴ at least as articulated in *Axioms* it was balanced by a social aspect as described above. But this move by Hobbs essentially backed moderate and progressive Southern Baptists into a corner in denominational debates with conservatives, so that to counter conservative attempts at centralized control of doctrine, they had to increasingly emphasize the individualist aspect of soul competency, soul liberty, and the priesthood of all believers exclusively —precisely as Shurden and Dunn did when they conflated these three distinct concepts into a single “soul freedom.”

All of which had the effect of obscuring the actual content of Mullins’s doctrine of soul competency, insofar as the concept was turned into a stalking horse in the fight between conservatives and progressive moderates for control of the Southern Baptist Convention, a fight conservatives won.⁴⁰⁵ In 1999, after a two-decade period when

⁴⁰² Carrell, “Edgar Young Mullins and the Competency of the Soul in Religion,” 12–14.

⁴⁰³ Ibid., 12n38.

⁴⁰⁴ Mullins, “Why I Am a Baptist,” 728–29.

⁴⁰⁵ This debate seems to have largely been a Southern Baptist phenomenon. In the American Baptist Convention, for example, concerns about individualism played out along different lines. In 1959, influential American Baptist historian Winthrop S. Hudson, who read Mullins as carrying on the individualism of late-nineteenth-century Baptist theologian Alvah Hoven, famously denounced soul competency as having the “practical effect” of “mak[ing] every man’s hat his own church.” Hudson, “Shifting Patterns of Church Order in the Twentieth Century,” in *Baptist Concepts of the Church*, ed.

conservatives gained control of the Convention and its six seminaries and achieved their goal of forcing out moderates from leadership and teaching positions, which led in turn to moderate churches leaving the Convention in favor of smaller, newly formed denominational bodies, two Baptist academic journals both released issues devoted to the legacy of E. Y. Mullins.⁴⁰⁶ The conservative journal, the *Southern Baptist Journal of Theology*, newly formed as part of the conservative takeover, had multiple articles decrying the rampant liberalism of Mullins.⁴⁰⁷ The mainstream *Review and Expositor*, by contrast, had essays that were mostly favorable, including one by James Dunn which again conflated soul freedom and soul competency.⁴⁰⁸ The lone critical note in the *Review and Expositor* issue was provided by Curtis Freeman, a communitarian in the school of James William McClendon and Stanley Hauerwas; while praising Mullins as “a courageous leader and a competent theologian who charted a course for the Southern

Winthrop S. Hudson (Valley Forge, PA: Judson, 1959), 216. Since 1935, soul competency had been discussed favorably in the American Baptist polity handbook, but when Hudson and Norman Maring wrote a new edition of the handbook in 1963, gone was mention of soul competency, and Maring and Hudson were careful to emphasize that soul liberty was not rooted in any notion of “individual rights” but rather in “the sovereignty of God over the conscience.” Norman H. Maring and Winthrop S. Hudson, *A Baptist Manual of Polity and Practice* (Chicago, IL: Judson, 1963), 4. See Carrell, “Edgar Young Mullins and the Competency of the Soul in Religion,” 8–11. Since then, when American Baptists have experienced internal tensions, the debates have been carried out in terms of freedom of conscience and biblical interpretation and not generally soul competency.

⁴⁰⁶ The different factions even published competing new editions of *The Axioms of Religion*. In 1997, the publishing house of the Southern Baptist Convention published an edition with an introduction by R. Albert Mohler. In 2010, Mercer University Press published a critical edition edited and with an introduction by Baylor religion professor C. Douglas Weaver, the edition cited herein.

⁴⁰⁷ In addition to Mohler and Moore and Thornbury, see Sean Michael Lucas, “Christianity at the Crossroads: E. Y. Mullins, J. Gresham Machen, and the Challenge of Modernism,” *Southern Baptist Journal of Theology* 3, no. 4 (Winter 1999): 74, blaming “seventy years . . . [of] shallow discipleship and vapid theology” on the prominent role Mullins allowed for experience in the Christian life.

⁴⁰⁸ Dunn’s failure to attend to the difference between these doctrines is likely why he professed disbelief at statements by Harold Bloom and Karl Barth that Mullins was the originator of soul competency. See Dunn, “Church, State, and Soul Competency,” 61–62.

Baptist ship of Zion through the waters of modernity,” Freeman nonetheless criticized Mullins for relying too heavily on the experiential theology of William James.⁴⁰⁹

A core aspect of soul competency for Mullins is the ability to read the Bible for oneself and recognize religious truth in it. As Mullins states, “Since the Reformation . . . [the religious axiom that all persons have an equal right to direct access to God] has found expression in nothing more than in the exercise of the individual’s right of private interpretation of the Scriptures. It guarantees the right of examining God’s revelation each man for himself, and of answering directly to God in belief and conduct.”⁴¹⁰ More broadly, Mullins also states:

Intelligent personal grasp of truth and inner illumination of the Spirit are a part of the structural law of the church. Without these the church is not a church. It is in the same context that Christ gives to Peter the keys of the kingdom and the power of binding and loosing [Matt. 16:19]. Experimental knowledge of the truth as revealed to the heart of the individual directly by the Father is the only possible key to the kingdom of God.⁴¹¹

According to Freeman, this emphasis on individual experience and the competency of the individual to have a one-on-one relationship with God led to a fatal mistake in framing, namely, a failure “to delineate the qualities of character that would constitute competency: the habits and skills which a competent soul would need to possess in order to read the Bible wisely.” Freeman continues:

[Mullins] could also have indicated the sort of community and spiritual formation that are necessary to initiate and sustain converted souls in the Christian life. Why the silence? Liberals and fundamentalists may contend it is because Mullins championed libertarian principles. But perhaps he says nothing because the safeguards of character and community were givens, part of the evangelical

⁴⁰⁹ Freeman, 102. See also *ibid.*, 93–97. (Freeman’s original essay from the *Review and Expositor* issue discussed here was later revised and included in an edited volume. For the sake of consistency, citations are made to the revised version.)

⁴¹⁰ *Ibid.*, 89.

⁴¹¹ *Ibid.*, 89–90 (alteration in original).

consensus of his day, constitutive elements of the Baptist understanding of the Christian life that he thought needed no explanation to his readers. If so, the consensus of Mullins' generation has long since dissipated, and the usefulness of soul competency as a navigational tool is severely limited.⁴¹²

As far as Mullins's *Axioms* goes, Freeman overstates the matter—most specifically because Mullins was not actually silent on this point. To the contrary, he devotes an entire chapter to Christian nurture, in which he repeatedly emphasizes the importance of the family in developing the Christian character of children.⁴¹³ More basically, *Axioms* is not so much an instruction book on how to be Baptist—the chapter just referenced is isolated in the middle of the book, without much connection to the surrounding matter—as it is a statement of differentiation between Baptists who believe in the competency of the soul and the non-Baptists who do not. Mullins explains, for example, that soul competency includes a commitment to “the doctrine of separation of Church and State because State churches stand on the assumption . . . that man without the aid of the State is incompetent in religion.”⁴¹⁴ Most especially, Mullins draws a contrast with Catholics who, because of clericalism—especially as reflected in an understanding of the

⁴¹² Freeman, 98–99.

⁴¹³ Mullins specifically states, “[T]here should be created an environment of the child that will predispose it to Christ and the church. Environment counts for more in childhood than at any other period.” Mullins, *Axioms*, 143. Similarly, he concludes the chapter by stating:

[A]ll the elements of Christian character [should] be brought into the conscious experience of the child at the earliest possible moment. Let religion take its proper form of personal experience. Let not the ordinances of religion be applied before the capacity for response is present, but let truth and piety become the enveloping atmosphere of the child's life—its spiritual universe, so to speak—until it responds thereto. . . . [L]et the truths of Christianity, the fact of God's fatherhood and Christ's saviorhood, of beautiful Christian character, and of eternal life, stand out as the objects of his spiritual world, warming him into life, and under God's blessing leading him out into the Christian profession. When the mind is sufficiently advanced to grasp the significance of the church, the ordinances, the doctrines, let these be interpreted, and let there flow into his soul the tide of joy and peace which comes from a recognition of the meaning of these things. But in all this let vital individual faith be recognized as the basic fact.

Ibid., 144.

⁴¹⁴ Ibid., 65.

sacraments that places them under the exclusive control of the clergy—“assert[] at every point the soul’s *incompetency* in religion.”⁴¹⁵ Nonetheless, Freeman’s reading of Mullins is perhaps an unavoidable one, given the use of soul competency by Hobbs, Dunn, and Shurden to elevate individualism to a Baptist distinctive.

Thus, as with Roger Williams, we can ask whether such allegations of excessive individualism are well-founded. To translate this question into the previously discussed categories of legalist, personalist, and individualist understandings of the conscience, we might say Mullins was rejecting the legalist understanding of the conscience (which depends on what he calls a belief in the soul’s “incompetency” in religion) in the strongest terms possible, but was he really as individualist as some of his later writings suggest and as his critics allege? The answer in this context is mixed.

Analyzing soul competency in its own terms, distinct from soul liberty, and distinct from the strong individualism of later interpreters such as Hobbs, Dunn, and Shurden, we can see that what Mullins was actually describing was a sort of *synderesis* for Reform theology. That is, just as soul competency established the personal competency of the soul to have a relationship with God, to participate in the priesthood of all believers in the context of church ministry and governance, and to read the Bible for oneself and, under the guidance of the Holy Spirit, recognize religious truth in it,⁴¹⁶ so too Aquinas turned *synderesis*, Jerome and Lombard’s “spark of conscience” that “survived

⁴¹⁵ Ibid., 68 (italics added); see generally *ibid.*, 68–70.

⁴¹⁶ See William Carrell, “The Inner Testimony of the Spirit: Locating the Coherent Center of E. Y. Mullins’s Theology,” *Baptist History and Heritage* 43, no. 1 (Winter 2008): 35–48.

even the Fall,”⁴¹⁷ into a competency of sorts (Aquinas called it a “natural habit”⁴¹⁸) “containing the precepts of the natural law,”⁴¹⁹ the first of which is “that good is to be done and pursued, and evil is avoided.”⁴²⁰ Synderesis is, in essence, the personal competency to naturally recognize the first precept of the *natural law* and have the conscience formed accordingly; Mullins’s soul competency is the personal competency to recognize religious truth in the *Bible* and have the conscience formed by *it*.⁴²¹

Additionally, the two-part nature of Mullins’s articulation of soul competency between the competency shared by all persons based on being created in the image of God and the competency of the regenerate based on the action of the Spirit and the indwelling Christ, a difference skipped over by many of his interpreters, coincides with Aquinas’s two-part understanding of the natural law (of which synderesis is the foundation), divided between the acquired and infused virtues. For Aquinas, the acquired virtues were true virtues (in contrast with Augustine, for whom the unregenerate were incapable of true virtue⁴²²) but were not of the same quality as the infused virtues. Similarly for Mullins, the competency common to all is a true competency, but it is not

⁴¹⁷ Kenneth R. Himes, “The Formation of Conscience: The Sin of Sloth and the Significance of Spirituality,” in *Spirituality and Moral Theology: Essays from a Pastoral Perspective*, ed. James Keating (New York: Paulist, 2000), 60.

⁴¹⁸ ST I, Q. 79, Art. 12. See also Thomas Aquinas, *Summa Theologiae: A Concise Translation*, ed. Timothy McDermott (Allen, TX: Christian Classics, 1989), 123, referring to synderesis as “a special competence.”

⁴¹⁹ ST I-II, Q. 94, Art. 1, ad. 2.

⁴²⁰ ST I-II, Q. 94, Art. 2.

⁴²¹ In discussing soul competency as the soul’s “‘natural’ capacity . . . for God,” Timothy George mentions John Calvin’s reference to the “worm of conscience” common to all, and that seems the correct parallel in the Reform tradition to the “spark of conscience” of Jerome that was later adapted by Lombard and Aquinas as synderesis. Timothy George, “The Priesthood of All Believers,” in *The People of God: Essays on the Believers’ Church*, ed. Paul Basden and David S. Dockery (Nashville: Broadman, 1991), 86, citing Calvin, *Instit.* 1.3.3.

⁴²² Augustine, *The City of God*, trans. Marcus Dods (New York: Modern Library, 1993), 680.

the same as the competency of the regenerate. In both cases, the material difference is the action of God's grace.

At the same time, Mullins was more individualist in describing soul competency than he needed to be, precisely because of the theoretical currents he was drawing on. The influences most often identified by scholars of Mullins in this context are William James, Friedrich Schleiermacher, and Borden Parker Bowne,⁴²³ though with regard to Schleiermacher the influence was primarily mediated through other theologians.⁴²⁴ The first two are widely known figures in theology; the third, the originator of a style of personalism prominent in the United States, somewhat less so. And while a complete investigation into all three of these scholars and the nature of their individualism which

⁴²³ See Mohler, 8–12; see also Freeman, 93–97. For extended analyses of the influence of James's pragmatism on Mullins, see Russell Hooper Dilday, Jr., "The Apologetic Method of E. Y. Mullins" (PhD diss., Southwestern Baptist Theological Seminary, 1960), ProQuest (AAT 0224421), 46–48, and Bill Clark Thomas, "Edgar Young Mullins: A Baptist Exponent of Theological Restatement" (PhD diss., Southern Baptist Theological Seminary, 1963), 151–63; on the influence of Schleiermacher's experiential theology, see Dilday, 44–46, and Thomas, 164–68; and on the influence of Bowne's personalism, see Thomas, 138–51.

⁴²⁴ Thomas, 166, notes, "[I]n most of the instances in which Mullins referred to Schleiermacher it was for the purpose of criticizing him." Similarly, he later states, "To say that E. Y. Mullins was influenced by experiential theology is not necessarily equivalent to saying that he was a disciple of Friedrich Schleiermacher." Ibid., 173. In this vein, Thomas, 165, lists Gottfried Thomasius, F. H. R. Frank, Albrecht Ritschl, I. A. Dorner, and Julius Kaftan as German experiential theologians who came after Schleiermacher and with whose work Mullins was familiar. Dilday, 48–51, discusses the influence on Mullins of Lewis French Stearns of the Bangor Theological Seminary who delivered a series of lectures at Union Theological Seminary in 1890 which became the basis of his book *The Evidence of Christian Experience*. Thomas, 168–73, also discusses Stearns, as well as Frank Hugh Foster of Pacific Theological Seminary in Berkeley, CA, whose lecture series at Princeton Theological Seminary in 1900 became the basis of his book *Christian Life and Theology*. Carrell, 67–72, emphasizes Mullins's strong relationship with Alvah Hovey, E. H. Johnson, W. N. Clarke, and A. H. Strong, as revealed in personal correspondence; the influence of Karl Immanuel Nitzsch, Johann August Wilhelm Neader, and Dorner, German theologians who "sought to mediate between the systems of Hegel and Schleiermacher while adhering to a more traditional view of Christianity" (69); as well as the more immediate influence of Ezekiel Gilman Robinson, professor of theology at Rochester Theological Seminary and later president of Brown University. Elsewhere, Carrell, 135, singles out Clarke (rather than Schleiermacher) as an especially important influence for Mullins's understanding of atonement. Freeman, 88–89, also sees in Mullins more of the influence of Clarke than Schleiermacher. And even Mohler, 22n59, concedes that "Mullins's engagement with Schleiermacher is complex." Meanwhile, Maddox, *Revisioning Baptist Principles*, 79n72, insists that the influence of Schleiermacher on Mullins has been overblown.

allegedly corrupted the theology of Mullins might be worthwhile, because the overall concern here is with developing a personalist communitarian understanding of the conscience, it is the personalism of Bowne, as well competing versions of personalism less susceptible to individualism, that merit specific discussion here.

4.2 Juxtaposing Personalisms

As noted above, contemporary critics of Mullins, whether from the conservative or post-liberal side, focus on the individualism in Mullins's understanding of "soul competency" which according to them undermines any normative role for church teaching (including that based in revelation) or any robust understanding of the social relations among persons more broadly. They then tie this individualism to subjectivism, experientialism, and personalism. To quote one such prominent critic, Southern Baptist theologian Albert Mohler:

[T]he underlying issue in Mullins's shift on these issues is his theological paradigm's dependence upon the autonomous individual and his or her religious experience. Placing experience as the first principle of a theological system would necessarily shift attention away from divine sovereignty in favor of human decision. The free agent becomes the focal point of theological consideration. God's sovereignty is redefined—but never denied—in order to accentuate the centrality of the human decision as an act of the religious consciousness. Schleiermacher's emphasis on religious experience over revealed knowledge so shaped Mullins's theology that, though points of continuity remained, his teachers could not have recognized their own theological system behind that of their student.⁴²⁵

Mohler blames Mullins's shift on "pastorates in Baltimore and Boston [which] exposed Mullins to the theological systems then current among northerners," citing specifically his "proximity to the faculty at Johns Hopkins University in Baltimore, and to the

⁴²⁵ Mohler, 12.

faculties at Boston and Harvard, as well as the Newton Theological Institute.”⁴²⁶ Mohler continues:

Through these and other influences, Mullins began explorations in the writings of European theologians such as Germans Friedrich Schleiermacher and Albrecht Ritschl. More directly, he was introduced to the pragmatism of William James at Harvard and the personalism of Borden Parker Bowne at Boston University. . . .

The Enlightenment’s famed “turn to the subject” set the foundation for a revolutionary emphasis on human experience and the centrality of individual experience in all questions of knowledge. Thus, for Schleiermacher, theology was not, in essence, the systematic expression of revealed truth, but reflection upon religious experience.

Similarly, movements in psychology and philosophy followed similar patterns of development. William James, whose philosophy of pragmatism set the stage for dramatic change in several disciplines, insisted that truth and experience were inextricably linked. As Mullins would explain, pragmatism “renounces the idea that truths are ready made and given to us independent of and apart from our experience.” From Bowne, whose personalistic idealism led to theological conflict with conservatives, Mullins gained a critical appreciation for the centrality of the person as the starting point for theological understanding. As he explained, personalism “takes the individual and personal life of man as its starting point, the highest datum possible for any form of philosophy.”

Bowne’s personalism would become firmly established as a central influence in Mullins’s theological system, affirming and undergirding his shift from the Calvinism of Boyce to a theological position centered—not on revelation—but on religious experience. Bowne explained the theological ramifications of his philosophical system as follows: “A world of persons with a Supreme Person at the head is the conception to which we come as the result of our critical reflections.” All knowledge is personal knowledge, and all personal knowledge comes through the medium of human experience. Religious experience is but one form of human experience, and it is the experience of human personality with the divine Personality.⁴²⁷

Setting aside the context of Mohler’s critique of Mullins, to a person versed in Catholic personalism, this description of “personalism” may seem unrecognizable, or at least unfamiliar—a correct observation, since it is in fact a different “personalism.” As Jacques

⁴²⁶ Ibid., 8.

⁴²⁷ Ibid., 8–9, quoting E. Y. Mullins, “Pragmatism, Humanism, and Personalism—The New Philosophic Movement,” *Review and Expositor* 5 (1908) 503, 510, and Borden Parker Bowne, “Personalism,” in *American Protestant Thought in the Liberal Era*, ed. William R. Hutchison (Lanham, MD: University Press of America, 1968) 87.

Maritain observed in 1947, “[N]othing can be more remote from the facts than the belief that ‘personalism’ is one school or one doctrine. . . . There are, at least, a *dozen* personalist doctrines, which, at times, have nothing more in common than the term ‘person.’”⁴²⁸ Thus, some context on this history of these personalisms is helpful.

First, despite their differences, there are some things that the various personalisms have in common. As described by philosopher Patricia Sayre, “Personalism, in its broadest sense, is a philosophical stance that takes the concept of personhood to be indispensable and central to a proper understanding of reality.”⁴²⁹ Similarly, Jan Olof Bengtsson states:

For all personalism, the person is a uniquely individual, positively determined, conscious, rational, willing, partly free and morally responsible being, whose continuous realization or development of itself as such is achieved through its dynamic existence in social, reciprocal relation and community with other persons, through moral character-formation and action, and through the process of gradual appropriation and concrete manifestation of higher values. Properly understood, the reality and life of such persons reveal the nature and meaning of all existence, as conceived both in the theoretical terms of knowledge and metaphysics and in the practical terms—regarded as closely related to and in some respects preconditions of the theoretical—of ethics and aesthetics.⁴³⁰

Beyond this general description, however, scholars group these varieties into two broad categories, the European and the American.

European personalism is generally understood as based in European phenomenology and existentialism, especially the work of Max Scheler,⁴³¹ emerging as a

⁴²⁸ Jacques Maritain, *The Person and the Common Good*, trans. John J. Fitzgerald (Notre Dame, IN: University of Notre Dame Press, 1966), 12–13 (emphasis added).

⁴²⁹ Patricia A. Sayre, “Personalism,” in *A Companion to Philosophy of Religion*, ed. Charles Taliaferro, Paul Draper, and Philip L. Quinn, 2nd ed. (Malden, MA: Wiley-Blackwell, 2010), 151.

⁴³⁰ Jan Olof Bengtsson, “Personalism,” in *Encyclopedia of Sciences and Religions*, ed. Anne L. C. Runehov and Lluís Oviedo (New York: Springer, 2013), 1627.

⁴³¹ For an overview of Scheler’s relevant work, see Zachary Davis, “Scheler and Human Dignity,” in *Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, ed. Marcus Düwell, Jens

distinct philosophical strain in the period between World War I and World War II. A key figure was Emmanuel Mounier, founder (in 1932) and editor of the journal *Esprit*—in the words of Sayre, “a journal committed to promoting dialogue between representatives of divergent points of view, but especially to encouraging exchange between Marxists and Christians.”⁴³² It is this European form of personalism that is correctly understood as developing in response to the twin materialisms of capitalism and communism as a mediating position between the two, as described by Samuel Moyn and discussed in the previous chapter.

Catholic or Thomistic personalism is included by scholars within the European form, and there were undeniable connections. Mounier was a younger friend of Maritain’s, to whom Maritain provided personal and financial support. And Maritain’s own political evolution was reflected in personalism’s middle path, as Maritain had earlier been associated with the nationalistic *Action française*, writing for its journals, before repudiating the movement in accord with Pope Pius XI’s denouncement of it in 1926 and shifting his intellectual and political allegiances to the left. By 1933, Maritain was working out his own thinking in the pages of *Esprit*, which published an early version of what would become a part of his book *Freedom in the Modern World*. In March 1934, Maritain co-wrote with others in this movement a manifesto entitled “For the Common Good” that, in the words of scholar Otto Bird, “decried and lamented the fact that France was being divided into two enemy camps, [the fascists and the

Braarvig, Roger Brownsword, and Dietmar Mieth (Cambridge: Cambridge University Press, 2014), 269–75).

⁴³² Sayre, 151.

communists,] ‘each of which forgets that the other is also France.’”⁴³³ The manifesto was signed by fifty-two French Catholics, including Mounier.

Yet for Maritain, *Esprit*’s style of personalism was “insufficiently theological,”⁴³⁴ and he soon publicly distanced himself from it—a rupture which highlights a broader point, namely, that the inclusion of Catholic personalism within the general category of European personalism can obscure that Maritain was tapping into something much deeper than contemporary philosophical currents in his response to historical events. Rather, as developed by Maritain and other Catholic writers, personalism’s emphasis on human agency and on human relationships as constitutive for the person is an approach with deep historic roots in Christianity, as discussed below.

American personalism, by contrast, emerged separately (and earlier) with Borden Parker Bowne’s 1908 book *Personalism*, a reaction to the philosophical naturalism dominant after the ascendance and widespread acceptance of Darwin’s theory of natural selection. Bowne argued that this Darwinian-inspired naturalism is an inadequate description of lived human experience. As Sayre states:

Forgetting that the impersonal terms in which we couch our scientific descriptions are the product of personal activity, the philosophical naturalist reverses the proper order of explanation and insists that personal activity (like everything else) is the product of impersonal forces. Consequently, philosophical naturalism encounters a number of seemingly intractable problems generated by its own procedures. How, for example, can naturalism give an adequate account of the qualitative feel of things using only the quantitative language of force and motion? Or, how can naturalism render comprehensible those of our physical attitudes and movements—kissing a loved one, or kneeling in prayer—that appear so inexplicable when abstracted from the context of persons acting with their purposes?⁴³⁵

⁴³³ Otto Bird, introduction to *Integral Humanism, Freedom in the Modern World, and A Letter on Independence*, ed. Otto Bird (Notre Dame, IN: University of Notre Dame Press, 1996), ix.

⁴³⁴ Bird, x.

⁴³⁵ Sayre, 153.

To redress this deficiency, Bowne turned the approach of naturalism on its head—in Sayre’s terms, he undid naturalism’s inversion of the “proper order”—and made lived human experience the epistemological starting point for philosophical inquiry. Thus, it is not so much the objective fact or theoretical possibility of moral agency as it is the human experience that becomes the foundation for Bowne. As Sayre describes Bowne’s approach, “Bowne argues that neither space nor time can be conceived as independently real without generating a whole host of contradictions involving the conflicting demands of unity and infinite divisibility; he thus concludes that space and time function as forms structuring our experience. . . . For Bowne, to be a dynamic center of active knowing is just what it is to be a person.”⁴³⁶

As referenced in the passage from Mohler quoted above, a key concept for Bowne and his successors is personality (or one might say personhood), a concept that combines the uniqueness of individual perspective with “the shared plurality of human persons” that inevitably shapes individual experience.⁴³⁷ What is peculiar about the American form of personalism, though, is that in starting from the human experience of personality, in order to avoid the problem of relativistic subjectivism, personalists posit “the existence of a dynamic power behind knowable objects which is not another object, known or unknown, but a center of active knowing”⁴³⁸—in other words, a “cosmic Person” usually identified with God.⁴³⁹ As described by Bengtsson:

⁴³⁶ Sayre, 154.

