

Rights Conflicts, Curricular Control and K-12 Education in Canada

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Abstract

In the context of Canada's Kindergarten to Grade 12 education system and given the *Canadian Charter of Rights and Freedoms*, there is a growing body of jurisprudence which reflects ongoing debates about who should ultimately maintain control of the formal and informal curriculum in our schools. In these cases, debates about curricular battles play out through rights conflicts, which our courts are required to resolve. These conflicts typically involve claims relating, directly or indirectly, to fundamental freedoms such as freedom of religion and freedom of expression as well as claims associated with the right to equality.

In this thesis, I aim to offer a critical assessment of the relevant body of jurisprudence. My critique draws on the theoretical work of Rob Reich and Jeremy Waldron. Reich suggests that our best hope of understanding and resolving the curricular struggles related to the control of children's education requires a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the state and children. Building on Reich's conceptualization of the different interest holders, I identify a fourth stakeholder, namely, teachers, who have interests which are germane to our analysis because these interests raise issues connected to curricular control and children's education. In my analysis, I apply Reich's matrix of interests to the extant body of jurisprudence to ascertain whether or not our courts are alive to the different interest holders in its treatment of cases involving conflicts of constitutional rights. I also want to know whether the interests of the four stakeholders overlap or conflict with another. Finally, I want to know how these interests are conceptualized by

the court and whether this conceptualization is consistent with, or differs from, the one offered by Reich.

Waldron's work offers analytical clarity for how we might better understand and resolve conflicts of rights, including conflicts involving constitutional rights claims. He maintains that rights conflicts are fundamentally about conflicts of duties and that we are likely to have more success reconciling conflicts of rights when we conceive of these conflicts in this manner. Applying Waldron's strategy for reconciling rights conflicts to the cases in my study, I posit that we can make sense of the reconciliation process by examining the duties associated with the rights in question. Although our courts do not explicitly draw on Waldron's theoretical framework in their legal analysis, I maintain that, generally speaking, what our courts do is consistent with a Waldronian analysis of conflicts of rights.

In my conclusion, I note that the jurisprudence considered initially seems to focus exclusively on two key guiding values: liberty and equality. Yet, a closer examination of the case law reveals a concern for two other important *meta* values, namely, efficiency and community. Furthermore, the notion of children as rights bearers poses special challenges. We might treat older children as rights claimants, on their own terms, because of their capacity to advance certain projects and to engage in certain commitments. Yet, the exact moral and legal status, for example, of a six- or seven-year old is still uncertain. Finally, I recognize that a "rights only" version of what happens in our schools provides only a partial account of educational reality. Other values such as duty, love, friendship and compassion are needed to furnish a richer and more nuanced account of morality for our school communities.

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INTRODUCTION

Since the entrenchment of the *Canadian Charter of Rights and Freedoms*¹ in the Canadian Constitution in 1982, our courts (and especially the Supreme Court of Canada) have rendered a number of significant decisions in the educational context. In this area, jurisprudence can be placed in one of three well-defined categories: 1) denominational rights²; 2) minority language educational rights³; 3) and individual rights. In the first two categories, collective rights are the focus of analysis. Here, the Supreme Court of Canada has upheld the special status accorded to these religious and linguistic groups in spite of Canada's changing ethnic and multicultural society. In the third category, however, the individual rights of students, parents and teachers are examined.

In the context of individual rights, the judicial decisions reflect a complex balancing act between entrenched constitutional values (e.g. the free speech right of teachers to express unpopular views) and other competing educational values (e.g. the need to maintain confidence in, and protect the integrity of, our schools) in a free and democratic society. By way of example, in the case of *Ross v. New Brunswick School District No. 15*⁴, the Supreme Court of Canada had to reconcile the freedom of expression of a public school teacher (who expressed anti-semitic views) with the need to protect the equality rights and interests of all students, including minority students, attending public schools in the school system where the controversial teacher taught. In its analysis, the

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

² See for example, *Adler v. Ontario*, [1996] 3 S.C.R. 609.

³ See for example, *Mahe v. Alberta*, [1990] 1 S.C.R. 342. The body of jurisprudence under s. 23 is actually quite impressive. For a good review of the case law, see Michael Power & Pierre Foucher. *Language rights and education*, 2nd ed. (Montreal: Yvon Blais, 2004).

⁴ [1996] 1 S.C.R. 825.

Court was sensitive to the rights of the teacher, the rights and interests of students, the concerns of parents (and the community) as well as the state's interest in a public school environment that is safe and welcoming and where school officials do not condone discrimination on the basis of one's religion or ethnicity. Put simply, the case involved an important rights conflict with a host of important stakeholders. In its judgement, the Court had to reconcile the teacher's constitutionally protected right to free speech with other compelling interests that are integral to the functioning of a healthy and respectful educational community.

In the context of Kindergarten to Grade 12 education and given the *Canadian Charter of Rights and Freedoms*, there is a growing body of jurisprudence (including the *Ross* decision) which reflects ongoing debates about who should ultimately maintain control of the formal and informal curriculum in our Canadian schools.⁵ In these cases, debates about curricular battles play out through rights conflicts, which our courts are required to resolve. These conflicts typically involve claims relating, directly or indirectly, to fundamental freedoms such as freedom of religion and freedom of expression as well as claims associated with the right to equality. In the realm of primary and secondary education, conflicts of rights may occur in different settings. These

⁵ Curriculum is what is taught in each grade or subject. According to Jon Young, Benjamin Levin & Dawn Wallin, there is a distinction between *formal curriculum* and *hidden curriculum*. See *Understanding Canadian Schools* 4th ed. (Toronto: Nelson, 2007), at 224. They define the former as "the subjects and courses" prescribed by the province and the school districts. *Ibid.* at 224-225. They define the latter in the following terms:

The term "hidden curriculum" was coined by Jackson ... who was among the first to point out that much of what the school teaches and what students learn does not appear in any curriculum guide. For example, schools may emphasize behaviour such as punctuality, obedience, truthfulness, independence, or competitiveness. In the eyes of many, these characteristics are more important than learning to solve quadratic equations or identify elements in the periodic table. Much of what happens in schools has to do with the influencing of behaviour, rather than with the learning of prescribed content or skills. *Ibid.* at 228.

I use the terminology *formal* and *informal* curriculum. My use of the term *informal* corresponds to the use of *hidden* as employed by Young et al. I also adopt their definitions for the purposes of my thesis.

include: public and secular schools, public and denominational schools (as protected under s. 93 of the *Constitution Act, 1867*⁶ and related constitutional provisions), and private schools. Conflicts may also arise in the context of home schooling.

In this thesis, I want to offer a critical assessment of the relevant Canadian jurisprudence where curricular disputes involving (directly or indirectly) conflicts of constitutional rights have been adjudicated. My critique will draw on the theoretical work of Rob Reich⁷ and Jeremy Waldron.⁸ Reich suggests that our best hope of understanding and resolving the curricular struggles related to the control of children's education requires a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the state and children. Building on Reich's conceptualization of the different interest holders, I identify a fourth stakeholder, namely, teachers, who have interests (e.g. an interest in freedom of expression) which are relevant for our analysis because these interests raise issues connected to curricular control and children's education. In my analysis, I apply Reich's matrix of interests to the extant body of jurisprudence to ascertain whether or not our courts are alive to the different interest holders in its treatment of cases involving conflicts of constitutional rights. I also want to know whether the interests of the four stakeholders overlap or conflict with another. Finally, I want to know how these interests are conceptualized by the court and whether this conceptualization is consistent with, or differs from, the one offered by Reich.

⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

⁷ "Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling" in Stephen Macedo & Yael Tamir, eds., *Moral and Political Education* (New York: New York Univ. Press, 2002), 275-313.

⁸ "Rights in Conflict", in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge Univ. Press, 1993), 203-224.

I also make use of Waldron's framework for how we might resolve conflicts of rights. In this regard, we must not forget that some of the special interests that parents, students and teachers have translate into constitutionally protected rights. For example, a parent who sends his or her child to a public school has an interest in ensuring that the child is free from religious indoctrination. This important interest is protected under s. 2(a) of the *Charter* which guarantees freedom of religion.⁹ In our study, a rights conflict occurs when a constitutionally protected right collides with an interest or another constitutionally protected right. In the first case, for instance, a parent's interest in home schooling, protected under s. 2(a) of the *Charter*, may conflict with the state's interest in monitoring what type of education home schooled children receive. In the second case, a student's right to equality (for example, his desire to bring his same sex boyfriend to the school prom) may collide with a denominational school board's right to religious freedom.

In both cases, Waldron's work offers analytical clarity for how we might better understand and resolve these types of conflicts. He maintains that rights conflicts are fundamentally about conflicts of duties and that we are likely to have more success reconciling conflicts of rights when we conceive of these conflicts in this manner. Applying Waldron's strategy for reconciling rights conflicts to the cases in my study, I want to know whether our courts (implicitly or explicitly) engage in a consideration of the underlying duties associated with the rights in question when they attempt to reconcile those rights with other interests or other rights. If they do, what duties

⁹Section 2(a) of the *Charter* reads as follows:

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;

(associated with the rights) do the courts highlight and why? If they do not, is their analysis and end result consistent with a Waldronian analysis of conflicts of rights?

My thesis is divided into a number of chapters. In Chapter One, I summarize and provide a brief critique of some of the most important contemporary theories of rights. In Chapter Two, I critically examine Ronald Dworkin's and Jeremy Waldron's approaches to resolving conflicts of rights. In Chapter Three, I offer a critical analysis of the relevant case law drawing primarily on the work of Reich and Waldron. In Chapter Four, I present some concluding remarks.

CHAPTER ONE: THEORIES OF RIGHTS

Introduction

Jeremy Waldron¹ notes that, in Western politics, “political morality and social choice are to be based wholly or partly on some account of the rights of the human individual. ...”²

This he explains is why the setting up of governments and the structuring of constitutions must be done in such a way to protect individual rights when these rights are threatened by the “private interests of those in power” or the “pursuit of other social goals and aspirations.”³ But, rights claims are controversial. Historically, not only have certain theorists challenged the idea that political morality begins with individual rights but they have bitterly opposed the notion that the individual may make claims against the wider community.⁴ Waldron claims that these controversies have also dominated the political practice and philosophy of the twentieth century. He suggests, however, that the modern discussion of rights has a couple of distinctive features. First, philosophers and jurists

¹ Jeremy Waldron, “Introduction” in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford Univ. Press, 1984), 1-20.

² *Ibid.* at 1. As Waldron observes: “We find it explicitly in the liberal theories of John Locke and Thomas Paine, implicitly in the moral and political philosophy of Immanuel Kant, and at least problematically in the work of Jean-Jacques Rousseau and John Stuart Mill.” *Ibid.*

³ *Ibid.*

⁴ As Waldron states:

Even in the liberal tradition, some philosophers insisted that rights could be taken seriously only if they were understood to be based on a prior theory of social and political morality such as the theory of utilitarianism. The idea that the rights of man could be a *starting-point* for political morality (in the way that a theory of human nature was taken to be a starting-point) was regarded by Jeremy Bentham and other utilitarians as wild and pernicious nonsense. Outside the liberal tradition, the critique was much more radical. Both conservative and socialist thinkers were appalled by what they took to be a celebration of the claims that the individual might make on his own behalf, asserting his own exclusive interests against those of the communities that had nurtured him and against the wider human community of which he was inevitably a part and in which alone his true fulfilment was to be found. As Karl Marx put it in an important early discussion, ‘none of the so-called rights of man goes beyond egoistic man, ... an individual withdrawn behind his private interests and whims and separated from the community.’ *Ibid.* 1-2.

have attempted “to be much more precise in their use of the concept of a right.”⁵ Second, the modern debate has been preoccupied with foundations. As Waldron explains, there is a concern “with the question of the fundamental assumptions and commitments that a plausible theory of rights might involve.”⁶

In this chapter, and with a focus on the second distinctive feature of the rights’ debate, namely foundations, I offer a summary and brief critique of some of the most important contemporary theories of rights. Chief among these are: Nozick’s view of rights as side constraints, Dworkin’s claim that rights are trumps, Raz’s Interest Theory of Rights, and Hart’s Choice Theory of Rights.⁷ Although these theories offer different views about individual rights, they all share a common and unshakeable commitment to the idea that we should treat individual persons as right holders who are bearers of a separate and distinctive moral identity. This concern for the individual is based on the notion that to show respect for the person means that we must not sacrifice him or her for the greater good of the community or for some utilitarian considerations because to do so would undermine the treatment to which s/he is entitled as a moral agent. In some deep sense, moral rights protect an individual’s capacity to live a life of freedom where s/he

⁵ *Ibid.* at 2. Wesley Hohfeld engaged in pioneering work, in relation to legal rights, when he set out the ambiguities in the use of phrases like “P has a right to X.”⁵ Hohfeld noted that the phrase may be used to convey any (combination) of the following ideas. First, the phrase may mean that ‘P has no duty (to a particular person Q or to people in general) not to do X.’ Hohfeld referred to this as a *privilege*. Second, talk of P’s right to do X may also mean that Q (or everyone) has a duty to let P do X. The existence of such a duty gives P some sort of claim against Q. Hence, Hohfeld referred to this second relation as a *claim-right*. Third, he noted that the concept ‘right’ might mean the ability of an individual to alter existing legal arrangements. Hohfeld qualified this as a *power*. Fourth, he observed that the term ‘right’ might be used to describe the correlate of the lack of a power – an *immunity* from legal change. In other words, if P has an immunity with regard to X, then Q (or maybe everyone) lacks the power to alter his legal position in regard to X. See Wesley H. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 1964) [reprinted from *Yale Law Journal* 1913 and 1917], 35-64. For a helpful summary of Hohfeld’s account of legal rights, see J. Feinberg, *Social Philosophy* (Englewood Cliffs, NJ, 1973), ch. 4.

⁶ *Ibid.* at 4.

