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## Christian Accounts of Religious Liberty: Two Views of Conscience

Joel Harrison

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# Christian Accounts of Religious Liberty: Two Views of Conscience

*Joel Harrison\**

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## I. INTRODUCTION

This Article examines two views of conscience: an understanding that conscience is directed towards a shared end and judged by those ends; and an understanding that conscience entails the individual's freedom to pursue self-determined ends. I call these "inter-subjective conscience" and "ethical freedom conscience." Both views are found within Christian religious liberty discourse. Both are part of a response to what Christopher McCrudden calls the "teleological problem": What is religious liberty *for*? What does it protect?<sup>1</sup>

Perhaps the dominant understanding of religious liberty is that it serves personal autonomy. Courts have typically agreed with the Supreme Court of Canada, emphasizing that religious liberty centers on "the notion of personal choice and individual autonomy and

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\* Senior Lecturer, Sydney Law School, University of Sydney. My thanks to Frederick M. Gedicks, Nicholas Aroney, Andrea Pin, and Dmytro Vovk for comments on a draft of this Article.

1. CHRISTOPHER MCCRUDDEN, *LITIGATING RELIGIONS: AN ESSAY ON HUMAN RIGHTS, COURTS, AND BELIEFS*, at ix (2018).

freedom.”<sup>2</sup> A number of influential commentators have amplified this understanding.<sup>3</sup> For example, Ronald Dworkin considers that religious liberty should be reconceived as a more fundamental commitment to “ethical freedom.”<sup>4</sup> This fits with his understanding of political authority. It exists to respect a person’s authenticity, the capacity to identify and pursue a way of life that “grips you as right for you.”<sup>5</sup> Accounts like this, whether they refer to authenticity or, for example, deep commitments or convictions, ask why a particular “religion” (say, Christian, Muslim, Jewish) should be treated with special concern. Such religions are now part of the general milieu of commitments, meaning they should equally be subject to the state’s law, or else most likely outweighed by the significant interests proposed by the law.

Christian religious liberty discourse has responded to these claims, but in different ways. Generally, an attempt is made to articulate a goal or purpose that religious liberty is directed towards that is more defined than capacious appeals to versions of personal autonomy. This is seen in arguments grounding religious liberty in a more institutional or social account.<sup>6</sup> I do not discuss such arguments in this Article, although it will be clear that the two accounts of conscience discussed can interact with such social or institutional accounts differently. My focus is on conscience, which broadly concerns the claims of individuals. In Part II, I discuss inter-subjective conscience. This view contains two claims, I will argue: first, that conscience should not be coerced, not because of ethical independence, but because of the end to which religion or conscience is directed; second, that conscience ultimately serves (and its exercise is judged by its consistency with) a social end. I will then address a critical argument in response: that the inter-subjective account of conscience is inconsistent with pluralism. In Part III, I discuss ethical freedom conscience. This

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2. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 40 (Can.).

3. See JOEL HARRISON, *POST-LIBERAL RELIGIOUS LIBERTY: FORMING COMMUNITIES OF CHARITY* 25–58 (2020).

4. RONALD DWORIN, *RELIGION WITHOUT GOD* 132 (2013) [hereinafter DWORIN, *RELIGION WITHOUT GOD*]; RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 61 (2006) [hereinafter DWORIN, *IS DEMOCRACY POSSIBLE HERE?*].

5. RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 203–09 (2011) [hereinafter DWORIN, *JUSTICE FOR HEDGEHOGS*].

6. See, e.g., Richard W. Garnett, “*The Freedom of the Church*”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); HARRISON, *supra* note 3, at 142–82.

understanding of conscience is first grounded on the claim that the individual must follow God's commands, as he or she discerns such commands, but it then concludes with a wider vision of respecting ethical freedom—the individual's capacity to determine his or her own ends. I discuss Kathleen Brady's recent arguments for natural religion as an example of how this trajectory can unfold.<sup>7</sup> I argue that it creates a question: What is the boundary of conscience claims? I then conclude by considering how this understanding of conscience is embedded within a vision of political community and the purpose of political authority, one that contrasts the inter-subjective view of conscience.

For some, conscience is a category separate from religious belief. It may concern a person's convictions seen as wholly based on an immanent ethic, for example.<sup>8</sup> International law refers to protecting "thought, conscience and religion," imparting an understanding that these are separate categories.<sup>9</sup> However, I am not concerned with attempting to uncouple conscience and religion in this way. In fact, I think it is difficult to articulate a non-religious view of conscience as wholly uncoupled from religious concerns and history.<sup>10</sup> This is illustrated by the discussion of ethical freedom conscience in Part III—such a view, although ending with a more capacious appeal to individual ethics, is at least marked by antecedent theological claims. Rather, the debate here is between two different understandings of "religious conscience," to borrow from Brady:<sup>11</sup> conscience that finds its end in God (as with the

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7. See text accompanying *infra* notes 71–96, discussing KATHLEEN BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW* (2015).

8. See, e.g., JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 90 (Jane Marie Todd trans., 2011) (arguing that freedom of religion is one category within freedom of conscience); BRIAN LEITER, *WHY TOLERATE RELIGION?* 63–64 (2013) (arguing that conscience, rather than religion, is a subject of potential toleration, with religion defined by categoricity of commands, insulation from evidence, and existential consolation).

9. International Covenant on Civil and Political Rights art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(1), Nov. 4, 1950, E.T.S. No. 5.

10. This argument is developed in HARRISON, *supra* note 3, at 59–99. Liberal egalitarian accounts of religion—focusing on convictions of conscience or authenticity, for example—are not substitutes for religion, but arise from a half-concealed theology. *Id.*; see also CHARLES TAYLOR, *A SECULAR AGE* 257 (2007) (discussing the shift, theological in provenance, towards a "disengaged, disciplined agent, capable of remaking the self . . . [as] one of the crucial supports of modern exclusive humanism").

11. As I discuss below, Brady hopes to distinguish this from "secular conscience." See text accompanying *infra* notes 73–81. However, I argue that her understanding of conscience

inter-subjective account of conscience) or conscience that finds its end in something that the individual alights upon in the pursuit of individual authenticity or self-determination (as with the ethical freedom account of conscience).

My focus is on “Christian religious liberty discourse.” Undoubtedly, that category presents a boundary question: Who is “in” and who is “out” of this conversation? I do not offer a definition or a threshold requirement. Rather, I discuss writers who consciously see themselves as drawing from Christian thought or in dialogue with it, with particular reference to claims of conscience. Further, I do not claim to be exhaustive. Notably, I only discuss a selection of Western sources—arguments rooted in Western European and North American sources and figures, albeit sources and figures that have often had a wider influence. This means I am largely only considering elements of Catholic and Protestant thought; I am not considering how this maps onto Orthodox claims, for example.<sup>12</sup> Nevertheless, my intention is to sketch what I argue is one important debate within Christian religious liberty discourse.

## II. INTER-SUBJECTIVE CONSCIENCE

The inter-subjective understanding of conscience contains two claims. First, conscience cannot be coerced because such coercion is inconsistent with the purpose of conscience (indeed, the end of the person)—the free offering of the person back to a God who is revealed as love. Second, claims of conscience are ultimately a social matter, developed and considered within a community and judged by the shared end to which they are ultimately directed. On this basis, conscience is “inter-subjective” because it entails communal discernment and a relationship to another subject, a person’s own end—God.