⁴³⁷ Bengtsson, “Personalism,” 1627.

⁴³⁸ Sayre, 154.

⁴³⁹ Peter A. Bertocci, “Borden Parker Bowne and His Personalistic Theistic Idealism,” in *The Boston Personalist Tradition in Philosophy, Social Ethics, and Theology*, ed. Paul Deats and Carol Robb (Macon, GA: Mercer University Press, 1986), 55.

Universality and objectivity are not suspended by but reconceived in accordance with the ultimacy of personality, apprehended either in the shared reality of a social plurality of human persons and/or as the supreme reality of the personal God. The nonrelativistic yet one-sidedly epistemological and formally moral subject of modern rationalism, including Kantianism, is modified, supplemented, or replaced by the concrete person, but the very nature of that person and his place in the personal whole rules out and invalidates relativistic subjectivism.⁴⁴⁰

To some degree, then, Mohler's critique of personalism is misplaced insofar as he conflates an emphasis on personal experience with individual subjectivism, since the divine or cosmic Person is posited precisely to refute this. It is certainly true, though, that in giving epistemological primacy to personal experience, personalism can be said to have opened the door to the relativism that would become so prominent in the postwar U.S. context, especially if the cosmic Person that acts as a ballast against subjectivism is severed and discarded from the overall framework.

Mohler is correct, however, in highlighting the influence that personalism had on Mullins, as attested by Mullins' reference to and citation of Bowne's work. In *Axioms of Religion*, for example, written in 1908 and drawing on Bowne's early work, Mullins briefly references personality in describing the potential contributions of his religious axioms to human progress:

The key to this movement of civilization is to be found in the idea and in the significance of personality. The value of the soul of man, the rights and privileges of the individual, the capacity of man for growth and happiness, for the attainment of moral and spiritual character, for fellowship with other men and above all with God—these are some of the rich contents of the great word, human personality. . . . [Similarly,] [t]he ideal of all forms of social life, as men are coming more and more to see, is that it is the moral fellowship of persons.⁴⁴¹

⁴⁴⁰ Bengtsson, "Personalism," 1627.

⁴⁴¹ Mullins, *Axioms*, 206.

By 1913, five years after both Mullins's *Axioms* and Bowne's *Personalism*, Mullins mentions Bowne by name in his book *Freedom and Authority in Religion* and explicitly endorses his personalistic philosophy, especially Bowne's use of the experience of human personality as the bedrock on which to build a philosophical framework. Mullins states, "[Bowne] sets out by assuming personal life and personal relations among men, and argues powerfully to prove that all the contradictions of thought are reconciled in personality. He thus keeps his feet resting on the solid rock of fact."⁴⁴² In her appraisal of American personalism, Sayre cautions that "Bowne makes no claims to have thus proven the existence of God; he claims merely to have identified the hypothesis making most consistent sense of our experience."⁴⁴³ But here Mullins seems to cross the line that Bowne had stayed to one side of, when he goes beyond just positing the subjective as the epistemological starting point and almost identifies the "fact" of personality with objectivity itself. In this same vein, he states:

Philosophy is the search for an intellectual string, so to speak, long enough to tie up all the facts of existence in one bundle. Personality is surely the longest and strongest string yet found. It is the highest and richest thing we know. Our own personality is a known fact. There is no ground for supposing therefore that it will be reabsorbed in something higher and thus canceled. Personalism finds it, values it, and leaves it. From it the supreme Person, God, is deduced.⁴⁴⁴

Later in this passage, Mullins tries to highlight the relational, non-individualistic aspect of personalism, when he insists, "Life is a fellowship of persons,"⁴⁴⁵ but unfortunately the

⁴⁴² Edgar Young Mullins, *Freedom and Authority in Religion* (Philadelphia: Griffith & Rowland, 1913), 143.

⁴⁴³ Sayre, 154.

⁴⁴⁴ Mullins, *Freedom and Authority in Religion*, 144.

⁴⁴⁵ *Ibid.*, 145.

resources within this American variant of personalism lend him little in the way of strong bolster or support.

In his 1917 textbook *The Christian Religion in Its Doctrinal Expression*, Mullins goes yet further, fully weaving personalism into his systematic theological framework. In an early section of that work, Mullins includes key elements of personalism in a discussion on personal experience and the self-revelation of God:

In the first place, a human personality [in Christ] is the only adequate medium for the self-revelation of a personal God. Only personality can fully reveal and express the meaning of personality. Of course there are many intimations and suggestions of personality to be found in the physical universe. But those are not sufficient in themselves to express all the wealth of meaning in the nature of the infinite personal God. The moral qualities of God especially call for a personal, moral life in order that they may be clearly and fully expressed. . . . And if God is to make himself fully known to men who, in the exercise of their freedom, came under the dominion of sin, it is most natural to expect that he would disclose himself to such personal beings in the form of a personal life.⁴⁴⁶

Moreover, the self-revelation of God through the person of Christ was not the only aspect of theology put in personalist terms. Rather, God's personality (or person-ness) is also manifest in the ongoing personal relationships God has through God's Spirit with believers:

Again, the personal and historical revelation of God was necessary to complete and establish firmly the inward revelation through the Spirit. In other words, it was necessary to save religion from the uncertainties and perils of subjectivism. So long as religion was without an objective ground, it was always exposed to the danger that it would fail to attain the stability and definiteness required by the religious life itself. Man must really know God if the idea and power of God are to bear their highest moral fruits in human life.⁴⁴⁷

⁴⁴⁶ Edgar Young Mullins, *The Christian Religion in Its Doctrinal Expression* (1917; repr., Valley Forge, PA: Judson, 1974), 22–23.

⁴⁴⁷ *Ibid.*, 23.

Later in the same work, Mullins doesn't just incorporate elements of personalism; he offers a full-throated endorsement: "*Christian theism, . . . as taught in the New Testament, is in the chief essentials the same as personalism as we have expounded it.* The Christian theistic view is that God is the infinite Spirit, personal, holy, loving purposive, immanent in the world, and transcendent. Personalism is in exact agreement with the New Testament in these respects."⁴⁴⁸ But is this right?

Returning to Catholic personalism for comparison, we can say that rather than starting with the human experience of personality and then deducing a cosmic Person, Catholic personalism places the personhood of God in the foreground, especially given the very roots of the concept of a "person" in the context of trinitarian theology, and then explores what it means for humans to be created in the image of such a God. This means that Catholic personalism comes at the person-ness of humans and God from a fairly different perspective than American personalism, emphasizing the inherent relationality and spirituality of personhood and contrasting it with individuality from the beginning.

Maritain himself, for example, was at the most immediate level drawing on the Thomist tradition that values the person because, as he states in *The Person and the Common Good*, "The human person is ordained directly to God as to its absolute ultimate end."⁴⁴⁹ But he uses the Thomist tradition to then connect to the broader Christian themes just mentioned, as when he states, citing Aquinas:

'They alone in the universe are willed for their own sake.' In other words, before they are related to the immanent common good of the universe, they are related to an infinitely greater good—the separated common Good, the divine transcendent Whole. In the intellectual creatures alone, Aquinas teaches further, is found the

⁴⁴⁸ Ibid., 122 (emphasis added). For Mullins's description of personalism, see *ibid.*, 112–21.

⁴⁴⁹ Maritain, *The Person and the Common Good*, 15.

image of God. In no other creature, not even in the universe as a whole, is this found.⁴⁵⁰

Which is to say, a broader difference between the Bowne/Mullins and Maritain styles of personalism is their relative degrees of rootedness in (and coherence with) the Christian tradition. While Bowne's personalism may have been influential in Mullins's doctrine of soul competency, even the latter, as discussed above, was more rooted in the Christian tradition than Bowne's personalism was. To be sure, Bowne's personalism has been developed by subsequent Christian philosophers—notably Edgar Brightman, Peter Bertocci, and Thomas O. Buford among others.⁴⁵¹ But even in its contemporary form, American personalism seems more interested in engaging with the idealist philosophical tradition of the last two hundred years than with the Christian theological tradition in any meaningful sense⁴⁵²; instead, it mostly presumes rather than develops this connection.⁴⁵³ Meanwhile it is probably fair to say that developments among some American personalists such as Brightman and Bertocci towards process theology⁴⁵⁴ have led to its being eclipsed by if not somewhat subsumed within that movement⁴⁵⁵—a movement

⁴⁵⁰ Ibid., 17–19 (citing *Summa Contra Gentiles*, III, 112).

⁴⁵¹ See, for example, the biographical sketches and contributions of nineteen scholars in the American personalist tradition since Bowne in Thomas O. Buford and Harold H. Oliver, eds., *Personalism Revisited: Its Proponents and Critics* (New York: Rodopi, 2002). See also the various contributions to James M. McLachlan, James Beauregard, and Richard Prust, eds., *Persons, Institutions, and Trust: Essays in Honor of Thomas O. Buford*, ed. (Wilmington, DE: Vernon, 2018). Buford received his PhD at Boston University under the direction of Peter Bertocci, thus representing the “fourth generation” of Boston personalism in the Bowne–Brightman–Bertocci–Buford lineage. Ibid., 269.

⁴⁵² For this reason, Juan Manual Burgos, *An Introduction to Personalism*, trans. R. T. Allen, (Washington, DC: Catholic University of America Press), 176, describes American personalism and idealist philosophy as declining in tandem.

⁴⁵³ See Jan Olof Bengtsson, *The Worldview of Personalism: Origins and Early Development* (New York: Oxford University Press, 2006), 275–76.

⁴⁵⁴ See Bengtsson, “Personalism,” 1632.

⁴⁵⁵ Notably, Bengtsson's *The Worldview of Personalism* is an admirable attempt to “retrace[] and reconstruct[]” a distinct British and American tradition of idealistic personalism distinct from pragmatism and process theology. Bengtsson, *The Worldview of Personalism*, 27.

which largely understands itself as a development beyond more than rooted in historic Christianity.⁴⁵⁶

Maritain and other Catholic personalists writing during this time such as Louis Janssens,⁴⁵⁷ by contrast, both built on the work of others who had developed rich connections with the Christian tradition, as well as laid the groundwork for those who would come after and do more of the same. Among immediate precursors and contemporaries, the work of Odon Lottin, Fritz Tillmann, and Gérard Gilleman bears special mention.⁴⁵⁸ For Lottin, this engagement with the Christian tradition was done through historical retrieval of the centrality of the person for twelfth- and thirteenth-century scholasticism—specifically, in the words of James Keenan, the principle that “the end of morality [should be understood] as the right realization of the person and the community in and according to God’s salvific plan.”⁴⁵⁹ Tillmann’s contribution was more in the area of retrieving a biblical understanding of personal discipleship, with his major

⁴⁵⁶ See, for example, Joanna Leidenhag, “A Critique of Emergent Theologies,” *Zygon* 51, no. 4 (December 2016): 867–82, analyzing the christologies and pneumatologies of various recent theologians in the process (or emergent) tradition. For a representative introduction to what is meant by process theology, see David Ray Griffin, *Reenchantment without Supernaturalism: A Process Philosophy of Religion* (Ithaca, NY: Cornell University Press, 2001), 1–19.

⁴⁵⁷ Theological ethicist Dolores L. Christie has written on the personalism of Louis Janssens, who in his 1939 *Personne et société* explicates the foundation of a “personalist moral method . . . [centered on] three aspects: 1) the person as a totality, 2) personalist morality, and 3) the person as ordained toward God.” Dolores L. Christie, *Adequately Considered: An American Perspective on Louis Janssens’ Personalist Morals* (Grand Rapids, MI: Eerdmans, 1990), 27. Similar to Maritain, Janssens distinguished “between the human person and the human being as individual.” The individual is identified as “that aspect of the human being that is defined by its concrete position in time and space as distinct from other entities which also exist in time and space,” while the person “constitutes the human being in his or her totality. It is the ontological principle which penetrates and synthesizes the activity of the whole.” *Ibid.*, 33. As precursors in personalism to Janssens, Christie notes the work of Dietrich von Hildebrand and Heribert Doms in their shift from focusing on the *ends* of marriage, sexual intercourse and offspring, to its *meaning*, “the growth of persons in the sustained human relationship of marriage.” *Ibid.*, 15

⁴⁵⁸ See James F. Keenan, SJ, *A History of Catholic Moral Theology in the Twentieth Century: From Confessing Sins to Liberating Consciences* (New York: Continuum, 2010), 36

⁴⁵⁹ *Ibid.*, 42. See Mary Jo Iozzio, *Self-Determination and the Moral Act: A Study of the Contributions of Odon Lottin, O.S.B.* (Leuven, Belgium: Peeters, 1995); Keenan, 35–49.

works *Die Idee der Nachfolge Christi* in 1934 and *Der Meister Ruft* in 1937.⁴⁶⁰ And Gilleman's monograph *Le primat de la charité en théologie morale*, published in 1952 as a revised version of a dissertation defended in 1947 under the direction of French Jesuit René Carpentier, functioned as retrieval of the Thomistic principle that "[o]nly charity allows us to be in union with God, ourselves and our neighbor"⁴⁶¹—and by extension that love, not law, should be the "dominant theme" of moral theology.⁴⁶² Those coming after Maritain and Janssens include Bernard Häring⁴⁶³ and Josef Fuchs,⁴⁶⁴ of whom Häring especially was keen to engage the biblical and early church traditions, as illustrated by the very first two chapters of his influential three-volume *Free and Faithful in Christ*, published in 1978.⁴⁶⁵

⁴⁶⁰ See Keenan, 59–69; Stuart Patrick Chalmers, "Fritz Tillmann, Discipleship and the Renewal of Moral Theology," *Irish Theological Quarterly* 86, no. 4 (August 2021): 352–69.

⁴⁶¹ Keenan, 73; see *ibid.*, 69–75.

⁴⁶² Gérard Gilleman, SJ, *The Primacy of Charity in Moral Theology*, ed. René Carpentier, SJ, trans. William F. Ryan, SJ, and André Vachon, SJ. (Westminster, MD: Newman, 1961), xxix.

⁴⁶³ Writing in 1978, Häring specified that "the personalism which I have untiringly proposed [for the last twenty-five years] has nothing to do with individualistic narrowness. It is a personalism that confronts each of us with God, with our fellowmen and with all of creation." Bernard Häring, C.Ss.R., *Free and Faithful in Christ: Moral Theology for Clergy and Laity*, vol. 1, *General Moral Theology* (New York: Seabury, 1978), 3. See also Häring's earlier and highly influential work *The Law of Christ: Moral Theology for Priests and Laity*, vol. 1., *General Moral Theology*, trans. Edwin G. Kaiser, C.Pp.S. (Paramus, NJ: Newman, 1966), originally published in German in 1954 as *Das Gesetz Christi: Moraltheologie, dargestellt für Priester und Laien*, as well as his *The Christian Existentialist: The Philosophy and Theology of Self-Fulfillment in Modern Society* (New York: New York University Press, 1968), based on his Deems Lectures delivered at New York University in 1966, and *Morality is for Persons: The Ethics of Christian Personalism* (New York: Farrar, Straus and Giroux, 1971).

⁴⁶⁴ As noted by Keenan, 143, Fuchs's preferred métier was the essay rather than longer books. As such, see the collected essays in Josef Fuchs, SJ, *Personal Responsibility and Christian Morality*, trans. William Cleves et al. (Washington, DC: Georgetown University Press, 1983); Josef Fuchs, SJ, *Christian Morality: The Word Becomes Flesh*, trans. Brian McNeil (Washington, DC: Georgetown University Press, 1987); and Josef Fuchs, SJ, *Moral Demands and Personal Obligations*, trans. Brian McNeil (Washington, DC: Georgetown University Press, 1993).

⁴⁶⁵ Häring, *Free and Faithful in Christ*, 1:7–58. It should be noted here that Karol Wojtyła, Pope John Paul II, also wrote on personalism, though his approach to theological anthropology and the moral act differ enough from that of Häring and Fuchs to represent a strain of Catholic personalism distinct from that discussed here—a topic that deserves elucidation though beyond the scope of this project. For a discussion of Wojtyła's work, see Burgos, 103–15. Curiously, considering the otherwise excellent scope of Burgos's book, he never mentions Häring or Fuchs at all—thus implicitly confirming the difference between the Wojtyła and Häring/Fuchs strains of Catholic personalism and placing Burgos's book in the former.

Both Maritain and Janssens were working to retrieve an identifiable strain of Thomism, in many ways harkening back to the pre-manualist tradition of the Second Scholastic and the “School of Salamanca” of Antonio de Montesinos, Francisco de Vitoria, Bartolomé de las Casas, and Francisco Suárez, among others, in the sixteenth and early seventeenth centuries, itself a major retrieval of Thomism. Intriguingly, other scholarship within the last thirty years has uncovered more of the roots of the Aquinas’s own emphasis on the person. Caroline Bynum’s work, for example, has focused on how medieval understandings of resurrection in western Christianity influenced notions of the person as a “psychosomatic unity” of body *and* soul, a particularity beyond mere subjective abstraction.⁴⁶⁶ Similarly, Brian Tierney has done extensive and important work on the twelfth-century understanding of subjective natural rights which inhered in the person—often relational rights, insofar as they were vis-à-vis a particular other person or class of persons. As he states:

[T]welfth-century civilization was certainly marked by a new emphasis on personalism or humanism, and it found expression on many levels of thought and feeling. Courtly love literature explored the joys and pains of human lovers. Religious piety cultivated an intense emotional relationship between the individual Christian and the person of Jesus. Peter Abelard taught that the moral value of an act was determined entirely by individual intention. Private scrutiny of conscience, followed by private confession, became a common practice. . . . Twelfth-century culture was also characterized by a great flourishing of new centers of corporate life—communes, guilds, confraternities, collegiate churches, monastic houses; but we have learned to understand that the corporatism of the age was not antithetical to its individualism but complementary.⁴⁶⁷

⁴⁶⁶ Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200–1336* (New York: Columbia University Press, 1995), 11. By contrast, Rufus Burrow, Jr., has called the “Platonic, Cartesian, Kantian, and Hegelian idealism” that “so thoroughly influenced” early Boston personalism in the context of “the mind-body relation on the metaphysical level” “the quintessential Achilles heel in [Boston] personalism.” Burrow, *God and Human Dignity: The Personalism, Theology, and Ethics of Martin Luther King, Jr.* (Notre Dame: IN: University of Notre Dame Press), 75, 76.

⁴⁶⁷ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids, MI: Eerdmans, 1997), 55–56.

And most recently, Mark D. Jordan has added insight into the personalism of Aquinas himself, persuasively arguing that not only is the *Summa Theologiae* personalist insofar as it “reorients the received topics of theology toward the predicament of human souls,”⁴⁶⁸ it is also profoundly personalist in the pedagogy inherent in its structure, as it “traces a sequence from the embodiment of human creation through bodily history to divine incarnation.”⁴⁶⁹ Jordan states:

If you read the *Summa* beginning with its last part, you begin with the incarnation, the life of Christ, and the Christian sacraments as continuations of that life. For Thomas, moral formation ultimately depends on these scenes of embodied instruction—not on assent to abstract “principles” from which one attempts to make binding deductions. We learn the best way to teach human beings by watching how God taught us. God did not send down a numbered list of moral axioms or a crisply formulated universal imperative. God took flesh. Embodied souls learn through bodies and from bodies. They learn from particular scenes enacted in time. Given the effects of sin in human hearts and human history, these scenes must be both urgent and memorable. Sacraments, too, must both represent and effect new patterns (characters, narratives) for the confused bodies that will share in them. Only when a reader appreciates such a pedagogy can she rightly assemble the elements of the moral account that make up the middle of the *Summa*. Without a vivid reminder of the moral teaching in incarnation and sacraments, the “moral part” of the *Summa* cannot achieve its distinctive effects.⁴⁷⁰

And of course, as alluded to above, all of this is against the backdrop in Christian theology where the very term “person” had its origins in the debates about the nature of the Trinity. As Bengtsson summarizes:

The philosophical concept of the person had developed through a long and complex historical process, beginning with the pre-Christian term *persona* being taken up in the protracted theological debates over the Trinity and the Incarnation. In the course of the Middle Ages, with a point of departure in Boethius’ definition, *persona est rationalis naturae individua substantia* (person is an individual substance of rational nature), it descended from the level of the divine

⁴⁶⁸ Mark D. Jordan, *Teaching Bodies: Moral Formation in the Summa of Thomas Aquinas* (New York: Fordham University Press, 2017), 4.

⁴⁶⁹ *Ibid.*, 13.

⁴⁷⁰ *Ibid.*, 15.

to be applied on the human level, where its definition was continuously developed and refined.⁴⁷¹

But then Bengtsson continues:

The process then continued as the concept was influenced by most of the main currents of modern thought, with an increased emphasis on subjectivity and self-consciousness.

The growing valorization of and confidence in secular humanity developed in the course of modernity account for much of the modern attention to and conceptual development of the category of personality. Even as personalism retained the theistic concept of God as the highest as well as deepest level of personality, and as the ultimate support of the value and dignity of human personhood, it was to some extent the conceptual development on the human level that was projected back onto the divine from where the concept had once descended. Thus, the theology or theistic metaphysics of personalism, in both its main early forms, was distinctively shaped by modern developments in theology, and, most obviously in the case of American personalism, in one strand of nineteenth-century idealism.⁴⁷²

And it is here where one wonders if Bengtsson hasn't conflated the American and Catholic forms of personalism, though in doing so he has helpfully if inadvertently put his finger on a key difference between these two.

As I stated above, I believe Catholic personalism, at least in its twentieth-century instantiation, never loses sight of the fact that the notion of "person" belongs first to God and then to humans. But Bengtsson correctly describes the way American personalism projected onto the divine idealist notions of personality, and that as a result, speculations about the nature of God were deduced from the necessities of an idealist theistic framework rather than from the Christian tradition per se. And to some degree, to uncover where this happened—how Bowne's personalism became a primary basis for

⁴⁷¹ Bengtsson, "Personalism," 1628. A proper discussion of the evolution of the term "person" in the context of trinitarian debates would necessarily include the fourth-century Cappadocian theologians Basil, Gregory of Nyssa, and Gregory of Nazianzus.

⁴⁷² Ibid.

Mullins's doctrine of soul competency, displacing in some respects traditional Baptist notions of the conscience and soul liberty and unintentionally exacerbating the individualist tendencies of these concepts in others—is to go some distance towards determining how to address the concerns raised about excessive individualism in Mullins's soul competency by Mohler, Freeman, and others.

So to step back and connect this discussion to other sections of this dissertation, we can summarize the story like this. In the New Testament, Paul describes the conscience in a variety of ways, including the guilty retrospective (or judicial) conscience, a healthy internal insight to be heeded, and the prospective (legislative) conscience, which is mindful of the consciences of others, even to the point of privileging others' consciences over one's own. With Luther, we get a major shift, where the troubled conscience is the impetus to conversion, but once a person is converted and accepts salvation through the grace of God, the conscience is "assured," and this assured conscience is de facto evidence of one's salvation. A contrary experience of the conscience for Luther is indication that one believes one's salvation can ever be merited through works—the response to which Luther would say is never more works but rather greater reliance on God's grace.

By the time of Schleiermacher over two hundred years later, because Schleiermacher was so interested in God-consciousness, understood as "a figuration into or an overlay on sensory self-consciousness that ever remains in the mode of active receptivity within and as its lifeworld,"⁴⁷³ the motif of consciousness largely supplants

⁴⁷³ Timo Helenius, "The State of Servitude: Schleiermacher's Phenomenology of Sin," *International Journal of Philosophy and Theology* 81, no. 2 (2020): 108. See Walter E. Wyman, Jr., "Sin

the conscience. At the same time, for a separate set of reasons, a strong emphasis on conscience of the type Roger Williams often employed had mostly dropped out of Baptist rhetoric in favor of the more nebulous concept of soul liberty—a concept more specific to Baptist understandings of conversion and, as a corollary, separation of church and state. Almost having to work backwards, E. Y. Mullins then theorized a theological anthropological “competency” underlying soul liberty (as well as other key tenets in Baptist belief and practice) which he termed “soul competency.” But influenced indirectly by Schleiermacher via other theologians, as well as separately and more immediately by James’s pragmatism and Bowne’s theory of personalism,⁴⁷⁴ Mullins was unable to see the danger of his framework tilting towards an individualistic subjectivism, especially living in a time when social and communal ties could be assumed without having to be made explicit.

To a significant degree, the susceptibility of soul competency towards excessive individualism can be remedied in Mullins’s schema by largely replacing the American form of personalism as the theological anthropological context for soul competency with its Catholic form, as discussed in this section. This task is aided by some contemporary

and Redemption,” in Jacqueline Mariña, ed., *The Cambridge Companion to Friedrich Schleiermacher* (New York: Cambridge University Press, 2005), 129–49; and Robert Lee Vance, *Sin and Self-Consciousness in the Thought of Friedrich Schleiermacher*, NABPR Dissertation Series 11 (Lewiston, NY: National Association of Baptist Professors of Religion/Edwin Mellen, 1994), 1–16 (summarizing Schleiermacher’s understanding of “consciousness of sin” in the context of his dialectical framings of God-consciousness versus world consciousness and the state of sin versus the state of piety). See also Walter E. Wyman, Jr., review of *Sin and Self-Consciousness in the Thought of Friedrich Schleiermacher*, by Robert Lee Vance, *Religious Studies Review* 22, no. 4 (October 1996): 334 (criticizing Vance’s study as fundamentally flawed due to use of “categories of existentialist theory to interpret Schleiermacher, . . . a conceptuality foreign to Schleiermacher’s thoughtworld”).