⁷ This survey is obviously not an exhaustive study of theories of rights. Yet it attempts to highlight some of the more prominent modern theories of rights in the Anglo-American tradition.

can make some fundamental choices (such as what religion, if any, s/he chooses to practice) about what gives value and meaning to a life that is ongoing and always subject to revision. In a foundational sense, a rights thesis is necessary because it protects the integrity of the person as that person leads his or her life.

As a preliminary matter, it is important to recognize that the concept *right* can be used to mean different things. It can be used to describe a purely *legal right* whose existence does not depend upon any supporting moral justification. The term can also mean a *moral right*. According to Dwight Newman, “A moral right is an entitlement or justified claim whose justification does not depend on whether any legal or political system recognizes the right.”⁸ In our discussion that follows, our focus is on theories of rights that are understood as moral rights. Later in the thesis (in Chapter Three), we consider *constitutional rights* in our analysis of the relevant case law. As we will see, these rights (such as the right to freedom of expression and the right to equality) are enshrined in our Constitution and are really *moral* rights which have been granted special legal status.

Rights as Side Constraints

For Robert Nozick⁹, “Political philosophy is concerned only with certain ways that persons may not use others; ...”¹⁰ In the Nozickean world, rights act as *side constraints*. As Nozick explains: “A specific side constraint upon action toward others expresses the fact that others may not be used in specific ways the side constraint excludes.”¹¹ In other words, the rights of others determine the constraints upon one’s actions. He maintains

⁸ Dwight G. Newman, *Community and Collective Rights* (D. Phil. Thesis, Oxford University, 2005) [unpublished], at 9.

⁹ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

¹⁰ *Ibid.* at 32.

¹¹ *Ibid.*

that moral side constraints “express the inviolability of other persons”¹² and “reflect the fact of our separate existences.”¹³ For Nozick, a limited set of near absolute individual rights make up the foundations of morality.¹⁴ Provided s/he does not violate the same rights of others, each individual has the right not be killed or assaulted, has the right to be free from all forms of coercion or limitation of freedom and has the right not to have legitimately acquired property, taken, or the use of it limited.

The individual also has the secondary right to punish and exact compensation for violation of his rights, as well as to defend himself and others against such violation.¹⁵ Likewise, s/he has the positive right to acquire property by making or finding things and by transfer or inheritance from others and s/he has the right to make such transfers and binding contracts.¹⁶ In the Nozickian world, the basic rights which compose the moral landscape and express the inviolability of persons are few in number but are all of equal strength. This view of rights also has implications for the role of the state. For Nozick, the only legitimate state is one to which individuals have transferred their right to punish or to exact compensation from others. Acting as the “night-watchman”, the state of classical liberal theory is limited to the functions of protecting all its citizens against violence, theft, fraud and breaches of contract.¹⁷ Consequently, the state may not impose burdens on the wealth of some of its citizens, or restraints on the liberty of some of its

¹² *Ibid.*

¹³ *Ibid.* at 33. As Nozick states:

Why not ... hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. *Ibid.* at 32-33.

¹⁴ In the end, Nozick shies away from absolutism. He suggests that side constraints “may be violated in order to avoid catastrophic moral horror.” *Ibid.* at 30, footnote.

¹⁵ *Ibid.* at 106-107.

¹⁶ *Ibid.* at 171-172.

¹⁷ *Ibid.* at 261-28.

citizens, to attend to the needs or suffering of some other citizens, regardless of the compelling nature of those needs or suffering. Rather, the state may only tax its citizens to provide the police, the law courts and the armed forces necessary to defend and to perform its role as night-watchman. According to Nozick, taxing earnings or profits, to help relieve poverty or to promote the general welfare such as public education, is morally unjustifiable. Redistributing wealth in this manner would be “on a par with” forced labour¹⁸ and would make the government imposing such taxes into a “part owner” of the persons taxed.¹⁹

In its best light, Nozick’s libertarian view of individual rights can be seen as a powerful critique of utilitarianism which ignores the moral importance of the separateness of individuals.²⁰ After all, he is concerned about people being used by others for some larger social good. As Nozick states:

What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. .. To use a person in this way does not

¹⁸ *Ibid.* at 169.

¹⁹ *Ibid.* at 172.

²⁰ H.L.A. Hart sums up what he describes as the four main arguments against utilitarianism for its failure to take seriously the distinction between persons. According to Hart:

The first point is this: In the perspective of classical maximising utilitarianism separate individuals are of no intrinsic importance but only important as points at which fragments of what is located, i.e. the total aggregate of pleasure or happiness, are located. ... Secondly, utilitarianism is not, as sometimes it is said to be, an individualistic and egalitarian doctrine, although in a sense it treats persons as equals, or of equal worth. For it does this only by in effect treating individual persons as of no worth; since not persons for the utilitarian but the experiences of pleasure or satisfaction of happiness which persons have are the sole items of worth or elements of value. ... Thirdly, the modern critique of utilitarianism asserts that there is nothing self-evidently valuable or authoritative as a moral goal in the mere increase in totals of pleasure or happiness abstracted from all questions of distribution. ... Fourthly, according to this critique, maximising utilitarianism, if it is not restrained by distinct distributive principles, proceeds on a false analogy between the way in which it is rational for a single prudent individual to order his life and the way in which it is rationale for a whole community to order its life through government. The analogy is this: it is rational for one man as a single individual to sacrifice a present satisfaction or pleasure for a greater satisfaction later, even if we discount somewhat the value of the later satisfaction because of its uncertainty. See H.L.A. Hart, “Between Utility and Rights” (1979) 79 *Columbia L. Rev.* 828-846, at 829-831.

sufficiently respect and take account of the fact that he is a separate person, that his life is the only life he has.²¹

Yet, in spite of his concern for protecting what he views as the fundamental freedoms of individuals, his theory of rights is open to challenges. First, why should we be convinced that Nozick is right when he claims that human beings have the few and very stringent rights that he assigns to them? What are we to make of other important rights such as freedom of speech and freedom of religion? Although one may agree that people should have the right to be free from assault and physical aggression, one might suggest that being able to speak one's mind freely (by criticizing the government in power or the social habits of others) and being free to practice a religion of one's choice (because of one's deep and sincerely held religious beliefs) are equally deserving of rights protection as they protect activities and human interests of deep moral significance. By focusing exclusively on the physical safety and integrity of individuals, along with their property rights, Nozick gives these other fundamental moral rights no consideration in his thinly sculpted moral universe.

Second, Nozick's critique of utilitarianism is at times predicated on a false dichotomy that he sets up between his theory and utilitarianism. As H. L. A. Hart explains, Nozick's libertarian theory "assumes that the only alternative to the Nozickian philosophy of right is an unrestricted maximising utilitarianism which respects not persons but only experiences of pleasure or satisfaction; and this is of course a false dilemma."²² Hart goes on to observe that Nozick uses a number of misleading terms to convince us that we are confronted with two stark choices: these terms include "sacrifice of one individual for others", "treating one individual as a resource for others", "making

²¹ *Supra* note 9 at 33.

²² *Supra* note 20 at 834.

others a part owner of a man”, and “forced labour.”²³ Hart points out that Nozick’s theory of rights is not tenable because Nozick fails to distinguish between legitimate and illegitimate interferences with liberty. By way of example, Hart posits that it is wrong to lump together, and ban as equally bad, things so different in their impact on individual life as taking some of a man’s income to save others from great suffering and killing him or taking one of his vital organs for the same purpose.²⁴ After citing other examples to the same effect, Hart goes on to conclude:

[O]nce we distinguish between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life or the development of the personality, the idea that they all, like unqualified maximising utilitarianism, ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons disappears into the mist.²⁵

Third, not only are the number of rights posited by Nozick extremely limited but the category of rights he admits is unitary. *Negative* rights are the only game in town. After all, in the Nozickian world, there are only individual people leading individual lives. Yet, some modern liberals are moving away from this uni-dimensional view of negative rights to suggest that different categories of rights exist. As Trakman and Gatién explain:

Some [modern liberals] also argue that rights should extend beyond ‘first generation’ individual rights to ‘second generation’ social and economic rights and ‘third generation’ rights to political self-determination. Yet others argue for new and distinct categories of communal rights, such as cultural, ethnic, and religious rights.²⁶

²³ *Ibid.* at 834.

²⁴ *Ibid.*

²⁵ *Ibid.* at 835.

²⁶ Leon Trakman & Sean Gatién, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999) at 8. For a defence of collective rights, see also the work of Dwight G. Newman, *Supra* note 8.

To be sure, negative rights or the freedom from interference from others (including the state) are important if one wishes to lead a good life in a Western democracy. Yet, opportunities and resources are also crucial ingredients for a meaningful existence. Hart reminds us that, with the exception of a few privileged and lucky persons, the ability to shape a life of meaning is contingent upon the positive marshalling of social and economic resources. As Hart states:

It is not something automatically guaranteed by a structure of negative rights. Nothing is more likely to bring freedom into contempt and so endanger it than failure to support those who lack, through no fault of their own, the material and social conditions and opportunities which are needed if a man's freedom is to contribute to his welfare.²⁷

If Hart is correct, then the state may have some positive obligation to redistribute (at least minimally) resources (through for example a regime of progressive taxation) so that all citizens have a right to some basic form of economic and social protection. A recognition of welfare rights suggests that we should not penalize those who find themselves in difficult living conditions because of forces they themselves cannot or do not control. This is obviously incompatible with a Nozikian world view where an individual achieves his or her own ends in a life s/he shapes by his or herself.

In sum, Nozick posits a theory of rights premised on a rugged individualism that sees persons as distinctly separate, apart from other persons and the larger community to which they may happen to belong. He is correct to point out that individuals should not be treated as ends for larger social goals or for the purposes of other individuals. Yet, his thinking is problematic for a variety of reasons. First, his category of protected rights is very limited. Second, Nozick constructs a false boundary between his theory of rights and the alternative, a utilitarian world where only the maximization of experiences of

²⁷ *Supra* note 20 at 836.

pleasure or satisfaction counts. This ultimately leads him to fail to distinguish between legitimate and illegitimate interferences with liberty. Finally, Nozick's exclusive focus on negative rights denies the possibility that some individual lives will go better when the state upholds minimal welfare rights. These rights may be needed to help individuals who find themselves in difficult social and economic conditions (e.g extreme poverty and lack of educational opportunity) through no fault of their own. Unless some state assistance is available, these individuals may not have a fair chance to make a good life for themselves.

Rights as Trumps

For Ronald Dworkin, anyone who claims "to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is."²⁸ In this regard, he suggests that two fundamental ideas must govern our thinking.

The first one is the idea of human dignity. As Dworkin explains:

This idea, associated with Kant, but defended by philosophers of different schools supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.²⁹

The second idea is that of political equality. According to Dworkin:

This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.³⁰

²⁸ See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MASS: Harvard University Press, 1977) at 198.

²⁹ *Ibid.*

³⁰ *Ibid.* at 198-99. That governments must treat all their citizens with equal concern and respect is for Dworkin "a postulate of political morality." *Ibid.* at 272.

Since rights protect both dignity and equality, they act as *trumps* against unjustified intrusion, by the state, into the lives of its individual citizens. In the political realm, fundamental rights protect freedom of speech, association and civil liberties generally. In the personal realm, fundamental rights protect freedom of religion, freedom of life-style, and freedom with respect to sexual practices, pornography and a host of liberal concerns.

In the Dworkinian framework, rights are qualitatively different from other social interests and hence do not go into the general utility calculus like they do for utilitarians. Thus, rights recognize the moral separateness or personhood of each individual and this means that individuals cannot be sacrificed to promote the general good. In addition, Dworkin claims that the specific rights generated by the equal respect principle compensate for the otherwise insufficiently egalitarian character of the results dictated by utility. He maintains that *external preferences* prevent utilitarian calculations from delivering egalitarian results:

Utilitarian arguments fix on the fact that a particular constraint on liberty will make more people happier or satisfy more of their preferences, depending on whether psychological or preference utilitarianism is at play. But people's overall preference for one policy rather than another may be seen to include, on further analysis, both preferences that are *personal*, because they state a preference for the assignment of goods or opportunities to him and preferences that are *external*, because they state a preference for one assignment of goods or opportunities to others.³¹

This counting of external preferences along with personal preferences "corrupts" the egalitarian character of the utilitarian argument because the likelihood of anyone's preferences have to succeed will then depend, "not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have

³¹ *Ibid.* at 275.

for him or for his way of life.”³² In so doing, the right of everyone to be treated with equal concern and respect is denied. Dworkin gives the following example to illustrate his point:

Suppose ... that many members of the community disapprove on moral grounds of homosexuality, or contraception, or pornography, or expressions of adherence to the Communist party. They prefer not only that they themselves do not indulge in these activities, but that no else does so either, and they believe that a community that permits rather than prohibits these acts is inherently a worse community. These are external preferences, but, ... they are no less genuine, nor less a source of pleasure when satisfied and displeasure when ignored, than purely personal preferences. ...[H]owever, if these external preferences are counted, so as to justify a constraint on liberty, then those constrained suffer, not simply because their personal preferences have lost in a scarce competition for resources with the preferences of others, but precisely because their conception of a proper or desirable form of life is despised by others.³³

He claims that the only defensible form of utilitarianism to justify constraints on liberty is one that fixes exclusively on personal preferences and ignores external preferences. Yet, he maintains that utilitarianism is unable to make this distinction. This leads Dworkin to embrace the concept of an “individuated political right” which he views as “a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not.”³⁴ This anti-utilitarian defence of rights is also closely linked to the idea that rights are necessary to protect vulnerable minorities in the face of majoritarianism. Here, Dworkin notes that most of the law concerns social, economic, and foreign policy, and this policy must reflect, in the main, the majority’s view of the common good. Thus, as he explains, the institution of rights is critical “because it represents the majority’s promise to the

³² *Ibid.* at 235.

³³ *Ibid.* at 275-76.