### *A. Against Coercing Conscience*

Why is coercing religious belief wrong? For a liberal writer like Dworkin, it is contrary to a principle of neutrality. If a political

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(an understanding shared with others) makes this increasingly difficult. See text accompanying *infra* notes 82–96.

12. For a discussion of the Russian Orthodox Church, human dignity, freedom, and rights, see Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517, 1524–25, 1529–30, 1536–39 (2016).

authority attempted to demand a person adhere to a religion, this would be inconsistent with equal concern and respect. The person's authenticity, or freedom to pursue what grips him or her as right, would be infringed, and it is the role of political authority to respect such ethical independence.<sup>13</sup> In Christian religious liberty discourse, different writers typically agree that political authority must not coerce persons into the faith.<sup>14</sup> However, this argument is more likely to be grounded on an understanding of what conscience is directed towards.

*Dignitatis Humanae*, the Second Vatican Council's Declaration on Religious Liberty, states that conscience is not rooted in the "subjective disposition of the person."<sup>15</sup> Rather, it grounds conscience in the person's natural desire or inclination to know the truth about God, a God who the Declaration affirms has reached down to persons and revealed himself as their end. Conscience is thus said to be directed towards the worship of God, "the end and purpose of life."<sup>16</sup> This can be characterized as a principle of subject-centering or subjectivity, but not of personal autonomy as it is typically understood in religious liberty literature.

On this argument, coercion into the faith would defeat its very nature; indeed, it would be contrary to the nature of truth. *Dignitatis Humanae* affirms as true that God's nature is to love and to desire nothing less than love. But this is understood as the free offering of the entire person, a desire that the subject, the person, comes to understand himself or herself as destined for God and as receiving his or her entire, unique being from God. On this basis, John Finnis writes that coercion is a wrong because it renders the person's search for truth—that free offering of oneself—inauthentic.<sup>17</sup>

13. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 209 (1985); DWORKIN, RELIGION WITHOUT GOD, *supra* note 4, at 130; DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 5, at 203–09.

14. This is distinguished from another debate within Roman Catholic discourse, namely whether the Church has coercive authority over the baptized. See Thomas Pink, *The Right to Religious Liberty and the Coercion of Belief: A Note on Dignitatis Humanae*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 427 (John Keown & Robert P. George eds., 2013).

15. POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM: *DIGNITATIS HUMANA*E § 2 (Dec. 7, 1965) [hereinafter POPE PAUL VI, *DIGNITATIS HUMANA*E], [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

16. *Id.* § 3.

17. 5 JOHN FINNIS, *Religion and Public Life in a Pluralist Society*, in RELIGION AND PUBLIC REASONS: COLLECTED ESSAYS 42, 49 (2011).

Moreover, as John Milbank notes, if the truth about God consists in love and a free offering in return, then coercion always risks distorting that truth— it presents the possibility that a person associates the truth of God with pain and violence.<sup>18</sup> Consequently, coercion is wrong— giving rise to a duty on the part of authorities not to commit that wrong— because conscience is understood as the site of persuasion towards this true end.<sup>19</sup>

These contentions are not novel and, generally, a prohibition on coercion is affirmed within Christian religious liberty discourse. Recently, Robert Louis Wilken has contended that arguments of this nature have been fundamental to Christian claims of liberty since the patristic period. He opens his book on “the Christian origins of religious freedom” with the following: “Religious freedom rests on a simple truth: religious faith is an inward disposition of the mind and heart and for that reason cannot be coerced by external force.”<sup>20</sup> He then begins to substantiate this claim with an appeal back to Tertullian, the second century Christian apologist who argued against punishing Christians for failing to worship the Roman gods.<sup>21</sup> Tertullian, Wilken notes, argued for “free choice with respect to divine matters” against being “forced to worship what I do not wish.” He continued, “Not even a human being would like to be honored unwillingly.”<sup>22</sup> Wilken summarizes: “If the mind is not persuaded, religious acts are a mockery of God.”<sup>23</sup> It is easy to read into the words of Tertullian and others a more modern claim—that conscience concerns individual self-determination facilitated by a neutral civil authority. Indeed, this is arguably the trajectory of Wilken’s Whig narrative, as I discuss below. However, what is notable in the early claims of Tertullian and others is that they are arguably entirely grounded on a Christian argument as to the nature of true religion. Coercion is a wrong not because it violates a sphere of personal choice at

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18. JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* 411–26 (2d ed. 2006).

19. POPE PAUL VI, *DIGNITATIS HUMANAE*, *supra* note 15, § 3.

20. ROBERT LOUIS WILKEN, *LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM* 1 (2019).

21. *Id.* at 10–13. The argument is then extended via other figures—for example, Lactantius—a century later. *See id.* at 20.

22. *Id.* at 11.

23. *Id.* at 20.

large, but because God desires that a person seeks him as the subject of worship freely.<sup>24</sup>

Underlying this view, then, is a contention: that conscience is directed towards a specific end. As Russell Hittinger emphasizes, the claim that conscience cannot be coerced does not give rise to a right of self-expressive autonomy. Coercion would be inconsistent with the person freely offering himself or herself to God, but conscience is nevertheless understood as the site where a person fulfils the duty to respond to the truth about God. It entails ultimately conforming to what *Dignitatis Humanae* calls “the imperatives of the divine law.”<sup>25</sup> David L. Schindler puts it this way: “I have a right to be free from coercion because I am made for truth and God, for the purpose of seeking the truth and God.”<sup>26</sup> For the inter-subjective view of conscience, this grounds a prohibition on coercing a person into adopting faith in God.

However, the argument goes further. Claims of conscience may entail a demand not to be coerced into a religious belief, but as Tertullian and other early Christians argued, the claim of conscience also entails individuals demanding the liberty to engage in practices consistent with conscience – and perhaps inconsistent with civil law. On the inter-subjective view, an understanding of the end of conscience – that it is ultimately for and directed towards “truth and God” – consequently also shapes when such a claim for liberty of practice should be recognized by a civil authority. Exploring this entails examining the *social* ends of conscience.

### B. The Social Ends of Conscience

Traditionally, conscience was understood as the site where God speaks.<sup>27</sup> For example, Augustine emphasized the interiority of the person as the place where God is most intimately heard; that

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24. Wilken summarizes: “[O]nly in giving of ourselves do we revere God.” *Id.* at 21. On Wilken’s account, these contentions can be found in many Reformers also. As I discuss below, this is typically coupled with a claim as to the differentiation between matters of the spirit, belonging to the individual before God, and matters of the body, belonging to the civil authority. See, e.g., *id.* at 69–70 (discussing John Calvin).

25. Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1046–48 (2000) (quoting POPE PAUL VI, *DIGNITATIS HUMANAЕ*, *supra* note 15, § 3).

26. David L. Schindler, *Freedom, Truth, and Human Dignity: An Interpretation of Dignitatis Humanae on the Right to Religious Liberty*, 40 COMMUNIO: INT’L CATHOLIC REV. 208, 287 (2013) (emphasis omitted).