⁴⁷⁴ For citations of analyses of the influence of Schleiermacher’s experiential theology, James’s pragmatism, and Bowne’s personalism on Mullins, see note 117, above; for citations of analyses of some of the theologians through whose work Schleiermacher’s theology was mediated for Mullins, see note 118, above.

personalists seeking integration of at least some elements of the American and European forms⁴⁷⁵—especially important, since even today, according to one eminent American personalist, explaining the place of the individual in society remains “one of the thorniest problems [American] Personalists face.”⁴⁷⁶

To be sure, Catholic personalism does not provide support for soul competency in the same way as Bowne’s original form of Boston personalism; in fact it is an improvement. Not only does Catholic personalism have a more developed relationship with the Christian tradition, it also better explains the relationality that has always been a part of Baptist understandings of soul competency, whether articulated as such or not. Baptist historian Bill Leonard has described the Baptist hermeneutic as “the people can be trusted to interpret Scripture aright, in the context of community and under the guidance of the Holy Spirit.”⁴⁷⁷ Insofar as some version of soul competency can be inferred from this hermeneutic, it is necessarily a relational competency (in several dimensions, in fact), as Catholic personalism would support more easily than American personalism, even as it may reside within each distinct person.

⁴⁷⁵ See, for example, Jonas Norgaard Mortensen, “Freedom for the Common Good: Danish Personalism on Democracy and the Engaged Human,” in McLachlan, Beauregard, and Prust, 169–86; and Eugene Thomas Long, “Persons in Relation,” in McLachlan, Beauregard, and Prust, 189–202. See also Anna Castriota and Simon Smith, eds., *Looking at the Sun: New Writings in Modern Personalism* (Wilmington, DE: Vernon, 2018). Burgos’s *An Introduction to Personalism* is helpful as an attempt to place the Catholic, European non-Catholic, and American forms of personalism in context, though unfortunately, as noted above, Burgos neglects discussion of Häring or Fuchs entirely.

⁴⁷⁶ Thomas O. Buford, response to Eugene Thomas Long, “Persons in Relation,” in McLachlan, Beauregard, and Prust, 202.

⁴⁷⁷ Leonard, *Baptist Ways*, 14.

Mullins's soul competency must not be discarded altogether, precisely because of the need of some form of synderesis amenable to the Reformed theological tradition.⁴⁷⁸ And it *need* not be discarded to avoid excessive individualism; that can be accomplished through altering the understanding of personalism that underlies it. It bears emphasizing, though, that neither soul liberty or soul competency—either the general competency of every soul to have a relationship with God or the special competency of the regenerate to participate in the priesthood of all believers—is the same thing as the conscience. Soul competency is never bound by human law; the conscience, as Paul alludes to in Romans 13:1–7, can be. One person's soul competency or soul liberty is never subject to another's. But, to again make reference to Paul, as he states in 1 Corinthians 10:23–33, a believer's conscience in many situations *should* be.

More broadly, soul competency can be stated in terms of absoluteness in a way that questions about the conscience and moral actions in the public sphere never can be. Matters of legislative conscience, as Aquinas (and Paul) understood, point to the virtue of prudence. And to connect this discussion more explicitly to the central concern of this dissertation, legal understandings of the religious conscience in the context of debates about religious liberty, the conscience *never* requires a person to automatically act—in this case, to act literally like an automaton—according to their beliefs. Rather, the conscience is that faculty or capacity responsible for prudentially judging, legislatively,

⁴⁷⁸ For the sake of this discussion, I assume that synderesis simpliciter is too aligned with the natural law for wholesale transplantation into the Reformed tradition as a replacement for soul competency. To do so would be to undermine the pivot away from Augustine that Aquinas was making on this point, a pivot that Luther and Calvin undid.

how one should act, *given* that one believes (according to synderesis or soul competency) as one does.

To be clear, this means that there will be times when Christians' consciences will necessarily be subject to the conscience of non-Christians—in a participatory democracy, this may in fact occur often. At the general level, this can be justified by Christian commitment to participatory democracy. As discussed in the previous chapter, however, it is not sufficient to leave such questions at the general level, since the commitments specific to each political issue (such as abortion or gay marriage, to name just two) may be perceived by many Christians as outweighing a general commitment to liberal democracy or civil society as such. Thus, to address the matter of the conscience in a more explicitly theological way, we turn in the next chapter to the pneumatology of the conscience.

4.3 Conclusion

As discussed in this chapter, theological understandings of the person are integrally related to theological understandings of the conscience. In the first part of this chapter, using the Baptist tradition as illustrative of the theological underpinnings of the legal understandings of the conscience outlined in chapter 1, the signal concepts in the Catholic tradition having to do with the person and the conscience—namely, the conscience, synderesis, and human dignity—were juxtaposed with the Baptist concepts of conscience, soul liberty (or soul freedom), and soul competency. We saw that the Catholic human dignity and Baptist soul liberty function in highly similar ways, as the basis for juridical rights pertaining to personal conscience which must be respected by civil society and especially the legal system, though the more robust Baptist concept has

implications which extend to various aspects of internal religious polity and practice as well. Meanwhile, synderesis and soul competency also function in similar ways as well. In the Catholic tradition, synderesis—the capacity to do good and avoid evil, in accordance with the natural law—was developed earlier than human dignity. In the Baptist tradition, by contrast, soul competency was only developed in the twentieth century, precisely as the theological basis for soul liberty and other associated freedoms. Unlike synderesis, however, soul competency is not the person’s link to the natural law; rather, in keeping with Reformed theological frameworks, soul competency is the person’s ability to relate directly to God and to read and find truth in the Bible, in the context of church teaching and under the guidance of the Holy Spirit.

The point, as it were, of this retracing was to contextualize theologically the individualist orientation of the Baptist understanding of the conscience, and moreover to highlight that while the Baptist tradition is certainly more individualist than the Catholic, it was not as individualist historically as it has been made to seem in the postwar era, and that theological work is necessary to make explicit the communitarian commitments that previously were implicit. As explored in the second part of this chapter, this work that is facilitated by pivoting away from, if not substituting outright, the Borden Parker Bowne/BU-style of personalism that emphasized individual subjectivity, in favor of the more communitarian Catholic personalism. As discussed, the BU-style of personalism which influenced Baptist theologian E.Y. Mullins held that the essence of human existence could be found in individual experience and then extended this understanding to the “personhood” of God as a ground of being. Catholic personalism, by contrast, looks to “personhood” in the context of the persons of the Trinity first, and then tries to

apply certain key understandings to the human, especially with regard to the inherent relationality of human existence and the experience of God.

5.0 CHAPTER 5: THE HOLY SPIRIT

In a recent essay on human emotions and the Holy Spirit, theological ethicist Andrea Vicini states, “The Holy Spirit is at the heart of the moral life and empowers persons and communities to discern, judge, decide, and act by promoting just relationships as well as personal and social flourishing.”⁴⁷⁹ In the same ecumenical spirit as that underlying this dissertation, Vicini, a Jesuit priest, goes on to quote the observation of Baptist theological ethicist Henlee Barnette (1911–2004) that “one of the surprising things that strikes the student of Christian ethics is the fact that ethicists almost universally ignore the essential relationship of the Holy Spirit to Christian morality.”⁴⁸⁰

In the words of *Gaudium et Spes*, in the depths of man’s conscience, “there he is alone with God,”⁴⁸¹ and in 1968, Philippe Delhay observed that “the conscience is inhabited by the Holy Spirit who guides and enlightens it.”⁴⁸² Yet beyond these bare references and others like them, the lacuna identified by Barnette more than sixty years ago and echoed by Vicini more recently remains. The pneumatology of the conscience specifically has received little to no focused treatment in contemporary theological ethics.⁴⁸³

⁴⁷⁹ Andrea Vicini, SJ, “Empowered by the Holy Spirit,” in *The Holy Spirit: Setting the World on Fire*, ed. Richard Lennan and Nancy Pineda-Madrid (New York: Paulist, 2017), 162.

⁴⁸⁰ Ibid., quoting Henlee H. Barnette, “The Significance of the Holy Spirit for Christian Morality,” *Review and Expositor* 52, no. 1 (1955): 5. Barnette was a longtime professor at the same seminary where E. Y. Mullins had previously served as president, Southern Baptist Theological Seminary in Louisville, Kentucky.

⁴⁸¹ Second Vatican Council, *Gaudium et Spes*, 16.

⁴⁸² Philippe Delhay, *The Christian Conscience*, trans. Charles Underhill Quinn (New York: Desclee, 1968), 35.

⁴⁸³ For example, Bernard Häring, CSSR, *The Law of Christ*, vol. 1, *General Moral Theology*, trans. Edwin G. Kaiser, CPPS (Paramus, NJ: Newman, 1966), 298–99, mentions the relationship between the Holy Spirit and the conscience only briefly, as Häring understands the conscience to be primarily a judgment of prudence and only much less frequently to represent a guidance by the Holy Spirit. In his later work *Free and Faithful in Christ: General Moral Theology* (New York: Seabury, 1978), Häring refers in

Perhaps the relationship between the Holy Spirit and the conscience seems so self-evident that it has not been thought worth commenting on. But as this chapter illustrates, this could not be further from the truth. In fact, there is much to be gleaned for our retrieved theological understanding of the conscience from recent studies in Christian pneumatology. Thus in this chapter, I will discuss the pneumatologies of four systematic theologians: Elizabeth Johnson, Jürgen Moltmann, Anselm Min, and Michael Welker.

As we will see, there are many assumptions about the conscience that receive implicit support from one or another various historical approaches to pneumatology. At the very least, by analyzing these four contemporary theologians' work on the Holy Spirit, we can draw these correspondences into the foreground, that they might be interrogated and, where needed, revised accordingly. More positively, the pneumatologies of these constructive theologians can contribute to an understanding of the personalist communitarian conscience, thus helping to stabilize a key concept for considering where (and how) Christians fit in a pluralist society.

5.1 Elizabeth Johnson, CSJ

In her groundbreaking 2002 book *She Who Is: The Mystery of God in Feminist Theological Discourse*, U.S. American Catholic theologian Elizabeth Johnson develops a

passing to “the creative power of the conscience under the influence of the Holy Spirit” (255), but does not develop the thought. Moral theologian James P. Hannigan did write an essay entitled “Conscience in the Holy Spirit,” in *Conscience*, ed. Charles E. Curran, Readings in Moral Theology 14 (New York: Paulist, 2004), 175–87, but there is little actual pneumatology in it beyond identifying the Holy Spirit as “the author of life in the Church and in the members of the Church, to which we owe allegiance” (184). Instead, his argument seems to be that the conscience is a judgment of reason and not a leading of the Holy Spirit, unless the person is *really* convinced they should follow church teaching despite public opprobrium or legal sanction—a position in keeping with his legalist understanding of the conscience. As such, Hannigan’s pneumatology may be said to be akin to that of Ratzinger’s, discussed in subsection 5.2.1. For a discussion of Hannigan’s implicit “substantialist” metaphysics,” see subsection 5.3.1. More recently, Jack Mahoney, SJ, *The Holy Spirit and Moral Action in Thomas Aquinas* (Lanham, MD: Lexington Books / Fortress Academic, 2021), stands out as notable work on the role of the Holy Spirit in the Christian ethical life.

trinitarian theology centered around a retrieval of the Sophia/Wisdom tradition in the Bible. Johnson's assessment of the existing landscape of pneumatology in the West, the backdrop for her feminist retrieval of a doctrine of the Holy Spirit, is especially pertinent to the current discussion. Johnson states:

[Since the Reformation,] Protestant theology and piety [has] traditionally privatized the range of the Spirit's activity, focusing on the justifying and sanctifying work of the Spirit in the life of the individual believer and emphasizing the Spirit's gift of personal certitude. . . .

Post-Tridentine Catholic theology, on the other hand, [has] traditionally tended in the opposite direction toward institutionalizing the Spirit, tying the Spirit's activity very tightly to ecclesiastical office and ordained ministry. The widely used neo-scholastic manuals of this period arranged their material in sequential blocks progressing from God to Christ to Church, thus ensuring that the radical freedom of the Spirit is controlled by subordination to ecclesiastical order and discipline. This mindset is crystallized in the words of even the enlightened thinker Karl Adam: "The structure of Catholic faith may be summarized in a single sentence: I come to a living faith in the triune God through Christ in His Church. I experience the action of the living God through Christ realizing himself in His Church. So we see that the certitude of the Catholic faith rests on the sacred triad: God, Christ, Church."⁴⁸⁴

If in other contexts one might quip with some merit that certain magisterial strains within the Catholic church mistake a high ecclesiology for a high christology, Johnson suggests that pneumatology fares even worse, insofar as it can seem almost left out of the picture entirely except for perfunctory creedal acknowledgments that merely obscure the omission.

⁴⁸⁴ Elizabeth Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (New York: Herder & Herder, 2002), 129, quoting Karl Adam, *The Spirit of Catholicism*, trans. Justin McCann (1923; repr., New York: Macmillan, 1955), 51. Johnson, 129, goes on to cite the observation from Yves Congar that Catholic piety if not theology has "tended to displace many functions of divine Spirit onto the pope, the cult of the Blessed Sacrament, or the Virgin Mary." See Yves Congar, *I Believe in the Holy Spirit*, trans. David Smith (1983; repr., New York: Crossroad/Herder, 2006), 1:160–64. While Congar sees progress in this area with Vatican II, even there the work of the Spirit is still largely confined to ecclesiastically approved, directed, and therefore mediated activities. See *ibid.*, 1: 167–72.

Thus framed, this general divide between Protestants and Catholics in terms of imbalanced approaches to pneumatology—respectively one way or the other—corresponds to the difference in approaches to the conscience outlined in previous chapters. That is, while the Holy Spirit is not explicitly linked to the conscience in any significant way in either tradition, the divergence in approaches to pneumatology implicitly underlies the difference between the legalist and individualist understandings of the conscience in the respective traditions.

Johnson goes on to point out, however, that “[t]he cumulative effect of this rather meager Western pneumatological tradition has been that the full range of the reality and activity of God the Spirit has been virtually lost from much of Christian theological consciousness.”⁴⁸⁵ In this context, then, it is not necessarily that divergent approaches to pneumatology have *directly* caused divergence in understandings of the conscience. Rather, in the *absence* of a well-developed understanding of the relationship between the Holy Spirit and the conscience, the most dominant characteristics of the Protestant and Catholic traditions—deference to the individual versus deference to church teaching, respectively—have filled the vacuum and thus distracted from the need to develop a pneumatological approach to the conscience, something which might otherwise seem obvious.

Johnson’s central methodological insight in *She Who Is* is that, as women are persons made in the image of God, the experience of women is an overlooked but

⁴⁸⁵ Johnson, 130. For Johnson, the underdevelopment of pneumatology in Western Christianity is plausibly related to its identification with theological tasks analogous to the “women’s work” of “bringing forth and nurturing life, holding all things together, and constantly renewing what the ravages of time and sin break down.” Ibid. She states, “Neglect of the Spirit and the marginalizing of women have a symbolic affinity and may well go hand in hand.” Ibid., 131.

essential resource for theological reflection. In her discussion of the Holy Spirit specifically, Johnson argues that because the experience of God is primarily a pneumatological one, women's experiences can be a particularly rich source for pneumatological reflection. Johnson thus highlights three aspects of women's experiences which should inform our understanding of the Holy Spirit: the negative *contrast* experience of living under oppressive conditions of patriarchy; the *confirmation* of these neglected experiences through the operation of memory, narrative, and solidarity with other women; leading to a culmination in *conversion*, a new understanding of women's agency.⁴⁸⁶

From these experiences, Johnson is able to identify three new ways of understanding the activities of Spirit-Sophia: The *vivifying* action of the Spirit is active in creating and the continuous energizing necessary for human participation as co-creators with God. Through her *renewing and empowering* action, the Spirit inspires those who seek her guidance, wipes away their tears, and directs them towards liberating praxis. And through her *gracing*, the Spirit orients persons towards God as ultimate mystery and fullness.⁴⁸⁷ And this in turn yields three overarching insights for pneumatology: the transcendent God's immanence, the divine passion for liberation, and the constitutive nature of relation.⁴⁸⁸

Translated to the conscience, we can see in Johnson's description of women's experiences the classic reflection-action model so characteristic of the conscience. We reflect on oppressive conditions and confirm the resources to counteract that oppression,

⁴⁸⁶ Johnson, 62–65.

⁴⁸⁷ Ibid., 133–41.

⁴⁸⁸ Ibid., 147.

reflection which forms the conscience. And then we are led by the Spirit to act, through the converted conscience, in vivifying, renewing, empowering, and gracing ways. Note that Johnson emphasizes “a new understanding of women’s agency,” but taken as a gestalt, this is not an individual agency but a relational one, an agency constitutively on behalf of or in relation to another. From the other side, it is not an agency waiting on instructions from ecclesial authorities. Rather, through the empowering action of the Spirit, a person is herself, with God’s help, able to take the initiative to act in liberating praxis for others, as a co-creator with God.

That the Holy Spirit is the focus of only a chapter in *She Who Is* necessarily means that the discussion of Johnson’s work for our retrieved understanding of the conscience is more abbreviated than the discussion of the other theologians below. Nonetheless, key aspects of the others’ work, as discussed below, are all present here. In allowing the conscience to be guided by the Spirit, a person can become part of the transcendent God’s immanent actions in the world. In having one’s conscience formed not just by church teaching but by negative contrast experiences of real-world oppression (including those one has been complicit in creating), a person can come to share God’s passion for liberation and act accordingly. And in understanding the constitutive nature of relation for the person of the Holy Spirit, a human person can understand her conscience as existing at the intersection of multiple commitments and multiple overlapping relationships, though the conscience alone is tasked with translating (and mediating) these commitments and relationships into tangible actions.

5.2 Jürgen Moltmann

Writing in 2004, Anselm Min described German Reformed theologian Jürgen Moltmann as “the pioneer without peer in renewing the theology of the Holy Spirit during the last three decades.”⁴⁸⁹ While Moltmann has addressed his understanding of the Holy Spirit in many of his theological writings, his fullest discussion appears in *The Spirit of Life: A Universal Affirmation*, first published in German in 1991 and translated into English the year following.

In *Spirit of Life*, Moltmann notes that the Holy Spirit is that aspect of God which is most directly related to the human experience of God. Notions of human experience, however, are necessarily derived from socially mediated categories. In the West, the ubiquity of the scientific worldview has instrumentalized experience into being a resource from which information can be extracted. Conceived of and placed in a subject-object relationship (with an “impartial” human subject), experience is confined within the artificial constraints of the scientific method, which places repeatability (among other things) as threshold criteria for epistemology. This eliminates an overwhelming amount of actual lived experience which is specific to time and place and raises significant obstacles in the way of meaningful theological reflection.⁴⁹⁰ Thus, to understand the Holy Spirit, we must first reconceptualize how we think about our experiences of God and of life. Moltmann notes how human experience is always mediated by an I-Thou relationship which is interdependent and not reducible to a subject-object relationship.⁴⁹¹

⁴⁸⁹ Min, *The Solidarity of Others in a Divided World*, 198.

⁴⁹⁰ Jürgen Moltmann, *The Spirit of Life: A Universal Affirmation*, trans. Margaret Kohl (Minneapolis: Fortress, 2001), 18, 24, 29.

⁴⁹¹ Moltmann, *The Spirit of Life*, 19.

This modern Western notion of experience also gets in the way of understanding and relating to the biblical understanding of the experience of the Spirit of God, which is fundamentally communal—the experience of God was socially situated, after all—as well as relational in the context of God’s covenant with God’s people. In the Hebrew Bible, the *ruach* of God is described as present at creation and in the charismatic leadership of various heroes of God’s judgment,⁴⁹² while the *shekinah* of God is the aspect of God’s glory present at various key moments of Israel’s experience, including at the giving of the covenant at Sinai.⁴⁹³

Similarly in the New Testament, especially in the Gospel of Luke, the Spirit of God is present with Jesus at various key moments, including Jesus’s conception and birth, both made possible by the Spirit. The Spirit led Jesus to his temptations in the wilderness, where his “messianic kingship without bread for the hungry masses, without the liberation of Jerusalem, and without any rule of violence” was “put on trial.”⁴⁹⁴ All Jesus could do was accept his role to suffer the marginalization and punishment of acting in solidarity with the marginalized, a solidarity in suffering made possible by the Spirit. The Spirit was present at the Garden of Gethsemane, where Jesus agonized over this path, even as the Spirit made his obedience to the Father possible. The Spirit was at the cross itself, when even in the midst of the forsakenness of the Father, the Spirit was able to experience the crucifixion and resurrection of the Son as a single movement of God’s history with humanity, the birth-pangs and birth joys of the new creation.⁴⁹⁵ And the

⁴⁹² Ibid., 40–43 glosses *ruach* as “the divine energy of life.”

⁴⁹³ Ibid., 47–51.

⁴⁹⁴ Ibid., 61.

⁴⁹⁵ See *ibid.*, 65.

Spirit was present at Pentecost, where precisely in their diversity, the new people of God were united in community.

Of course, Moltmann's overall theology is always interlinking, trinitarian, and eschatological, and his understanding of the Holy Spirit is the linchpin in many of his theological schemas.⁴⁹⁶ Regarding his trinitarianism, the Spirit is the relational aspect which makes what would otherwise be a closed binary between the Father and the Son into an open community—a self-giving, self-receiving perichoretic dance. Thus the Spirit is the “openness”—a key pneumatological motif for Moltmann—which allows for the possibility of human participation in this dance, as we know the Father and the Son *through the Spirit*. Precisely through the Spirit we are children of the creator, and siblings of the Christ.

The Spirit is also, essentially, eschatological. Thus the Spirit is able to introduce possibilities and resources available only eschatologically into the present through divine action. This makes it possible for persons to have hope when none would seem logically possible and to take actions which are not mere extension of present possibilities. He speaks of the Christian understanding of Spirit as eschatologically oriented *forward*, as opposed to a Greek spirit orientation of *up*.⁴⁹⁷ Ironically, this eschatological work of the Spirit in human history can make the experience of oppression all the more painful, as “the chains begin to hurt, for we already sense that we have the power to break them.”⁴⁹⁸

⁴⁹⁶ See, for example, *ibid.*, 69: “It is pneumatology that brings Christology and eschatology together.”

⁴⁹⁷ *Ibid.*, 89–93.

⁴⁹⁸ *Ibid.*, 75.

But the Spirit gives us the power to sustain that pain and to work for the removal of all shackles, our own as well as those anywhere in creation.

Finally, the key method of the Spirit is unifying and differentiating. As Moltmann states, “The goal is neither unity nor difference, but the differentiated community which liberates the individual members belonging to it.”⁴⁹⁹ Only through the action of divine Spirit are human persons able to live into their uniquely diverse calling without succumbing to the atomizing effect of separation; only through the Spirit are we able to remain connected to the suffering of others as we live into the uniqueness of our embodied life.⁵⁰⁰ For Moltmann, it is the Spirit which opens our ears to the cry of the suffering and oppressed, empowers us to act on their behalf, and comforts and sustains us as we bear the consequences of sharing in their suffering through the work of liberating praxis.

5.2.1 Reframing “experience”

There are several consequences of Moltmann’s understanding of the Spirit for our retrieved understanding of the conscience that bear further discussion. First, there is marked significance of Moltmann’s recharacterization of human experience for our understanding of the relationship between the consequent and antecedent aspects of the conscience. By instrumentalizing experience into scientific data for analysis and creating a subject-object relationship between a person and her acts, it become easy—almost inescapably so—to consider one’s past actions and experiences as completely separate from one’s self. Actions and experiences are perceived as a series of “one-offs,” having

⁴⁹⁹ Ibid., 228.

⁵⁰⁰ Moltmann understands the Spirit as not only working towards the negation of the negative but as enabling persons to move affirmatively towards the positive. See *ibid.*, 74–77.

no reverberative effects for oneself other than occasions for one's learning or self-discovery.

Alternatively, if these experiences and actions are framed as constitutive of our "I-Thou" relationships, with God and with others, and the action of the divine Spirit is perceived as at work precisely in those experiences, we can understand that our acts are not one-offs. (Or to paraphrase William Faulkner, past actions and experiences are not separate from a person, and they are never really "past.") While a person is not reducible to her actions or experiences by any means, there also is not the sharp distinction that Western notions of the individual would have. Instead, the Spirit is always working on persons, as relational beings, to retrieve the past, to build on it or to make up for it—hopefully, through divine action, to redeem it. And from the perspective of the person, this is often felt as the initial pangs of a guilty conscience, for the wrong acts either of oneself or one's community collectively. Though the Spirit, this guilty conscience need not remain a weight around one's neck. Rather, through the forward action of the Spirit on the converted conscience, the person can be lead to act (to use Johnson's terms) in vivifying, renewing, empowering, and gracing ways, precisely as a consequence of allowing one's conscience to be formed by honest reflection on the past and opening oneself to the eschatological possibilities that the Spirit may create.

5.2.2 "Unitarian" versus "trinitarian" understandings of fellowship in the Spirit

The second major consequence of Moltmann's understanding of the Spirit for our consideration of the conscience is his description of the Spirit as leading to both unity *and* individuation, especially significant in the context of situating the conscience in a pluralist society. To explain this a bit more, though not connecting it to pluralism

explicitly, Moltmann develops what he calls a “trinitarian” understanding of fellowship in the Spirit, which he contrasts with the “unitarian” understanding of then-Cardinal Joseph Ratzinger (later Pope Benedict XVI) and others. These concepts bear exploring in a bit more detail, but first some context and a summary of the specific work of Ratzinger’s that Moltmann directly engages is helpful.

In early 1986, the president of the University of St. Michael’s College in Toronto invited Cardinal Ratzinger to give a lecture at the college “on the pressing theme of the ecclesial dimension of theology.”⁵⁰¹ As later recounted by a faculty member of the college, “The immediate reason for the urgency of this question—and for the enormous audience [estimated at over six thousand]—was the highly publicized, ongoing investigation, since 1979, by the Congregation for the Doctrine of Faith (CDF) of some of the positions advocated by Charles Curran, a priest of the Diocese of Rochester, NY, and professor of moral theology at the Catholic University of America.”⁵⁰² The lecture, delivered April 14, 1986, was followed the next day by a private question-and-answer session with Ratzinger attended by the faculty of the Toronto School of Theology.