³⁴ *Ibid.* at 277.

minorities that their dignity and equality will be respected.”³⁵ His philosophical rebuttal of utilitarian thinking, where numbers count and individual interests are always subject to the calculus of the whole or at least to all other interests affected by the individual’s interests, is an important contribution to our understanding of why we should take individual rights seriously. For Dworkin, fundamental rights protect minorities and dissenters from the tyranny of the majority.³⁶

Dworkin’s defence of fundamental rights as trumps has generated much controversy. We consider three challenges to his views about rights. First, legal philosophers have challenged the role he accords external preferences or prejudices in his theory of rights. For instance, H.L.A. Hart has pointed out that the moral rights we have, according to Dworkin, ultimately depend on what external preferences or prejudices prevail, at any given time and in any given society, to dominate in a utilitarian decision procedure or majority vote.³⁷ Thus, argues Hart, with the progressive liberalisation of a society where prejudices against homosexuality and the expression of heterodox opinions disappear, rights to these liberties will likewise wither away. As Hart notes: “So the more tolerant a society is, the fewer rights there will be; there will not merely be fewer occasions for asserting rights.”³⁸

This paradox, according to Hart, is compounded by another. Remember that Dworkin’s theory of rights is a response to an alleged defect of utilitarian argument. His theory only establishes rights against the outcome of utilitarian arguments about general

³⁵ *Ibid.* at 205.

³⁶ James W. Nickel is correct to point out that “it is not clear that there is a perfect congruence between the philosophical defects of utilitarianism and the practical defects of majoritarianism.” He notes, for instance, that utility may be promoted by actions of which the majority would not approve (e.g. torturing suspects); here the needed remedy is anti-utilitarian but not anti-majoritarian. See, “Dworkin On the Nature and Consequences of Rights,” (1977) 11 *Georgia Law Review*, 1115-1142, at 1128-9.

³⁷ *Supra* note 20 at 840.

³⁸ *Ibid* at 840.

welfare or a majority democratic vote in which external preferences are likely to tip the balance. With this in mind, Hart contends that Dworkin's theory "cannot provide support for rights against a tyranny or authoritative government which does not base its coercive legislation on considerations of general welfare or a majority vote."³⁹ Hence, as Hart explains, the Dworkinian argument does not establish a basis for individual rights at either end of the political continuum: in an extremely tolerant democracy or an extremely repressive tyranny.⁴⁰

More important, Hart claims that Dworkin's argument that denial of liberty on the basis of external preferences is a denial of equal concern and respect is erroneous. Hart reminds us that Dworkin views the inclusion of external preferences as a "form of double counting", something which Dworkin's theory will not admit. Hart considers the example where homosexuals are denied the same sexual freedom as their heterosexual counterparts because the external preferences of some heterosexuals (opposed to homosexuality) tip the balance against greater sexual liberty for gays. Hart contends that, from a dworkinian perspective, this result means that homosexuals suffer a loss of equal concern and respect because "their concept of a proper or desirable form of life is despised by others, and this is tantamount to treating them as inferior to or of less worth than others."⁴¹ Hence, based on Hart's reading of Dworkin, every denial of freedom on the basis of external preferences suggests that those denied are not entitled to be considered as equals. But, he contends that this leads to an unacceptable change in Dworkin's argument. As Hart states:

³⁹ *Ibid.*

⁴⁰ *Ibid.* Hart does acknowledge, however, that Dworkin might respond by saying that the reach of his argument "extends to contemporary Western democracies in which the allegedly corrupting 'external preferences' hostile to certain liberties are rife as prejudice." *Ibid.* at 840.

⁴¹ *Ibid.* at 842.

The objection is no longer that the utilitarian argument or a majority vote is, like double counting, unfair as a procedure because it counts in ‘external preference’, but that a particular *upshot* of the procedure where the balance is tipped by a *particular kind* of external preference, one which denies liberty and is assumed to express contempt, fails to treat persons as equals.⁴²

Hart goes on to add:

But this is a vice not of the mere externality of the preferences that have tipped the balance but of their content: that is, their liberty-denying and respect-denying content. But this is no longer to assign certain liberties the status of (‘anti-utilitarian’) rights simply as a response to the specific defects of utilitarianism as Dworkin claims to do. Yet that is not the main weakness in his ingenious argument. What is fundamentally wrong is the suggested interpretation of denials of freedom as denials of equal concern or respect. This surely is mistaken.⁴³

For Hart, denying homosexuals the right to form sexual relations is above all else an unjustified restriction of their liberty, with the attendant consequences related to their personal life and happiness. As he notes, “The evil is the denial of liberty or respect; not *equal* liberty or *equal* respect.”⁴⁴ Furthermore, as Hart observes: “[W]hat is deplorable is the ill-treatment of the victims and not the relational matter of the unfairness of their treatment compared with others.”⁴⁵

A second challenge that rights’ theorists like Dworkin face relates to the intelligibility and coherence of rights claims themselves. Dworkin claims, with respect to free speech, that most people who believe in rights would agree “that a man has a moral right to speak his mind in a non-provocative way on matters of political concern, and that this is an important right that the State must go to great pains to protect.”⁴⁶ He also argues that we can defend such important rights like freedom of expression on both instrumental

⁴² *Ibid.* at 843.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 845.

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 28 at 197. At the same time, he readily acknowledges that there is great controversy as to the limits of such paradigm rights. *Ibid.*

and constitutive grounds. On the first ground, free speech is important “not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us.”⁴⁷ As for the second ground, Dworkin maintains that free speech is valuable because “it is an essential and ‘constitutive’ feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.”⁴⁸ In sum, for liberals like Dworkin there is, in some meaningful sense, a core meaning to paradigmatic rights like freedom of expression and a relatively clear and coherent justification that one can point to in order to defend such a moral right.

Yet, this view of rights is not embraced by all. Members of the Critical Legal Studies (CLS) movement⁴⁹, for instance, argue that legal reasoning is riddled with openness,

⁴⁷See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford: Oxford Univ. Press, 1996). *Ibid.* at 200. He goes on to state:

Free speech is said to be important, for example, because as Holmes declared in his *Abrams* dissent, politics is more likely to discover truth and eliminate error, or to produce good rather than bad policies, if political discussion is free and uninhibited. Or for the reason Madison emphasized: that free speech helps to protect the power of the people to govern themselves. Or for the more commonsense reason that government is less likely to become corrupt if it lacks the power to punish criticism. According to these various instrumental views, America’s special commitment to free speech is based on a national endorsement of a strategy, a collective bet that free speech will do us more good than harm over the long run. *Ibid.*

⁴⁸ *Ibid.* He observes that this constitutive justification has two attributes of moral responsibility. First, morally responsible people must be free to make up their own minds about what is good and bad or true and false. Government denies citizens their moral responsibility when it rules that they cannot be trusted to hear offensive and dangerous opinions for fear that they might be persuaded by them. For Dworkin: “We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.” *Ibid.* He then describes the second attribute as follows:

For many people, moral responsibility has another, more active, aspect as well: a responsibility not only to form convictions of one’s own, but to express these to others, out of respect and concern for them, and out of a compelling desire that truth be known, justice served, and the good secured. Government frustrates and denies that aspect of moral personality when it disqualifies some people from exercising these responsibilities on the ground that their convictions make them unworthy participants. *Ibid.*

⁴⁹ For a helpful review of the origins and key ideas associated with CLS, see Mark Tushnet’s article, “Critical Legal Studies: An Introduction to its Origins and Underpinnings” in David Adams, ed., *Philosophical Problems in the Law* 3d ed. (Belmont CA: Wadsworth/Thomson, 2000) at 104-110. Tushnet explains how CLS got its start by drawing on the projects of Legal Realism and progressive historiography. He maintains that the core part of the CLS project is the rejection of the policy analysis

indeterminacy and contradiction. In the context of rights discourse, Duncan Kennedy declares: “Rights discourse is internally inconsistent, vacuous, or circular. Legal thought can generate plausible rights justifications for almost any result.”⁵⁰ For CLS disciples, systemic indeterminacy precludes authoritative rules from dictating a determinate outcome to legal cases.

In the domain of free speech, the CLS movement is predictably sceptical about the underlying liberal values. The scepticism is rooted in two grounds; one conceptual, the other political. Critics like David Kairys maintain that the right to free speech is more open than most legal standards to the subjective notions and whims of judges. In the context of the "clear-and-present" danger test⁵¹, he notes:

Since the scope of the dangers referred to has never been meaningfully defined (or even limited to unlawful activities), the clear-and-present-danger formulation amounts to the notion that speech loses its protection when it becomes persuasive or effective concerning something a judge views as dangerous.⁵²

Mark Tushnet expresses another concern related to a rights discourse which focuses on reification. He maintains that this precludes conceptualizing speech issues in a political context informed by people's own experiences:

Having thought of myself as exercising a right to free speech, I will find myself asking whether the Nazis in Skokie or pornographers also have the rights to free

approach to law whereby the right answer to legal disputes can be found by balancing the various social and particular interests identified in an appropriate analysis. For Tushnet, CLS has no constructive program in any meaningful or “deep sense.” Abandoning the search for social truth and social theory, Tushnet notes that the “dominant” view in CLS is based on deconstruction whose goal is to reveal how power actually operates in a social setting. In essence, the CLS position is a political one. As Tushnet observes: “Instead of having political positions flow from social theory, the dominant CLS project simply takes political positions.” *Ibid.* at 108. The author concludes by highlighting another project of CLS, namely the critique of rights. He maintains that rights are defined too abstractly to be helpful in resolving the claims presented in particular cases. He also adds that people cannot know what rights they have and there are no political methods that guarantee those rights. *Ibid.*

⁵⁰ Duncan Kennedy, “Legal education as Training for Hierarchy” in David Kairys, ed., *The Politics of Law: A Progressive Critique* 2d ed. (New York: Pantheon Books, 1982) 40-61, at 47.

⁵¹This is one of the primary American judicial standards used to restrict speech.

⁵² David Kairys, “Freedom of Speech” in David Kairys, ed., *The Politics of Law: A Progressive Critique* 2d ed. (New York: Pantheon Books, 1982) 140-171 at 165.

speech. Of course one can resist this pressure by defining the right to free speech in one way rather than another. Or one can concede the need to protect the "rights" of Nazis and pornographers as a prophylactic in a society not in general devoted to advancing the cause of the party of humanity. But the problem arises because of the reification of rights in the first instance. If we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues on the appropriate level.⁵³

For Tushnet, the theory behind the language of rights thus introduces artificial and unjustifiable constraints on a socially impoverished free speech principle.

On a political level, CLS members also claim that free speech practice benefits primarily the privileged and powerful. As Tushnet declares:

The first amendment has replaced the due process clause as the primary guarantor of the privileged. Indeed, it protects the privileged more perniciously than the due process clause ever did. . . . the first amendment stands as a general obstruction to all progressive legislative efforts.⁵⁴

From an economic perspective, Kairys points to the concentration of resources and wealth in the hands of the political elites. These people, he argues, shut out the poor and politically vulnerable by denying them access to the media.⁵⁵ This practice of denying access, therefore, seriously undermines the effectiveness of freedom of expression. In essence, the CLS attack on a Dworkinian defence of fundamental freedoms such as free speech vehemently denies the possibility that rights have some centre of settled substantive meaning and that those rights can be justified on principled and coherent grounds.

⁵³ Mark Tushnet, "An Essay on Rights" (1984) 62 Tex. L. Rev., 1363-1403 at 1383-84.

⁵⁴ *Ibid.* at 1387.

⁵⁵ As he states :

Technological, social and cultural changes have rendered the fruits of the free speech struggle somewhat obsolete. Television, radio, newspapers (increasingly concentrated and limited in number and diversity), and direct mail now constitute the battleground, but in the absence of mass-based demands, the law has allowed no meaningful inroads into these media for people or groups without substantial money or power. Indeed, accompanying the recent rightward political trend, there will be a decrease in popular access to these media and an increased "privatization" of the means of communication, exemplified by the attacks on the already weak "fairness doctrine" and the apparent acceptance of a highly privatized conception of cable television. *Supra* note 52 at 166.

A third attack on Dworkin's theory of rights relates to his claim that political morality is a rights-based morality.⁵⁶ Like many liberals, Dworkin attributes priority to the right over the good.⁵⁷ He contends that a liberal is committed to the view that "political decisions must be, so far as possible, independent of any particular conception of the good life, or what gives value to life."⁵⁸ Yet, this liberal priority of the right over the good has not gone unchallenged. Alasdair MacIntyre, for instance, condemns the very attempt to establish a system of principles, which are independent of a rationally justified conception of the human good.⁵⁹ John Gray claims that the priority of the right must be abandoned altogether.⁶⁰ Charles Taylor argues that we should move away from Dworkin's *procedural liberalism* to a *substantive liberalism* that is based in conceptions of what constitutes a *good life*.⁶¹ In a strident critique of John Rawls⁶², Michael Sandel posits that persons do not have the qualities that Rawls demands in order to justify the priority of the right over the good. Prior to its ends, the Rawlsian self must remain unencumbered by its actual and historical

⁵⁶ Dworkin contrasts this with a political theory that is either "goal-based" or "duty-based". In the former case, he claims that such a political theory would take some goal, like improving the general welfare, as fundamental. In the latter case, the theory would take some duty (such as obeying God's will) as being fundamental. *Supra* note 28 at 171-172.

⁵⁷ Alongside Dworkin, John Rawls is another prominent and modern, liberal theorist who espouses his commitment to the priority of the right in these terms:

We can express this by saying that in justice as fairness the concept of right is prior to that of the good. A just social system defines the scope within which individuals develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which these ends may be equitably pursued.

See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 31. More recently, Rawls has written:

The priority of right gives the principles of justice a strict precedence in citizens' deliberations and limits their freedom to advance certain ways of life. It characterizes the structure and content of justice as fairness and what it regards as good reasons in deliberation.

See his *Political Liberalism* (New York: Columbia Univ. Press, 1993) at 209.

⁵⁸ See Ronald Dworkin, "Liberalism", in Michael J. Sandel, ed., *Liberalism and Its Critics* (Cambridge: Cambridge University Press, 1982) at 64.

⁵⁹ See "The Privatization of Good: An Inaugural Lecture", in C.F. Delaney, ed., *The Liberalism-Communitarianism Debate* (Lanham, MD: Rowman & Littlefield Publishers, 1994) at 1.