27. See HARRISON, *supra* note 3, at 185–88.

the person, in looking inward, may meet the “immaterial light which casts as it were its rays upon our minds, to enable us to come to a right judgement.”<sup>28</sup> Such illumination is God speaking. Oliver O’Donovan consequently characterizes conscience in patristic writing more generally as “our self-opening to the probing interrogation and challenge of an encounter with God.”<sup>29</sup> Thomas Aquinas continues in similar vein, although with a shift towards greater rationalism. Conscience, he argued, entails applying the natural law to new circumstances. Each person has knowledge of the truth because God has implanted an inner faculty that inclines them towards the good. He called this *synderesis*. Conscience was then the further “application of [such] knowledge to something.”<sup>30</sup> This gives rise to a creative tension in Aquinas’s writing. A person is culpable for a wrong conscience; he or she could be judged for misunderstanding the requirements of the natural law in a given case. However, that person could also nevertheless understand that conscience to be binding, being that person’s determination of what God’s precepts required.<sup>31</sup>

In each case—whether patristic or medieval, Augustine or Aquinas—the person turns inward. He or she turns towards the illuminating light or else is committed to an act of reason reflecting on the natural law. However, in both cases the person is nevertheless also reaching externally, towards God. This has important consequences. Although an act of the individual person, conscience in this line of thought is intrinsically social. It is social for several reasons.

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28. AUGUSTINE, CONCERNING THE CITY OF GOD, AGAINST THE PAGANS bk. XI, at 461 (Henry Battenson trans., 2003). *Gaudium et Spes* states, “Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths.” POPE PAUL VI, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: *GAUDIUM ET SPES* § 16 (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html).

29. OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* 305 (2005).

30. See THOMAS AQUINAS, ON CONSCIENCE. DISPUTED QUESTION ON TRUTH 17 (1256–59), reprinted in THOMAS AQUINAS: SELECTED WRITINGS 217, 221 (Ralph McInerney ed. & trans., 1998); see also Rex Ahdar, *Is Freedom of Conscience Superior to Freedom of Religion?*, 7 OXFORD J.L. & RELIGION 124, 130 (2018).

31. AQUINAS, *supra* note 30, at 224–26. This echoes St. Paul who, as Robert K. Vischer notes, understood conscience to include “a set of moral convictions that may misperceive moral reality, but that nevertheless shape the person’s conduct.” ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 52 (2010).

First, Aquinas echoes St. Paul, who considered that conscience concerned knowledge shared between persons, as well as a self-awareness of God's judgment.<sup>32</sup> It consequently is subject to an inter-subjective search for and application of truth.<sup>33</sup> Indeed, O'Donovan notes that even the conscientious individual who dissents from society, as radical prophet or martyr, is still on this view acting in order to communicate an understanding of a shared, common good.<sup>34</sup>

Second, conscience consequently concerned shared deliberation and shared practices; it could not be divorced from a community. Indeed, as Wilken notes, claims of conscience or arguments against coercive practices – whether patristic or Reformed on his account – typically concerned not simply an individual, but the flourishing of the community and its practices.<sup>35</sup> In Catholic thought, developing one's conscience is said to take place necessarily within a community. The community communicates its understanding of God and develops the individual's knowledge through what Pope John Paul II called "the deeper capacity to entrust oneself to others."<sup>36</sup> More recently, Pope Francis has warned against reducing the religious life to the "quiet obscurity of the individual's conscience."<sup>37</sup>

Third, and most fundamentally, conscience is social because for this tradition of thinking it concerns a *shared* end – God. This is not a generic or abstracted God, a placeholder for what may be the

32. See O'DONOVAN, *supra* note 29, at 303–04; VISCHER, *supra* note 31, at 50–52.

33. See VISCHER, *supra* note 31, at 3. Vischer argues, "There is a clear need to recapture the relational dimension of conscience – the notion that the dictates of conscience are defined, articulated, and lived out in relationship with others." *Id.* On this basis, Vischer also refers to conscience as "inter-subjective." *Id.* at 9. He continues: "The moral convictions that make up conscience connect the individual to something outside herself, to a perception of self-transcendent reality. This outward orientation makes our moral claims uniquely susceptible to social engagement and influence." *Id.* at 45.

34. O'DONOVAN, *supra* note 29, at 310.

35. See WILKEN, *supra* note 20, at 12–13 (discussing Tertullian), 23 (discussing Constantine), 112 (discussing the Reformed tradition).

36. See JOHN PAUL II, ENCYCLICAL LETTER: *FIDES ET RATIO* § 32 (1998), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091998\\_fides-et-ratio.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html); POPE PAUL VI, *DIGNITATIS HUMANA*E, *supra* note 15, § 3 ("The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue . . .").

37. POPE FRANCIS, APOSTOLIC EXHORTATION: *EVANGELII GAUDIUM* § 255 (2013) [hereinafter POPE FRANCIS, *EVANGELII GAUDIUM*], [https://w2.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html](https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html).

individual's ultimate concern. God here is understood to be the triune God revealed in Christ. This specificity means that any claim of conscience could be subject to judgement as to its character. The life of the conscientious individual responding to God should, if truly conscientious, take on a particular shape, albeit one that is creatively repeated through perpetual variety, potential difference, and even surprise. Thus, Milbank argues that "all Christians inherit Christ's kingly power to judge, in equity, above and beyond the law." But this is coupled with an understanding of what judging in equity means: "To be a king in Christ's image must mean that every Christian individual takes upon himself to 'represent' his neighbours by standing in active and atoning solidarity with them . . . ."<sup>38</sup> Indeed, in his speeches on religious liberty, Pope Francis has tended to emphasize that religious liberty—and the claim of conscience—can only truly be considered an act of religion or conscience if it manifests right ends or fraternity and love.<sup>39</sup> This follows from an understanding of the end of conscience—it is directed towards the God who is love. Francis refers to an "authentic and mature living out of religious freedom," and has linked this with the "call to conversion, reconciliation, concern for the future of society, self-sacrifice in the service of the common good, and compassion for those in need."<sup>40</sup>

### C. Inter-Subjective Conscience and Pluralism

Such a view of conscience—as grounded in a shared end—could be criticized as potentially leaving little space for the religious liberty or the conscience claims of those who disagree. The

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38. JOHN MILBANK, *BEYOND SECULAR ORDER: THE REPRESENTATION OF BEING AND THE REPRESENTATION OF THE PEOPLE* 249 (2013).

39. See Joel Harrison, *Pope Francis, True Religion, and Religious Liberty*, 33 J.L. & RELIGION 447 (2018). This also reflects an emphasis on rights as necessarily serving a more fundamental duty. For this emphasis in Catholic thought, see Christopher McCrudden, *Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?*, 1 OXFORD J.L. & RELIGION 185, 193 (2012). For a similar claim in Protestant thought, see, e.g., *The United Church Pronouncement on Human Rights*, in MAX L. STACKHOUSE, *CREEDS, SOCIETY, AND HUMAN RIGHTS* app. IV, at 296 (1984).

40. Pope Francis, *Meeting with the Leaders of Other Religions and Other Christian Denominations: Address of Pope Francis*, VATICAN (Sept. 21, 2014), [http://m2.vatican.va/content/francesco/en/speeches/2014/september/documents/papa-francesco\\_20140921\\_albania-leaders-altre-religioni.html](http://m2.vatican.va/content/francesco/en/speeches/2014/september/documents/papa-francesco_20140921_albania-leaders-altre-religioni.html); Pope Francis, *Meeting for Religious Liberty with the Hispanic Community and Other Immigrants: Address of Pope Francis*, VATICAN (Sept. 26, 2015), [http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco\\_20150926\\_usa-liberta-religiosa.html](http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150926_usa-liberta-religiosa.html).

inter-subjective view affirms that a person cannot be coerced into religious belief. However, even this is based on the argument that conscience ultimately entails cohering to what is true. On this view, conscience is directed towards God, and not just any God but the triune God affirmed in Christianity. This then means that the exercise of conscience is judged by its relationship to God. Such judgement is social in the ways described. It entails communal discernment. The individual does not decide alone, but is formed by a community, and the act of conscience, rightly understood, is directed towards a social end. Critics may contend that the inter-subjective view of conscience consequently renders dissenting claims or simply claims that are different (a different understanding of God, for example) lamentable instances of “un-freedom” or the wrong exercise of conscience.