⁵⁰¹ Harry McSorley, “Contextualizing ‘The Church as an Essential Dimension of Theology’: Cardinal Joseph Ratzinger’s Public Lecture, Toronto, April 13, 1986,” *Toronto Journal of Theology* 29, no. 2 (Fall 2013): 409. The date of the lecture has been variously recorded, as April 13, 14, or 15. See respectively *ibid.*; Joseph Ratzinger, “Theologie und Kirche,” *Internationale katholische Zeitschrift ‘Communio’* 15, no. 6 (November 1986), 515n; and Joseph Ratzinger, “The Church and the Theologian,” *Origins* 15, no. 47 (May 8, 1986): 761. The correct date according to contemporaneous news reports, however, is April 14. See Michael McAteer, “Cardinal Ratzinger Begins 5-Day Visit,” *Toronto Star*, April 13, 1986; Michael McAteer, “Cardinal’s Hard Line Draws Cheers,” *Toronto Star*, April 15, 1986. The confusion seems to be between the date Ratzinger preached at a mass as part of his visit to Toronto, which was Sunday, April 13, and the public lecture delivered the next day. For the text of the mass homily, see Joseph Ratzinger, “University Mass Homily Preached at the University Mass Sunday, 13 April 1986,” in Joseph Ratzinger, *St. Michael’s Papers I: The Church as an Essential Dimension of Theology: A Public Lecture* (Toronto, ON: University of St. Michael’s College, 1986), [21–24].

⁵⁰² McSorley, 409. For more on the dispute between Curran and the CDF, including Ratzinger’s 1985 letter to Curran and Curran’s response, see Charles E. Curran and Richard A. McCormick, SJ, eds., “Part Five: The Curran Case and Its Aftermath,” in *Dissent in the Church, Readings in Moral Theology* 6 (New York: Paulist, 1988), 357–539.

The lecture Ratzinger delivered, entitled “The Church and the Theologian,” never mentioned Curran by name. What it did, however, was make clear that Catholic theologians should consider themselves subordinate to church teaching, whether the teaching is deemed “infallible” or not.⁵⁰³ Ratzinger condemned as an “abuse of authority” the actions of any teacher who “exploits his students by using a [teaching] position given by the Church in the first place, to encourage them to accept views that are opposed to the teachings of the Church.”⁵⁰⁴ He similarly condemned as “abuse of authority” any inaction by church authorities who would “serenely . . . allow this paradoxical situation to continue.”⁵⁰⁵ Invoking the World War II experiences of Heinrich Schlier, Ratzinger implied that the theologian must defer to the church because the individual theologian cannot on his own be trusted to stay free from the sway of the godless forces outside the church, a danger most vividly represented by the power the Nazi regime wielded in the 1930s over the German Evangelical Church.⁵⁰⁶

⁵⁰³ In the private session with faculty the next day, Ratzinger went so far as to discount the category of the “infallible” in the context of moral theology entirely, stating that no moral teachings had ever been determined “infallible.” Michael G. Steinhauser, “Cardinal Ratzinger in Dialogue with the Toronto School of Theology: What Was Said in 1986?,” *Toronto Journal of Theology* 29, no. 1 (Spring 2013): 78, 80. This accords with the position of Cardinal William Levada, appointed prefect of the Congregation for the Doctrine of the Faith by Ratzinger upon his installation as Pope Benedict XVI in 2005, as outlined in Levada’s doctoral dissertation, *Infallible Church Magisterium and the Natural Law* (Rome: Pontifical Gregorian Press, 1971), 77–79. Having marginalized the category of the “infallible,” Ratzinger went on to describe a category with a lower epistemological threshold, the “certain,” which does not require papal invocation but which according to Ratzinger should be deemed binding on theologians and exempted from theological debate nonetheless. Steinhauser, 78, 80. Ratzinger cited Rahner as the source for this category of the “certain,” but as McSorley, 412, points out, he did so without context. Lawyers and judges quip that the “strict scrutiny” standard applied by the U.S. Supreme Court in certain cases—a standard which almost inevitably leads to the statute in question being struck down—is “strict in theory but fatal in fact.” An analog in this context might be that Ratzinger’s category of the certain is “certain in theory but infallible in fact.”

⁵⁰⁴ Joseph Ratzinger, “The Church as an Essential Dimension of Theology,” *Toronto Journal of Theology* 29, no. 2 (Fall 2013): 405.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid., 391, 403–4.

Ratzinger based his subordination of theology (and the theologian) to the Church on two biblical passages, from Galatians and the Gospel of John. The passage from Galatians is where Paul states, “I live, no longer I, but Christ lives within me” (2:20). According to Ratzinger, Paul “describes the Christian as a person who is distinguished both by a revolutionary, personal experience and also by an objective reality.”⁵⁰⁷

Ratzinger continued:

[C]onversion, according to Paul, is something much more radical than a mere revision of a few opinions or attitudes. It is a death event. In other words, it is the replacement of the subject—of the “I.” The “I” ceases to be independent and to be a subject existing in itself. It is torn from itself and inserted into a new subject. The “I” does not perish, but must let itself diminish completely, in effect, in order to be received within a larger “I” and, together with that larger “I,” to be conceived anew.

The basic notion that conversion is the abandonment of the old, isolated subjectivity of the “I” [*isolierte Subjektivität des Ich*], and the finding of oneself within a new and subjective unity [*Subjekteinheit*] in which the limitations of the former “I” have been surpassed, makes it possible to come into contact with the basis of all truth.⁵⁰⁸

He concludes, “Very simply [this] means that for Paul, the believing Christian is a person who has been converted to, taken over by, the Lord Jesus. This happens in and through the Church, which is Christ’s own body in the world.”⁵⁰⁹

Turning to the Gospel of John, Ratzinger explained, “If, on the one hand, Paul was interested principally in the issue of faith and how it is to be professed, John, on the other hand, focuses on the question of correct understanding. Obviously, both are interested in the fundamental truth of our being. John is concerned about the fact that,

⁵⁰⁷ Ibid., 393.

⁵⁰⁸ Ibid., 394. Bracketed text is from the German translation of Ratzinger’s lecture, “Theologie und Kirsche,” *Internationale katholische Zeitschrift “Communio”* 15, no. 6 (November 1986), 519, added here to clarify what phrases from Ratzinger Moltmann is referring to in the passage quoted below, since the English translation of Moltmann’s quotations does not match the English phrases Ratzinger used in his lecture.

⁵⁰⁹ Ratzinger, “The Church as an Essential Dimension of Theology,” 395.

when one concentrates on Jesus's speeches or on what he does, one becomes terribly confused about who he is. Who is this man?"⁵¹⁰ Ratzinger continued:

John's answer to this question may at first sight appear to be mythological—especially to modern eyes. John says, "Only the Paraclete can make him known," the Spirit who is the Spirit of the Father and of the Son himself. . . . We can see that John's reference to pneumatology is an important indication for ecclesiology. We can see that the process of understanding being described here is definitely and precisely outlined. How does the Spirit work?⁵¹¹

Ratzinger's answer to the question he has posed is important, and it bears quoting in full:

In a first phase, the Spirit works by providing the memory, memory in which the individual is grouped together with the whole, which confers its true meaning, previously misunderstood, on the individual. Next, the Spirit's work is characterized by listening. The Spirit does not begin by speaking of itself, that is, it listens and teaches others to listen. It does not add to the Word but inserts itself into the Word, which becomes light when it is heard. It does not use violence but allows everyone it meets to speak. It enters into me. Here we have another element: the Spirit creates room for listening and remembering. This room John calls "we." This "we" is John's Church, a place where we acknowledge Jesus. Only through this "we" by which we participate in the origins can we ultimately reach understanding. Bultmann put it very well when he said that the testimony of the Spirit "is a repetition, a 'calling to mind,' in the light of their present relationship to him."⁵¹²

Thus, while Ratzinger invoked both Christ and the Holy Spirit, he channeled each of these through the church, to which the formerly independent "I" of the believer must be subjected.

Moltmann critiques the approach outlined by Ratzinger as akin to that of Schleiermacher, for whom a "unitarian concept of the Spirit [which] leads to a unitarian concept of fellowship."⁵¹³ Moltmann explains that for Schleiermacher, "the Spirit is only

⁵¹⁰ Ibid., 396.

⁵¹¹ Ibid.

⁵¹² Ibid., quoting Rudolf Bultmann, *The Gospel of John* (Oxford: B. Blackwell, 1971), 554.

⁵¹³ Moltmann, *The Spirit of Life*, 224.

‘the union’ of the divine essence with human nature.”⁵¹⁴ Thus, “[t]he divine-human union in the church, which constitutes its fellowship, corresponds to the union of the divine essence with human nature in Christ, which constitutes his Person.”⁵¹⁵ But “[b]ecause he does not see the Holy Spirit in his trinitarian fellowship with the Father and the Son, [Schleiermacher] is compelled to start from the one, undifferentiated divine essence, and has to think of the ‘union’ as a *unio simplex*.”⁵¹⁶ Moltmann states, “The inevitable result of this is a unitarian concept of [divine] community, which threatens to abolish the differences between the [divine] persons. . . . The unitarian concept of the Spirit leads to a unitarian concept of fellowship, and to a one-sided stress on the love that binds, over against the freedom that differentiates.”⁵¹⁷

We can see how the Spirit operates similarly for Ratzinger in the passage quoted above. For Ratzinger, the Spirit “does not add to the Word but inserts itself into the Word”; it “creates room for listening [to] and remembering” “the memory . . . in which the individual is grouped together with the whole,” in which the individual finds “its true meaning.”⁵¹⁸ For Moltmann, Ratzinger’s understanding of the relationship between the church and its members is severely deficient, precisely as the result of a deficient understanding of the Spirit. He explains:

Joseph Ratzinger has developed the notion that in the church people surrender their old “isolated ego subjectivity” [*isolierte Subjektivität des Ich*] and find themselves in a new, higher “unity of determining subjects” [*Subjekteinheit*]; but this idea . . . stresses only the union of divided humanity “in Christ,” not the diversity of the different charismata “in the Holy Spirit.” The overextension of the head-body image for the church leads to a graduated hierarchy: God—Christ—the

⁵¹⁴ Ibid., 222.

⁵¹⁵ Ibid., 223.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid., 223, 224 (emphasis omitted).

⁵¹⁸ Ratzinger, “The Church as an Essential Dimension of Theology,” 396.

body of Christ. It is self-evident that this is a way of legitimating the hierarchical constitution of the church. In as much as Christ is considered to be a “determining subject,” the community of Christ can be christologically called a “unity of determining subject.” But in the abundance of the Spirit and its many gifts, it is a community in which everyone contributes what is his or hers: it is a non-hierarchical fellowship of equals in the Holy Spirit. To call it “a unity of determining subjects” is too weak a definition of this fellowship in the Spirit, and the inadequate definition hinders the development of the fellowship’s charismatic wealth. The true unity of the church is an image of the perichoretic unity of the Trinity, so it can neither be a collective consciousness which represses the individuality of the persons, nor an individual consciousness which neglects what is in common. In the church’s true unity, the persons express the community by expressing themselves, and—conversely—the community gives expression to the persons by giving expression to itself. In this complementarity there is no priority.⁵¹⁹

This “unitarian” approach of Schleiermacher and Ratzinger contrasts with the trinitarian concept of fellowship endorsed by Moltmann. For Moltmann, the New Testament phrase “the fellowship of the Holy Spirit” denotes not only the means by which persons are invited into fellowship with God but also the very nature of that fellowship, akin to the fellowship the Holy Spirit participates in with the Father and the Son. As he states:

The Spirit does not merely bring about fellowship with himself. He himself issues from his fellowship with the Father and the Son, and the fellowship into which he enters with believers corresponds to his fellowship with the Father and the Son, and is therefore a *trinitarian fellowship*. In the unity of the Father, the Son and the Holy Spirit, the triune God himself is an open, inviting fellowship in which the whole creation finds room.⁵²⁰

Later in the same passage, he continues:

⁵¹⁹ Moltmann, *The Spirit of Life*, 224, German words in brackets taken from the original German version of the text, Jürgen Moltmann, *Der Geist des Lebens: Eine ganzheitliche Pneumatologie* (Munich: Kaiser, 1991), 236, quoting Ratzinger, “Theologie und Kirsche,” 519. Moltmann also cites Ratzinger’s *Einführung in das Christentum: Vorlesungen über das Apostolische Glaubensbekenntnis* (Munich: Kösel, 1968), 194–97, translated by J. R. Foster as *Introduction to Christianity* (London: Burns & Oates, 1969), 178–82, which follows the same theme as the later 1986 lecture, drawing on Galatians and the Gospel of John in similar ways.

⁵²⁰ Moltmann, *The Spirit of Life*, 218.

The trinitarian concept of community envisages *diversity in unity* from the very outset. To create community does not merely mean united what is different. It differentiates the One as well. The unfolding differentiation of the potentialities given and opened up through a common reality in no way contradicts this movement towards community, for differentiation is one of the essential elements in community. It is only standardization which reduces community to the lowest common denominator. True community is different. It opens up individual potentialities in the greatest given diversity.⁵²¹

Moltmann insists that the “experience of God in the experience of sociality,” which Ratzinger would privilege in the thoroughly socialized context of the church, and “experience of God in the experience of the self must not be turned into opposites, as if they were alternatives. In fact they are two sides of the same experience of life, in which we experience others and ourselves.”⁵²² Sharpening the point, he states, “Anyone who makes a severance here, or assigns different values to the two aspects, is ‘quenching’ the life-giving Spirit and damaging the wealth of life with the Spirit confers.”⁵²³ For Moltmann, to insist that the authoritarianism of the Nazi regime could only be combatted by a countervailing authoritarianism in the church is, to no small extent, to miss the point of the trinitarian “fellowship of the Holy Spirit” into which we are all invited and to which the church is called to bear witness.

Importantly, this fellowship of the Holy Spirit extends to non-Christians, and indeed to all of creation.⁵²⁴ As Moltman explains, the Holy Spirit is present in the

⁵²¹ Ibid., 219–20.

⁵²² Ibid., 221. Ratzinger, *Introduction to Christianity*, 179 even refers to the person as “completely ‘socialized,’ incorporated in one single being, but in such a way that the separate individual is not extinguished but brought completely to himself.” While the individual may not be completely “extinguished” for Ratzinger, however, the individual’s subjectivity apparently is, as the individual is “torn from itself and inserted into a new subject,” as he will later say. Ratzinger, “The Church as an Essential Dimension of Theology,” 394.

⁵²³ Moltmann, *The Spirit of Life*, 221.

⁵²⁴ Ibid.

evolutionary principle found in the community of creation, an evolution towards ever more complex forms of community. He states:

The whole is always more than the sum of the parts that have come together to form it. As the unities become more complex, the capacity for communication grows, and with the capacity for communication, the capacity for transformation increases too. The range of anticipation widens and fans out. The process brings with it an ever-greater wealth in the forms of individuality that are minted. Ever richer forms of social relationship develop, and a continual expansion of the scope for free behavior.⁵²⁵

Thus, the relationship between the church and society is not one-sided, with the church as “prototype,” “example,” or “model,” as these understandings “put[] an undue strain on the Christian church, make[] it incapable of learning, and set[] up clerical claims to domination in society.”⁵²⁶ Moltmann states, “There is certainly a line drawn between Christians and non-Christians through baptism and membership of the church, but as far as the natural and voluntary communities are concerned, there is in fact no inside and outside. There is only the complex web of life’s relationships.”⁵²⁷

Instead of an inside/outside approach to the church, Moltmann favors the image of “two movements . . . which are rhythmically related to one another: 1. The *gathering* of Christians in the church. 2. The mission of *sending out* of the church to Christians in the world.”⁵²⁸ This sending out involves action groups made up of Christians and non-Christians working towards peace, environmental issues, and justice for the developing world, as well as various forms of participation in democratic governance.⁵²⁹ But what sets the church apart is not uniformity among its members in affirming a creed or

⁵²⁵ Ibid., 226.

⁵²⁶ Ibid., 231.

⁵²⁷ Ibid.

⁵²⁸ Ibid., 234.

⁵²⁹ Ibid., 241–43, 252.

assenting to church teaching but rather its orientation “towards the kingdom of God.”⁵³⁰

“The special thing about the community of Christians is not so much its character as a social model (*exemplum*),” Moltmann states,

as the redeeming experiences of the fellowship of Christ found there, and the liberating experiences of the Holy Spirit—in short, the assurance of the fellowship of God (*sacramentum*). These impulses have their effect on the natural and voluntary communities in which Christians live. Congregational and church structures—at least in the older Christian countries—seldom belong here.⁵³¹

In placing these aspects of Moltmann’s pneumatology and his critique of Ratzinger in the context of the concerns of this chapter, we can see that while Moltmann’s work does not explicitly describe a “pneumatology of the conscience,” it does set up the context in which the ideas can be connected. Ratzinger’s understanding of the relationship between the church and the moral theologian aligns rather precisely with the legalist conscience as outlined by Linda Hogan and discussed at the end of chapter 3. And Ratzinger’s “unitarian conception of fellowship,” as Moltmann describes it, identified exclusively with the church, where the individual been “torn from itself and inserted into a new subject,”⁵³² not only leaves little room for the individual conscience to do anything other than apply church teaching, it makes any significant moral initiative at the individual level difficult to conceive. In contrast, Moltmann’s “trinitarian conception of fellowship” is seemingly fecund with opportunities for moral initiative at the personal level. Thus, in place of Ratzinger’s hierarchical understanding of moral theology, Moltmann allows for networks—inherently relational and personalist—of self-differentiated but intimately connected moral agents.

⁵³⁰ Ibid., 248.

⁵³¹ Ibid., 231.

⁵³² Ratzinger, “The Church as an Essential Dimension of Theology,” 394.

5.3 Anselm Kyongsuk Min

While Moltmann envisions Christians engaged in political action groups with non-Christians, beyond this his account of the action of the Holy Spirit in the world in the context of pluralism and the political sphere is not particularly robust. For this we turn to the work of Anselm Min. Like Moltmann and Johnson, Min barely mentions the conscience in his work. That said, as with the previous two, it is clearly implicated.

Min's pneumatology, outlined in his book *The Solidarity of Others in a Divided World*, is primarily framed as a reaction to the postmodern approaches of Emmanuel Levinas and Jacques Derrida, whose politics of difference sees positive meaning in difference as such and any attempt at unity as a corrupting totality.⁵³³ While Min finds aspects of this postmodern approach laudable, he finds it has very limited application for social transformation.

By contrast, the possibility of social transformation is a *sine qua non* for Min's pneumatology, not just with regard to method but with regard to the nature of the Holy Spirit itself, which exists precisely as the possibility of self-transcendence within the trinitarian relationship. In contrast to the Creator and the Christ, the Holy Spirit is pure relationality. As such, she is the self-effacing aspect which directs attention not at herself but at God as the transcendent horizon of all being and therefore constitutes the self-transcendence which makes human participation in God possible.⁵³⁴ Thus in contrast with

⁵³³ Anselm Min, *The Solidarity of Others in a Divided World: A Postmodern Theology after Postmodernism* (New York: T & T Clark, 2004), 59–60.

⁵³⁴ Ibid., 118. Note that Min refers to the Holy Spirit as feminine, to balance out the otherwise male-centered images used for the Trinity, as explained at *ibid.*, 3. See also Anselm Min, "Liberation, the Other, and Hegel in Recent Pneumatologies," *Religious Studies Review* 22, no. 1 (Jan 1996): 29, criticizing Moltmann's exclusive use of masculine pronouns when referring to God.

Moltmann's method of unity-in-differentiation, Min understands the method of the Spirit as negation and transcendence.⁵³⁵

Min identifies three key dialectics of the Holy Spirit: *totality* as actualizing principle; *infinity* as idealizing principle; and *solidarity* as socializing principle.⁵³⁶ By totality, Min is referring to the self-transcending possibilities inherent in human nature as body and soul. By infinity, Min means to include not just the postmodern emphasis on difference but on the social structures so vilified in postmodernism; Min holds out the possibility for their self-transcendence as well. (On this point, Min praises Moltmann for allowing for the inclusion of social structures also.) And finally, Min focuses on solidarity as the praxis to bring about this social transformation, but it is a solidarity without hierarchy—thus his emphasis on a solidarity *of* others, not *with* others.

Min describes postmodernism's "philosophy, culture, and politics of difference" as "a will to justice and liberation" which "accentuates difference"; "denounces *all* tendencies to unity, totality, universality, system, grand narrative, and community, as well as claims to reason and truth"; and "in the name of *differance* . . . criticizes all ideas of fixed, unchanging nature or essence, rejecting all metaphysics and all claims to foundation and essence."⁵³⁷ For Min, such identity-centering postmodern approaches are a good starting point, but left unchecked they degenerate into a proliferation of identified "others," without any coherent theoretical framework for solidarity across identities beyond merely strategic alliances.⁵³⁸

⁵³⁵ Ibid., 129.

⁵³⁶ Ibid., 26.

⁵³⁷ Ibid., 59–60.

⁵³⁸ Min, *The Solidarity of Others in a Divided World*, 58.

Similarly, such approaches have trouble providing the foundation for political change, insofar as they are theoretically unable to place their confidence in any systemic reform, so disdainful are they of any political institution or law. Min describes this line of thought and identifies its problems as follows:

Political actions and the making of laws seek to institutionalize systems of identity. Laws are made for all and binding on all, not just for a particular group. They are indeed systems of identity par excellence. Precisely because they are symptoms of identity, there is also a great and constant danger that the laws may be oppressive to some. The alternative here, however is not just to denounce all systems of identity indiscriminately, as postmodernists tend to do, for never measuring up to the messianic ideal of justice, but rather to struggle to establish a less oppressive and more liberating one. Merely to denounce all determinate systems of identity as oppressive may be good idealism and immensely pleasurable to a disembodied intellect in search of an uncontaminated perfection, but it fails to respond to the imperatives of action in civic solidarity in a demanding and imperfect world. We cannot afford either pure idealism or cynical realism, which are, in fact, dialectically the same . . . In a world where collaborative civic action is so much demanded, accentuating difference both further fragments the community and enervates the energy for needed cooperative action.⁵³⁹

Min is not arguing for a return to the status quo ante postmodernism, before society became attentive to identities different from that imposed by the dominant institutions. Rather, Min is keen to describe the best approach *after* postmodernism and thus after the fissuring of the totality that the recovery of sublated identities effects.

Much of this reintegrative work is done by Min's christology, specifically his understanding of "the body of Christ." (Like Johnson and Moltmann, Min's pneumatology is fundamentally christological.⁵⁴⁰) For Min, the body of Christ encompasses not just the Christian church, as it has often done in its ecclesiastical

⁵³⁹ Ibid., 70–71.

⁵⁴⁰ Stated differently, theological ethicist Lisa Sowle Cahill describes these three theologians as having a "spirit christology." See Lisa Sowle Cahill, *Global Justice, Christology, and Christian Ethics*, New Studies in Christian Ethics 30 (New York: Cambridge University Press, 2013), 193–203.

applications in the Christian tradition. It also includes eschatologically “the coming fullness of redemption and re-creation of *all* humanity and indeed of all creation.”⁵⁴¹ Min acknowledges that “the ecclesiastical sense of the body of Christ [is] perhaps the only sense in which the metaphor has been used in the tradition” but argues that it need not and must not be so limited going forward: “We cannot simply identify Christ and the church—the church as the mystical body of Christ, and the church as a visible organization—something the Reformers insisted on and postconciliar Catholicism began to recognize.”⁵⁴² He continues:

There is no doubt that the metaphor of the body of Christ has often been used in the past to separate those who belong to Christ and his church and those who do not. My point is that as a Trinitarian event, the metaphor contains a self-expanding dynamic of solidarity to include not only all humanity but also all creation, and that it is time for us to develop that dynamic.⁵⁴³

As a part of this “Trinitarian event,” the Holy Spirit works to bring this “self-expanding dynamic” into being. Min states:

The Holy Spirit creates, redeems, and re-creates all things precisely by bringing things together in Christ as the primordial model of the creature created in the image of God. It is the Holy Spirit, the Spirit of both the Father and the Son, who gives life by establishing the unity in diversity and solidarity of others in the manifold body of Christ. All purely christocentric or christomonistic discussion of the body of Christ that excludes an essential role of the Holy Spirit tends to fall into monism, mechanism, hierarchical thinking, and totalitarianism without internal differentiation and vitality. The Trinity, especially pneumatology, remains an essential context for all theological reflection on the body of Christ.⁵⁴⁴

Theologically, this description seems correct, and it is consistent with the work of Moltmann and Johnson discussed above. The apparent problem, however, is relating this

⁵⁴¹ Ibid., 146 (emphasis added).

⁵⁴² Ibid., 146, 147. Min, 145 approvingly quotes Rahner in support of this point.

⁵⁴³ Ibid., 151.

⁵⁴⁴ Ibid., 149.

understanding of the relationship between the body of Christ and the Holy Spirit to the personal conscience in a way that acknowledges that while there may be significant differences between the consciences of Christians (or, in a Reformed lexicon, the “regenerate”) and non-Christians, the non-Christian conscience should still be given equal weight by Christians, as should laws passed as the result of a participatory democratic process, within the context of a Christian commitment to a pluralist democracy.