⁶⁰ See "Agonistic Liberalism" (Winter 1995), 12(1) *Social Philosophy & Policy* 111, at 121.

⁶¹ "The Politics of Recognition", in Amy Gutmann, ed., *Multiculturalism* (Princeton: Princeton Univ. Press, 1994) at 61.

⁶² *Supra* note 57.

circumstances. Yet, Sandel argues for the opposite. He argues that real persons are encumbered by conceptions of the good. As a result, the political order must likewise be encumbered. This is necessary so that justice and the right remain subject to the good.⁶³

Although Sandel does not specifically address Dworkin's theory of rights in his work, Sandel's views of the importance of rights, and the limits that we can place on them, represent a serious attack on Dworkin's rights-based morality. Sandel frames rights claims in terms of their relationship to the good: "The question is not whether rights should be respected but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good."⁶⁴ For Sandel, justice is relative to the good, not independent of it. More specifically, he argues that, "rights depend for their justification on the moral importance of the ends they serve."⁶⁵

Sandel gives one an even clearer sense of what his arguments hold for a critique of Dworkin's theory of rights in his brief discussion of two paradigmatically important rights in the introduction of *Liberalism and the Limits of Justice*.⁶⁶ The rights he considers are freedom of religion and freedom of expression. In the first scenario, Sandel claims that the case for according special protection to freedom of religion presupposes that religious belief "produces ways of being and acting that are worthy of honor and appreciation - either because they are admirable in themselves or because they foster qualities of character that make good citizens."⁶⁷ He acknowledges that this approach passes judgment on the content of the ends that rights promote: "[T]he moral justification for a right to religious liberty is unavoidably judgmental; the case for the right cannot

⁶³ See *Liberalism and the Limits of Justice*, 2d ed (Cambridge: Cambridge Univ. Press, 1998), at 133-174.

⁶⁴ *Ibid.* at 186.

⁶⁵ *Ibid.* at xi.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at xiii-xiv.

wholly be detached from a substantive judgment about the moral worth of the practice it protects.”⁶⁸ Sandel contrasts his approach with the liberal justification for protecting religious liberty (including a Dworkinian defence of freedom of religion) where people are free to live autonomously, to choose and to pursue their values for themselves.⁶⁹ Hence, by implication, Sandel is highly critical of rights theorists like Dworkin where the right’s justification does not depend on the moral worth of the practice it protects.

In his free speech example, Sandel notes that liberals refuse bans on offensive or unpopular speech because these restrictions “fail to respect each citizen’s capacity to choose and express his or her opinions.”⁷⁰ Liberals might still restrict speech likely to cause significant harm, such as violence, for example. Yet, Sandel claims that liberals (this would of course include Dworkin) refuse to restrict hate speech⁷¹ because their definition of harm is unduly constrained by the liberal conception of the person:

No hate speech could constitute harm in itself, for on the liberal view, the highest respect is the self-respect of a self independent of its aims and attachments. For the unencumbered self, the grounds of self-respect are antecedent to any particular ties and attachments, and so beyond the reach of an insult to ‘my people.’⁷²

He observes that liberals will treat Holocaust survivors who objected to neo-Nazi groups marching through their streets⁷³ no differently from the Southern segregationists who opposed Martin Luther King, Jr. marching in their communities.⁷⁴ Here, Sandel

⁶⁸ *Ibid.*

⁶⁹ As Sandel observes:

According to this view, government should uphold religious liberty in order to respect persons as free and independent selves, capable of choosing their own religious convictions. The respect the liberal invokes is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one’s religion freely. On the liberal view, religious beliefs are worthy of belief, not in virtue of their content but instead in virtue of being ‘the product of free and voluntary choice.’ *Ibid.* at xii.

⁷⁰ *Ibid.* at xiv.

⁷¹ Absent its likelihood to provoke some actual physical harm.

⁷² *Ibid.*

⁷³ This is the infamous Skokie case. See *Collin v. Smith*, 578 F.2d 1198 (1978).

⁷⁴ See *Williams v. Wallace*, 240 F. Supp. 100 (1965).

challenges what he sees as “the folly of the nonjudgmental impulse”⁷⁵ of liberals who insist on being neutral with respect to the content of the speech, thereby allowing both marches to proceed. He rejects this approach and draws the following distinction between the two types of marches:

The obvious grounds for distinguishing the cases is that the neo-Nazis promote genocide and hate, whereas Martin Luther King, Jr. sought civil rights for Blacks. The difference consists in the content of the speech, in the nature of the cause. There is also a difference in the moral worth of the communities whose integrity was at stake. The shared memories of the Holocaust survivors deserve a moral deference that the solidarity of the segregationists does not.⁷⁶

Whereas Dworkin would argue that free speech must allow individuals to express morally despicable opinions that others find offensive and hurtful, Sandel claims that this is only possible in a world of political morality that wrongfully asserts the priority of the right over the good.

Joseph Raz’s Interest Theory of Rights

In *The Morality of Freedom*⁷⁷, Joseph Raz articulates and defends what has come to be known as an Interest Theory of rights. Raz proposes the following definition of rights:

‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.⁷⁸

In essence, rights ground duties in the interests of others. Raz suggests that some rights derive from others. These he calls *derivative rights*. He distinguishes these from *core rights* which he defines as non-derivative rights. By way of example, he notes that his right to walk on his hands is based on his interest in being free to do as he wishes, on which his general

⁷⁵ *Ibid.* at 15.

⁷⁶ *Ibid.* xv-xvi.

⁷⁷ (Oxford: Clarendon Press, 1986).

⁷⁸ *Ibid.* at 166.

right to personal liberty is directly based. Hence, the right to personal liberty is the core right from which the other derives.⁷⁹

Raz also embraces a correlativity thesis which holds that to every right there is a correlative duty. He qualifies this thesis with three clarifications. First, he suggests that many rights ground duties which fall short of securing their object, and they may ground many duties and not just one. By way of example, he points out that a right to personal security does not require others to shield a person from all manner of injury. But, the right entails the foundation of several duties, namely, the duty not to assault, rape, or imprison the right-claimant. Second, it is unacceptable “to simply translate statements of rights into statements of corresponding duties.”⁸⁰ A right of one person is not a duty on another. As he observes, it is the ground of the duty which “justifies holding that other person to have the duty.” Finally, no closed list of duties corresponds to the right.⁸¹ Changing circumstances may give rise to new duties based on the old right. As Raz explains: “This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical thought.”⁸²

In terms of who can exercise rights, Raz makes it clear that only those whose well-being is “intrinsically valuable” can have rights.⁸³ From a justificatory perspective, he notes, however, that interests which are both of intrinsic value and instrumental value can be the basis of rights. Furthermore, Raz views interests as part of the justification of

⁷⁹ *Ibid.* at 168-169.

⁸⁰ *Ibid.* at 171.

⁸¹ Raz also notes that we might know that a right exists, along with the reasons for the right, yet might not know who is bound by duties based on the right or what exactly these duties are. By way of example, he suggests that a person may know that each child has a right to education. But we may not know who has the duty in this regard. This question ultimately involves principles of responsibility to determine the order of responsibility of different persons to the right-holder. *Ibid.* 184-185.

⁸² *Ibid.* at 171.

⁸³ *Ibid.* at 176-180.

the rights. In turn, the rights are part of the justification of the duties. As he declares: “Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.”⁸⁴ He also claims that since rights ground requirements for action in the interest of other people, these rights “assume special importance in individualistic moral thinking.”⁸⁵ By the same token, he flatly rejects moral individualism and Dworkin’s argument that (political) morality is rights-based.⁸⁶ He prefers to find the foundations of morality elsewhere, namely, in duties, goals, and virtues.⁸⁷

Unlike Dworkin, Raz does not claim that rights are fundamental since they derive from interests. The Razian right is based on the well-being of individuals. Yet, his approach to rights shows a concern for the respect of persons which may not be totally incompatible with Dworkin’s notion that individuals have rights because they are deserving of equal respect and concern. Although Raz recognizes that those who view rights as based on respect for persons deny that respect for persons means giving due weight to their interests⁸⁸, he suggests that, “One may claim that respect for persons consists in respecting some of their interests only.”⁸⁹ As Raz explains:

⁸⁴ *Ibid.* at 181.

⁸⁵ *Ibid.* at 180.

⁸⁶ Not surprisingly, Raz is reluctant to embrace Dworkin’s view of rights as trumps. As Raz declares: Given that rights are based on people’s interests it cannot be claimed that they are trumps in the sense of overriding other considerations based on individual interests. Moreover, in the discussion of collective rights ... we will see that that collective or group rights represent the cumulative interests of many individuals who are members of the relevant groups. It follows that there is nothing essentially non-aggregative about rights. Nor are rights necessarily agent-relative considerations. Some rights and some duties are or may be agent-relative, but there is no reason to think that all are nor do I know of anyone who has argued that. *Ibid.* at 187.

⁸⁷ *Ibid.* at 193. Raz rests his moral outlook on the twin ideas of the constitutive role of a common culture, on the one hand, and of individual action on the other. *Ibid.* See Chapter 8.

⁸⁸ As Raz notes:

The reason is clear. Combining the claim that respect for persons consists in having due regard for their interests with the claim that rights rest on respect for persons leads to the conclusion that a person has a right that his interests will be duly respected. There is no apparent way by which this line of thought could explain the distinction between a person’s interests which are protected by rights and those which are not. *Ibid.* at 190.

⁸⁹ *Ibid.* at 190.

In particular, it may be said, it consists in respecting their interest in being free to choose to do and to live as they like. This may be thought to explain why some interests people have are not protected by rights. Rights protect not their interests generally but only their interest in freedom. The capacity to be free, to decide freely the course of their own lives, is what makes a person. Respecting people as people consists in giving due weight to their interest in having and exercising this capacity. On this view respect for people consists in respecting their interest to enjoy personal autonomy.⁹⁰

Hence, for Raz, rights play a central role in the protection of freedom. It is little surprise then that rights such as freedom of speech, freedom of religion and the right to be free from discrimination figure prominently in his analysis. These important rights are necessary to protect the ideal of the free or autonomous person. According to Raz, this respect for personal autonomy means that there is a “limit to what can be demanded of an individual in the name of collective goals and of communal welfare.”⁹¹ At the same time, Raz contends that there is a collective aspect or dimension associated with liberal rights. In other words, some of these rights depend “for their value on the existence of a certain public culture, which their protection serves to defend and promote.”⁹² By way of example, Raz notes that religious freedom has traditionally been defended on the grounds that it protects an important individual interest, namely, individual conscience. Yet, he points out that this interest and the ability to serve it have rested in practice on the secure existence of a public good: “the existence of religious communities within which people pursued the freedom that the right guaranteed them.”⁹³ In this sense, as Raz observes, “The importance of liberal rights is in their service to the public good.”⁹⁴

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at 250.

⁹² *Ibid.* at 245.

⁹³ *Ibid.* at 251. He makes a similar argument for freedom of expression.

The precise boundaries of freedom of speech are notoriously controversial, but its core is and always was the protection of political speech and of the free exchange of information which is of public interest. It benefits all those who are subject to that political system. Thus while political theorists often highlight the protection for the individual dissident which it provides, in practice its

Raz's Interest Theory of Rights offers a powerful account of moral rights which is sensitive to both the individual and collective dimensions of rights. Yet, his theory is open to challenge. First, Rowan Craft⁹⁵ claims that Raz's Interest Theory fails to offer an account of unjustified rights. On the Razian account, Craft observes that a right exists when an interest justifies a duty. This leaves no room for unjustified rights with a purely legal or institutional existence. Yet, as Craft argues, such unjustified rights surely can exist. He gives the example of the feudal 'droit de seigneur' as the example of an unjustified right that could exist if it was legally enshrined, even though it would obviously not be justified.⁹⁶ Craft also contends that Raz's theory implies that every right must serve its holder's interest and that this is wrong. He maintains that there can be some rights which do not serve their holders' interests in any way. For instance, he imagines the case where he holds property rights in some ugly and worthless garden gnomes. Their wretched state precludes him from selling them and from engaging in an aesthetic appreciation of their appearance. He also admits that he is not sentimentally moved by the manner in which he came to acquire them. On this basis, he concludes that his property rights in his gnomes do not serve his interests in any way.⁹⁷

Second, there exists an unresolved tension which arises from the justification Raz offers for the existence of rights. He notes that rights can be defended on both

primary role has been to provide a collective good, to protect the democratic character of the society. *Ibid.* 253-254.

⁹⁴ *Ibid.* at 256.

⁹⁵ "Rights: Beyond Interest Theory and Will Theory?" (2004) 22 *Law & Philosophy* 347-397.

⁹⁶ *Ibid.* at 372.

⁹⁷ *Ibid.* at 372-373. Craft does acknowledge, however, that one might respond by saying that his property rights in his gnomes serve his interests in an indirect sense, in that his property rights in the gnomes are parts of an overall property system whose existence serves his interests. In response, Craft states:

If my gnomes really are useless, then it seems strange to say that my property rights over the gnomes nonetheless serve my interests, albeit in an 'indirect sense'; it seems more natural to say that they do not serve my interests at all, even though the overall institution of property rights does serve my interests. *Ibid.* at 373.

instrumental and intrinsic grounds. Yet, his discussion of fundamental rights such as freedom of expression focuses exclusively on an instrumental view of rights. Rights are important to the extent that they serve the interests of the individual and the community.

In the context of free speech, Raz declares:

The precise boundaries of freedom of speech are notoriously controversial, but its core is and always was the protection of political speech and of the free exchange of information which is of public interest. It benefits all those who are subject to that political system. Thus while political theorists often highlight the protection for the individual dissident which it provides, in practice its primary role has been to provide a collective good, to protect the democratic character of the society.⁹⁸

It is thus unclear how, if at all, a constitutive justification might figure into Raz's analysis of free speech in these circumstances. In other words, would a constitutive justification of free speech protect different kinds of speech activity other than those contemplated by an instrumental defence of freedom of expression or would it simply be coterminous with a consequentialist justification?