For example, in his contribution to this volume, Frederick Mark Gedicks argues that inevitable religious difference and moral pluralism rules out appealing to Christian theological claims as the basis for key political and legal concepts.<sup>41</sup> He discusses dignity, but the argument equally applies to related discussion of conscience. On this view, such appeals impede “the formation of a stable political consensus for human rights.”<sup>42</sup> Gedicks raises the possibility that appealing to a “thick” theological understanding of conscience, like the inter-subjective view, renders the permissibility of alternative claims, claims not rooted in Christian thought, into a dispensation—such claims are judged against the central idea of what conscience is for.<sup>43</sup> He consequently writes, “It would seem self-evident that a political consensus founded on Christian dignity [or, as here, conscience] is unlikely to attract non-Christian and unbelieving members in a pluralistic polity.”<sup>44</sup>

In this, Gedicks follows John Rawls. It was Rawls who considered that under conditions of freedom, the presence of equally reasonable comprehensive doctrines was inevitable.<sup>45</sup> This

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41. Frederick Mark Gedicks, *Christian Dignity and the Overlapping Consensus*, 46 *BYU L. REV.* 1245 (2021).

42. *Id.* at 1245.

43. Gedicks rightly raised this point in commentary on my article in draft. I am grateful to him for pressing the argument.

44. Gedicks, *supra* note 41, at 1260.

45. See JOHN RAWLS, *POLITICAL LIBERALISM* 133–35 (expanded ed., 2005) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; see also JOHN RAWLS, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES* 129, 131 (1999) [hereinafter RAWLS, *Public Reason Revisited*].

is the “fact of reasonable pluralism.”<sup>46</sup> Others have echoed this claim as to the inevitability of pluralism.<sup>47</sup> For Rawls it meant that the aspiration to consider whether a shared conception of the good orders our political life, one in which our talents and roles creatively participate, was an experiment in un-freedom. It was not possible then, as Plato, Aristotle, and thinkers of Christendom had argued, to pursue a common good, traditionally understood as shaping the ends of political community; this must be abandoned in favor of a conception of rights.<sup>48</sup> Only such equal rights could ground an overlapping consensus between reasonable conceptions of the good; and only then would the exercise of political authority be legitimate, as grounded on reasons acceptable to all reasonable people.<sup>49</sup> On this argument, to judge claims of conscience based on a shared end—God, as discussed, and the character of conscience this then precipitates—fails to account for pluralism. Gedicks argues, in the context of dignity discourse, that it enacts “repression” against those of different beliefs.<sup>50</sup>

Perhaps unsurprisingly, a discussion of conscience can quickly lead to a discussion of pluralism and political authority. These are, of course, complicated matters that have been debated for some time. Here, I will only point towards why those advancing the inter-subjective view of conscience would disagree with the Rawlsian claims. They would disagree with at least two lines of argument: (1) persuasion for political purposes is not possible, leaving us with inevitable conflict to be overcome by putting aside comprehensive claims; and (2) differences cannot be accommodated within an appeal to an objective good or appeals to Christian claims.

Gedicks argues that a Christian conception of dignity, and we can assume of conscience, self-evidently will not attract the support

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46. RAWLS, *POLITICAL LIBERALISM*, *supra* note 45, at 172.

47. See, e.g., Richard W. Garnett, *Religious Accommodations and— and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 503 (2015) (“My own thinking . . . is pluralistic in the familiar sense that it accepts as given, unavoidable, permanent, and human the fact that people, associations, institutions, and communities reasonably disagree about things that matter.”).

48. Rawls writes that we cannot be “a community, where by a community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine.” JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 3* (2001).

49. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 45, at 217; see also RAWLS, *Public Reason Revisited*, *supra* note 45, at 136–37.

50. Gedicks, *supra* note 41, at 1259.

of others. It is not “likely to persuade most liberal Christians, non-Christians, or unbelievers of its preeminent claim.”<sup>51</sup> He refers to the existence of Jews, Muslims, Hindus, Indigenous persons, Buddhists and others for the claim that a Christian conception lacks persuasive purchase. But why should persuasion be ruled out in advance in this way? There appears to be an *a priori* commitment that persuasion for the sake of shaping the political community is not in fact possible, and for all time. This means that advancing conceptions of the good for public life is inevitably cast as conflict, a conflict that must be circumvented through a claimed alternative mode of discourse, such as Rawls’s public reason.<sup>52</sup> Political argument must, Gedicks concludes, turn to a discourse of rights in which the “neutral” state facilitates self-determination.<sup>53</sup> Others have suggested that this line of argument renders public discourse shallow and thinned-out, or else does violence to a person’s convictions.<sup>54</sup> Perhaps most importantly, it may rob us of something desirable: a truer, more complete understanding of how we want to live well together in society.<sup>55</sup> Indeed, given the typical content of thick, theologically informed claims as to dignity or conscience, it is strange to refer to such claims as constituting repression.<sup>56</sup> That argument appears to depend on the contention

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51. *Id.* at 1262.

52. See generally KRISTEN DEEDE JOHNSON, *THEOLOGY, POLITICAL THEORY, AND PLURALISM: BEYOND TOLERANCE AND DIFFERENCE* (2007). Deede Johnson argues that “within political liberalism, as articulated by Rawls, difference is seen as a fact or problem to be dealt with,” notably by demanding unity in public reason. *Id.* at 2. She continues:

[T]he entire point of his theory is to find conceptions of justice upon which all people can agree, that form the basis of a consensus, so that disagreement and dissensus can be kept out of the political realm. Not even the principles of justice themselves are the result of dialogue . . .

*Id.* at 63. John Perry similarly argues that thinkers from John Locke to John Rawls demonstrate “a deep distrust of the give-and-take of political debate.” John Perry, *Arguing Out of Bounds: Christian Eloquence and the End of Johannine Liberalism*, in *RELIGION IN A LIBERAL STATE* 219, 225 (Gavin D’Costa, Malcolm Evans, Tariq Modood & Julian Rivers eds., 2013).

53. See Gedicks, *supra* note 41, at 1269.

54. See, e.g., STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 39 (2010) (arguing that the demand for secular vocabulary—like public reason—leaves us unable to “fully own up to . . . our real commitments,” ensuring that “our discourse will often be barren, unsatisfying, and shallow”).

55. I take this as a significant apologetic claim within Christian thought. See, e.g., JOHN MILBANK & ADRIAN PABST, *THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE* 4 (2016) (arguing that the question of what shape an individual life should take, its character, is only comprehensible when we also ask “what sort of society all of us want”).