The answer can be found in what Min calls the “heterological imperative,” “an essential condition of living in a multicultural, pluralistic world.”⁵⁴⁵ By “heterological imperative,” Min is referring to

the willingness to subject all our convictions to the challenge of others, their views, their needs, their identity; not in the sense of giving up our convictions and beliefs as conditions of dialoguing with others, as some pluralists tent to argue; but in the sense of a culture of readiness to live in the tension between our own ultimate beliefs and the challenge of those who differ, with the willingness to modify our views and behaviors if necessary, and otherwise always to take the other into consideration.⁵⁴⁶

He continues, “As postmodernists argue, we do not indeed possess God’s vision of totality, and we must learn to live with the challenge of the other, sometimes in the *light* of others so that we may learn from them, often in the *shadow* of others so that we may be challenged to repentance and conversion.”⁵⁴⁷

The “substantialist metaphysics” of the classical tradition, based as it was in the Boethian definition of a person to mean “an individual substance of rational nature,” defined a person as “a substance or subsistent being, not an accident such as a relation; a

⁵⁴⁵ Ibid., 61.

⁵⁴⁶ Ibid., 62.

⁵⁴⁷ Ibid.

rational rather than an irrational being; and an individual entity rather than a generic nature.”⁵⁴⁸ But this contrasts quite radically with the divine persons of the Trinity, where “relations are subsistent, a rational being contains the possibilities of nonrational beings as their Creator, and a subsistent relation is at the same time his or her own essence. In the divine persons as subsistent relations, traditional dichotomies break down: substance and accidents, rational and irrational, individual and nature.”⁵⁴⁹ Accordingly, we must “revolutionize our concept of person.” He explains:

Instead of a fixed, individual substance of rational nature, we are to conceive of the person in terms of relations, processes, and movements. It is also important to realize that in God this relationality is itself a mode of being of divine persons in whom essence and existence coincide, and therefore a modality of the *Ipsum esse per se subsistens*, of the fullness, actuality, and movement of the divine *esse*. This is especially true of the person of the Holy Spirit who, as the will of the Father, connotes love, impulse, movement, and inclination. The Holy Spirit—as a subsistent relation of the mutual love of the Father and the Son, whose function lies precisely in creating relations and relating the relations to the mutual love of the Father and the Son—moves and relates all things to their ultimate end as the grace of divine motion that executes the plan of divine providence.⁵⁵⁰

For Min, “substantialist metaphysics” is inadequate and has been revealed as erroneous insofar as it fails to account for “the signs of the Spirit today.”⁵⁵¹ He mentions “the countless ministers of the Holy Spirit actively involved in the praxis of uniting, reconciling love all over the world: self-sacrificing parents, dedicated teachers, caregivers for ill, family and pastoral counselors, conscientious public servants, relief workers, and contributors for victims of violent nature.”⁵⁵² In Min’s estimation, “The most distinctive and most frightful crisis today . . . has been the artificial, structural creation of oppressive,

⁵⁴⁸ Ibid., 125.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid., 125–26.

⁵⁵¹ Ibid., 127.

⁵⁵² Ibid.

alienating inequalities based on class, gender, ethnicity, culture, religion, and technology, which also mediate and intensify the negative potentialities inherent in natural inequality.”⁵⁵³ In the face of such challenges, our theology has not kept up.

Instead, Min proposes a “concrete social metaphysics” to replace the substantialist metaphysics of the classical tradition, one which

sees society as a totality of economic, political and cultural relations at a particular time in history—relations that do not merely exist side by side but enter into a dialectic of negation and transcendence among themselves, necessarily generating transformations of structures and institutions, so that they see human individuals precisely as dynamic networks of personal, social, and natural relations within the conditions set by society.⁵⁵⁴

He states:

A concrete social metaphysics will see the work of the Spirit precisely in the qualities and transformations of social relations in their dialectic and in their impact on individuals. Traditional pneumatology limited itself to the role of the Spirit in the sanctification of individuals and at most in the guidance of the ecclesiastical magisterium, not also in history and the universe, in concrete social struggles, and in our violent relations to often violent nature; that traditional doctrine has not a little to do with its lack of a concrete social horizon.⁵⁵⁵

Citing *Gaudium et Spes*, Min highlights that his “dynamic theology of the Holy Spirit as the Spirit of solidarity of others in God makes it possible for Christians to believe . . . that the Holy Spirit is also active in the world, in other religions and cultures [including secularized ones] . . . but that we do not yet know how she is present there.”⁵⁵⁶ He argues:

The actual perceived difference between Christianity and other religions is not itself an argument for the absence of the Spirit in the latter. The Holy Spirit [which is present in the struggle for social transformation] is the Spirit of Christ, and there cannot be any contradiction between them in principle. . . . Even though we do not yet know how different religions may be mutually compatible, the fellowship of the Word and the Spirit in the immanent Trinity also gives us hope

⁵⁵³ Ibid.

⁵⁵⁴ Ibid., 129.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid., 130.

that they may be compatible and complementary, and that in and through those religions the uniting and reconciling Spirit is nonetheless working to bring different religions together into a solidarity of others in her own mysterious way.⁵⁵⁷

5.3.1 Significance of Min's pneumatology for the conscience

In the context of our analysis of the conscience, there are several observations to be made. The first pertains to Min's emphasis on "a dialectic of negation and transcendence" among "economic, political and cultural relations" and his description of individuals as nodes of intersection within these multiple "dynamic networks." It is this combination of concepts—the Spirit's action in persons defined by relations and arranged in networks—which keeps the conscience from becoming thoroughly socialized, as it is in Ratzinger's "unitarian" understanding of fellowship in the Spirit. Conversely, neither is the individual elevated at the expense of the group—as Harold Bloom described the "American religion"; as Roger Williams accused the Quakers of doing; and as liberalism has often done—as a direct recipient of God's revelation. Instead, the person's experience of the Holy Spirit is always relational. Yes, this relationality of the Spirit includes one's relationship with God most especially, but it is also multi-dimensional, so that the Spirit's action is also in one's relationships with the various religious and secular networks of which one may be part, networks always in tension, both internally and with each other.

Second, Min's use of the word "sanctification" is also key here, though perhaps for reasons inadvertent on his part. Min refers to "the role of the Spirit in the sanctification of individuals and at most in the guidance of the ecclesiastical magisterium," but this does not seem quite right. As noted in an earlier section of this

⁵⁵⁷ Ibid., 130–31.

chapter, there exists a de facto “bait and switch” between the pneumatology and ecclesiology in some classical approaches, where the role of the Holy Spirit is sometimes acknowledged but then quickly restricted to working through the church. In referring to the role of the magisterium in the sanctification of individuals, it would seem that Min has stumbled upon, without realizing it, a key step in that bait-and-switch: the “formation of the conscience.”

Which is to say, to the extent that the role of the Holy Spirit in the lives of Christians has, in strains such as Ratzinger’s unitarian understanding of fellowship in the Spirit, been replaced by the role of the church, a key mechanism of this replacement has been an excessive emphasis on a person having her conscience formed by church teaching—as is done in legalist understandings of the conscience—and a corresponding lack of emphasis on a person’s sanctification by the Spirit. But Min’s reference to the concept of sanctification, that aspect of salvation effected by the Holy Spirit among the regenerate, highlights—inadvertently—that the role of the church in “forming the conscience” can only ever be secondary to the work of the Holy Spirit in sanctifying the believer, which will necessarily also effect (re)formation of the conscience. And if, in turn, we understand that the personal conscience is directly affected by the sanctifying action of the Holy Spirit—as Min correctly describes it—and acknowledge that the Holy Spirit is encountered by the person both within and without the church, then the importance of understanding the person as a node within multiple dynamic network leaps into view, as it has consequences both for the church and for the other traditions a person is connected to.

No longer is the person merely a vector in the public square for acting out church teaching. Instead, the person, in all her relations, is a site of sanctification, and so while the church may have much to teach the world, it has much to learn also—at least if it wants to be open to the actions of the Spirit in the world. The church certainly maintains a special place—precisely as the ecclesiastical dimension of the body of Christ. But it is not the only network of which persons are a part where the Holy Spirit is experienced, just as the ecclesiastical is not the only dimension of the body of Christ.

The third observation to be made relates to Min’s shift from a “substantialist metaphysics” to a “concrete social metaphysics.” In one of the few essays specifically relating the Holy Spirit to the conscience, moral theologian James P. Hannigan admits that, in the context of a legalist approach to the conscience where the conscience is charged only with applying church teaching, acts done according to conscience are primarily about identity.⁵⁵⁸ Similar to Ratzinger’s unitarian approach to fellowship in the Spirit, Hannigan identifies the Spirit as “the author of life in the Church and in the members of the Church, to which we owe allegiance.”⁵⁵⁹ But with Min’s description of the underlying metaphysics, we can see that identity-based understandings of the conscience predominantly reflect a substantialist metaphysics as Min defines it. Which is to say, when the Holy Spirit as a person of the Trinity is identified as the “author of life in the Church . . . to which we owe allegiance,” it becomes difficult to disentangle as a practical matter one’s understanding of the substance of the Holy Spirit from the substance of the church—a conflation that Hannigan seems to encourage.

⁵⁵⁸ Hannigan, 176–77.

⁵⁵⁹ Ibid., 184.

When, however, one sees the works of the Spirit as reflecting a concrete *social* metaphysics, evidenced as negation and transcendence in the dialectics of totality, infinity, and solidarity—a metaphysics supported by Min’s description of the Spirit as “self-effacing, selfless God whose selfhood or personhood seems to lie precisely in transcending herself to empower others likewise to transcend themselves in communion with others”⁵⁶⁰—then acts done according to conscience have little to do with identity and much more to do with becoming a part of the actions of the Holy Spirit in the world.

This relates to Min’s concept of the “heterological imperative.” If the actions of the Spirit are manifest in the world in the conscience-driven acts done by “the countless ministers of the Holy Spirit actively involved in the praxis of uniting, reconciling love all over the world,”⁵⁶¹ then Christians must respect those consciences, to repeat a key sentence from Min,

subject[ing] all our convictions to the challenge of others, their views, their needs, their identity; not in the sense of giving up our convictions and beliefs as conditions of dialoguing with others, as some pluralists tent to argue; but in the sense of a culture of readiness to live in the tension between our own ultimate beliefs and the challenge of those who differ, with the willingness to modify our views and behaviors if necessary, and otherwise always to take the other into consideration.⁵⁶²

At first (or second) reading, this “heterological imperative” may sound like a radical departure from Christian commitments to universal truth claims, as represented by Christian understanding of the natural law. I would highlight, however, that this is but a differently worded version of a concept described by Bernard Häring more than fifty years ago, which he named as “the reciprocity of consciences.” Discussing this concept,

⁵⁶⁰ Min, *The Solidarity of Others in a Divided World*, 118.

⁵⁶¹ Ibid.

⁵⁶² Ibid., 62.

Häring states, “Nobody possesses a monopoly of truth, and nobody can hope to be inspired by the Spirit unless he honours the Holy Spirit who works in all and for all.”⁵⁶³ As Min notes, this applies even to Christian perception of other religions and by extension to “secularized” culture.

5.4 Michael Welker

The fourth theologian to be discussed here is Michael Welker. Welker’s 1994 *God the Spirit* is a significant pneumatology, with much to commend it.⁵⁶⁴ In the context of the current discussion, however, I will focus on Welker’s more recent 2019/2020 Gifford Lectures, entitled *In God’s Image: An Anthropology of the Spirit*, which outlines a natural theology of the human spirit. I choose this narrow scope largely because these lectures offer a helpful complement to the work already discussed here, as Welker’s focus in the lectures is less the Spirit of God than the spirit that humans have, as creatures made in the image of God. It is also the case that Welker’s earlier book shares elements with the previously discussed books by Moltmann (which came just before it) and Min (which came shortly after). As I have chosen to discuss those two instead, focusing on the Welker’s Gifford lectures here will avoid unnecessary duplication.

For Welker, the relationship between humans and the Holy Spirit is more complicated than traditional depictions have allowed. The Holy Spirit cannot be reduced to Moltmann’s formulation of “the Spirit of Life,” since “all natural, earthly life—without exception—lives indispensably at the cost of other life, thus the formulation of Alfred

⁵⁶³ Bernard Häring, *Free and Faithful in Christ*, vol. 1, *Moral Theology for Clergy and Laity* (New York: Seabury, 1978), 283.

⁵⁶⁴ Michael Welker, *God the Spirit*, trans. John P. Hoffmeyer (Minneapolis: Fortress, 1994).

North Whitehead: ‘Life is robbery.’”⁵⁶⁵ There are predatory forms of “life,” emphasizes Welker, which he compares to “the growth of tumor cells or the sudden emergence and development of a reign of terror.”⁵⁶⁶ Thus, discernment of spirits is essential to differentiate the divine Spirit, which Welker identifies with the creative powers of “justice, freedom, and truth, as well as human dignity,”⁵⁶⁷ from others.

Welker describes how the “I-Thou” formulation of human-Spirit relations has implied a duality, between the Holy Spirit’s spiritual nature on one side and humanity’s fleshly nature on the other. But “the human body is characterized not only by transitory, predatory flesh but also by psyche (soul) and spirit.”⁵⁶⁸ Citing Hegel’s early understanding of the spirit—for Welker, more insightful on this topic than Hegel’s later work—Welker states, “The spirit is a living, integrative power within human subjectivity and the latter’s varied mental faculties as well as within the religious, moral, and political spheres of life. As such, the spirit manifests itself in various forms amid ever-changing cultural and historical surroundings.”⁵⁶⁹ Welker thus understands this spiritual dimension of human embodiment as primary in human relations with the Spirit of God.

The “I-Thou” formulation has also encouraged an understanding of human-divine relations that are bipolar, but Welker insists that “the cooperative actions of the divine Spirit and the human spirit” cannot be so reduced. In place of an “I-Thou,” and drawing from studies of early childhood mental development, Welker proposes a “multimodal”

⁵⁶⁵ Michael Welker, *In God’s Image: An Anthropology of the Spirit; The 2019/2020 Gifford Lectures at the University of Edinburgh*, trans. Douglas W. Stott (Grand Rapids, MI: Eerdmans, 2021), 27.

⁵⁶⁶ *Ibid.*, 29, 27

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.*, 28.

⁵⁶⁹ *Ibid.*, 41.

understanding which includes a person's understanding of "one's individual, concrete physical existence," as well as "socially interactive and linguistically mediated processes of communication and the radiance of natural and cultural surroundings."⁵⁷⁰

The paradigmatic example Welker offers for this multimodal cooperation between divine Spirit and human spirit is the aftermath of Pope John Paul II's June 1979 visit to Poland, just eight months after his election as pope. After celebrating his first mass there as pontiff, at Warsaw's Victory Square, "he concluded with a prayer that electrified his fellow Poles: 'And I cry—I who am a son of the land of Poland and who am also Pope John Paul II—I cry from all the depths of this millennium, I cry on the vigil of Pentecost: Let your Spirit descend! Let your Spirit descend and renew the face of the earth, the face of this land! Amen.'"⁵⁷¹

The tremendous political upheaval that followed, says Welker, cannot be reduced either to a series of bipolar relations between God and person or between one person and another, nor (at the other extreme) to a "diffuse plurality" that "assumes . . . the divine Spirit is a numinous, transcendent power that descends upon creatures from the beyond like wind and rain."⁵⁷² Rather, Welker explains:

Many people were concretely, profoundly moved and inspired to think, communicate, and act anew and indeed in new ways. . . . A key factor in all situations involving the outpouring of the Spirit . . . is that the resulting interplay between people does *not* simply remain diffuse and aimless. What emerges is a movement. A great many individuals act together, doubles sometimes even in conflict with one another, and yet always in "re-action" to one another, and it is together, collectively, that their actions bring about grand results. Plural developments of this sort, developments that cannot be traced back to simple cause-and-effect chains, are described as "emergent." As a rule, emergent developments initiated by the outpouring of the Spirit cannot be guided or stopped

⁵⁷⁰ Ibid., 24, 35.

⁵⁷¹ Ibid., 21.

⁵⁷² Ibid., 25.

by simple intervention and are permeated by a healthy measure of free decisions and actions and thus sometimes take surprising turns.⁵⁷³

Welker then proceeds in the lectures to discuss each of the four primary spheres of action of the divine Spirit in human society: justice, freedom, truth, and peace. With regard to *justice*, Welker describes how “this multimodal spirit has for millennia in the spheres of jurisprudence, politics, and morality efficaciously combined the commitment to justice with a commitment to the protection of the weak.”⁵⁷⁴ He cites the West German self-designation (codified in the Basic Law) as a “social state governed by the rule of law” as “an initial but crucial framework within which the multimodal formative potential of the spirit can come to bear in working toward social circumstances,” and thereby an example of what might, on the national level, be considered “just.”⁵⁷⁵

The second sphere, *freedom*, includes not just freedom from the material oppressions of “hunger, poverty, chronic illnesses” and spiritual distresses such as “fear, persecution, terror”⁵⁷⁶ but also the “extremely valuable *sense* of freedom . . . of being the ‘initiator’ of one’s will and the ‘subject’ of one’s life.”⁵⁷⁷ Welker is skeptical, however, of organized religion’s efforts on behalf of “freedom,” which too often equate the institutional power of religion with religious freedom. “[The] overt politicization of the struggle for religious freedom,” he observes, “driven not only by politics but certainly also by religious leadership itself, presents us with a grim, almost belligerent tableau.”⁵⁷⁸

⁵⁷³ Ibid., 26.

⁵⁷⁴ Ibid., 66.

⁵⁷⁵ Ibid., 45–46.

⁵⁷⁶ Ibid., 69–70.

⁵⁷⁷ Ibid., 70.

⁵⁷⁸ Ibid., 85.

Regarding the sphere of *truth*, Welker affirms that humans are made in God's image "as destined seekers of truth and in their multifaceted if fragile efforts to attain and communicate in both thought and action an element of correctness, certitude, consensus, coherence, commensurability, and fertile and liberating knowledge."⁵⁷⁹ For Welker, this pursuit of truth includes all scientific and scholarly pursuits, as well as interdisciplinary approaches and conflicts pertaining to the meaning of human life. It also includes for religious persons meaningfully engaging with the critiques leveled against religion, for example, by Marx and Nietzsche. This engagement, suggests Welker, will help Christians honestly confront "the kind of symbolic religious kitsch that alienates so many reflective persons from religion today," as well as "the kind of cheap, self-righteous morality that laments the situation of the world and accuses the evil 'others' of culpability in order to divert attention from its own lethargy and impotence and from its own failures in the face of quite concrete current situations of distress."⁵⁸⁰

Welker rejects, as do many others, any reduction of *peace*, the fourth sphere, to merely an absence of conflict. He insists, however, that the forms of human flourishing that many would include in a robust definition of peace are only accessible through multimodal cooperation with the divine Spirit, without whom "the powers of God remain mysterious and obscure."⁵⁸¹ Welker argues that this robust form of peace is impossible without "what one might call the cool and calm love of benevolence toward humankind

⁵⁷⁹ Ibid., 111.

⁵⁸⁰ Ibid., 107.

⁵⁸¹ Ibid., 121.

that wishes only good and never ill to one's fellow human beings."⁵⁸² He gives the example of a concentration late in one's life on the next generation and explains:

The capacity to transcend one's own life burdens in creative self-withdrawal on behalf of others provides a powerful source of experiential joy and profound inner peace. This experience of peace resides securely and reliably within the warm love toward others in one's immediate sphere as well as in the cool and calm love toward others quite beyond any ethos associated with intimate spheres, and through precisely this engagement that same experiences acquires a beneficent radiance and resonance even at the very boundaries of life's natural energies.⁵⁸³

Lastly, at several points in his lectures, Welker addresses the tension between natural theology's understanding of the divine Spirit/human spirit relationship and the specific commitments unique to Christianity. He rejects, for example, neo-scholastic configurations of the natural law based on what he sees as the "deficient systematic tenability of the association between nature, on the one hand, and law that takes its orientation from justice, on the other."⁵⁸⁴ When this understanding of the natural law is combined with certain understandings of the conscience, "conscience as the inner judge, often in the name of God, is polarized over against professional judges acting in the name of society."⁵⁸⁵ He asks rather rhetorically, "But does reference to natural law and to divine and human justice and righteousness not degenerate and reinforce the subjective sensibility and feeling for morality and justice along with the status quo of social power relations?"⁵⁸⁶

And yet, for Welker this does not undermine universal understandings of moral and ethical truth. He explains, "We must note those particular multimodal spiritual

⁵⁸² Ibid., 126.

⁵⁸³ Ibid., 128–29.

⁵⁸⁴ Ibid., 54.

⁵⁸⁵ Ibid., 58.

⁵⁸⁶ Ibid.

interrelations within legal culture, political culture, family ethos, and the ethos of social innovation that have been developed and indeed thoroughly tested for millennia and that constantly interact with human cognitive, moral, and aesthetic faculties. Hence,” Welker concludes, “it is bold but by no means absurd to proclaim and work toward a universal ethos and praxis of human dignity, human rights, and justice in the sense of the freedom and equality of all human beings.”⁵⁸⁷

5.5 Conclusion

Taken together, the work of these four theologians in the field of pneumatology provides significant contributions for our consideration of the conscience. From Johnson, we can recognize women’s experiences of contrast, confirmation, and conversion, along with vivifying, renewing and empowering, and gracing actions, all as experiences through and actions made possible by the Holy Spirit. These actions line up with many of the attributes we also assign to the conscience, thus highlighting the potential of the conscience to serve a means by which the transcendent God acts in and through persons to become immanent in the world.

From Moltmann, we get a reframed understanding of experience, so that a person’s actions and experiences are no longer the remainders of our subjective motives and intentions. Rather, there is an interrelatedness between a person and her past actions and experiences. This interrelatedness, in turn, can be used by the Spirit in moving a person to future actions, a future into which the Spirit is able to weave eschatological possibilities—what Johnson called “gracing”—that are not mere extension of past probabilities. Moltmann’s understanding of the Holy Spirit’s role within the Trinity also

⁵⁸⁷ Ibid., 60.

forms the model for his “trinitarian understanding of fellowship” in the Spirit, where diversity, self-differentiation, and individuation do not come at the expense of unity and intrinsic relationality—with God, others in one’s community, and other aspects of creation. To the contrary, through the Spirit those relations flourish. This trinitarian understanding of fellowship stands in contrast to “unitarian” understandings of fellowship, which require a movement towards unanimity with church teaching based on an identification of the church as the Spirit’s primary if not exclusive intermediary on earth.

This emphasis on diversity is continued in Min, where we understand the Spirit’s role in creating diversity and then bringing this diversity back together in a “solidarity of others.” Those brought together in the Spirit’s solidarity do not persist as “others,” but rather, through the processes of Min’s “concrete social metaphysics,” constitute the new totality, a process of interrelated dialectics that always proceeds towards the idealizing principle Min call’s “infinity” but which, in other theological frameworks, we might refer to as the horizon of transcendence itself.⁵⁸⁸ Min not only leaves space open for considering the role of the Spirit in other religions (and by extension, secularized culture) but goes so far as describe a “heterological imperative,” where Christians are *required* to “live in the tension between our own ultimate beliefs and the challenge of those who

⁵⁸⁸ See Karl Rahner, “Theology of Freedom,” in *Theological Investigations*, vol. 6, *Concerning Vatican Council II*, trans. Karl-H. and Boniface Kruger (Baltimore, MD: Helicon, 1969), 180

differ, with the willingness to modify our views and behaviors if necessary, and otherwise always to take the other into consideration.”⁵⁸⁹

And finally, with Welker’s natural theology, we get a description of the “multimodal” relationship between the divine Spirit and the human spirit that allows us to nuance our understanding of the relationship between the conscience and the Holy Spirit. Instead of simply representing the conscience as acted on directly by the Spirit, which necessitates the immediate qualifier that the conscience is *not* the “voice of God,” we can understand instead that conscience, perhaps more than any other human faculty, relates especially to the spirit aspect of one’s “body.” This allows us to see the universality of spirit-inspired, conscience-directed actions, in the spheres of justice, freedom, truth, and peace. Especially important to the current discussion on religious liberty, Welker’s emphasis on the multimodal cooperation between divine Spirit and human spirit specifically allows us deemphasize an individual person’s belief that their “religious conscience” should exempt them from complying with generally applicable laws, and instead see the divine Spirit’s work in emergent movements involving people from all religious and secular belief systems.

⁵⁸⁹ Min, *The Solidarity of Others in a Divided World*, 62.

6.0 CHAPTER 6: THE CONSCIENCE AND THE MORAL ACT

The fourth of our four axes of investigation is the moral act. As discussed in chapter 1, the Religious Freedom Restoration Act presumes as a default position that one has the right to act in the public square according to her religious beliefs. This is sometimes referred to as the right to act according to conscience.

As I have argued, apart from any legal understanding or recognition of the religious conscience, Christians should have their own understanding of the conscience, insofar as Christian participation in pluralism must be justified from within the Christian tradition itself and not merely imposed on Christians by secular political or legal traditions. Moreover, while the legal tradition (at least as represented by RFRA) may understand the “religious conscience” to require a person to act in the public square according to her religious beliefs, this does not accord with the Christian tradition’s own understanding of the conscience, where the conscience is best understood as that faculty responsible for a person’s prudential determination of how she should act in the public square, given that she holds the beliefs that she does. To use the metaphor of a fixed-gear bicycle (known as a “fixie”), the conscience is not a moral fixie, automatically connecting one’s beliefs and one’s actions in a direct relationship. Rather, the conscience is an integrative and prudential *faculty*, taking into account a broad range of factors—including religious beliefs and legal obligations—to calibrate a person’s actions according to circumstance.

In the conclusion to this dissertation following this chapter, I will describe how my proposal for understanding the conscience might best be understood within the current landscape of legal scholarly discourse. But first, in this chapter, I would like

examine the relationship between the moral act and the conscience in the Christian tradition, since it turns out that understanding how the conscience relates to the moral act is an essential part of understanding the conscience in the context of religious liberty.