Finally, the Razian approach to rights places a lot of emphasis on personal autonomy as a moral foundation for rights. For Raz, this value above all others, justifies the existence of certain normative constraints once we have recognized that individuals have sufficiently important interests which ground duties in others. Yet, autonomy is a contested value. While Dworkin acknowledges the important role speaker and listener autonomy play in his justification of free speech, he suggests that equality, and not autonomy, should be the foundation for any defensible theory of rights. And libertarians like Nozick argue for unrestrained liberty.

As we have already seen in our critique of Dworkin, strong communitarians like Sandel challenge the liberal priority of the right over the good. Unlike Dworkin, Raz

⁹⁸ *Supra* note 77 at 253-254.

certainly incorporates a collective dimension into his rights analysis as he claims that individual rights both depend on and serve collective goods. Yet, critics like Sandel will claim that Raz does not go far enough because his preoccupation with individual autonomy ultimately gets in the way of a strong and robust defence of community. Hence, Sandel is unlikely to be convinced that liberal rights, predicated on a value such as individual autonomy, are the best means to attain freedom and equality.

Some feminist scholars might also take issue with Raz's defence of autonomy for his theory of rights. For some, the idea of autonomy envisions human beings as separate, discrete and self-determining. Certain feminist scholars have challenged what they have come to see as a male view of autonomy which seeks to erect boundaries between individuals. Robin West, for instance, claims: "Men value autonomy from the other and fear annihilation by him. Women value intimacy with the other and fear separation from her."⁹⁹ Bettina Quistgaard maintains that the "separate" self is highly underinclusive because it fails to acknowledge the self's inherently relational and interdependent nature. Furthermore, this has negative implications for how we think about fundamental rights such as freedom of expression:

[F]eminist critiques of autonomy counter the assumption of a separate, fixed, and self-defining individual in need of protection - through such rights as freedom of expression - against interference by the collective with its selfhood and its freedom. They suggest, instead, that the individual is fundamentally related to other individuals and to society/culture more generally. Moreover, they assert that individual identity is constituted in and by these relationships.¹⁰⁰

Since Raz claims, in his defence of the individual, that "The capacity to be free, to decide freely the course of their own lives, is what makes a person," he runs the risk of facing

⁹⁹ "Jurisprudence and Gender" (1988) 55(1) *Univ. Chi. L. Rev.* 1-72, at 28.

¹⁰⁰ "Pornography, Harm and Censorship: A Feminist (Re) Vision of the Right to Freedom of Expression" (1993) 52 *Univ. of Toronto Faculty Law Rev.* 132-168 at 147.

the charge, from certain feminists, that he places an unduly high and unjustified premium on the value of autonomy.

H.L.A. Hart's Choice Theory of Rights

Certain rights theorists believe that a right essentially gives effect to or protects the right holder's freedom of choice or will about a particular issue.¹⁰¹ Chief among these is H.L.A. Hart who articulates his theory of rights in his essay "Are There Any Natural Rights?"¹⁰² Hart's basic thesis is that if moral rights exist at all, then there is at least one natural right¹⁰³, and that is "the equal right of all men to be free."¹⁰⁴ He further clarifies what he means by this while stating that any adult human being capable of choice (1) has the right to forbearance on the part of all others from using coercion or restraint against him (except to hinder coercion or restraint) and (2) is at liberty to take any action which does not coerce or restrain or is not designed to injure other persons.¹⁰⁵ Hart is quick to add that man has no absolute or unconditional right to do or not to do any particular thing or to be treated in any particular way. Furthermore, coercion or restraint of any action might be justified in special conditions that are consistent with his general principle.¹⁰⁶

¹⁰¹ Certain authors use the term "Will Theory" in lieu of "Choice Theory." The terms are synonymous and I express a preference for Choice Theory in the thesis.

¹⁰² See (1955) 64 (2) *Philosophical Review* 175-191. Other prominent choice theorists include L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987) at 42-43; and Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994) at 57-58.

¹⁰³ Hart offers two reasons, emphasized he notes by classical theorists of natural rights, to describe the right as a *natural* right:

(1) This right is one which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other. (2) This right is not created or conferred by men's voluntary action; other moral rights are. *Ibid.* at 175.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 176.

Hart points out that to have a right “entails having a moral justification for limiting the freedom of another person and for determining how he should act.”¹⁰⁷ He also suggests that there are two broad categories of moral rights: special rights and general rights. Hart defines special rights as follows:

When rights arise out of special transactions between individuals or out of some special relationship in which they stand to each other, both the persons who have the right and those who have the corresponding obligation are limited to the parties of the special transaction or relationship.¹⁰⁸

He notes that promises are the most obvious cases of special rights but that these rights can occur in other circumstances, such as when a person surrenders his rights to another to take precautions for his health or happiness.¹⁰⁹ As for general rights, Hart declares:

In contrast with special rights, which constitute a justification peculiar to the holder of the right interfering with another’s freedom, are general rights, which are asserted defensively, when some unjustified interference is anticipated or threatened, in order to point out that the interference is unjustified. ‘I have the right to say what I think.’ ‘I have the right to worship as I please.’¹¹⁰

In his subsequent article, “Between Utility and Rights”,¹¹¹ Hart notes that some liberties such as freedom of worship and freedom to form sexual relations are important for the conduct of a meaningful life or the development of the personality.¹¹² Because such liberties play a central role in human existence, Hart observes that they “are too precious to be put at the mercy of numbers even if in favourable circumstances they win out.”¹¹³ In

¹⁰⁷ *Ibid.* at 183.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* 183-187. Hart suggests that special rights may also arise where the parties have a special natural relationship, as in the case of parent and child. He claims that, “The parent’s moral right to obedience from his child would I suppose now be thought to terminate when the child reaches the age “of discretion.” *Ibid.* at 187.

¹¹⁰ *Ibid.* at 187.

¹¹¹ *Supra* note 20.

¹¹² *Ibid.* at 835 and 845.

¹¹³ *Ibid.* at 845.

this sense, Hart adopts an anti-utilitarian view of rights.¹¹⁴ Yet, he readily acknowledges that not all interferences with liberty are of comparable value. Hence, Hart would favour wealth redistribution (through higher taxes on the wealthy) as a justified interference on liberty to help those, through no fault of their own, who find themselves lacking opportunities and resources because of debilitating social and economic conditions.¹¹⁵

Hart's account of rights might be challenged on a number of fronts. First, he claims that only adults have an equal right to be free. In this regard, he notes that they may exercise general rights such as the right to free speech and the right to religious freedom. Yet, it is unclear why children under certain circumstances cannot exercise similar rights. One might well understand why it may be difficult to talk about a 6 year old exercising her right to religious freedom especially if s/he does not have an awareness of what religion or belief is and depends (almost) exclusively upon his or her parents to make all the important life decisions regarding the child's welfare. In this sense, the child is not developmentally prepared or ready to exercise his or her freedom. But, can the same be said for an intelligent and mature 15-year? If this person writes an article to the local newspaper critical of government policy as it relates to multiculturalism or castigates his or her high school policy (in the school newspaper) about student discipline, should s/he automatically be excluded from the class of moral right holders

¹¹⁴ Hart's opposition to utilitarianism is opposition to a specific kind of utilitarianism. As he states: The modern insight that it is the arch-sin of unqualified utilitarianism to ignore ... the moral importance of the separateness of persons is, I think, in the main, a profound and penetrating criticism. It holds good when utilitarianism is restated in terms of maximum want or preference satisfaction and minimum want or preference frustration rather than in the Benthamite form of the balances of pleasure and pain as psychological states, and it holds good when the maximand is taken to be the average rather than total general welfare. But it is capable of being abused to discredit all attempts to diminish inequalities and all arguments that one man's loss may be compensated by another's gain such as have inspired policies of social welfare; all these are discredited as if all necessarily committed the cardinal sin committed by maximising utilitarianism of ignoring the separateness of persons. *Ibid.* at 831.

¹¹⁵ *Ibid.* at 835-836.

simply because s/he is not an adult? If we adopt Hart's claim that only adults may exercise moral rights, we deny non-adults such as teenagers the right to engage (in a reasonable and responsible way) in the exercise of an important moral right, namely, the right to free speech. This result seems problematic if we acknowledge that teenagers are morally separate persons who have equally valid claims (as adults) to significant moral rights such as freedom of expression.

Second, Hart's justification for the exercise of general moral rights such as freedom of speech, freedom of worship and freedom to engage in sexual relations may be somewhat limited. We may well agree with him that these are important general rights that are necessary because they serve important purposes such as making life meaningful and developing human personality. Yet, this justification for rights is primarily instrumental or consequentialist. Other rights theorists, such as Dworkin, remind us that this type of justification does not tell the whole story. Rights may also be defended on other grounds. In other words, we need not rely exclusively on the good or the purpose that rights serve to defend these rights. Moral rights such as the right to free speech and the right to freedom of religion may be defended (at least according to Dworkin) for reasons which relate to the deep respect that should be accorded individuals. This defence of rights does not rely on an instrumental view of things. Along Dworkinian lines, a moral right such as freedom of expression must protect speech that expresses racial or sexual hatred or bias in order to protect the moral integrity of individuals. By focusing mainly on a consequentialist view of rights, Dworkinian liberals might say that Hart's defence of rights is underinclusive.

Finally, Hart's defence of rights rests on a morally contested view of why rights are important in the first place. For Hart, moral rights are important because they protect individual choice and liberty. Yet, as we have already seen, this perspective is contested both from within and outside the liberal rights paradigm. Dworkin champions equality in his defence of rights while Raz favours autonomy. Outside the liberal worldview, communitarians and certain feminists challenge the special place accorded to rights. For communitarians, the right must give way to the good. Some feminists claim that the privileged role accorded to rights puts too much emphasis on the individual and negative freedoms. This, they maintain, fails to recognize the relational and interconnected nature of our personhood.

Conclusion

In this chapter, we have considered the theories of individual moral rights of Nozick, Dworkin, Raz and Hart. Each theorist offers a distinctive justification for why we should treat individual rights as a matter of fundamental importance. Nozick contends that rights act as *side constraints*, which place restrictions on one's actions. Dworkin argues that rights act as *trumps*, meaning that governments must treat all individuals with equal concern and respect. Raz defends rights on the basis that rights protect special interests, which ground duties in others. Finally, Hart claims that natural rights guarantee the equal right of all men to be free.

Although these justifications for moral rights are different, they all, nonetheless, share a concern for the individual as a separate person and in this sense are anti-utilitarian or anti-majoritarian. All four theorists acknowledge that respect for the individual cannot simply be conflated with the wishes or preferences of the greatest number. From a moral

vantage point, individuals matter because they are distinct persons who pursue the good life through individual projects and commitments. At the same time, and unlike the other three theorists, Raz's view of rights is unique given his concern for the collective aspect or dimension of individual rights. For Raz, liberal rights not only protect individual autonomy and freedom. These rights are important because they also serve the public good.

Theories of individual rights are controversial and hence not immune from critique. Members of the Critical Legal Studies (CLS) movement, communitarians and certain feminists have all challenged these theories. CLS scholars, like Duncan Kennedy and Mark Tushnet, have claimed that rights discourse is indeterminate and highly political. Communitarians, like Sandel, suggest that the good should take precedence over the right. Certain feminist scholars, such as Bettina Quistgaard, note that rights discourse focuses too much attention on negative freedoms and thus omits to acknowledge the relational and interconnected nature of individuals. In spite of these critiques, I maintain that a defence of individual moral rights along Dworkinian/Razian lines should not be abandoned. A concern for treating individuals with respect, by not simply conflating their fundamental or special interests with those of others including the community or the majority, means that separate persons cannot be ignored or sacrificed for the common good or some other social project. At present, in liberal democracies, individual moral rights arguably provide the best form of protection against state or communal action which fails to treat individuals as ends in themselves.

CHAPTER TWO: CONFLICTS OF RIGHTS

Introduction

What happens when fundamental moral rights, such as freedom of expression, conflict with other moral considerations such as social utility or the public interest? And what transpires when fundamental freedoms conflict with each other, such as freedom of expression and the right to be free from discrimination? How should we resolve these kinds of disputes? Different theorists offer different answers to these difficult and persistent moral dilemmas, which rights conflicts represent.¹

In this chapter, I provide a description and critical assessment of two approaches to resolutions of conflicts of rights offered by two leading liberal theorists: Ronald Dworkin and Jeremy Waldron.² I also draw on the insights from this critique to consider three hypothetical scenarios involving freedom of expression and conflicts of rights. The purpose of this examination is to probe further the tensions and challenges, which rights theorists must confront when faced with various and difficult situations involving rights conflicts.

¹ Conflicts of rights are obviously not limited to conflicts involving fundamental moral rights. They can of course entail conflicts involving legal rights and political rights. In my thesis, however, the analysis focuses on conflicts of a constitutional nature in the context of education law where fundamental freedoms (namely freedom of expression and freedom of religion) and the right to equality are implicated. These constitutionally protected rights are also obviously moral rights. In other words, we would still have a moral justification for defending freedom of expression even if it were not formally enshrined in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Consequently, in this chapter, my discussion of conflicts of rights is confined to an examination of conflicts of moral rights.

² In Chapter One, I considered the theories of rights of four influential theorists: Robert Nozick, Ronald Dworkin, HLA Hart, and Joseph Raz. Although Nozick, Hart and Raz acknowledge that rights are not absolute, they do not address the issue of conflicts of moral rights in a detailed manner. Hence, in this chapter, I have limited my discussion of conflicts of rights to the work of Dworkin and Jeremy Waldron. I ultimately conclude that Waldron offers the most satisfactory and sophisticated approach to resolving conflicts of rights and draw on his work to inform the analysis of my case law in Chapter Three.

Ronald Dworkin and Conflicts of Rights

As we saw in Chapter One, Dworkin argues that individual rights are vitally important because they protect both dignity and equality. Thus, rights act as *trumps* against unjustified intrusion, by the state, into the lives of its individual citizens. Since rights recognize the moral personhood of each individual, individuals cannot be sacrificed to further the general good. In essence, fundamental rights protect minorities from threats posed by a tyrannical majority.