56. Take discussion of dignity in Christian thought. Pope Francis refers to the “transcendent dignity” of the person. This means that each person is understood to be

that a judgement exercised against a person's sense of authenticity, or what Rawls called self-respect, for example, is necessarily harmful if the judgement arises from another comprehensive conception of the good.<sup>57</sup> But self-respect is not hindered by true claims; pointing to what is truly desirable for a person and a community (which is of course open to debate) is not unjust simply because what is truly desirable is critical of some choices.<sup>58</sup> As discussed, the inter-subjective view of conscience is fundamentally social in orientation, meaning it is linked with ideas of solidarity, fraternity, and love as the true character of conscience claims. This may not be accepted by all, but it may nevertheless pose something deeply attractive and capable of persuading many.

Nor is pluralism necessarily complete or conflictual, even in the absence of persuasion. Gedicks refers to different religious groups being alienated by a Christian conception of the good for a political community, but this is debatable. It is not uncommon that persons of different faiths support acknowledging Christian claims as central to public life, in contexts where this is traditionally taken to be the case, precisely because this gives voice to the very idea that there is a religious end to our individual and collective endeavors.<sup>59</sup> Indeed, although Gedicks points to non-Christians rejecting

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desired and needed in our common life. Before the European Parliament in 2014, he argued that such a vision of dignity stands against "selfish lifestyles . . . indifferent to the world around us, and especially the poorest of the poor." Pope Francis, *Address of Pope Francis to the European Parliament*, VATICAN (Nov. 25, 2014), [https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco\\_20141125\\_strasburgo-parlamento-europeo.html](https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html). Dignity means, he states elsewhere, "form[ing] a community composed of brothers and sisters who accept and care for one another." Pope Francis, *Message of His Holiness Francis for the Celebration of the World Day of Peace: Fraternity, the Foundation and Pathway to Peace*, VATICAN (Jan. 1, 2014), [http://w2.vatican.va/content/francesco/en/messages/peace/documents/papa-francesco\\_20131208\\_messaggio-xlvi-giornata-mondiale-pace-2014.html](http://w2.vatican.va/content/francesco/en/messages/peace/documents/papa-francesco_20131208_messaggio-xlvi-giornata-mondiale-pace-2014.html); see also JEREMY WALDRON, *ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY 204-05* (2017) (discussing dignity, understood religiously, as "a special story or trajectory or range of narrative possibilities that apply to each person. Each person is seen as the recipient of a high calling, a possible subject of faith, a subject and object of love, and a subject of penitence and object of redemption").

57. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 45, at 318.

58. See John Finnis, *On the Practical Meaning of Secularism*, 73 *NOTRE DAME L. REV.* 491, 507-09 (1998).

59. See Tariq Modood, *Introduction: Establishment, Reform and Multiculturalism*, in *CHURCH, STATE AND RELIGIOUS MINORITIES 4* (Tariq Modood ed., 1997) (arguing that minorities value the establishment of the Church of England as "ongoing recognition of the public character of religion" against any "triumphal secularism"); JONATHAN SACKS, *THE PERSISTENCE OF FAITH: RELIGION, MORALITY AND SOCIETY IN A SECULAR AGE 68* (1991) (arguing that establishment includes representing shared values).

Christian claims, it is not at all clear that all of these groups would typically opt for “a set of largely instrumental rights oriented to self-realization” as the central constitutive commitment of a political community.<sup>60</sup> Many are quite likely to see this simply as an alternative vision of the good life for the political community, and one inimical to a truer or richer understanding of community with others. Such a central constitutive commitment cannot be avoided. A commitment to fraternity and love (as Francis advocates)<sup>61</sup> will draw boundaries on what is permissible and not permissible, just as a commitment to personal autonomy will.

Nevertheless, those advancing the inter-subjective view of conscience typically still emphasize recognizing the claims of others within this central commitment. A Christian argument—like the inter-subjective view of conscience—can recognize difference. For example, Milbank argues that toleration and even mutual respect can be grounded on the Christian claim that those who err should be treated with love and patience, and that there will always remain an apophatic sense of our own limited perspective.<sup>62</sup> This can be coupled with what Pope Francis calls “healthy pluralism.”<sup>63</sup> Francis gives the image of society as a polyhedron rather than a sphere. Whereas the sphere reflects the demand for uniformity—each point is exactly the same as another—a polyhedron points to different groups and persons with their own specific differences (the planes) that nevertheless contribute to shared ends (the connected shape).<sup>64</sup> Drawn out further in the context of conscience claims, the argument reflects two contentions. First, that conscience pursues a substantive end—love of God that necessarily manifests as fraternity and charity, for example. Second, that this substantive end can be generously understood as respecting analogous or different responses to the urgings of conscience that seek to forge, for

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60. Gedicks, *supra* note 41, at 1268.

61. POPE FRANCIS, ENCYCLICAL LETTER: *FRATELLI TUTTI* ON FRATERNITY AND SOCIAL FRIENDSHIP (2020), [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_enciclica-fratelli-tutti.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html). See generally Harrison, *supra* note 39, 473–74 (arguing that Francis understands religious liberty as necessarily directed towards fraternity and charity).

62. John Milbank, *The Decline of Religious Freedom and the Return of Religious Influence*, in *RELIGION IN THE PUBLIC SQUARE: NEW CONVERSATIONS* 26, 33 (James Walters & Esther Kersley eds., 2018).

63. See POPE FRANCIS, *EVANGELII GAUDIUM*, *supra* note 37, § 255.

64. See *id.* at §§ 236, 255.

example, a right relationship with God.<sup>65</sup> Indeed, the inter-subjective view of conscience argues that the very possibility of such respect for analogous responses arises from the commitment to a substantive end that lies at the heart of the inter-subjective understanding. Conscientious objection to war is a clear example. Even a society that demands citizens kill in its name, seemingly rejecting a renunciation of war, can nevertheless recognize the claim of the conscientious objector as reflecting something good – the sanctity of life, the primacy of peace – that is commonly shared and perhaps even persuasive.

### III. ETHICAL FREEDOM CONSCIENCE

The inter-subjective understanding of conscience is not the only understanding present within Christian religious liberty discourse. Gedicks' emphasis on self-determination as central to human dignity is echoed in what I am calling the ethical freedom understanding of conscience. On this understanding, conscience ultimately concerns the individual's development of authenticity; it is the individual who is able to define what conscience is directed towards and what are its demands. This arises through abstraction. The inter-subjective view is rooted in a claim as to conscience's shared end. It points ultimately to God, and God with a particular character. In contrast, the ethical freedom understanding, through an increasing focus on the individual, frames conscience as covering a multitude of possible ends. I will critically suggest this creates a boundary question: Is it possible to delineate what counts as a claim of conscience? I will then conclude by examining how the ethical freedom view of conscience is embedded within an understanding of the role of political authority different from the inter-subjective view of conscience.

#### *A. Conscience Abstracted*

Wilken continues his tracing of the "Christian origins of religious freedom" through an extended discussion of the Reformers, leading then to an epilogue on James Madison and an

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65. See generally, HARRISON, *supra* note 3, at 59-99 (discussing respecting pluralism and disagreement when religious liberty is framed by substantive ends). This contrasts an understanding that the state must remain neutral as between claims of conscience, creating a "moral marketplace." See VISCHER, *supra* note 31, at 4-5.

appendix on Thomas Jefferson.<sup>66</sup> In this ascending Whig view, there is an increasing emphasis on the individual exercising what Wilken calls “a sphere of choice.”<sup>67</sup> It comes to fruition in Madison’s *Memorial and Remonstrance*. Madison famously argued for religious liberty based on the “duty of every man to render to the Creator such homage, and such only, as he believes acceptable to him.”<sup>68</sup> “The religion . . . of every man,” he contended, “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”<sup>69</sup> As with the first view of conscience, conscience here demands consent in any act of worship, against coercion into the faith. But Madison’s appeals to conscience—and Wilken’s overarching argument that this recapitulates a “sphere of choice”—may also reflect a more radical thought: it is the individual who determines what God is commanding, the individual who can act “as believes acceptable to him.”<sup>70</sup> This then precipitates a slide towards an even more capacious argument: that political authorities must respect ethical freedom more generally. For this reason, I call this second account of conscience ethical freedom conscience.