That this is the case may not be immediately evident. But just as in the context of the pneumatological aspects of the conscience discussed in the prior chapter, there are notions of the moral act which are implicitly at play for Christians in discussions of religious liberty and pluralism, and so just as it was necessary in the context of pneumatology to unpack those implicit framings and to construct an explicit frame to dislodge the implicit ones, so too must this be done with regard to the moral act.

In the United States' historically predominantly Protestant context, moral acts have been given little explicitly theological attention. The state was expected to legislate regarding morals—indeed, “health, safety, and morals” was often described by courts as the explicit purview of state legislation—but this was more to promote public virtue and limit vice than to impose any religiously based moral *diktat*, an important distinction given the Constitution's prohibition on religious establishment. Instead, from the perspective of Protestant theology, the nature of one's professed religious beliefs, not her actions, was considered to be of primary significance.⁵⁹⁰ To a significant degree, this is

⁵⁹⁰ A prominent exception that proves the rule here is Protestant theological ethicist Paul Ramsey. In commenting on a letter written to regional medical officers in Great Britain from the chief medical officer of the Department of Health and Social Services which made reference to such a belief-act distinction in the context of providers of gynecological services who might have moral reservations about providing abortions—the letter said job applicants could be asked about their willingness to perform abortions but should not be questioned about their “personal beliefs”—Ramsey expressed incredulity, since “it must be said that only the most degenerate forms of Lutheranism set such a gulf between ‘the Kingdom of God inwardly’ (personal conscientious beliefs) and one's official or professional intention to perform certain outward behaviors in obedience to the ‘princes’ of the world.” Nonetheless he admitted, “So far as I know, the Church of England has not protested.” Paul Ramsey, *Ethics at the Edges of Life: Medical and Legal Intersections; The Bampton Lectures in America* (New Haven, CT: Yale University Press, 1978), 57–58.

precisely why the belief-act distinction of the *Reynolds* case and its progeny could seem self-evidently workable and correct, from both legal and (Protestant) theological perspectives. That is, the government could regulate acts in the public sphere in ways presumptively consistent with commonsense Protestant middle-class morality, but it could not regulate either one's beliefs (which were of soteriological significance) or, because Protestant religious gatherings had been historically suppressed, one's right to gather in religious worship. Conversely, this is also why many Protestant groups failed to appreciate the Pandora's box that would be opened by passage of the Religious Freedom Restoration Act.

With regard to the Catholic perspective, as with notions of the conscience, the pre-Vatican II Catholic understanding of the moral act is markedly different from that presumed in U.S. jurisprudence. Instead of focusing on one's religious *beliefs*, the Catholic tradition has placed considerable emphasis on the moral *act*, where certain acts are so significant that, if consciously chosen, they effect (or at least indicate) an alteration and even severance in a person's fundamental relationship with God. Accordingly, the Catholic tradition developed various heuristic analyses to determine the permissible scope of moral actions, such as the principles of "double effect" and "cooperation with evil."⁵⁹¹ But as Cathleen Kaveny has observed, this approach, "increasingly removed

⁵⁹¹ The principle of double effect is a test to be used in situations where the object of the act is morally right or neutral but the act has consequences some of which will be good and some bad. In such situations, for the act to be deemed morally permissible, the actor must intend only the good consequences not the bad ones (even as a means to a end), the good consequences must outweigh the bad ones, and the actor must work to minimize the harm which will come from the act. Cooperation with evil, by contrast, pertains when there is more than one actor. In such situations, the actor must not have the same intent as the wrongdoer (which would be formal as opposed to material cooperation), and she may not provide immediate (as opposed to mediate) assistance except under conditions of duress. See James F. Keenan, SJ, and Thomas J. Kopfensteiner, "The Principle of Cooperation: Theologians Explain Material and Formal Cooperation," *Health Progress* 76, no. 3 (April 1995): 23–27.

from the agent-centered, virtue-oriented view of human action that permeates the writings of Thomas Aquinas,” was problematic. She states, “Decoupled from its essential moorings in broader understanding of how an agent’s purposeful activity shapes his or her character, the action theory employed by the manualists began to take on an externalist (sometimes called physicalist) cast.”⁵⁹²

Aside from the problems with this approach as a matter of moral theology, this meant that when RFRA was passed, it interacted with Catholic moral frameworks designed to insulate a person from complicity in practices that violate church teaching in ways that were different from the individualist assumptions of many of its Protestant and non-religious supporters.⁵⁹³ But from the other side of the analysis, if the more externalist or physicalist approach to acts is theologically correct, anything short of the protections of the RFRA would be unjust, since a pluralist “nation of laws” can hardly place its citizens in the position of having to choose between complying with the law and risking their eternal relationship with God.

⁵⁹² Cathleen Kaveny, “Appropriation of Evil: Cooperation’s Mirror Image,” *Theological Studies* 61 (2000), 288. The “physicalist paradigm” to which Kaveny refers “is primarily a classicist, essentialist method” which “has been criticized for . . . narrowly focusing on the exterior, observable aspects of the physical act as to equate the physical with the moral act while largely ignoring subjective factors of intention, character of the agent, virtue, reason, conscience, and the relative amount of freedom involved in light of the circumstances in which the physical act was performed.” James T. Bretzke, SJ, *Handbook of Roman Catholic Moral Terms* (Washington, DC: Georgetown University Press, 2013), 176, 177.

⁵⁹³ See Garrett Epps, “The Strange Career of Free Exercise,” *The Atlantic*, April 4, 2016, www.theatlantic.com/politics/archive/2016/04/the-strange-career-of-free-exercise/476712/. To explain the point being made here a little further, it is one (highly questionable) thing for the law to defer to individual determinations of conscience; it is a separate thing (and questionable on separate grounds) for the law to defer to individuals who are themselves obligated to defer to a specific church’s magisterial teachings. In the former, the problem is a presumption of individual moral self-sufficiency and an inadequate understanding of how the person relates to her community. In the latter the problem is a presumption of incommensurability and an inadequate understanding of how the religious and legal-political moral traditions can relate to one another, and how the person can relate to each. Moreover, the latter can actually *create* the conditions of solipsism it seeks to avoid, precisely by weakening the ties the person has with her legal-political tradition. Having at least partially dissolved *those* ties of responsibility, the church may find the ties between the person and her religious tradition have been critically weakened also, with no clear or sufficient checks against the solipsism that was sought to be avoided.

Thus, to bolster the personalist understanding of the conscience discussed throughout this dissertation, as well as to justify a turn away from the approach of the RFRA towards something more consistent with a nation of laws equally applicable to all, it is necessary to develop the understandings of the moral act associated with the personalist conscience. This will provide an alternative both to the externalist (or physicalist) approach associated with the legalist conscience, as well as to individualist approaches which may fail to give any theological weight to the moral act at all.

Accordingly, in this chapter I will outline just such an alternative. I will begin by describing key aspects of the existing personalist approaches to the moral acts of Josef Fuchs, Klaus Demmer, James Keenan, and Darlene Fozard Weaver. I will then describe what I believe to be an area for developing these approaches, mostly centering around an incomplete articulation of the relationship between the conscience and the will and the temporal dimensions of the will as it relates to the conscience. Finally, I will discuss my own constructive proposal which both draws on these four theorists while incorporating new insights also.

6.1 Existing personalist approaches to the moral act

6.1.1 Josef Fuchs, SJ

Josef Fuchs (1912–2005) was originally best known for his foundational work on the natural law.⁵⁹⁴ It was this area of specialty which led to his being named to the Papal Commission on Population, the Family, and Birthrate, which met in Rome from 1963 to

⁵⁹⁴ See especially Josef Fuchs, *Lex Naturai. Zur Theologie des Naturrechts* (Düsseldorf: Patmos, 1955), published in English as *Natural Law: A Theological Investigation* (New York: Sheed and Ward, 1965).

1966. This, in turn, led to a development in Fuchs's thought of special significance to the current discussion.

In 1930, the Church of England changed its position on birth control, declaring that the use of artificial birth control was morally permissible in certain circumstances.⁵⁹⁵ Seemingly in response, Pope Pius XI issued the encyclical *Casti connubii* in December 1930 restating Catholic opposition to birth control. Specifically, *Casti connubii* established the primacy of procreation as the end of sexual intercourse within a marriage and stated that all sexual acts must be open to that possibility.⁵⁹⁶ Three decades later, in 1963 Pope John XXIII appointed a small commission to advise him on the issue, a commission expanded multiple times over the following years by Pope Paul VI, John's successor.⁵⁹⁷ Among the earliest to be added was Josef Fuchs, who, as noted, had published significant works on the natural law and the absoluteness of moral norms. Nominated to the body by the American moral theologian John Ford, Fuchs was seemingly intended to counterbalance the more liberal Bernard Häring, who was already on the commission.⁵⁹⁸

Meanwhile, given the possibility that the reformist Council might take up the matter, Ford flew to Rome to discuss steps with the pope that might keep this from happening.⁵⁹⁹ Under much greater public scrutiny, a reconstituted commission (to which Ford had now also been added) conducted hearings and took statements from practicing

⁵⁹⁵ Lambeth Conference of Anglican Bishops, *The Life and Witness of the Christian Community—Marriage and Sex, Resolution 15* (1930), www.anglicancommunion.org.

⁵⁹⁶ Pope Pius XI, *Casti connubii*, December 31, 1930, Vatican.va.

⁵⁹⁷ Robert Blair Kaiser, *The Politics of Sex and Religion: A Case History in the Development of Doctrine, 1962–1984* (Kansas City, MO: Leaven Press, 1985), 20, 43, 70–71, 77.

⁵⁹⁸ James F. Keenan, *A History of Catholic Moral Theology in the Twentieth Century: From Confessing Sins to Liberating Consciences* (New York: Continuum, 2010), 120–22.

⁵⁹⁹ *Gaudium et Spes* no. 18n14; Kaiser, 113–20.

Catholics, as well as expert testimony from John Noonan, a prominent American Catholic theologian (and later U.S. federal judge) who had published an exhaustive examination of the history of the Catholic church's position on contraception.⁶⁰⁰ And over time, Fuchs changed his position, opening the way for others to change, also.⁶⁰¹ When a final vote was taken, the majority of the commission voted in favor of allowing birth control, and Fuchs wrote the majority report which was given to the pope for his consideration. Ford, however, was having private audiences with the pope, arguing that the Catholic church should not change its position on the issue. And so when the pope finally issued his encyclical *Humanae vitae* a full year after two different positions (the majority and minority reports) were delivered, it affirmed *Casti connubii* and maintained the ban on use of artificial contraception; in fact, it strengthened it.⁶⁰²

In the view of James Keenan, SJ, whose doctoral dissertation was directed by Fuchs, Fuchs's primary shift in understanding was not on contraception, it was on conscience.⁶⁰³ Keenan states, "By listening to others, Fuchs slowly recognized that his original supposition was inadequate, and began to explore critically a key question posed by Karl Rahner: whether the method of directly applying a norm to a case is also

⁶⁰⁰ John T. Noonan, Jr., *Contraception: A History of its Treatment by the Catholic Theologians and Canonists* (Cambridge, MA: Belknap Press of Harvard University Press, 1965). See Kaiser, 78–83; Robert McClory, *Turning Point: The Inside Story of the Papal Birth Control Commission, and How Humanae Vitae Changed the Life of Patty Crowley and the Future of the Church* (New York: Crossroad, 1995), 68–69.

⁶⁰¹ Keenan, *A History of Catholic Moral Theology in the Twentieth Century*, 120–22; Kaiser, 160–62, 172–73.

⁶⁰² Keenan, *A History of Catholic Moral Theology in the Twentieth Century*, 123.

⁶⁰³ James F. Keenan, SJ, "20th Century Moral Theologians" (lecture, Boston College, Chestnut Hill, MA, January 17, 2017). See Kaiser, 87–92; James F. Keenan, SJ, "Champion of Conscience," *America*, April 4–11, 2005, 6.

adequate for determining moral truth. If that question were posed to Josef Fuchs in 1952, his answer would have been a resounding yes; by 1968, it was an equally decisive no.”⁶⁰⁴

In his book on Fuchs’s natural law theory, Mark Graham explains that prior to this conversion, Fuchs “understood natural law as the moral demands arising from nature, and the focus of his natural law theory was to articulate the finalities and demands inherent in the order of nature.”⁶⁰⁵ After his conversion, however, “*recta ratio* has displaced nature as the proximate norm of morality.”⁶⁰⁶ He continues:

Fuchs still claims that natural law is a “*lex interna*,” a preexistent moral order grounded in the divine nature that is valid whether recognized by humans or not. The crucial question is . . . , How is this internal law recognized or discovered? Retrieving what he believes to be Thomas Aquinas’s understanding of the natural law, Fuchs now claims that natural law is made manifest through the power of human reason, or more precisely, *recta ratio* through which humans participate in eternal law.⁶⁰⁷

This *recta ratio* holds, in Graham’s account, that “discovering natural law is a rational process dependent on human reason at every step in assessing the rightness or wrongness of actions” and that “grasping natural law through reason requires experience . . . [and] occurs over time”; moreover, “*recta ratio* admits a degree of legitimate moral pluralism,” since “the magisterium has no special competency” in its determination.⁶⁰⁸ Graham notes that this methodology for natural law theory

resembles what Bernard Lonergan calls a “moving viewpoint”: reason actively probing and seeking new information about human beings and our world; new insights arising and being tested for their cogency and validity; these insights, in turn, affirming, correcting, complementing, or developing earlier insights; a more critical viewpoint emerging from the dynamic and constructive process of reasons

⁶⁰⁴ Keenan, *A History of Catholic Moral Theology in the Twentieth Century*, 120–21.

⁶⁰⁵ Mark Graham, *Josef Fuchs on Natural Law* (Washington, DC: Georgetown University Press, 2002), 148.

⁶⁰⁶ *Ibid.*, 149.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

accumulating and verifying insights; and the process repeating itself indefinitely as more data is generated and further questions are raised and answered.⁶⁰⁹

In the case of contraception, this revised understanding of a natural law methodology allows for the consideration of “the insights of married couples, population experts, medical doctors, social scientists, philosophers, and theologians to determine the liceity of artificial contraception.”⁶¹⁰ The moral norm is not eliminated, but neither is the norm, as articulated by the Church magisterium, a substitute for the person’s determination about what is objectively the right action in the situation.

Or as summarized by Keenan, for Fuchs objectivity in moral deliberation is not sacrificed in favor of some individualistic relativism. Rather, the location of the objectivity is shifted—at least in questions such as contraception—from the church-given moral norm to the personal moral act taken in conscience.⁶¹¹ And importantly, this shift in Fuchs’s thinking did not result from theoretical speculation; it resulted from listening to the testimony of those couples whose experiences were considered by the Commission, and from Fuchs’s conviction that the couples who used contraception had made a “morally, objectively right decision” to do so.⁶¹²

⁶⁰⁹ Ibid., 157, citing Bernard J. F. Lonergan, *Insight: A Study of Human Understanding* (New York: Longmans, Green, 1958), xxiii–xxx.

⁶¹⁰ Graham, *Josef Fuchs on Natural Law*, 156.

⁶¹¹ James F. Keenan, SJ, “Josef Fuchs and the Question of Moral Objectivity in Roman Catholic Ethical Reasoning,” *Religious Studies Review* 24, no. 3 (July 1998): 253–58; see Josef Fuchs, SJ, “The Absoluteness of Behavioral Moral Norms,” in *Personal Responsibility and Christian Morality* (Washington, DC: Georgetown University Press, 1983), 115–52.

⁶¹² Keenan, “Josef Fuchs and the Question of Moral Objectivity in Roman Catholic Ethical Reasoning,” 255. The analysis would admittedly be quite different in questions such as torture. The difference can be described as between an absolute negative prohibition (as in torture) and a context-dependent norm (as in contraception).

6.1.2 Klaus Demmer, MSC

Building on the work of Fuchs, in *Living the Truth* Klaus Demmer (1931–2014) reverses the analysis, so that instead of going from the person to the act, Demmer goes from the act to the person, directly confronting the question of in what sense do actions matter for the person acting. We know that no single act represents the “truth” of who we are, since any act is only an incomplete expression of the thoughts, hopes, fears, and dreams that give shape to our actions. But at the same time, the primary way we are known in the world is through our actions. If we are blasé about our actions, we become reckless and eventually lost; if we are overly conscientious, we can become paralyzed in a Hamlet-like quandary, never committing to any single path and never accomplishing what, perhaps, we otherwise may have. Demmer explains how we might escape these opposing fates and places that process in the broader theological context of personhood in time.

Demmer’s central concept is the “ethical personality” which the human actor strives towards living into more fully. The person’s fundamental decision towards God orients her action with the future horizon of the fullness of Being—proleptically revealed in Christ’s resurrection—so that the outcome is, for the successful human, almost necessarily “good,” but this does not overdetermine the act itself, not does it relieve the actor of having to keep a vigilant hand on the wheel to keep the direction of her life true. And crucially, it does not guarantee the act is correct; there is no simple path of moral growth, and even if there were no actor could always see it.

The process is reflexive not linear, requiring alternative movements of introspection and outward action. Goals are redefined, setbacks occur, and new

possibilities present themselves. More to the point, the individual is bound to fail in the pursuit of the goal, but whether the failure is temporary or lifelong is up to the individual. Failure in any step can be retrieved for meaning—and for Demmer it must be, to the greatest extent possible—since only incorrect actions allow the actor to uncover untruthfulness within herself and root it out through the difficult process of self-examination and confrontation, and only suffering allows the actor to test her powers of perseverance,⁶¹³ a requisite for successfully proving oneself in life.

Addressing the interplay of norm-based and virtue-based approaches to moral theology, Demmer is coherent and persuasive. Stated simply, individuals experience an overemphasis on norms as oppressive and stifling of moral growth, so a focus on virtues must come first. But norms are ultimately indispensable, since the “canalization” they make possible allows the individual to focus on more important matters.⁶¹⁴ Most significantly, norms represent ethical commitments without which the individual risks experiencing her life as “irrelevant,” no matter the good intentions of her friends who believe their lack of expectations is a mercy if not a gift.⁶¹⁵

What sets this book apart and allows it to take sustained flight is Demmer’s success in communicating both the rigors and the joys of pursuing an ethical life. As he perceptively notes, the greatest fear in life is not that one’s life does not matter but the unshakable knowledge that it does. Thus, the individual “is terrified, not by the thought of excessive challenges but by the thought that the challenges may not be great

⁶¹³ Klaus Demmer, MSC, *Living the Truth: A Theory of Action*, translated by Brian McNeil (Washington, DC: Georgetown University Press, 2010), 36.

⁶¹⁴ *Ibid.*, 38.

⁶¹⁵ *Ibid.*, 38, 69, 129.

enough”⁶¹⁶ and that, like the third servant in Jesus’ parable of the talents, she might become so afraid of risking loss that she fails to achieve what she could. Thus one must “allow[] himself to be captivated by goals and commit[] his best powers with complete consistency and without wavering to the realization of these goals, without heeding the losses he suffers on the way. . . . If one’s own story, in all its fragility, is to endure, one must live for an idea and let oneself be consumed for it.”⁶¹⁷

6.1.3 James Keenan, SJ

In his 1992 book *Goodness and Rightness*, theological ethicist James Keenan takes the Kantian distinction between the goodness of a person’s intent and the rightness of her actions and traces a similar distinction in the *Summa Theologiæ* of Thomas Aquinas.⁶¹⁸ Building on the work of Odon Lottin (1880–1965), Keenan describes a development in Aquinas’s thought, contrasting Aquinas’s earlier and later written parts of the *Summa* pertaining to the will and the moral act. In the *Pars prima* of the *Summa*, when Aquinas asked the question “What moves the will?” the answer was that reason moves the will. But later, in writing the *Prima secundae*, Aquinas came to recognize that in order to avoid intellectual determinism and preserve the will’s autonomy, before

⁶¹⁶ Ibid., 34.

⁶¹⁷ Ibid., 74.

⁶¹⁸ The analogous distinction in the Anglo-American legal tradition is between a person’s mental state (*mens reas*) and the act (*actus reus*), where crimes and civil torts are each considered to consist of some combination of a specific mental state (usually either negligent, reckless, knowing, or intentional) and physical act. There is no crime or tort that consists of only a mental state and no act (though the crime of conspiracy comes close, requiring only an “overt act in furtherance of the conspiracy”), and there are only a very few that consist of only an act and no mental state (for example, a person may be convicted of statutory rape due to the victim’s being under the age of consent regardless of whether the perpetrator had actual knowledge of the victim’s age, though sexual intercourse is by definition an “intentional act,” so some level of intentionality with respect to act itself is still required for the act to be criminal).

reason can move the will, the will must move the will in order to set the terms by which reason will be recognized, an antecedent movement he termed *quantum ad exercitium*.⁶¹⁹

Keenan notes that this distinction corresponds to a distinction between the way Aquinas describes the virtue of love and the other virtues. Charity (or love) for Aquinas is nearly always formal, seldom material. Thus, there are (with very few exceptions) no direct acts of love; rather we do other virtuous acts *ex caritate*, or out of love.⁶²⁰ Without robbing divine power its role in initiating the theological virtue of love, infused as a matter of grace, Keenan argues that in this prior action of the will, the person still has the power either to reject this gift or to respond to it in love. As Keenan states, “We can, in effect, avoid goodness in one way: by not attending to it.”⁶²¹ Keenan thus reserves the term “good” for those persons who strive in love to do right acts, whether or not the act is actually right. The moral act can be right or wrong, where wrongness would be a failure in reason. But the person is, antecedently, determined as morally good or bad, based on whether or not they are striving in love.⁶²²

In a follow-up essay, Keenan focused on the implications of this development of Aquinas’s for his understanding of sin. In Keenan’s view, while Aquinas was forced to develop his understanding of the will’s relationship to the reason in order to maintain the will’s autonomy, and while this development parallels Aquinas’s discussion of the virtue of charity, unfortunately Aquinas never reached the point where this development affected his understanding of sin. Instead, the treatise on sin remained moored in an

⁶¹⁹ James F. Keenan, SJ, *Goodness and Rightness in Thomas Aquinas’s ‘Summa Theologiae’* (Washington, DC: Georgetown University Press, 1992), 43–47.

⁶²⁰ *Ibid.*, 133–37.

⁶²¹ *Ibid.*, 47.

⁶²² *Ibid.*, 142–43.

incorrect frame where reason was primary. Or to state the matter in Thomistic terms, “Aquinas considered sin solely in terms of specification, that is, as wrong action. He did not engage *exercitium* as he did in his discussions on moral psychology and charity.”⁶²³

To some degree, this is because to do the right thing and avoid the sin for Aquinas, both the will and the reason must have been right and good; a defect in either results in sin. Thus made it convenient for Aquinas to focus on the later act of specification exclusively, as the last opportunity to avoid defect in the causal chain. Instead of this focus of Aquinas’s, however, Keenan insists that sin is determined antecedently, in the order of *exercitium* and not in specification. Which is to say, the sin is located in whether the person chooses to respond to God’s initiative in love with love and striving, not in whether one’s reason errs in the application or implementation of this love.⁶²⁴ Moreover, it is not sufficient to describe the wrong act as sin and then find some basis for excusing based in erroneous reason, as some moralists do. For Keenan it was never bad (although it was wrong)—and thus never properly described as “sin”—in the first place.⁶²⁵

Keenan thus distinguishes what we can say about the *person* from what we can say about the person’s *acts*. The moral and intellectual virtues do not make a person, in contemporary use of the term, “good”; they make a person rightly ordered.⁶²⁶ Similarly, one cannot “begin[] with wrong acts and attempt[] to arrive at badness” because “in

⁶²³ James F. Keenan, SJ, “The Problem with Thomas Aquinas’s Concept of Sin,” *Heythrop Journal* 35, no. 4 (1994): 408.

⁶²⁴ *Ibid.*, 411–14; see also Keenan, *Goodness and Rightness*, 161.

⁶²⁵ *Ibid.*, 153–57.

⁶²⁶ *Ibid.*, 99–100, 109.

reality badness precedes actions whether right or wrong ones, just as goodness precedes actions whether right or wrong.”⁶²⁷

6.1.4 Darlene Fozard Weaver

But if Keenan’s insistence that the goodness of a person is determined antecedent to the act is correct, do actions not redound to character or the person at all? This is the question which drives the 2011 book *The Acting Person and Christian Moral Life*, by theological ethicist Darlene Fozard Weaver. For Weaver, it is important to name sins as “sins” precisely to highlight the corrosive effect such acts have on a person. As a corollary, naming sins is also important for the purpose of moral instructions.

As a general matter, *The Acting Person and Christian Moral Life* is an attempt to make sense of the repudiation by Pope John Paul II in his 1993 encyclical *Veritatis splendor* of “revisionist” proportionalism. Implicitly, Weaver shares with the revisionists a critique of traditionalist or manualist approaches that may be described as physicalist. But she wants to take the traditionalists’ critique of the proportionalism seriously also, and thus her book can be understood as an attempt to develop personalist approaches beyond proportionalism rather than necessarily a repudiation of revisionist positions themselves.

Weaver views the revisionists as constitutionally reticent to tie the moral culpability of the person to any specific act, while traditionalists are too eager to do so. For Weaver, the revisionist approach leads to excessive distancing between the person and her actions, while the traditionalist approach is too dismissive of the operative constraints in the specific context within which the actor makes her moral choices.

⁶²⁷ Ibid., 156.

Missing from this debate, according to Weaver, is proper acknowledgment of how the moral agent, through the self-reflexive, theologically significant processes of embodied moral development within the created world, is shaped and formed by her actions. Setting aside the actor's moral culpability for a specific act, a proper evaluation of the act in moral terms is a vital step in the actor's growth in intimate relation to God, and failure to do so accurately inevitably negatively affects that relationship and thus the person herself. While acknowledging the drawbacks of traditional act-based moral theology (namely, that its claim to objectivity in judging the moral act lacked basis in real-world multiple-variable contexts and that therefore its normative claims were invalid), Weaver identifies what she believes to be an overcorrection among the revisionists "amounting to an unfitting agnosticism . . . regarding the religious significance of particular sorts of actions."⁶²⁸

Weaver situates the doctrine of sin within this context, with the tension between an emphasis on sin as an ontological state in a fallen world and sin as a specific wrong act. Contemporary approaches are uncomfortable identifying specific acts as sins, but for Weaver this is vital, since understanding sins as act-based ruptures in our relationships with God and others concretizes an otherwise uselessly abstract understanding of sin and provides necessary cultural thickness.