Dworkin considers two models that help us to think about how we might resolve conflicts where the rights of the individual come up against the interests of society. The first model is a balancing model, which he describes as follows:

The first model recommends striking a balance between the rights of the individual and the demands of society at large. If the Government infringes on a moral right (for example, by defining the right of free speech more narrowly than justice requires), then it has done the individual a wrong. On the other hand, if the Government inflates a right (by defining it more broadly than justice requires) then it cheats society of some general benefit, like safe streets, that there is no reason it should not have. So a mistake on one side is as serious as a mistake on the other. The course of government is to steer to the middle, to balance the general good and personal rights, giving to each its due.¹

Dworkin rejects the balancing model for two reasons. First, he maintains that treating collective goals as society's rights is both confusing and dangerous. If collective goals acquire the status of collective rights that can win out in a competition with individual rights, then the latter rights are doomed.² Second, Dworkin argues that one should not accept the position that mistakenly inflating a right is as bad as deflating one. After all, individual rights are based on considerations of dignity and equality unlike collective

¹ *Taking Rights Seriously* (Cambridge, MASS: Harvard University Press, 1977) at 197-98.

² *Ibid.* at 199.

goals.³ He reasons that, in most cases, individual rights are more important than collective goals and that in borderline cases we should favour individual rights over collective goals even if the government “pays a little more in social efficiency than it has to pay.”⁴ He thus favours a different model tipped clearly in favour of individual rights:

The second model treats abridging a right as much more serious than inflating one, and its recommendations follow from that judgment. It stipulates that once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based.⁵

Dworkin does, however, accept that the use of ‘balancing’ is appropriate when one right conflicts with another. By way of example, he refers to the conflict that arises between the Southerner’s claim to freedom of association and the black man’s claim to an equal education. In these circumstances, “Then the Government can do nothing but estimate the merits of the competing claims, and act on its estimate.”⁶ Dworkin also suggests that there are three grounds, which a government may advance to justify limiting rights:

First, the Government might show that the values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right ... would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.⁷

He recognizes that rights are not absolute. But when rights conflict with collective goals, only exceptional circumstances, such as an emergency, will justify an infringement

³ I acknowledge that collective rights can exist but do not focus on them in this paper. For an excellent discussion of collective rights, see the work of Dwight G. Newman, “Collective Interests and Collective Rights” (2004) 49 Am. J. Juris. 127-151.

⁴ *Ibid.*

⁵ *Ibid.* at 200.

⁶ *Ibid.* at 199. One may question whether Dworkin’s example is an act of ‘balancing’ or whether the government is simply making a choice between two claims, deciding one is immoral and the other defensible.

⁷ *Ibid.* at 200.

of those fundamental rights. As Dworkin declares: “But the emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude.”⁸ Absent exceptional circumstances, he is adamant that utilitarian reasons and the will of the majority cannot count as grounds for limiting a right.

Dworkin’s notion of rights as *trumps* is a useful starting point for thinking about how we should settle conflicts between rights and utility because it acknowledges the centrality of rights and the bulwark of protection rights afford to individuals in the face of majoritarian preferences and pressures. Yet, his views about resolving rights conflicts are not free from problems and this is true for a variety of reasons. I highlight three challenges here.

First, his claim that only emergencies or exceptional circumstances justify setting aside individual rights may be too high a threshold for us to support. As Dworkin himself concedes, there are obvious circumstances where the right to free speech, for example, must give way to collective or utilitarian considerations:

Of course the Government may discriminate and may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person or the property of others, and no other means of preventing this are at hand, as in the case of the man shouting ‘Fire!’ in a theatre.⁹

But does the government always have to wait to reach this emergency threshold before it can restrict the rights of its citizens?

In Dworkin’s context, the paradigmatic confrontation is between the citizen and the government. Yet, in a different context, public policy or other considerations might well justify restrictions on free speech, which do not have to meet the high threshold

⁸ *Ibid.* at 195.

⁹ *Ibid.* at 204.

Dworkin envisages when the government, acting as state actor alone, proposes to restrict the free speech rights of its citizens. Take, for instance, the public school context where the government must act also in its capacity as employer and educator. A teacher who uses profane language in class and in front of his students may attempt to justify his actions on the basis of free speech. Yet, this claim for protection appears wrong headed. Since teachers should inculcate in their students the values of decency, respect and civility, restrictions on their use of rude and disrespectful language seem merited. No one would reasonably suggest that an emergency is needed to limit the teacher's expression. A teacher who unexpectedly criticizes a fellow teacher on the spur of the moment for poor pedagogical practices may also attempt to defend her actions on the grounds that she is simply exercising her freedom of expression. But, this claim may be defeated for professional reasons, which relate to the integrity of the profession and the complaint process. In this context, ambush is not allowed and the complaining teacher must give advance notice to the colleague who is the subject of her criticism.¹⁰ This can be contrasted with the behaviour of a private citizen who can attack the government on any issue or policy and at any time without having to give advance warning that the expressive assault is about to take place.

Finally, a teacher who engages in a sustained and highly visible verbal attack on his school board's curricular policy (and simply because he disagrees with the philosophical and pedagogical approach his board adopts) may undermine trust and public confidence in his employer and violate his duty of loyalty. In these circumstances, restrictions on the teacher's expression may be justified. In contrast, a private citizen who

¹⁰ In this regard, see *Cromer v. British Columbia Teachers' Federation* (1986), 4 B.C.L.R. (2d) 273 (C.A.).

rants and rages against his government and its policies may write a number of excoriating editorials. In a liberal democracy, the government would have no moral (or legal) basis to curb this type of expressive activity. In sum, when the government acts in a different capacity other than state actor alone, there may well be sound policy reasons, which do not constitute an emergency yet justify placing restrictions on freedom of expression.

Second, Dworkin's assumption that rights are only concerned with the individual, and by extension are seen to be always in opposition to collective interests, seems highly contestable. Let us not forget that he embraces an individualist thesis of rights. Joseph Raz describes the thesis in these terms:

It regards rights as being by their very nature a way of protecting individual interests against the interests or claims of the public or collectivity, or against whatever reasons there are to promote the general good. The individualist view of rights is confrontational: rights set limits of the private sphere, in which each individual is sovereign over his or her own affairs, as against the public domain, where the public interest, as determined by political action, prevails. Rights protect individuals against demands that they contribute to the public good, or to the welfare of other individuals.¹¹

The individualist thesis thus maintains that the interests of the individual are, by nature and from the very beginning, in opposition to the goals of the public or collectivity. For Dworkin, examples of collective goals include: economic efficiency, the greatest economic aggregate benefit, equality of wealth between racial and ethnic groups, preventing inconvenience to the public, the average welfare of members of the community, overall discomfort or satisfaction, and overall general welfare and utility.¹² Free speech thus protects the dissenter who stands against the menacing majority who may feel inconvenienced or discomforted by controversial expression. In the context of

¹¹ "Rights in Politics" in J. Tasioulas, ed., *Law, Values and Social Practices* (New York: Dartmouth, 1997) 75-92, at 80.

¹² *Supra* note 1 at 91-96.

hate speech, for instance, Dworkin relies on the individualist thesis and his constitutive justification of free speech to defend the dissenting citizen who wishes to engage in despicable expression. He characterizes the conflict as one involving the rights of the individual and the collective goals or interests of society, including those persons who are opposed to expression that they find hurtful, harmful and contrary to the public interest.

Yet, Raz challenges the individualist thesis and its attendant view of individual rights. He claims that while rights protect the right-holders' interests, "the reasons for protecting those interests, and therefore the justification of the rights which provide the protection, are not confined to concern for the well-being of the right-holders."¹³ In the context of free speech, Raz observes:

It benefits all those who are subject to [the] political system. Thus while political theorists often highlight the protection for the individual dissident which it provides, in practice its primary role has been to provide a collective good, to protect the democratic character of the society.¹⁴

Hence, the interests which justify the right to free speech and which give it its shape and content are the interests of the public at large alongside the interests of the right-holder. The relationship between the individual and the collective is thus one of interdependence and not one of opposition. Raz notes that one especially important type of common good "is the cultivation of a culture and a social ambience which make possible a variety of shared goods, that is, a variety of forms of social association of intrinsic merit."¹⁵

One might argue that expression like hate speech undermines the common good because it makes it more difficult for minority groups to participate in the polity and to be treated with respect like all members of the political community. Hate speech can stand

¹³ *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 81.

¹⁴ *Ibid.* at 253-54.

¹⁵ *Ibid.* at 85.

in the way of human flourishing and undermine the identity of minority individuals as well as the minority community's group identity, both of which may be fragile and vulnerable at the best of times. Thus, this type of speech not only interferes with the interests of individuals who have a right to be free from discrimination but it also cannot be reconciled with the common good. In sum, hate speech is anathema to an open, tolerant and non-discriminatory society.

One might be tempted to claim that what Raz calls 'a dual harmony', between the interest of the right holder and the interest of others which is served by his or her right, treats right-holders as means to the promotion of the common good, rather than as ends in themselves. Yet, he rejects this claim because rights are never justified simply because they serve the common good. Their justification stems from the fact that rights serve the interest of the right-holder and in doing so they also serve the common good. As Raz notes: "Far from it being the case that the interest of the right-holder is ignored or sacrificed for the common good, the fact that rights serve the common good justifies extra protection to the interest of the right-holder."¹⁶ Although an individual may have an interest in spouting hatred or discriminatory remarks vis-à-vis minorities, it is hard to see how this type of expression can serve the common good. Therefore, on Raz's line of reasoning, hate speech would not justify extra protection to the interest of the speaker.

Third, Dworkin offers disappointingly little guidance about how we should resolve conflicts among rights themselves. He admits that this is a balancing task: "'Balancing' is appropriate when the Government must choose between competing claims of right".¹⁷ Yet, he does not tell us much about how we should proceed to resolve

¹⁶ *Ibid.*

¹⁷ *Supra* note 1 at 199.

this conflict. He simply states: “Then the Government can do nothing but estimate the merits of the competing claims, and act on its estimate.”¹⁸ An obvious question emerges. How are we to “estimate the merits of the competing claims”? This in turn generates further questions. Does the estimating involve a simple weighing of the competing rights and the interests or values associated with those rights? And if so, how do we weigh them and do we ultimately engage in some kind of trade-off between the competing rights? Or, should we proceed differently and, if so, how and why? Intuitively, we may sense that Dworkin is pointing us in the right direction. Yet, it is far from clear as to how we are actually supposed to resolve conflicts among rights themselves. Hence, further analysis and clarification are required.

Jeremy Waldron and Conflicts of Rights

Compared to Dworkin, Jeremy Waldron offers a more sophisticated account of how we should proceed when we are faced with conflicts of rights.¹⁹ Like Dworkin, he agrees that fundamental rights are important but the reason for their importance is articulated differently. Waldron claims that these rights cannot be understood without reference to choice and liberty for every individual: “Liberty is a concept which captures what is distinctive and important in human agency as such and in the untrammelled exercise of powers of individual deliberation, choice and the intentional initiation of action.”²⁰ He also embraces a different conception of rights, which does not focus on dignity and equality as it does for Dworkin. Instead, Waldron focuses on an understanding of rights along the lines of Joseph Raz’s Interest Theory.²¹ As he explains:

¹⁸ *Ibid.*

¹⁹ *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge Univ. Press, 1993).

²⁰ *Ibid.* at 39.

²¹ *Ibid.* at 166.

According to Raz, a person may be said to have a right if and only if some aspect of his well-being (some interest of his) is sufficiently important in itself to justify holding some other person or persons to be under a duty. Thus, when A is said to have a right to free speech, part of what is claimed is that his interest in speaking out freely is sufficiently important from a moral point of view to justify holding other people, particularly the government, to have duties not to place him under any restrictions or penalties in this regard.²²

Unlike Dworkin, Waldron does not view conflicts of rights as involving, first and foremost and in most cases, a competition between individual dignity and equality, on the one hand, and collective goals or the public interest, on the other. He proposes the following definition of a rights conflict: “When we say rights conflict, what we really mean is that the duties they imply are not compossible.”²³ By this, Waldron means that there is a clash between the duties, which rights themselves generate. By way of example, he suggests that A has an interest in not drowning, which is sufficiently important to justify holding others to be under a duty to rescue him. If the same is true for B, Waldron notes that, “we will be faced with a conflict of rights whenever both are in difficulties and there are resources available to rescue only one.”²⁴ Hence, the conflict arises because of the duty to rescue which extends to both A and B.

Waldron also maintains that rights should not be thought of as correlative to single duties. Instead, they should be seen as generating a multiplicity or “wave” of duties. In his discussion about the right not to be tortured, for example, Waldron notes that the right generates a host of duties. These include: the duty not to torture, the duty to investigate torture, the duty to compensate victims of torture and any other duties associated with that right.²⁵ He observes that not all duties are of equal strength and that

²² *Ibid.* at 204.

²³ *Ibid.* at 206.

²⁴ *Ibid.* at 207.

²⁵ *Ibid.* at 219.

this may ultimately affect how we resolve conflicts of rights.²⁶ Furthermore, Waldron claims that conflicts of rights take one of two forms. On the one hand, they may involve conflicts between rights and social utility. For instance, he states that the right to free speech “is widely believed to clash with the interest people have in avoiding the distress that arises when their cherished beliefs are contradicted”.²⁷ On the other hand, the conflicts may be among rights themselves. As Waldron observes:

Conflicts of rights can be placed initially in two categories: *intra*-right conflicts, that is, conflicts between different instances of the same right; and *inter*-right conflicts, that is, conflicts between particular instances of different rights.²⁸

In the first category, he presents the scenario of conflict, which arises when the demands of a number of sick or injured people are placed on a supply of scarce medical resources. In the second category, Waldron considers the conflict that exists when a group of Nazis propose to make inflammatory speeches calling for the suppression of Communists. If the Nazi speech induces people to invade Communist gatherings to prevent Communists from speaking, then he suggests that we have a conflict between the Nazis’ right to free speech and the Communists’ right to free speech.

Waldron claims that, in some circumstances, rights have qualitative or lexical priority²⁹ over considerations of utility³⁰ and even in regard to one another. In other

²⁶ We return to this idea later in the thesis.