Kathleen Brady’s attempt to rehabilitate the Madisonian line of argument illustrates the trajectory, and the difficulties this poses.<sup>71</sup>

Brady discusses the increasing skepticism over religion’s claim to special or particular treatment, expressed in arguments for fairness or equality between convictions, including non-religious convictions. In response, she restates what she calls an “American

66. WILKEN, *supra* note 20, at 184, 189.

67. *Id.* at 110–11.

68. JAMES MADISON, RELIGIOUS FREEDOM: A MEMORIAL AND REMONSTRANCE 5–6 (1819). Written in 1785, Madison’s complete *Memorial and Remonstrance* can also be found as an appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947) (Rutledge J., dissenting).

69. MADISON, *supra* note 68, at 5.

70. Indeed, the thought may go a step further, as it arguably did for John Locke and certainly did for Thomas Jefferson: what ultimately matters, what God accepts, is sincerity regardless of belief. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 38 (J.H. Tully ed., 1983) (1689) (“Faith only, and inward Sincerity, are the things that procure acceptance with God . . . no Religion, which I believe not to be true, can be either true, or profitable unto me.”); Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in 6 THE WRITINGS OF THOMAS JEFFERSON 256, 261 (Andrew A. Lipscomb ed., 1903) (quoted in BRADY, *supra* note 7, at 104 (“[We] are answerable, not for the rightness, but uprightness of [our] decision[s].”).

71. She is not alone in appealing to a Madisonian tradition. See also Nicholas Wolterstorff, *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, in UNDERSTANDING LIBERAL DEMOCRACY: ESSAYS IN POLITICAL PHILOSOPHY 329 (Terence Cuneo ed., 2012); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013).

self-understanding."<sup>72</sup> Appealing to the founders of American constitutionalism, she argues that there is a common understanding of religion which is, or should be, compelling to all persons. Madison is again a key figure. Brady appeals to his claim of conscientious duty to render to the Creator only that which the person believes is acceptable. She sees this as encapsulating (or perhaps better, bringing to fruition) the character of natural religion<sup>73</sup> or what she refers to as "religious conscience."<sup>74</sup> On her argument, this is distinguishable from secular conscience. That distinction turns on how she understands religion.

Religion, she argues, is a transcultural and transhistorical phenomenon, a category that, once defined, covers all particular instances of what we may commonly think of as religion. It "grows out of common human experience."<sup>75</sup> Brady attempts to capture what exactly this common experience is. At times, her articulation of natural religion takes on more explicitly Christian (or at least Abrahamic) overtones. She refers to the experience of creatureliness, authorship in the cosmos, and then communion with the divine, through which the believer "shares in the divine life" – "[t]he believer's finitude is taken up into the infinite."<sup>76</sup> On occasion, Brady alludes to the transcendent, but given the definition is intended to cover non-transcendental religions, and her concern to avoid sectarianism, this cannot be definitive.<sup>77</sup> More generally, however, she frames religion as a category that refers to "being in a relationship to a greater Reality that grounds and defines all that is."<sup>78</sup> This "greater Reality" may otherwise be known as "the Absolute, Being Itself, the Infinite, the Holy, the Ultimate, Ultimate Reality or Power, the Mystery of all existence."<sup>79</sup> It is a "communion" that leads to "salvation or liberation of fulfilment."<sup>80</sup> For Brady, then, religious conscience, entailing the individual's

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72. BRADY, *supra* note 7, at 1.

73. *Id.* at 80–99.

74. *See, e.g., id.* at 23.

75. *Id.* at 6.

76. *Id.* at 82–84.

77. *Id.* at 207.

78. *Id.* at 70.

79. *Id.* at 82.

80. *Id.* at 90.

response to this ultimate, should be afforded special protection or accommodation at law.<sup>81</sup>

But does this encapsulate a natural category of “religion” or “religious conscience”? Brady wants this to be the case because she does not want to rest on “controversial theological premises” that “lack persuasive force in an increasingly secular society.”<sup>82</sup> She acknowledges that her view of natural religion, and the conscience that responds to it, is fundamentally individualistic.<sup>83</sup> She appears to think that this is “inescapable.”<sup>84</sup> Why it is inescapable is not clear. For example, for some Christians, certainly historically, the formation of a body of people—the Church or the *populus christianus*—is foundational.<sup>85</sup> More likely, such individualism is fundamental to a specific American tradition of religious liberty—the tradition Brady explicitly draws from, while claiming it reflects something natural—or else extends upon a specific modern understanding of religion.<sup>86</sup> Within Brady’s set of terms can be found the Madisonian divine, elements of Romanticism and the rejection of rationalism, cosmotheism, the metaphysics of absolute spirit, and an appeal to Christian existentialism. This lineage, leading to the modern claim as to what “religion” encapsulates, is typified by two features: an increasing individualization reinforced by an increasing level of abstraction.<sup>87</sup> As Graham Ward argues, it

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81. See *id.* at 120–21 (“At the heart of the founding era protections for the rights of conscience was a respect for conscience, the unique and uniquely important relationship that grounds it and gives it special dignity, and the claim that conscience and its demands make on believers, and the efforts of believers to heed these demands as they see them. This respect for conscience remains a powerful value today.”).

82. *Id.* at 69.

83. She writes, “We must begin with the individual, and, indeed, we must end there as well.” *Id.* at 9.

84. *Id.* at 159.

85. See, e.g., BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 215 (2012); HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 91 (1983). Individualism here refers to the *end* at stake—an individual’s self-determination, for example. However, what exactly the individual alights upon does not spring simply from the depths of a person. As I discuss below, this understanding of natural religion or religious conscience contributes to characterizing consumption as a religious act. Such consumption is not simply a matter of private choice, but the structuring of an economy, the marketing of desire, and what Charles Taylor calls “mutual displays of identity.” TAYLOR, *supra* note 10, at 483. Claims of religious conscience are never removed from social interactions, even when the individual’s ultimate concern is taken to be their end.

86. BRADY, *supra* note 7, at 208.

87. See GRAHAM WARD, *TRUE RELIGION* 73–133 (2003). Ward characterizes Tillich’s “ultimate” as part of an “evacuation of expression.” *Id.* at 117–20.

reflects attempts within Christian thought to reconceive specific traditions as pursuits of some hidden, or greater, “infinite” or “ultimate,” rendering their specificity irrelevant. Notably, this includes Paul Tillich’s understanding of “the ultimate,” which Brady appeals to.<sup>88</sup> Tillich famously characterized religion as the individual’s experience of a “depth” of “ultimate concern.”<sup>89</sup> But such abstraction privileges the individual: all instances of “the ultimate” are fundamentally the subject of individual determination. Madison’s individual determining a response to a divine is, on this account, one beginning.<sup>90</sup>

Given this, an appeal to the conscience responding to its own understanding of the ultimate is likely to raise a boundary concern. What falls into this seemingly increasingly expansive category? Brady recognizes this concern.<sup>91</sup> However, she wishes to maintain a distinction between “religious and nonreligious beliefs” or “religious conscience” and “secular conscience.”<sup>92</sup> The former includes individualists who shop around for religious experiences and new religious movements. These individuals and movements are characterized as still seeking “meaning through a genuine connection or relationship with the higher power or powers.”<sup>93</sup> In itself, it could be asked whether conscience should be afforded special concern when it concerns such consumer expression. This is

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88. BRADY, *supra* note 7, at 103.

89. PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* 63–64 (1962).

90. *See also* GREGORY, *supra* note 85, at 167–71 (on Madison constructing “individual conscience as an autonomous and inviolable court”), 215 (on the development of radical Protestant claims). I emphasize that Madison is *a* beginning, meaning his claims no doubt rest on prior movements towards the individual. For example, in this volume, Nicholas Aroney discusses how understandings of human dignity were flattened out—shifting from a social vision of role, virtue, community, and assumption into Christ to an understanding of self-determination or autonomy. Aroney focuses on Kant as central. *See* Nicholas Aroney, *The Rise and Fall of Human Dignity* 46 *BYU L. REV.* 1211 (2021). Vischer points to Locke’s understanding of conscience “as formed experientially” as “dominant” today. VISCHER, *supra* note 31, at 60. Although Vischer sees Locke’s argument as still referring to moral sources outside of the person, he argues it contributes to “the modern tendency to treat conscience as an idiosyncratic question of taste or preference, rather than an objective, or even accessible, source of moral insight.” *Id.* My discussion in this part of the article echoes Charles Taylor’s genealogy, in which a covenanting God establishing human order by divine command gives way to the internal development of ethical rules and then, finally, the individual’s own sense of authenticity. TAYLOR, *supra* note 10, at 221–95 (“The Turning Point”), 473–504 (“The Age of Authenticity”).

91. *See, e.g.,* BRADY, *supra* note 7, at 207.

92. *See, e.g., id.* at 143.

93. *Id.* at 209.

significantly removed from the social ends (and judgement) of the first account. But Brady also wants to maintain a boundary between such expression that is truly seeking a religious connection and that which is not. It is not clear where that boundary lies, once this expansion has been accepted. Indeed, as others have argued, the contemporary understanding of religion is as likely to be manifested in consumer experiences more generally.<sup>94</sup> This includes practices self-consciously seen as spiritual endeavors (like wellness consumption)<sup>95</sup> and religious traditions reconceived in market terms, both of which Brady accepts as instances of religious conscience, but also simply the very act of consumption itself. Individuals now seek – and have marketed to them – an apparent infinite variety of commodities and consumed experiences appealing to a sense of depth, immersion, a claim of ultimacy, or even transcendence.<sup>96</sup>

This is a dilemma found in religious liberty discourse more generally.

Within case law, the movement from conscience as the individual following God's commands towards a more capacious understanding of personal autonomy is likely to be seen as natural. For example, Justice Dickson of the Supreme Court of Canada explicitly traced the underlying justification for religious liberty in precisely these terms. He stated the liberty arose historically from a concern for those in post-Reformation Europe who found themselves subject to a ruler who attempted to enforce a different faith – a concern to prevent coercion. He then contended that this shifted to a focus on an underlying “reality of individual conscience” planted by God. But this new emphasis precipitated, he concluded, the contemporary position, in which religious liberty concerns the centrality of individual judgement – personal

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94. See, e.g., WARD, *supra* note 87, at 114–53; William T. Cavanaugh, *Return of the Golden Calf: Economy, Idolatry, and Secularization since Gaudium et Spes*, 76 THEOLOGICAL STUD. 698 (2015); JAMES K. A. SMITH, *DESIRING THE KINGDOM: WORSHIP, WORLDVIEW, AND CULTURAL FORMATION* 96 (2009). For example, Cavanaugh writes, “The people standing ready to burst into Best Buy at midnight on Thanksgiving are not disenchanted.” *Id.* at 715. This can be contrasted with Brady’s claim (referring to new spiritualities) that “there are simply not a lot of Americans who belong to nontraditional faiths.” BRADY, *supra* note 7, at 210.

95. See COURTNEY BENDER, *THE NEW METAPHYSICALS: SPIRITUALITY AND THE AMERICAN RELIGIOUS IMAGINATION* (2010).

96. See HARRISON, *supra* note 3, at 81–86, for further discussion. D. Stephen Long refers to “non-confessional theology” contributing to the “contentless character of global capitalism.” D. STEPHEN LONG, *DIVINE ECONOMY: THEOLOGY AND THE MARKET* 55 (2000).

autonomy – as the foundation of human dignity and the concern of political authority.<sup>97</sup>

Such a line of development, moving from God's commands to a conception of ethical freedom, is then developed in prominent theories of religious liberty. Martha Nussbaum argues that religious liberty is designed to protect what she calls the "faculty with which each person searches for the ultimate meaning of life." This is consciously capacious; it does not purport to judge what answer the individual finds or "the question whether there is a meaning to be found" at all.<sup>98</sup> Similarly, Charles Taylor and Jocelyn Maclure argue that in a society of plural beliefs, political authority should respect "convictions of conscience."<sup>99</sup> The subsequent question is whether this capacious category should be afforded any special protection when it conflicts with general laws. As with Brady, theorists typically do not go so far as raising whether the pursuit of an ultimate is manifested in consumer practices. Indeed, Nussbaum, as well as Maclure and Taylor, attempt to rule out for special treatment beliefs or practices that are "frivolous" (Nussbaum) or "expensive taste" (Taylor and Maclure).<sup>100</sup> Such distinctions arguably import an assessment of such claims, beyond the focus on individual subjectivity that typifies these accounts.

For this reason, Dworkin comes closest to following the logic of the argument through to a more thoroughgoing relativization, in which conscience covers a multitude of individual acts of self-determination or even consumption. His account of religious liberty ends by conflating the theist (typically associated with a voluntarist God) and the atheist, so long as each is conscientiously pursuing a life that "grips" him or her, especially through choices that can be characterized as particularly "intimate."<sup>101</sup> In doing so, he appeals to an evolving understanding of what religion is. For him, Tillich also acts as a fulcrum figure who expressed the logic of shifting towards the individual as the spiritual center of gravity.<sup>102</sup> Religion for Dworkin consequently concerns pursuing

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97. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, paras. 118–25 (Can.).

98. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 168–69 (2008).

99. See MACLURE & TAYLOR, *supra* note 8, at 13.

100. NUSSBAUM, *supra* note 98, at 168–69; MACLURE & TAYLOR, *supra* note 8, at 69–80.

101. See DWORKIN, RELIGION WITHOUT GOD, *supra* note 4, at 122; DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 4, at 73.