Weaver explains how acts relate to our intimate relationship with God and are incorporated back into our moral state, which she calls "the reflexive character of acting."⁶²⁹ Weaver insists that correctly identifying the morality of actions directly affects

⁶²⁸ Darlene Fozard Weaver, *The Acting Person and Christian Moral Life* (Washington, DC: Georgetown University Press, 2011), 27.

⁶²⁹ *Ibid.*, 76.

our ability to participate in the ongoing action of God in the world in a way that the revisionists' disembodied talk of social sin and premoral values does not adequately capture. She also explains how including the truth of God and an accurate identification of sin within the frame of moral development is what keeps the process from becoming hopelessly solipsistic. It gives the process direction—namely, towards increasing intimacy in that relationship with God. God's truthfulness is the Archimedean point of reference which keeps the narratives we tell about ourselves from becoming unmoored, self-contained, or morally adrift; it keeps us from telling a story of "lies."⁶³⁰

The goal of this process, as Weaver describes it, is to lay the foundation for healthy relationships marked by forgiveness and reconciliation—with each other, with ourselves, and with God. Mechanisms of accountability will generally be a pre-condition for this abundant life. Thus the Church becomes the ideal site for this process, with its "practices of confession, forgiveness and reconciliation, which make Christian happiness possible."⁶³¹

6.1.5 Analysis and observations

Key insights abound in each theologian's work. As Fuchs recognizes, to shift in emphasis from the norm to the act is not a surrender to moral subjectivism. It is rather to recognize the integrative function of the conscience, which is to take norms and circumstances into account and to act prudentially—and for Christians, lovingly—in the situation at hand. As Keenan states more succinctly, for Fuchs the objectivity is in the moral act taken in conscience, not in the moral norm.

⁶³⁰ Ibid., 143.

⁶³¹ Ibid., 187.

In Demmer, we see a retrieval of the notion of norms in a way that is complementary to virtue and personal moral agency that does not essentially resolve into a legalist understanding of the conscience. Norms are repositories of moral wisdom, so that every moral deliberation need not be started from scratch, not every wheel reinvented. They represent a “canal” to guide us, not shackles to bind us. From Demmer we also get the “ethical personality,” conceived of in a direct but not overdetermined relationship with the moral act. Actions redound to character, as they do for Weaver, and yet goodness and character cannot be reduced to any single action. Third, we get, as we do with Keenan, a clear sense of the vector of moral development, with the imperative to continue to grow in love. And crucially, throughout all of this, we get an overarching emphasis on honesty, to which I will return shortly.

With Keenan, we get the clearest break yet between the person and the act. The person’s goodness is determined antecedently to the act, so that the test of goodness is whether the person is striving in love, which may be stated as “whether one is seeking Christ and neighbor or not.”⁶³² Keenan relates what Aquinas referred to as the will’s movement *quantum ad exercitium* to his understanding of love as a formal virtue not a material one. Keenan is then able to define sin as the failure to strive in love, the failure to bother to care. Whether there may be *some* relationship between our moral acts and our goodness, it bears noting, is a question Keenan does not directly address in the book on goodness and rightness or the essay on sin, other than to reject the position that it is a

⁶³² Keenan, “The Problem with Thomas Aquinas’s Concept of Sin,” 413.

direct relationship where a wrong act necessarily means that a person is bad or sinful. Rather, the implication is that the action would have to affect the person's striving.⁶³³

This is precisely the question, however, that Weaver insists must be asked directly. If the emphasis of the traditionalists on intrinsically evil acts is too physicalist, then what *is* the nature of the relationship between the act and the person? Strikingly, in insisting on the importance of sussing out the details of this relationship, Weaver's emphasis on the recursive effects of actions for the person strongly echoes Demmer. Also strikingly, however, Weaver has the least consideration of the conscience when considering the relationship between the person and the act—which is not surprising, since according to church teaching, the direction of moral causation in the legalist conscience (which Weaver does not address) is from church teaching to personal conscience to action. There is little if any possibility here of how a person might have agency in forming her own conscience, at least not beyond selecting a source for outside instruction.

But it is precisely *this* relationship, between the conscience and the act, which I believe can fruitfully be revised and developed. And in separate writing on the conscience, Keenan intriguingly opens the door to considering what exactly this might look like—that is, how the moral act might be thought of as affecting the person. And in so doing, Keenan points the direction in which the work of Fuchs, Demmer, and Weaver might be helpfully integrated with his own.

⁶³³ See Keenan, *Goodness and Rightness*, 156; Keenan, "The Problem with Thomas Aquinas's Concept of Sin," 412–13.

Before turning to Keenan's essay on conscience, however, it is useful to make two observations about the framework of these theologians, who are all working in the Thomistic tradition broadly considered. The first is simply to note how much their approaches to human action are suffused with an emphasis on the will. More specifically, the emphasis is on the present and future action of the will and the role of the will's causality for human actions. As Keenan has noted, this emphasis on the will and a concern for its freedom was a central concern of scholastic theology.⁶³⁴ Thus, the question was posed as what moves the will for the person to act as she does—a question that led Aquinas to distinguish two actions of the will, where reason moves the will in “the ambit of specification” but the will moves the will in “the antecedent ambit of *exercitium*.”⁶³⁵ Note for the moment that this exclusively forward momentum of the will, at least within a Thomistic schema, contrasts with the conscience, which has long been understood as having both retrospective and prospective temporal dimensions, referred to respectively as the judicial and legislative aspects of the conscience.

The second, corresponding point is that the conscience is (with the exception of in Fuchs) largely sidelined in this inquiry. As we saw in chapter 2, this is partly due to the conscience as a theological concept having been fragmented in the centuries leading up to Aquinas, so that its action was split between *synderesis* (an orientation to the natural law and for Aquinas a habit) and conscience (the application of the natural law to the situation at hand; for Aquinas, an act). Another reason for this sidelining, however, was to make room for the prominence given to prudence and reason. As described by

⁶³⁴ Ibid., 401.

⁶³⁵ Ibid., 410.

Demmer, the “mystical element” of Augustine’s understanding of the conscience “got lost . . . during the ensuing history of theology, making room for an increasing intellectualization and moralization of the process of moral knowledge. Thomas Aquinas can be considered the classical representative of this evolution; conscience plays a minor role in his thought, in favor of practical reason (which occupies the central position).”⁶³⁶

Thus considered, we can see that what is referred to as “forming the conscience” in the legalist paradigm of the conscience is little more than perfecting the reason through prudence, insofar as the conscience is restricted to detecting the natural law authenticated in church teaching and applying said teaching to the situation at hand. Once described as “conscience,” however, the object presented to the will has been made binding regardless of any error in reason, since according to contemporary moral theology “an invincibly erroneous conscience binds to its action and makes it good, in spite of the objective error it brings about.”⁶³⁷ This, to say the least, is a problem.

6.1.6 Reintegrating the conscience

So what is it that Keenan says that opens the door to a possible solution to the question of how to reconsider the relationship between the conscience and the act? In his 2015 essay “Redeeming Conscience,” an essay noted previously in this dissertation, Keenan contrasts the U.S. American approach to the conscience with the European. In the United States, says Keenan, with its emphasis on the individual, the conscience became

⁶³⁶ Klaus Demmer, MSC, *Shaping the Moral Life: An Approach to Moral Theology*, ed. James F. Keenan, SJ, trans. Roberto dell’Oro (Washington, DC: Georgetown University Press, 2000), 17.

⁶³⁷ Ibid., 17.

identified with the individual's right to "opt out," in stark contrast to the European model for understanding conscience. He explains:

Appeals to conscience emerged in the United States both during the Vietnam War and in the shadows of *Humanae vitae*. These were two moments when conscience as an act materialized: in the personal appeals by young men drafted into an undeclared war and in the claims of married couples exasperated by a church leadership unable to meet their needs for change.

These moments of conscience were not begun as they were in Europe with the collective social acknowledgement of profound human wretchedness. Europeans searched conscience as a way of struggling with their vicious history in the war: they went to judge not others, but themselves. When the Americans turned to conscience, they were pleading against the very law-and-order mentality that Catholic culture so supported. The European experience of culture was collective guilt and shame; the American turn to conscience was precisely a legitimate appeal for individuals to opt out of what the law was requiring of them.

Over the past 50 years, the phenomenology of conscience has played out differently on the two sides of the Atlantic. Unfortunately the American use of conscience never really settled into, or emerged from, the place it did in Europe, that is, as the source of responsible moral agency. European moralists turned to the notion of Christian conscience to awaken in postwar Europe a sense that moral agency needed to be collectively accountable, and the locus of that competency was the Christian conscience. This turning to conscience was not a matter of giving Christians freedom to exercise prerogatives, even compelling ones against law; rather, it was to place before Christians the mindfulness that ultimately they would be a people judged and hopefully redeemed by God.⁶³⁸

The key difference, then, is that the European approach to the conscience began in consideration of the past, specifically, in the guilty conscience. Here, we see an interruption in the forward momentum created by future-oriented questions of the will. Here, the person's will is—for a time at least—focused *backwards*, in its ability to decide how the person will understand herself in light of her past actions.

From this insight, the modest solution I propose for understanding the relationship between the person and the act is to specify that an essential movement before any action of conscience is taken is an honest consideration of a person's past actions—a

⁶³⁸ James F. Keenan, SJ, "Redeeming Conscience," *Theological Studies* 76, no. 1 (2015): 134–35.

consideration that often begins when the person feels “the prick of guilty conscience.” This feeling is not synonymous with the “voice of God,” but consistent with *Gaudium et Spes* no. 16, it is a place of open and honest communication with God. I specify “an honest consideration,” because I would argue that honesty is the primary virtue associated with the conscience.

Only after this first movement can one then proceed to consulting the requirements of one’s religious and legal-political moral traditions and one’s own beliefs, or consider ways the Holy Spirit might be opening a path for “gracing” actions. Which is to say, rather than the subsequent (or judicial) and antecedent (or legislative) aspects of the conscience being understood as being two largely unrelated dimensions of the conscience, that instead, in most if not all cases, these two dimensions should be understood as integrally related to one another, and no call to future action should be undertaken without an honest consideration of one’s past actions (and mistakes) in this same area.

In Keenan’s terms, we might say that this honest appraisal of the past can be considered an element of one’s “striving.” In Weaver’s terms, this would be described as a recognition of one’s sins and the need for seeking forgiveness and reconciliation. Keenan, too, would insist that a person must seek reconciliation with those whom one has harmed through wrong acts, if one is to go forward in love for one’s neighbor—though for him, past wrong action is better described as one’s “vicious history” rather than sin.⁶³⁹

⁶³⁹ Ibid., 134. In writing about his understanding of love as a formal (and not material) virtue, Keenan explains that his approach does not necessarily displace others’ work on “fundamental option” theory; rather it adds concreteness to a “conceptual understanding of the moral person [that is only] pre- or a-thematic[.]” *Goodness and Rightness*, 143. In contrast to fundamental option theory, “charity . . .

I suggest that apart from the question of whether one's wrong acts are, in themselves, better described as "vicious" (Keenan) or "sinful" (Weaver), that the failure to honestly come to terms with one's action and their consequences—with respect to God, one's neighbor, and one's own self—is a sin. And moreover, it is this honesty with regard to one's past actions—the stories we tell ourselves about ourselves, and whether we are honest in the accounting or not—that determines how actions recur to the person, whether we call that aspect of the person her "character," her "ethical personality," or her soul.

In one sense, I might seem to be saying that, rather than a person's goodness being determined antecedently to the bad act, it is determined subsequently, in the ability to be honest about what one has done. A better description of my argument, however, would be the commonplace observation that what is subsequent to one act is always antecedent to the next—and the conscience is the bridge between them.

6.2 Connecting the axes

At this point, finally, it is time to connect the four axes of investigation pursued in this dissertation so far. In chapter 3, I argued that contrary to certain of Alasdair MacIntyre's interpreters who argue for the incommensurability of the religious and legal-political moral traditions, that in fact it is possible for persons to participate in more than one moral tradition. It is important in such situations, however, for the affected persons to

provides a description for thematic or categorical description. . . . Thus, charity rescues fundamental option from the recesses of the human person." Ibid. It seems that Keenan prefers describing wrong acts as vicious rather than sinful for a similar set of concerns—primarily, that calling an act a "sin," apart from a careful consideration of a person's antecedent intent as it pertains to striving in love, is too metaphysically abstract to be either pastorally helpful or theologically correct. See Keenan, "The Problem with Thomas Aquinas's Concept of Sin," 412, 415–17.

understand themselves as doing this, so that they can understand the nature of their respective commitments to each of these moral traditions. This would replace the Rawlsian understanding of the person as only truly belong in the religious moral tradition (the “reasonable comprehensive worldview”) and thus only present in the “special domain” of the political to the extent it does not ask them to do anything inconsistent with their religious instruction—a view roughly in line with the “legalist” understanding of the conscience. Likewise, it understands the person as more than a mere individual, subjectively isolated in her moral solipsism. Rather, the approach outlined in the chapter understands the person as committed to both her religious tradition and her legal-political tradition. It further assumes that when these traditions conflict, while coming to some grand theoretical resolution of these truth claims may be beyond her ken, she can nevertheless be trusted to act morally in the situation at hand in light of these commitments, occasionally even in ways that she may understand to be in conflict with her personal beliefs, precisely due to the nature of her commitments which, along with her beliefs, place a demand on her conscience.

In chapter 4, I focused on the person—specifically on the person as understood as an isolated individual in the Baptist tradition. I argued that, contrary to presentations that pit the secular (or liberal) versus the religious understanding of the conscience, that in fact the liberal individualist understanding of the conscience has strong theological underpinnings, and that understandings of the person contained in the Baptist tradition are illustrative of these. I further argued, however, that the Baptist concepts of the conscience, soul liberty, and soul competency could productively be placed in conversation with the Catholic concepts of the conscience, human dignity, and

synderesis, in order to clarify Baptist understandings of how the conscience functions in the context of theological anthropology. Similarly I explored the differences between Catholic personalism and the Boston University-style personalism (really, personalistic idealism) and argued that the former is more consonant with the Christian tradition than the latter. Taken together, these course-corrections in the Baptist understanding could go a long way towards ameliorating the excessive individualism implicit in that tradition and by extension in much of evangelical Protestantism and which many Protestants then carry into their debates about the role of Christians in U.S. American legal and political contexts.

In chapter 5, I explored the pneumatology of the conscience, a largely underdiscussed aspect of the conscience. As highlighted by Elizabeth Johnson, pneumatology has been an underexplored area of theology more broadly. The result has been that the underlying instincts and institutional momentums of Catholicism and Protestantism have guided the traditions' respective understanding of the Holy Spirit, so that in Catholicism, the Spirit has been identified with the role of the church (and specifically the magisterium) in both religious and secular life, while in Protestantism the Holy Spirit has been understood as acting primarily through individuals. I traced how this difference corresponds to the traditions' respective emphases with respect to the conscience, where the Catholic church has tended to emphasize the role of church teaching in forming the individual's conscience, while Protestants have tended to see the Holy Spirit's direct influence in their lives as justification for relying on the deliberations of their individual consciences. But as explored in the discussion of Johnson, Jürgen Moltmann, Anselm Min, and Michael Welker, a robustly pneumatological understanding

of the conscience has the power to dislodge these polarized understandings. Instead, the Holy Spirit can be understood as empowering our individuality precisely as our bonds of community are strengthened, through a “trinitarian” understanding of human fellowship. Moreover, because humans are created in the image of God, we can understand the human spirit as cooperating in the action of the divine Spirit across the boundaries of traditions, in the work of justice, freedom, truth, and peace.

And then in this earlier parts of this chapter, I explored the relationship between the person and the moral act. As I discussed, questions of “religious conscience” in the public square are often implicitly driven (especially in the Catholic tradition) by externalist (or physicalist) understanding of the moral act. When the moral act is understood as having the power to affect (or at least imply) a person’s eternal relationship with God, questions of morality as determined by the religious tradition become paramount, regardless of one’s legal or citizenship obligations, and the legalist understanding of the conscience becomes the only viable option. As explored in the work of Catholic moral theologians Josef Fuchs, Klaus Demmer, James Keenan, and Darlene Fozard Weaver, however, we saw that it is possible to retain the important theological insight that a person is affected by her moral actions (pace many Protestant perspectives, that allow a strong personal belief-public act distinction) without going all the way to an externalist view of the moral act. As developed in the work of Fuchs, vesting the person with the power to act according to conscience does not equate with moral subjectivism; rather it recognizes that in each situation, objective moral truth is contained in the act and not the norm. As developed in the work of Demmer, however, it is important for the person to make “sense,” through a continuous process of honest self-reflection, of her

past actions in the context of the moral norms by which she holds herself accountable. Actions redound to character, or as Demmer calls it, the “ethical personality.” This insight dovetails with Keenan’s work on the distinction between goodness and rightness, so that a person may still be “good” even if she did a bad act; the key inquiry is whether the person is striving in love. Whether the past act is labeled “sin” as Weaver would label it or not, future conscience-driven action must necessarily be informed by one’s understanding in conscience of one’s past actions. She must be honest about what she did wrong, and what she needs to do better in the future.

6.2.1 Synthesis

Taking all of this together, it is possible to describe a personalist communitarian understanding of the conscience. To state the matter in Thomistic terms—albeit admittedly in a retrieved sense only—one might say that conscience is best considered a power of the soul, a possibility that Aquinas considered but rejected in *ST*. I, Q. 79, Art. 13, both because of the fragmented state of the conscience as a concept at the time of Aquinas (between synderesis and conscience) and also because Aquinas, like those of his time, was convinced that it was man’s rationality that was his crowning feature.

To identify the conscience as a power raises the question of how it is perfected by virtue, or more directly, by what specific virtue is it perfected. As Keenan explains the relationship between a power and a virtue in Aquinas’s schema:

Virtue is an operative habit. As a habit, virtue does something: it perfects a power for its operation. Thomas uses this assertion frequently and in various forms: virtue perfects the matter, the power, the intellect, the appetite, the person, the passions, and the soul. Virtue as form perfects the power in which it resides, while power is the matter or subject that virtue perfects.⁶⁴⁰

⁶⁴⁰ Keenan, *Goodness and Rightness*, 96, citing *ST* I-II, Q. 54, Art. 4; Q. 55, Art. 2; Q. 56, Art. 1; Q. 57, Art. 5; Q. 59, Art. 5, arg. 1; Q. 64, Art. 4, arg. 2; and Q. 65, Art. 1, arg. 1.

The answer to the question, then, as suggested above, is that the conscience is perfected by *honesty*. As powers of the soul are perfected by specific virtues—as, for example, reason is perfected by prudence—so too the conscience is perfected by honesty.

Of course, honesty (which Aquinas called the virtue of truth) was presumed as foundational for Aquinas, which he “annexed” to justice as a “secondary virtue.”⁶⁴¹ Especially interesting in light of Keenan’s emphasis on charity is Aquinas’s discussion of lying, the vice opposed to truth, which Aquinas states may also be “contrary to charity by reason of its false signification.” Such lies are “most grievous and . . . mortal sin[s].”⁶⁴² But in not placing honesty on par with the four cardinal virtues, Aquinas failed to adequately conceive of the mechanisms of relation between the virtue of honesty and the reason and the will, precisely because he had failed to place the conscience on the same level as those powers. For example, this reconfigured arrangement of concepts makes clear that honesty, unique among the acquired virtues, has a regulative role with respect to prudence and is not just regulated *by* it, as the other virtues are.

In undertaking this reconfiguration of Aquinas’s schema, I take my cue from Francisco de Vitoria (1483-1546), when he insisted that non-Christian sovereigns are true sovereigns, receiving their authority “directly from God according to the natural law . . . [which means] they do *not* receive their power from the pope, nor do they receive it from the people, whose power the pope (having clearly received *his* power from God) might be able to contravene.”⁶⁴³ Which is to say, it matters how one envisions the relationship

⁶⁴¹ *ST I-II*, Q. 109, Art. 3.

⁶⁴² *ST I-II*, Q. 110, Art. 4.

⁶⁴³ John E. Carter, “Reconsidering the Relationship between Vitoria’s and Grotius’s Contributions to the International Law and Natural Law Traditions,” *Journal of Religious Ethics* 49, no. 1 (2021): 170.

among concepts, and it is especially important to make sure that ideas which are equally important are not represented as one having priority over another, or one presuming or implying the other.

I also take my cue from Keenan, who astutely notes that in the *Prima pars*, Aquinas was flirting with intellectual determinism. Explaining the autonomy of the will through the will's ability to move itself was the first step away from this position. But I would argue that this first step, while enough to establish the will's autonomy, is not enough to establish a person's *moral* autonomy, at least insofar as morality presumes responsibility for one's past actions. Instead, as I argue here, it is necessary to understand the conscience itself as a power, a status commensurate with its mediating role between the reason and the will.⁶⁴⁴

Considering the matter in this way makes clear that the proper role of the conscience is to mediate in moral matters between the reason and the will—in contrast to the “fixie” model I referenced at the beginning of the chapter. Framed with respect to the reason (or intellect), the conscience is what keeps the reason from degenerating into motivated reasoning; framed with respect to the will, one might say the conscience keeps the will honest about what its true object is. As honesty must regulate prudence, so too must prudence regulate honesty; as the conscience keeps one's reasoning moral, so reason keeps the conscience from becoming either lax or scrupulous.

⁶⁴⁴ For example, Lisa Fullam begins her essay “Joan of Arc, Holy Resistance, and Conscience Formation in the Face of Social Sin,” in *Conscience and Catholicism*, ed. David E. DeCosse and Kristin E. Heyer (Maryknoll, NY: Orbis, 2015), 69–82, by stating “The goal of conscience is truth” (69). She then proceeds, however, into a discussion of prudence and other virtues for the remainder of the essay without ever mentioning honesty.

For example, every experience of having a “guilty conscience” is not evidence of sin. Rather, the guilty conscience is an occasion for honest self-reflection and the exercise of prudence, in figuring out whether the action was in fact wrong, whether it resulted from a good or bad—or dishonest—will, who was harmed by the act, and whether there is a need to seek forgiveness or reconciliation. There is a parallel here between Aquinas’s distinction between the passive and active powers of the intellect,⁶⁴⁵ where the initial guilty conscience might be said to represent the passive power of the conscience while the process of honest self-reflection represents the active. To a significant degree, this corresponds with Paul’s discussion about the “weak” conscience in I Corinthians 8; what Paul called “weak,” we might now call “imperfect.”

To categorize the conscience as a power is to displace the contemporary notion that the conscience is a “sense.” To draw on the field of cognitive neuroscience just for a moment—at least to illustrate the current point—there is no “moral” part of the brain, no distinct biological “conscience.” Rather, when persons are asked questions pertaining to moral determination, two parts of the brain “light up” during functional magnetic resonance imaging (fMRI): the social brain and the emotional brain.⁶⁴⁶ The province of the conscience in the understanding being proposed is to parse this data *honestly* during the process of self-reflection, to bring it to the surface so that it may be interrogated by reason—thus, the conscience is the integrative power that makes “sense” of this sense data.

⁶⁴⁵ *ST I-II*, Q. 79, Arts. 2–4.

⁶⁴⁶ Liane Young and James Dungan, “Where in the Brain is Morality? Everywhere and Maybe Nowhere,” *Social Neuroscience* 7 no. 1 (2012): 1–10.

And, to move back to the theological from the biological, this occurs, as described in *Gaudium et Spes* no. 16, in “the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths.” This understanding of the conscience is thus a return to what Demmer called the “mystical element” of Augustine’s understanding of the conscience, evidenced in the case of Augustine’s struggle with himself to be honest about the moral valence of his actions when he participated with his friends in stealing the pears, recounted in his *Confessions*.

Note that the aspect of honesty I just described is primarily interior, not exterior. As Demmer describes it, honesty must be integrated into a regular practice of genuine self-reflection, about the rightness or wrongness of one’s past actions, about the guilt one feels for the negative consequences of one’s wrong actions, whether intentional or not. Contrariwise, the possibility must also be pointed out that a person may not be as bad as, at first reflection, they appear to themselves either. It may be that one’s inclination towards right actions is so well-tuned that the right act is done instinctually in the moment, without the person having a conscious awareness of their reasoning. A person prone to self-doubt and self-recrimination may later, on initial reflection, attribute to themselves bad motives or intent, but on continued honest self-reflection she may discover that the internal landscape of her intention was actually more loving and right than it first appeared.

This internal reflection does not, however, merely stay internal; to the contrary, it necessarily has external implications. For example, Keenan mentions the case of parenting:

To the extent that parents try to find right ways of guiding and directing their children, to that extent they are loving and, therefore, good. To the extent, however, that they successfully attain proper guidance, their parenting is right. Parents know, certainly, that providing right guidance is not necessarily an indication of love and, likewise, that erring in guidance is not necessarily an indication of a failure to love. Parental errors are not necessarily signs of parental selfishness.⁶⁴⁷

To extend Keenan's analysis, while parental errors may not have been due to a lack of striving in love, there may be consequences for their child's development. These consequences, in turn, may require apology and efforts towards reconciliation on the part of the parent. Even unintentionally wrong acts, once acknowledged internally by the parent as wrong, may require efforts to dismantle the consequences of the wrong act for others, including patient listening to accounts of those harmful consequences, and any insistence that one did not intend the wrong has the potential to rob efforts at reconciliation of their efficacy. To be clear, this listening should not include having motives or intentions attributed to the wrongdoer that the wrongdoer did not have. But it does include listening to the feelings of those who have been hurt by the wrong act and honestly parsing out internally one's responsibility for the past act and considering how one might reasonably act to avoid such harm in the future.