²⁷ *Ibid.* at 221.

²⁸ *Ibid.* at 217.

²⁹ Here, Waldron draws on John Rawls idea of lexical ordering as set out in *A Theory of Justice* (Cambridge: Harvard University Press, 1971). Rawls adopts the notion of lexical ordering in relation to the rights he establishes by his principles of justice. For him, rights of political liberty have lexical priority over rights of equal opportunity in the economic realm, and equal opportunity, in turn, has priority over the social and economic rights generated by the difference principle. See Rawls, 42-44, 243 and 298.

³⁰ Waldron does acknowledge that considerations of ordinary utility may at some point play a relevant role in a rights conflict situation. As he states:

We surely think that *some* attention is due to considerations of ordinary utility, and while it is reasonable to postpone that until the most striking of the requirements generated by rights have been satisfied, it is not reasonable to postpone it forever while we satisfy duty after duty associated with rights. Maybe there is no limit on the social convenience that should be sacrificed for the sake

circumstances, however, rights conflicts are best handled in the sort of balancing way that a quantitative image of weight suggests. As he explains:

[W]e establish the relative importance of the interests at stake, and the contribution each of the conflicting duties may make to the importance of the interest it protects, and we try to maximize our promotion of what we take to be important.³¹

Waldron's use of lexical ordering is similar to Dworkin's view of rights as trumps when conflicts between rights and social utility emerge. As for interright conflicts, he thinks that it is implausible that all rights should be put on a par. Hence, his suggestion that the right to life maybe more important than the right to free speech. To move beyond an "intuitionist" defence of lexical priority, Waldron advances the notion of an *internal relation* between moral considerations. As he states, lexical priority "expresses the fact that a pair of moral considerations are related internally to one another, rather than externally in the way that a purely quantitative amount of their respective importance would imply."³²

Waldron suggests that Dworkin's theory of rights as *trumps* is an example of this sort of internal relation. He reminds us that, according to Dworkin, a person has a right to some benefit if it is the case that any utilitarian argument in favour of denying him or her that benefit is likely in the real world to have been "corrupted" by the counting of external preferences. Since we cannot disentangle external from personal preferences in utilitarian calculations, we introduce rights as a corrective. Commenting on the internal relation between rights (as a corrective) and utility, Waldron declares:

of the prohibition on torture. But is there equally no limit on the convenience that should be sacrificed for the success of the Commission of Inquiry that has been set up to bring torturers to justice and ensure that torture is made marginally less likely in the future? *Supra* note 19 at 216.

³¹ *Ibid.* at 223-24.

³² *Ibid.* at 220.

Now for rights set up in this way, the resolution of any conflict with considerations of utility is obvious: the rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to “trump” the importance of the first. Instead, our sense of an internal connection between the two establishes the order of priorities.³³

He claims that a similar approach is sometimes available to establish priorities among rights themselves. His earlier example³⁴ about free speech and the conflict between Nazis and Communists serves to illustrate the point. Waldron rejects the idea that free speech is simply a question of protecting each person’s interest in expressing his or her views. Rather, he thinks of it in a more systemic way. Each person has an interest in participating on equal terms in a form of public life in which all may speak their minds. From this perspective, the conflict between the Nazis and the Communists is amenable to an easier resolution. As Waldron observes:

To count as a genuine exercise of free speech, a person’s contribution must be related to that of her opponent in a way that makes room for them both. But though they claim to be exercising that right, the Nazis’ speeches do not have this character. The speeches they claim the right to make are calculated to bring an end to the form of life in relation to which the idea of free speech is conceived. We ban their speeches, therefore, not because we think that we can necessarily safeguard more rights by doing so, but because in their content and tendency the Nazis’ speeches are incompatible with the very idea of the right they are asserting. What looked like a brute confrontation between two rival interests, independently understood, turns out to be resolved by considering the internal relation that obtains between our understanding of the respective rights claims.³⁵

His approach to resolving conflicts of rights, especially with respect to interrights conflicts, is certainly more nuanced, complex and developed than the simple balancing method that Dworkin proposes. Waldron’s claim that rights generate multiple duties allows us to move beyond the simplistic view that rights are correlative to single duties.

³³ *Ibid.* at 220-21.

³⁴ See p. 51 of the thesis.

³⁵ *Supra* note 19 at 222.

In this regard, it becomes possible to see that different duties generated by the same right have different degrees of moral weight. Hence, as Waldron suggests, though the right not to be tortured may be viewed as being more morally weighty than many other rights, including the right to free speech, one need not concede that every duty associated with the right not to be tortured is more morally weighty than any duty associated with any of the other rights.³⁶ His diagnostic of the dilemma, notably, that in some circumstances some rights have qualitative precedence over others while in other circumstances some weighing and balancing should take place when resolving conflicts of rights, is particularly insightful. As Waldron himself declares:

We seem to want to have our cake and eat it too. We want to retain some sense that rights have qualitative priority over considerations of utility and even in regard to one another. But we also want some way of expressing the fact that not all the duties generated by a given right have the same degree of importance.³⁷

Yet, his way of tackling clashes involving rights is not free from challenges. A number of concerns still persist. I focus on three of them.

First, how are we to know when the qualitative, as opposed to the quantitative, approach is to be espoused? Waldron suggests that many, and perhaps most, conflicts (whether between rights and utility or among rights themselves) are best addressed through the process of quantitative weight. Yet, in other circumstances, qualitative priority will apply. What litmus test, if any, might we use to make this distinction? This appears to depend, in large part, on how we qualify the initial conflict. Is it one involving a right and social utility or is it an interright conflict? In the context of hate speech, for example, how do we categorize the conflict? Is it one between a right to free speech and a social interest in being free from despicable opinions? If it is, then on Waldron's account,

³⁶ *Ibid.* at 219.

³⁷ *Ibid.* at 220.

free speech must win the day. Yet, a different answer may or may not obtain if we see the conflict as being one between two fundamental freedoms, namely, freedom of expression and the right to be free from discrimination. Waldron's categorization of the types of rights conflicts is helpful but it may not always be obvious to ascertain in which category we place the original dispute. More important, how we classify this dispute has important implications for how we resolve it.

Second, Waldron's defence of the concept of internal relation between moral considerations as a justification for lexical priority has been challenged. Samantha Besson³⁸ acknowledges that the balancing of interests that frames the shape of a right and our understanding of it limits the interests that may be recognised in invoking this right. Yet, this limitation of interests takes place before the right's recognition. She maintains that this undermines Waldron's approach as it relates to his free speech example:

What this implies is that if there were no right to free speech which one may use to abolish free speech, then no conflict of rights could occur in the first place, since such a right could not be recognized at all in the particular case. This countervenes our intuition that we are facing a conflict of rights and not only of interests.³⁹

This leads Besson to conclude that the idea of internal relationship of priority between rights is contradictory.

She suggests that, "One solution would be to understand rights as having some limited degree of internal priority over other non-rights founding interests by virtue of being rights."⁴⁰ Besson goes on to posit that these rights would then have "some degree of *external priority* among themselves on grounds of the priority they have over other

³⁸ *The Morality of Conflict* (Oxford: Hart Publishing, 2005).

³⁹ *Ibid.* at 438.

⁴⁰ *Ibid.*

non-rights based interests.”⁴¹ She maintains that this external priority among rights could be established by the relative importance of the interests the different rights protect (i.e. a quantitative measurement of the different rights) or by what she calls a *qualified lexical ordering of rights*. This would reconcile the sense of qualitative priority of some rights over others. At the same time, it would permit differences in stringency of the different right and duties at stake on each side in a conflict but also among themselves.⁴² Besson’s critique of Waldron’s notion of internal relations among rights (and in so far as it relates to his example of Nazi and Communist speech) appears to offer a more coherent and defensible view of how qualitative priority among rights might actually work.⁴³

Furthermore, Andrei Marmor⁴⁴ is particularly critical of Waldron’s example of the internally related argument that draws on the famous account of John Stuart Mill of the grounds for the right to free speech. According to Waldron: “Since the whole point of free expression is to challenge received opinion and shake up complacency, the discomfiture attendant on that challenge is to be given no weight at all against free speech.”⁴⁵ In most cases, Marmor notes that there is no such thing as “the whole point of free expression is” such and such. He also suggests that in pluralistic societies, and where rights are most needed, people are bound to disagree about the purpose of having a right

⁴¹ *Ibid.*

⁴² *Ibid.* As Besson notes:

Some rights and duties take lexical priority over others before a certain threshold is attained and this threshold may change from one right or duty to the next. Once the threshold is attained, however, weighing and balancing has to take place and the importance of the interests at stake must be compared. Of course, not all rights will share the same thresholds; as long as one’s right’s threshold is not attained, no comparative weighing of the interests protected will take place. *Ibid.* at 438-9.

⁴³ At the same time, it is important to remember that Besson does not disagree with Waldron’s diagnostic of the dilemma or his conclusion. Like him, she defends lexical priority. The disagreement is simply about how one explains the idea of qualitative priority.

⁴⁴ “On the Limits of Rights” (1997) 16 *Law and Philosophy* 1-18.

⁴⁵ *Supra* note 19 at 221.

to free expression, even if there is consensus that they should have the right in the first place. As Marmor states:

Thus, for example, ‘the whole point of free expression’ that Waldron adopts from Mill, may well be the point of the right for the educated majority of a democratic society; the ground for this right for an oppressed ethnic minority, or for, say, an ultra orthodox religious minority, may well be quite different! In other words, the lexical ordering of rights’ conflict is only possible in the framework of a shared culture of moral and political views, but it is precisely in such cases that rights have relatively little cultural and political significance.⁴⁶

Marmor’s critique highlights the controversial nature of rights claims and the difficulty of determining the precise limits of rights, especially when people do not share a common understanding of ultimate values.⁴⁷ It also suggests that Joseph Raz’s description of the “intermediate” nature of rights discourse is an apt one. After all, Raz suggests that assertions of rights “are typically intermediate conclusions in arguments from ultimate values to duties.”⁴⁸ In this regard, we can say confidently that conflicts of rights entail conflicts of values as well as conflicts of duties. Unfortunately, Waldron’s analysis does not appear to stress this point explicitly and strongly enough. For him, conflicts of rights are primarily about conflicts of duties. Nonetheless, one can discern a concern for values and interests in his discussion about conflicts of rights. In the context of internal connections between moral considerations as a basis for justifying claims about lexical priority, Waldron declares:

Instead of announcing peremptorily that a certain interest just has absolute priority over some other interest ranked lower than it, we express our sense of a particular priority in our conception of the interest itself. In thinking about it, and

⁴⁶*Supra* note 44 at 17.

⁴⁷ Samantha Besson responds to Marmor’s critique in the following manner:

The problem with this critique ... is that it seems to undermine the entire idea of rights as trumps and of rights having qualitative priority over some interests at least. Moreover, any kind of prioritization of interests will be evaluative and if rights cannot be seen as an intermediary agreement in this evaluative process, then it is difficult to see what role they can play. *Supra* note 38 at 39.

⁴⁸ *Supra* note 13 at 181.

singling it out for moral attention, we are already thinking about the type of consideration with which it is likely to conflict.⁴⁹

This consideration for a “particular priority in our conception of the interest itself” suggests that a discussion of underlying values must play a role in approaching rights conflicts. Regrettably, it is underdeveloped. Waldron’s analysis of conflicts of rights would thus be strengthened if he spent more time developing and clarifying how we should address conflicts of values. This in turn would reinforce the idea of the intermediate nature of rights discourse.

Third, Waldron does not tell us how to proceed when, in some rare cases, rights of equal strength conflict. Should we try to reconcile them or should we employ some other method to determine which right should get priority? In these circumstances, Besson suggests that we should distinguish between *intra-right conflict*, where the same right is in conflict on each side, and *inter-right conflict*, which arises when different rights just happen to be equally strong in a particular case. In the first case, she gives the example of one person’s right to free movement conflicting with another person’s right to free movement. Here, Besson claims that the rights can be maximized by conciliating them: “we can only exercise our rights in the limits set by the exercise of the other.”⁵⁰

In the second instance, Besson once again advocates conciliation because when rights have equal stringency, “it is difficult to see how they could not both have to be respected as far as possible.”⁵¹ Yet, this raises certain challenges. She frames the conundrum we are faced with as follows:

A problem arises, of course, when one or all of the rights in the conflict are such that they cannot be partially applied as it is difficult to see how they could be

⁴⁹ *Supra* note 19 at 222.

⁵⁰ *Supra* note 38 at 47.

⁵¹ *Ibid.*

conciliated in that case. ... Clearly, in these cases, one of the rights should get priority as we cannot renounce to protecting both since it is presumably worse to violate two moral duties than to violate one. The question is to know which one since both are equally strong.⁵²

Besson concludes that, in these rare circumstances, morality provides no means of deciding which option to pursue. For her, one way of solving this morally arbitrary situation is by flipping a coin. She defends a similar course of action when equally strong rights cannot be conciliated because the rights in conflict are incommensurable. As Besson states: “In such cases, moral resources to solve the conflict are even more scarce and the choice between priority and conciliation is left open. Again, flipping a coin seems the least unfair solution to the conflict.”⁵³ At some level, this toss of a coin seems unsatisfactory. Yet, if two equally strong rights are incommensurable, we will be obliged to choose between the underlying values, which the rights represent (e.g. autonomy versus community). This is a difficult choice because it forces us to think deeply about the type of society we wish to cultivate and the ultimate values we are willing to embrace. Greater freedom for the individual will have consequences for our sense of community while a stronger notion of the collective will have effects on individual liberty.

Challenges Associated with the Resolution of Conflicts of Rights

In this part of the chapter, and in light of the preceding discussion, I explore some of the tensions that liberal theorists must address when confronting conflicts of rights. I focus the discussion around three hypothetically different scenarios involving freedom of expression. I suggest that these situations force us to consider a number of issues: 1) the

⁵² *Ibid.*

⁵³ *Ibid.* at 48.

question of categorization; 2) the instrumental/intrinsic divide; 3) the issue of autonomy; 4) the individual/collective divide; and 5) the question of harm.