102. DWORKIN, RELIGION WITHOUT GOD, *supra* note 4, at 37.

an understanding that there is value to be found in the world, and the responsibility to make one's life a success.<sup>103</sup> Religious liberty is to serve this—it protects ethical freedom or independence.<sup>104</sup> But this means, he continues, that religious traditions should not be singled out for accommodations when faced with neutral laws regulating conduct. Doing so would let “eccentricity” undermine government regulation. There is, he argues, no way to differentiate between the hedonist, the drug-loving libertarian, and the sacramentalist.<sup>105</sup> All fall under a general right to ethical freedom or independence.<sup>106</sup>

### B. Ethical Freedom Conscience and Political Authority

Neither the inter-subjective view of conscience nor the ethical freedom view of conscience concern simply “conscience” as one important value. Each contributes to shaping an understanding of the purpose of political authority and the ends of political community. Brady is again clear on this. She acknowledges the potential proliferation of conscience-claims encapsulated in the individualistic and abstracted account of religious conscience. But this is seen as foundational to an understanding of the domain of political authority and what it should protect.

Brady raises the claim, common to American constitutionalism, that cultivating factional difference—a thousand flowers blooming, with roots potentially located in each individual—means that no single group can claim the reins of power.<sup>107</sup> Such factional difference is a core feature, on this account, of good, limited government. This is coupled with the claim that civil authority is, seemingly by its nature, not competent to judge questions of religious truth. Doing so is left to the individual, as the locus of religious truth.<sup>108</sup> Others have argued similarly. Wilken sees such claims as foundational to Reformed thought (and its fruition in

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103. *Id.* at 10.

104. *Id.* at 132; DWORKIN, *IS DEMOCRACY POSSIBLE HERE?*, *supra* note 4, at 61.

105. DWORKIN, *RELIGION WITHOUT GOD*, *supra* note 4, at 124–25, 135.

106. Dworkin does not consider that all instances of “religion,” so understood, should be afforded a special right. That would be unworkable, he argues. Rather, all of these are protected by a general freedom (ethical independence) limiting the reasons for government action: “[G]overnment must never restrict freedom just because it assumes that one way for people to live their lives—one idea about what lives are most worth living just in themselves—is intrinsically better than another.” *Id.* at 130.

107. BRADY, *supra* note 7, at 144–45.

108. *Id.* at 123–24.

American constitutionalism). Between John Calvin and Roger Williams, for example, there is a common claim of differentiation: civil authority is tasked simply with civil peace, and the outward behavior necessary for this, in distinction to the freedom of the soul, accountable to God alone.<sup>109</sup> Nicholas Wolterstorff continues in this vein. He argues that political authority cannot be concerned with inculcating virtue, including true religion. It must secure “the excellence of being free.”<sup>110</sup> He then aligns this argument for the limited role of government with John Locke’s appeal to subjective rights: an individual has “a property in his own person.”<sup>111</sup> As Steven Smith notes, “the spiritual center of gravity” shifts towards the individual,<sup>112</sup> individuals whose multitude of ultimate concerns can be facilitated or supported by a now secular state. Claims of this kind, reflecting the ethical freedom of the individual to determine such ultimate concerns or what grips him or her, need not relate to an understanding of the ends of the community beyond facilitating such expressions. John Perry critically calls this “the individual’s sovereignty over the moral world.”<sup>113</sup>

#### IV. CONCLUSION

Compared to its pre-modern usage, translated by some authors into a contemporary vein, the ethical freedom understanding of

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109. WILKEN, *supra* note 20, at 68–70 (on John Calvin), 147–49 (on Roger Williams).

110. NICHOLAS WOLTERSTORFF, *Do Christians Have Good Reasons for Supporting Liberal Democracy?*, in UNDERSTANDING LIBERAL DEMOCRACY: ESSAYS IN POLITICAL PHILOSOPHY 305, 320 (Terrence Cuneo ed., 2012). For Wolterstorff, this freedom concerns the inherent dignity and equal worth of individuals that must not be violated. For a discussion of Wolterstorff’s arguments in the context of religious liberty, see HARRISON, *supra* note 3, at 130–40.

111. WOLTERSTORFF, *supra* note 110, at 322; see JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT, AND END OF CIVIL GOVERNMENT 128 (Mark Goldie ed., Everyman Press 1993) (1690).

112. See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1878 (2009) (reviewing 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008)). At the same time, these theories reflect the rise of state power. It is the state that is now characterized as having control over the body, what Calvin identified with safety, housing, food, and the law as the “needs of the present life,” for example. See WILKEN, *supra* note 20, at 68. As Gregory notes, in identifying a distinct sphere of conscience for religion, the Reformers also justified a more complete regulation of the person by the state. See GREGORY, *supra* note 85, at 147–48.

113. John Perry, *Two Questions for Wolterstorff: On the Roles Played by Rights-Talk in History and the Measuring of Worth*, 23 STUD. CHRISTIAN ETHICS 147, 149–51 (2010). He continues: “I can claim a right to religious freedom even while denying (or being agnostic on) worship of God as a true human good.” *Id.* at 151.

conscience is “truncated” or “distorted.”<sup>114</sup> On the inter-subjective view of conscience, still present in Christian religious liberty discourse, the person has a duty to pursue God as one’s own end. This entailed forming a community – conscience was not simply an act of the individual, but it was directed to social ends. Conscience, in other words, is exercised in aid of a flourishing community. Such flourishing is found in a common good or end, in which different talents and roles are creatively reconciled. The inter-subjective view of conscience consequently is embedded within a different understanding of the role of political authority. Political authority is tasked with supporting this true end. It concerns itself with cultivating a community that “live[s] well,” to borrow from Aquinas, or that exists for “communion and fellowship with others,” as Richard Hooker argued.<sup>115</sup> I have discussed this elsewhere as fraternity, solidarity, and charity.<sup>116</sup> That further means that the inter-subjective view of conscience rejects the claim that political authority is simply incompetent in matters of religion. Rather, in situations of conflict or tension, when a conscientious claim is raised, political authority must determine whether this is a true act of conscience (generously understood), whether it contributes to or is consistent with “living well.”

This does not mean that political authority can coerce a person into the faith. To the contrary. Here, we find broad agreement across different strands of Christian religious liberty discourse against coercion. But the inter-subjective view frames this in terms of a true understanding of religious ends – the free offering of the person to God. The duty not to coerce a person derives from, on this account, the duty political authorities have to be attentive to the pursuit of this true understanding of religion. In contrast, the ethical freedom view of conscience sees coercion as contrary to the “sphere of choice” that it is the task of political authority to protect and further.

A final question remains. At the outset of this Article, I raised whether religion or religious conscience, to adopt Brady’s term, is becoming equally subject to the state’s law, or else most likely

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114. Ahdar, *supra* note 30, at 131.

115. Thomas Aquinas, *On Kingship or The Governance of Rulers* (De Regimine Principum, 1265-1267), in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 14, 27, 29 (Paul E. Sigmund ed. & trans., 1988); RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 87 (Arthur Stephen McGrade ed., 1989).

116. See HARRISON, *supra* note 3, 142-82 (“The Ecclesiological Account”).

outweighed by the significant interests proposed by the law. In part, this outcome is generated by the movement towards abstracting religion and conscience into an increasingly capacious category of the individual's relationship to some "ultimate." Conscience as a category of special concern is undermined. It becomes political authority supporting ethical freedom, or a "sphere of choice," leaving the inter-subjective view of conscience as just one possible outlook. But what if conscience is grounded in a specific tradition—reflecting a shared end in God, necessitating persons forming a community with a particular shape, however partially understood and debated? Rather than flattening claims of conscience through an abstraction—all are equally included, but all are equally subject to the law—holding to a concrete tradition is, I have suggested, more likely to ground a special respect for conscience, even analogous pursuits of a shared end.