As Keenan explains elsewhere, "Friendship and concupiscence are distinguished by their forms of apprehension. In friendship we apprehend the other as another self, and any subsequent apprehension of a good we wish for the friend, we wish as for ourselves. In concupiscence, we apprehend every good directly for ourselves."⁶⁴⁸ In the context under discussion, an excessive emphasis by a wrongdoer on her lack of bad intent would

⁶⁴⁷ Keenan, "The Problem with Thomas Aquinas's Concept of Sin," 412.

⁶⁴⁸ Keenan, *Goodness and Rightness*, 121.

indicate lack of true friendship, since her focus on her subjective intent reflects a self-centeredness without regard for the impact of her actions on the other. By contrast, an honest understanding that one's actions were harmful and, regardless of intent, had harmful consequences resulting in a breach that needs a repair—repair that is satisfactory not just from the perspective of the wrongdoer but more importantly from the perspective of the one harmed—would indicate true friendship, since that would reflect a true concern for the other as we might wish for ourselves.

This internal honesty is of a piece with external honesty also. Stated simply, one is honest with those with whom one is in true community, whether that is one's external community of friends, family, and broader society, or one's internal relationship with God and one's own self-relation. Thus, in the commonly cited moral quandary of the person hiding a Jewish family in the attic, when faced with Nazis at the door looking for the family, a person who lies to the Nazis is, in the matter at hand, choosing to value community with the Jews over community with the Nazis, where the Nazis have already made clear they are unsuited and untrustworthy for community of any type. Similarly, to not be honest with oneself is to not be in community with oneself—or more simply, to be a fragmented self. To not be honest with God is potentially a most grievous and even “mortal” sin.⁶⁴⁹

6.2.2 Discussion

Placing this revised understanding of the conscience in conversation with the four theorists discussed above, first, it draws on Fuchs's correct identification of objectivity in

⁶⁴⁹ On this point, in addition to lies opposed to charity, Aquinas also discusses lies opposed to the virtues of faith and religion, all of which he considers mortal sins. *ST*. I-II, Q. 110, Art. 4.

the act, not the norm, and retains much of Fuchs's methodological description of moral discernment. It also retains a dual emphasis on both conscience and reason, though their relationship is reconfigured. Second, this model draws heavily on Demmer's understanding of the recursive effect of actions on moral development and the all-important virtue of honesty, but places the conscience within a more clearly delineated relationship with reason, while also specifying the mediating role of the conscience vis-à-vis the reason and the will. With regard to Keenan's understanding of goodness and rightness, this model adds detail to Keenan's concept of "striving." In this vein, just as Keenan says that "we can, in effect, avoid goodness in one way: by not attending to it,"⁶⁵⁰ so too we can avoid being truthful with ourselves: by choosing to never exercise our conscience to honestly see ourselves or our actions, and by never being honest with ourselves or others about our regret and sorrow for having harmed them. But the model also places each moral act (consisting of an intention and an act) in an ongoing chain with other moral acts, going at least some way towards addressing Weaver's insistence that wrong acts have the ability to affect a person's goodness, without resorting to a physicalist, almost metaphysical, understanding of the power of an action to affect a person's being.

Weaver states, for example, "We make ourselves the persons we are by our acts."⁶⁵¹ This is close but not exactly right. Rather, we make ourselves the persons we are by what we *tell* ourselves about our acts, and whether we are honest when we do so. By shifting to analysis of a person's *honesty* about whether the completed act was right or

⁶⁵⁰ Keenan, *Goodness and Rightness*, 47.

⁶⁵¹ Weaver, 44.

wrong, we can see how a person's goodness might be affected by a past act, but we have recategorized this as an essential step in forming one's intention for the next moral act.⁶⁵²

This model does, however, follow Weaver's emphasis on honesty with God in naming our acts,⁶⁵³ though it is less important here than for her whether wrong acts are labeled "sins" with God so long as they are named as wrong. And this model accomplishes all of these things while staying true to the traditional understanding of the conscience as having both consequent (judicial) and antecedent (legislative) temporal dimensions.⁶⁵⁴

Importantly, one can have a conscience perfected by honesty even if one is only oriented to the natural and not supernatural final end. It is possible to be honest (moral) or dishonest (immoral) in pursuit of human happiness, and this is better described by including the conscience and honesty in the discussion—and not just the virtues of prudence, justice, temperance, and fortitude⁶⁵⁵—even though from the perspective of the

⁶⁵² This approach has some resonance with the "action-reflection-action" methodology developed in the context of clinical pastoral education (CPE) and still used today, insofar as the "reflection" step is similar to the self-reflection that occurs in the conscience between moral acts. And as that described above, CPE method is remarkably personalist, in that it "focusses more attention (though not exclusive attention) on the person who is doing the learning rather than on what is being learned or how it is being learned," since "in ministry, how skilled the helper is able to become will determine the quality of help available." Joan E. Hemenway, "Position Paper on CPE Supervision and Learning," *Journal of Pastoral Care* 36, no. 3 (September 1982): 198. The "reflection" step in CPE, however, is a formal, externally facilitated process, unlike the internal process of the conscience I describe.

⁶⁵³ Weaver, 131–60.

⁶⁵⁴ See Kenneth Himes, OFM, "The Formation of Conscience: The Sin of Sloth and the Significance of Spirituality," in *Spirituality and Moral Theology: Essays from a Pastoral Perspective*, ed. James Keating (New York: Paulist, 2000), 60–63; Charles Curran, "Conscience in Light of the Catholic Moral Tradition," in *Conscience*, ed. Charles E. Curran (New York: Paulist, 2004), 6–7.

⁶⁵⁵ In his essay "Proposing Cardinal Virtues," *Theological Studies* 56 (1995): 709–27, Keenan proposes a revised list of cardinal virtues focused on a person's different dimensions of relationality—namely, justice (with regard to neighbor and enemy), fidelity (God), self-care (self), and prudence (as in Aquinas's schema, it perfects the reason). My proposal here regarding honesty as the virtue that perfects the power of the conscience is amenable to either Aquinas's list or Keenan's. Keenan's virtues, however, align well with the dimensions of the conscience outlined in this section, as the virtue of honesty pertains to oneself, to God, to neighbor, and—for Christians—to enemy. For a positive appraisal of Keenan's proposal and its application to a specific case, see Lisa Fullam, "Joan of Arc, Holy Resistance, and Conscience Formation in the Face of Social Sin," in *Conscience and Catholicism: Rights, Responsibilities, and Institutional Responses*, ed. David E. DeCosse and Kristin E. Heyer (Maryknoll, NY: Orbis, 2015), 69–82.

Christian oriented to the final end of union and friendship with God, there is no truth that is not spoken in love.

This, in turn, has important consequences for one of the major problems associated with Rawls's political liberalism discussed in chapter 3. Specifically, I refer to the problem with Rawls's locating the person inside only one "reasonable comprehensive doctrine" and residing only secondarily in the "special domain of the political," where Rawls would have us make arguments in terms of "public reason" only. Rawls suggested that, in this context, the most important civic virtue is civility.

But as Cathleen Kaveny argues (as discussed in chapter 3), civility does nothing to undercut the incentive that we have to not be honest with one another in the public square about our true reasons for taking a position. Discussing Rawls's proviso that one may make arguments in the public square according to one's true beliefs so long as the arguments are eventually recast in terms of public reason, she explains:

If 80 percent of one's contributions to the public square are cast in the distinctive language of a comprehensive worldview, will the fears of those who feel excluded from the worldview really be assuaged by one or two prominent efforts to make one's point in the terms of public reason? Moreover, if religious believers comply with the proviso only sporadically, their interlocutors will understandably think that when they do cast their arguments in terms of public reason, they are doing nothing more than practicing a subterfuge. Finally, consider the matter from the perspective of religious believers. Will the proviso's concession be sufficient to address the objections that they have to the strictures of public reason . . . ? I think it is more likely that the proviso's requirement that they *eventually* reframe their public interventions in a way that is alien to them seems like an insulting test of their fitness to participate in public debate. If it is viewed in this manner, the proviso will further neither civic respect nor civic peace, despite Rawls's best intentions.⁶⁵⁶

⁶⁵⁶ Cathleen Kaveny, *Prophecy Without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016), 57–58.

As Kaveny allows in her discussion, Rawls certainly had no intention to excuse public dishonesty, but because his framework was so idealized, he failed to see that at least some—and as current political discourse suggests, often much—public dishonesty in the name of his superior good of civility would inevitably result.

If one instead understands the person as being present in two moral traditions, the religious (or philosophical) and the legal-political, and further understands the importance of honest *argument* in a MacIntyrean moral tradition, one sees that—as Kaveny details—Rawls essentially has it backwards. Instead, civility should be subordinated to honesty, and *honesty* elevated to the position of being the most important civic virtue. It is important (and possible) for everyone, Christian or not, to be moral in the public square when we make our arguments, but only if we are truly honest with one another about the nature of our reasoning in furtherance of civic or political goods. The active role of the person’s conscience makes clear that motivated reasoning has no place here and is in fact toxic to the civic good.

Returning to the point made at the beginning of the chapter, that if the externalist (or physicalist) approach to the moral act were the correct Christian understanding, it might require the protections afforded by RFRA, note how the model presented here shifts the requirements of religious liberty. Instead of insisting that the legal system provide Christians “safe passage” through the public square to remain insulated from laws that might damage our relationship with God, we can now see that as Christians, we are called to be well-formed *agents*, not just agents with well-formed consciences,⁶⁵⁷ who

⁶⁵⁷ I am indebted to Anne E. Patrick, SNJM, “The Rhetoric of Conscience: Pope Francis, Conversion, and Catholic Health Care,” in *Conscience and Catholic Health Care: From Clinical Contexts*

can draw on (and be responsible to) both religious and legal moral traditions in making conscience-informed actions.

Note how this shift in understanding the conscience makes this model ineluctably *personalist*, in that it explains the very robust role that the person has in her own moral formation through processes of self-reflection. It does this by emphasizing the perfection of the conscience rather than its formation, which in turn deemphasizes—if not largely forecloses—the overdetermined role that the legalist understanding of the conscience gives to the teaching of the magisterium in the formation of the conscience.

It is also ineluctably open-communitarian, in that allows the person to draw primarily on her religious moral tradition, even as she is understood to be drawing from—and accountable to—the legal-political moral tradition also. Optimally, the legal-political moral tradition will be open to revision based on the experiences and conscience-driven actions of Christians, just as Fuchs was open to changing his position on contraception as a result of his revised understanding of the conscience. Certainly the legal changes that resulted from the actions of the Rev. Dr. Martin Luther King, Jr., many other Christians, and many non-Christian religious and secular conscience-driven persons involved in the Civil Rights Movement provide the paradigmatic positive example here.

And, it bears noting, this proposal of the conscience is *not* individualist, in such a way that it might condone or encourage moral solipsism. Instead, it is a dynamic, person-centered proposal that attempts to move past the liberal individualist-communitarian binary that has hamstrung the debates around the conscience for the past decades. It is an

to *Government Mandates*, ed. David E. DeCosse and Thomas A. Nairn, OFM (Maryknoll, NY: Orbis Books, 2017), 19, for identifying this important distinction.

attempt to stabilize a mediating position, and to do so correctly, as justified with argument from inside the Christian tradition.

Lastly, and building off the previous point, it bears summarizing just how theological this understanding of the conscience is. The model is theological in that it follows the approach of John Courtney Murray outlined in chapter 4, that the conscience should be oriented to objective moral truth—which is to say, it reinforces the distinction that Murray makes between the conscience and human dignity. The model is theological in that it also maintains the distinction that Aquinas made between *synderesis* and the conscience—a distinction that makes clear that the anthropological condition that makes the operation of the conscience even possible is the natural orientation to do the right and avoid evil, the first precept of the natural law, which Aquinas understood as *synderesis*. Alternatively for many Protestants, we can say the model makes clear that the anthropological condition that makes the operation of the conscience possible is the capacity to have a personal, direct relationship with God, which E. Y. Mullins understood as soul competency. The model is theological in that it understands the Holy Spirit can further our unity even as we are led, through conscience, in processes of individuation.

And though not made explicit above, the model is theological in that it allows for the operation of the conscience to be transformed not just by the theological virtues of love and faith, but also, perhaps most especially, by the virtue of hope. During the operation of the conscience, when one is honestly self-reflecting about the nature of one's intentions and the inadvertent harm one has caused, a sense of heaviness is bound to develop. But it is the virtue of hope that allows oneself to still understand that one is immensely valued and loved by God. It is the virtue of hope that allows one to work in

the political domain towards reconciliation, whether with committed political adversaries or those harmed by past actions. It is the virtue of hope that allows one to endure the difficulties inherent in pursuing the joys of an ethical life.

CONCLUSION: RETURNING TO THE LAW

Having travelled this long road through the history of the conscience and a discussion of various of its associated concepts—its role in certain twentieth century U.S. Supreme Court cases and federal statutes, key phases of its development in the Christian tradition, its theoretical role as the point of intersection between religious and legal-political moral traditions, a reconstruction of certain of the theological bases of its more individualist conceptions and a discussion of how those might be moderated, a proposal for developing its pneumatological aspects, as well a proposal for reconceiving its relationship to moral action—we are ready to return to the issues laid out in chapter 1 with the question, how does the understanding of the conscience as developed in chapters 2 through 6 affect the legal understanding of religious liberty?

The answer, as discussed in this concluding section, is complicated. In some respects, the revised understanding of the religious conscience results in less drastic changes than some might hope. In other ways, it finds support from unlikely quarters.

But the implications can be summarized as follows. Because there is a theological basis in the Christian tradition for respecting the consciences of *all* citizens, not just those who can link their actions to some religious belief, Christians should support efforts to broaden respect and legal protection for *all* rights of conscience, not just the religious conscience. This will necessarily mean, however, that the individualist conscience becomes more obviously untenable—and the open communitarian conscience more theoretically attractive—precisely to avoid every person becoming a “law unto himself.” But this move away from an individualist conscience and towards a communitarian understanding is more consonant with Christian understandings of the conscience in any

event, despite the sometimes well-intentioned but often misguided invocations by Christians of the protections afforded under U.S. law to the individualist conscience, the theoretical bases of which many of those same Christians have been quick to attack.

At the same time, the dangers posed by not protecting the free exercise rights of specifically religious believers, as well as the dangers of establishmentarianism (de facto, and under other names), are both present today as well. A solution, then, is to separate the rights of personal conscience from the rights of free exercise—to maintain them both, but separately. To restate a passage from John Courtney Murray quoted in chapter 3: “It is through the freedom of the citizen that the freedom of the Church is actively and effectively defended. In turn, the freedom of the citizen finds its surest warrant in the freedom of the Church; for where the state closes itself against the Church, it likewise closes down on the freedom of the citizen.”⁶⁵⁸ Splitting the rights of conscience from the right to free exercise honors both of these Murray’s freedoms—of the citizen, and of the Church—while keeping true to the premise that these freedoms are related—intertwined, even—and that to protect each of them separately may be the best way to protect the other.

Protecting these twin freedoms seems to have been the aim of RFRA and its amendments, but the statute that resulted from the hurried reaction to Scalia’s decision in *Employment Division v. Smith*—where he tried to almost singlehandedly take on the excessively individualist conception of the conscience— was, at least in some respects, the worst of both worlds. It watered down the “free exercise” of religion by allowing

⁶⁵⁸ John Courtney Murray, “Current Theology: On Religious Freedom,” *Theological Studies* 10, no. 3 (September 1949): 421.

“religion” to be whatever anyone said it was. It also failed to adequately identify the proper source of the right to, in limited, compelling, and historically justified circumstances, seek an exemption from an otherwise generally applicable law: the conscience.

In the brief section that follows, I discuss certain works by two prominent legal scholars writing in the field of religious liberty, Brian Leiter and Douglas Laycock. Leiter is a prominent critic of providing special protections to the religious conscience, while Laycock was involved in drafting and promoting passage of RFRA. It must be stated that, as this is a concluding section, the proposals that follow are little more than sketches. But as discussed below, the proposals are also innovative, and even offering sketches for the next directions for this work will hopefully provide some perspective for the road traveled in this dissertation thus far.

In his 2013 book *Why Tolerate Religion?*, philosopher and law professor Brian Leiter argues that religious claims of conscience should be given no more weight by the legal system than nonreligious claims. Leiter starts his argument by allowing that religion should be “tolerated,” by which he seems to simply mean not suppressed. He justifies “principled toleration” as follows:

Moral truths . . . —that is, truths about how we *ought* to live—supply the ground for a wider scope of toleration, one that encompasses *practices*, not just *beliefs*. . . . [T]o know how we really ought to live, it is not enough to hear differing opinions expressed on the subject; one must have the empirical evidence provided by lives actually lived in accordance with different guiding principles.⁶⁵⁹

⁶⁵⁹ Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University, 2013), 20–21.

In keeping with this broad justification, however, he argues that the only reason “matters of religious conscience deserve[] toleration . . . [is] because they involve matters of *conscience*, not matters of *religion*.”⁶⁶⁰

He further argues, however, that no claim of conscience, either religious or nonreligious, should in itself be sufficient grounds for being exempted from general laws of neutral applicability, unless the exemption were such that it creates no additional burden or harm for others—what he calls the “No Exemptions” Approach. At the same time, he rejects French-style *laïcité* of the sort which bans “ostentatious religions symbols—such as Muslim headscarves, or Jewish skullcaps, or large Christian crosses—in the public schools.”⁶⁶¹ If religion should not be specially protected, it should not be specially targeted either.

It bears noting that throughout his argument, Leiter conflates protecting the religious conscience with protecting rights of religious free exercise; at one point he completely equates them.⁶⁶² This is a commonplace in the relevant jurisprudence, as well. But as I explain below, it is a correctable mistake.

In stark contrast to Leiter is legal scholar and strong advocate of legal protection for the religious conscience Douglas Laycock. While Laycock has written extensively in this area, the work I single out for mention here is an early essay of his, entitled “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,” which lays out an approach to understanding the Religion Clauses as working in tandem.

⁶⁶⁰ Ibid., 64.

⁶⁶¹ Ibid., 104.

⁶⁶² Ibid., 115.

In the essay, Laycock argues that while the Free Exercise and No Establishment Clauses have distinct spheres of application, they function together to establish an important tension. Namely, he states, “The establishment clause limits the scope of claims for special treatment under the free exercise clause.”⁶⁶³ With regard to free exercise specifically, Laycock outlines what he calls the “three faces of free exercise,” that is, the three areas of free exercise jurisprudence:

One category is the bare freedom to carry on religious activities: to build churches and schools, conduct worship services, pray, proselytize, and teach moral values. This is the exercise of religion in its most obvious sense.

Second, and closely related, is the right of churches to conduct these activities autonomously: to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.

Third is the right of conscientious objection to government policy. The phrase is most prominently associated with the military draft, but there has also been conscientious objector litigation with respect to war taxes, compulsory education, medical treatment and inoculations, social insurance, Sabbath observance and nonobservance, monogamy, and other requirements that conflict with the moral scruples of certain sects or individual believers. These cases are also within the clause, because one way to exercise one’s religion is to follow its moral dictates.⁶⁶⁴

Astutely, Laycock points out that the first two categories of free exercise cases are often shoe-horned into the third. He explains:

Many courts and commentators think only in terms of conscientious objection. One of the most common errors in free exercise analysis is to try to fit all free exercise claims into the conscientious objector category and reject the ones that do not fit. Under this approach, every free exercise claim requires an elaborate judicial inquiry into the conscience or doctrines of the claimant. If he is not compelled by religion to engage in the disputed conduct, he is not entitled to free exercise protection. . . .

⁶⁶³ Douglas Laycock, “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,” *Columbia Law Review* 81, no. 7 (1981): 1374.

⁶⁶⁴ *Ibid.*, 1388–90.

This approach reflects a rigid, simplistic, and erroneous view of religion. Many activities that obviously are exercises of religion are not required by conscience or doctrine.⁶⁶⁵

This analysis seems patently correct, and it goes a long way towards correcting the conflation noted above. It does not, however, address the argument made by Leiter and given theological ballast by this dissertation—that *all* consciences deserve deference, though not to an absolute degree.

As I suggested above, one solution would be to separate free exercise from rights of conscience. Properly understood, and with Laycock’s admonition that all cases of free exercise should not be conflated or translated into cases involving the religious conscience, First Amendment jurisprudence could be maintained largely as is—though with some reframing, as discussed below.

With regard to RFRA, however, there is one solution which presents itself as nearly self-evident, which would correct the problems identified with it in chapter 1 while also addressing the argument of both Leiter and this dissertation that all sincere consciences should receive some protection. That solution would be to amend RFRA, changing the nature of the protected right from “free exercise” to “freedom of conscience.” Considering the standardless recognition of subjective claims of religious beliefs in RFRA as it is currently written, that is essentially what RFRA is now anyway. But it makes clear that this right is distinct from the “free exercise” rights of the First Amendment, which could go back to being understood as existing in tension with the No Establishment Clause, exactly as Laycock describes it and as discussed at greater length in chapter 1, instead of being so heavily favored as it is under RFRA as currently written.

⁶⁶⁵ Ibid., 1390.

Amending RFRA would also create space for the development of judicial frameworks and balancing tests for applying the amended statute to evaluate claims of conscience *as* claims of conscience and not as free exercise cases.

Overall, the framework I have described is a better, more intellectually honest way to think about the issues considered in the cases discussed at the beginning of the dissertation in chapter 1. Thus, in the monumentally significant question of participation in military conflict, the outcome of *Seeger* was correct, but it should have been decided under a framework of freedom of conscience, not freedom of religion. To respect deeply founded moral objections rooted in conscience to serving in the military, whether pretextually connected to a “religious” belief or not, is not to open the door to allowing exemptions based on political opposition to a particular war, as the historical section of *Seeger* well shows.⁶⁶⁶

Similarly, separating free exercise from freedom of conscience claims would offer a better analytic framework for considering the claims in *Employment Division v. Smith*. But here there would be a two-part analysis, not just a single one. Remember that in this case, Justice Scalia found that Smith and Galen’s free exercise rights were not violated as a matter of constitutional law, since the criminal law prohibiting the use of peyote did not target religious use of peyote. Under a law protecting religious free exercise along the

⁶⁶⁶ Of course, *Seeger* itself was not decided under the First Amendment but rather under the applicable statute for conscientious objector claims. The point here is that by providing explicit protection for freedom of conscience in a revised RFRA, it would be more acceptable to respect freedom of conscience simpliciter elsewhere in federal and state law. Under the current system, by contrast, where rights of religious free exercise are explicitly mentioned in the law but freedom of conscience is not, it becomes harder to escape the assumption that freedom of conscience must be tethered to free exercise of religion to find protection under federal law, generally speaking.

lines of RFRA,⁶⁶⁷ Smith and Galen very well *would* be entitled to an exception based on their rights of free exercise, since the law is so heavily skewed towards honoring such claims.

Under my proposal, however, because many conscience claims would be subjected to a separate analysis—where precisely because *everyone* has a right to freedom of conscience, it cannot be given the degree of deference that RFRA currently allows—there would be no need for Scalia’s harsh overreaction, insisting that no free exercise claim exists where the law is generally applicable. Instead, the best practice would be to require the type of expert testimony that was adduced in *Yoder*. Assuming that the expert testimony corroborated Galen and Smith’s testimony about their religious practice, an exemption could be granted.

As a freedom of conscience claim under a revised RFRA, however, a claim such as Galen and Smith’s would likely fail. As I say, precisely because if *everyone* were given rights of conscience as expansive as RFRA currently envisions for the religious conscience, civil society would become ungovernable, such rights would obviously have to be more limited. Which is to say, separated from their religious contexts, there would no longer be the background assumption that a person’s duty to follow conscience is always and in every respect to be equated with following a divine dictate, one which must be given priority over a person’s duty to the state. Instead, rights of conscience would still be respected, but they would more easily be placed in counterpoise with one’s responsibility to one’s fellow citizens.

⁶⁶⁷ Of course, RFRA itself could not be used in a case such as *Employment Division v. Smith*, since it only governs legal areas directly under federal jurisdiction. That said, the federal RFRA has served as a model for many state versions, written along similar lines.

And finally, as mentioned at the close of chapter 1, a paradigm for considerate weighing of everyone's consciences is Justice Kennedy's approach in *Masterpiece Cakeshop*—a fact-specific, case-by-case approach, where Kennedy took account of all the circumstances, affirmed that all the parties were entitled to be treated with respect, took account of the case arising during a transitional phase in legal acceptance of same-sex marriage, and also implicitly took into judicial consideration widespread religiously based opposition to that transition.

The case was decided, at least partially, as a free exercise case, but this was always a bad fit for that protection. Phillips may have testified that, to him, his work was but a part of his attempts to glorify God in all things, but almost manifestly this is better considered as a freedom of conscience case. As the outcome of *Masterpiece Cakeshop* demonstrates, such a reframing does not downgrade the rights at issue into lower ones, it just frames them more accurately.

In 1 Corinthians 10:29, Paul famously asks, "For why should my liberty be subject to the judgment of someone else's conscience?" But he was not *refusing* to subject his own conscience to another's. Rather he was rhetorically asking the question before explaining why he *should*. Somehow, legal protections for free exercise and the conscience have been arranged so that many Christians believe they should never have to do this. The goal of this dissertation has been to explain theologically why, as Paul advised, they should. The goal of this concluding section of the dissertation has been to sketch what a revision to the law of free exercise and freedom of conscience that would allow them to arrive at this conclusion might look like.

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