Let us imagine that we are called on to resolve the following conflicts that involve freedom of expression.⁵⁴

Scenario One:

A private citizen makes a public speech in which he expresses strong opposition to homosexual marriage and questions the ability of same sex couples to act as competent parents. He believes strongly in the traditional definition of marriage, being the union of a man and a woman. He also firmly maintains that children need both a mother and a father to serve as appropriate and respective female and male role models for the children. Let us assume that his speech causes some fear and some loss of self-esteem among some members of the local gay community who feel upset by the speaker's comments.

Scenario Two:

A private citizen appears on a local television show and expresses his strong disapproval of homosexual conduct. As a born again Christian, he distinguishes between homosexual people (of whom he approves and views as God's children just like his heterosexual brothers and sisters) and homosexual behaviour which he claims is sinful and against the will of God. He thinks that homosexuals should resist the urge to act on their impulses (for example, by dating somebody of the same sex). He sincerely believes that counselling can help gays overcome their destructive sexual urges for members of the same sex. Compared to scenario one, this speech causes even more fear and more loss of self-esteem among some members of the local gay community.

⁵⁴In the context of public education, and in Chapter Three, we consider the case of *Kempling v. British Columbia College of Teachers* where the free speech rights of a public school teacher who engaged in anti-gay expression collided with the equality rights and interests of gay students. *Infra*, Chapter 3.

Scenario Three:

A private citizen writes a letter to the local newspaper expressing inflammatory views about gays. He argues that homosexuality is intimately linked to immorality, abnormality, perversion and promiscuity. To counter what he sees as moral degeneracy, proof of which is provided by a growing societal acceptance of the gay life style, he believes that courageous heterosexuals should speak out against homosexuality. In our three scenarios, this speech causes the most fear and most loss of self-esteem among members of the local gay community. In all three scenarios, some straight people find the expression disturbing and upsetting.

The Question of Categorization

In our three scenarios, how should we describe the conflict? Does each scenario represent a conflict between a fundamental right, namely, free speech and social utility, which we might depict as an interest in being free from moral distress? Or is the conflict between two rights, namely, the right to free speech and the right to be free from discrimination? This is an important question and will have some bearing on how we resolve the dispute.

For Dworkin, we might present all three conflicts as a conflict between a right and a collective interest. On the one hand, there exists the right of the private citizen to exercise his right to freedom of expression, even if the exercise of such a right is unpopular and controversial. This right can be contrasted with the societal interest people have in being free from disturbing or upsetting opinions or being immune from moral distress, which arises when cherished beliefs are challenged or when people are subjected to odious viewpoints or controversial expression that they would simply prefer to avoid. Furthermore, one might argue that these scenarios do not involve a conflict with equality

because there is no discriminatory action to point to. This is different from a situation where somebody is refused service in a store, for example, because of his or her sexual orientation.

The government is not imposing a burden, in the form of a discriminatory law, rule or practice, on gays while exempting heterosexuals from the imposition. Likewise, it is not conferring a benefit on straight people (e.g. a lower rate on property taxes) and denying the same benefit to homosexuals. In essence, one might conclude that some gay people and some straight people are upset essentially because they do not like the content of the individual's expression. Drawing on a Millian framework, Waldron suggests that conflict between free speech and moral distress is easily resolved:

Since the whole point of free expression is to challenge received opinion and shake up complacency, the discomfiture attendant on that challenge is to be given no weight at all against free speech; rather it is to be regarded as a good sign that free speech is fulfilling its function.⁵⁵

Hence, for both Dworkin and Waldron, if we categorize the dispute in each situation as one involving free speech and social utility, we may presumptively say that free speech acts as a trump or has lexical priority thereby defeating the social interests which are opposed to the speech. In other words, this type of characterization makes it easier to defend the right to free speech in our three scenarios.

Yet, others might qualify the conflict as involving a collision between two rights. In our scenarios, the right to free speech might be seen to be pitted against the right to dignity or the right to be free from discrimination (i.e. the equality argument). If we describe the dispute in these terms, we may no longer simply accord lexical priority to the speech or view the speech as a trump card, which presumptively or automatically

⁵⁵ *Supra* note 19 at 221.

vanquishes the opposing interests. We might conclude that both rights, *per se*, are important and that speech does not have qualitative precedence over equality. We would then have to assess both rights on their own merits before deciding how to resolve the conflict. Drawing on Waldron's view of conflicts of rights as being primarily about conflicts of duties, we could outline the duties associated with both rights.⁵⁶

First, let us consider some of the duties associated with the right to free speech. These might include the duties: not to impose censorship, to protect those who make speeches in public from the wrath of those who are disturbed by what they say, to punish suppressors of free speech, to establish rules of order so that people have opportunities to speak at an appropriate time and place and in an appropriate manner, to educate people about the role of free speech in a democracy, including the importance of accommodating a wide variety of opinions (both popular and unpopular), and to promote tolerance.⁵⁷

Second, we would then consider the duties associated with the right to be free from discrimination. These might include the duties: to protect the dignity and identity of members of vulnerable minority cultures and especially sexual minority cultures, to prevent discriminatory practices (including discriminatory speech), to protect vulnerable

⁵⁶ We would also consider the importance of the interests, which both rights protect. Free speech typically protects the search for truth, political participation and self-fulfilment. Commenting on the purpose of the equality guarantee as set out in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada in *Law v. Canada* stated:

It may be said that the purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. [1999] 1 S.C. R. 497, at 529.

Section 15(1) of the *Charter* states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. See Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11

We return to the question of interests and values later in our discussion.

⁵⁷ This list is not exhaustive and there may well be other duties, which could also be included.

minorities from violence or threats of violence or destructive attitudes which might lead to discriminatory practices, to educate about the social evils, harm and dangers related to discrimination, to promote social harmony through social programmes and practices which celebrate the contributions of minority communities, to avoid moral distress, and to promote tolerance for those who are different.

With these conflicting duties in mind, we might then engage in a sort of balancing exercise consistent with the idea of quantitative weight to attempt to resolve the conflicts. In Scenario 1, the equality argument is the weakest because expressing opposition to homosexual marriage *per se* may not necessarily involve an attack on a gay person's dignity if the speaker uses moderate and reasoned discourse to suggest that heterosexual marriage is distinct from other types of unions, including homosexual ones. The speaker may also readily admit that registered civil partnerships or unions, as distinct from marriage, may be entirely suitable for committed gay couples. Even if a gay person perceived the expression as an attack on his or her dignity, we still might not feel that this violation of the duty not to undermine human dignity was sufficiently strong in the circumstances to justify overriding the expression. If this were the case, then any sense of offence, ridicule or belittlement occasioned by controversial speech could lead to unjustifiable restrictions and disastrous consequences.⁵⁸

Yet, the equality argument acquires its greatest force in Scenario 3 where the speaker attacks the nature and sexual identity of a homosexual person by describing that person as being perverse, promiscuous, abnormal or immoral. Under these circumstances,

⁵⁸ One has only to think about *The Merchant of Venice* (and the portrayal of the Jewish Shylock as the avaricious moneylender) and films such as *La Cage aux Folles* (a French farce involving two gay lovers) as two well-known examples of artistic expression which some might claim to demean respectively Jews and gays. If we were to ban these works of the imagination because they involved slights to somebody's dignity, we would begin an unjustified descent into censorship that most of us would abhor.

expressive means are being used to promote the social inferiority of gays and this is a much more serious attack on their dignity and violation of their equality rights which merits special attention when attempting to reconcile the two rights under consideration. The force and violence of the language itself might be seen to be inherently discriminatory and thus a violation of the duty not to discriminate. We might also worry about the actual and potential influence the extreme language might have on shaping the attitudes and behaviours of heterosexuals vis-à-vis gays.

Scenario 2 is more problematic. The distinction between homosexual people and homosexual behaviour is one that a number of people make. Free speech advocates might claim that this type of expression is qualitatively different from hate speech. The person is being accepted yet his behaviour is not. But defenders of equality might counter that the *person/conduct* divide is a false dichotomy and smokescreen, which serves as a nefarious ploy for a deeply discriminatory attack on the dignity and identity of gays. No obvious answer cries out. A careful analysis of the conflicting duties and their respective strengths would be necessary to solve this conflict. In sum, if we frame the conflict as one involving two rights, the presumptive advantage free speech acquires in the rights-social utility dichotomy quickly evaporates. We are then forced to examine the conflict in a different light and to consider the strength of the respective duties.

The Instrumental/Intrinsic Divide

Free speech can be justified on both instrumental and intrinsic grounds. With respect to the first justification, Dworkin claims that free speech is important “not because people have any intrinsic moral right to say what they wish, but because allowing them to do

so will produce good effects for the rest of us.”⁵⁹ This means that free speech is more likely to lead to the discovery of truth and to produce, in the political realm, good rather than bad policies. From an instrumental point of view, free speech produces more good than harm in the long term.⁶⁰ As for the second rationale, Dworkin maintains that free speech is valuable because “it is an essential and ‘constitutive’ feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.”⁶¹

He posits that this constitutive justification has two attributes of moral responsibility. First, morally responsible people must be free to make up their own minds about what is good and bad or true and false. Government denies citizens their moral responsibility when it rules that they cannot be trusted to hear offensive and dangerous opinions for fear that they might be persuaded by them. For Dworkin: “We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.”⁶² He describes the second attribute as follows:

For many people, moral responsibility has another, more active, aspect as well: a responsibility not only to form convictions of one’s own, but to express these to others, out of respect and concern for them, and out of a compelling desire that truth be known, justice served, and the good secured. Government frustrates and denies that aspect of moral personality when it disqualifies some people from exercising these responsibilities on the ground that their convictions make them unworthy participants.⁶³

⁵⁹ *Supra* note 1 at 200.

⁶⁰ *Ibid.* He notes that free speech also helps to protect the power of the people to govern themselves and serves as a check on government corruption.

⁶¹ *Ibid.* He reminds us that the instrumental and constitutive justifications of free speech are not mutually exclusive and that free speech is valuable as both as an end and as a means.

⁶² *Ibid.*

⁶³ *Ibid.*

Dworkin recognizes that the instrumental view of free speech cannot justify racist or hate speech since suppressing this type of expression will not prevent us from choosing among different policies or sifting truth from falsity.⁶⁴ Yet, he is adamant that we cannot place restrictions on hateful speech because to do so would be to undermine the constitutive justification for free speech and consequently the moral integrity of the speaker as an individual. As he claims: “[C]itizens have as much right to contribute to the formation of the moral or aesthetic climate as they do to participate in politics.”⁶⁵

If we apply Dworkin’s constitutive defence of free speech to our three scenarios, it seems clear that we cannot restrict the expression of our private citizen to contribute to the “moral or aesthetic climate” of his community regardless of how despicable and discriminatory his comments are (as especially reflected in Scenario 3). The citizen should be able to express shocking, hurtful and deeply offensive opinions about gays and other vulnerable minorities because freedom of expression demands nothing less. If this freedom protects only that with which we agree, it is indeed a hollow protection. As McLachlin J. (as she then was) of the Supreme Court of Canada declared in *R. v. Keegstra*:⁶⁶ “If the guarantee of free expression is to be meaningful, it must protect

⁶⁴ *Ibid.* at 203-204.

⁶⁵ *Ibid.* at 200-201. Jeremy Waldron suggests that individuals have a moral right to do wrong. If we take the idea of moral rights seriously, then, and if we draw the connections with the ideas of choice and of the importance of certain areas of decision . . . , it is necessary to insist that wrong actions as well as right actions and indifferent actions can be the subject of moral rights. The clusters of actions subsumed under our general rights are likely to include, in the circumstances that face us, actions that would be stupid, cowardly, tasteless, inconsiderate, destructive, wasteful, deceitful, and just plain wrong, as well as actions that are wise, courageous, cultured, compassionate, creative, honest, and good. This may seem messy to a certain austere type of analytic mind, but it involves no contradiction, as far as I can see, and it is the only way to reconcile the importance of moral rights, as a distinctive ingredient in ethical theory, with the diversity and the wide range of standards of ethical evaluation. *Supra* note 19 at 85.

One could argue, at least in expressive terms and as far as hate and discriminatory speech are concerned, that individuals have a free speech right to make morally wrong, hateful, and hurtful comments about others.

⁶⁶ [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1.

expression which challenges even the very basic conceptions about our society.”⁶⁷

Allowing the government to censor the citizen simply because it does not like his anti-gay comments fails to treat him as a morally responsible and autonomous agent.

Yet, not all liberals defend a constitutive justification for free speech. Joseph Raz, for instance, maintains that free speech is vitally important to a democracy for instrumental reasons. He claims that the very purpose of free speech is first and foremost its protection of political speech. As Raz declares: “The precise boundaries of freedom of speech are notoriously controversial, but its core is and always was the promotion of political speech and of the free exchange of information which is of public interest.”⁶⁸ If political speech is the most important speech and we value it because of its instrumental value, we will judge the three scenarios with this in mind. To what extent does the speech in each of our scenarios qualify as political speech? In scenario 1, one can posit that definitions of who is entitled to marry and what constitutes appropriate parental roles are matters of public policy and thus deserve special protection under the auspices of free speech.

By contrast, the speaker in scenario 3 is promoting hateful or discriminatory speech by claiming that gays are immoral and promiscuous. Assertions of this nature attacking a person’s sexual and human identity can hardly be seen to further legitimate public dialogue or political expression. Scenario 2, however, is more complicated. The sin/sinner distinction may be relevant for some religious fundamentalists who are genuinely concerned about the salvation of others, including gays, and feel the need to speak out publicly on this subject. Hence, we may have a political interest in allowing this type of speech which differs from the expression contained in scenario 3. Yet, this

⁶⁷ *Ibid.* at para. 85.

⁶⁸ *Supra* note 13 at 353.

distinction seems irrelevant as far as strict government practice and policy go. We might well conclude in this situation that the speech is of limited value in terms of its contribution to public debate and dialogue. Our discussion illustrates the point that there is often no consensus about the very interests and values, which justify the right in the first place.⁶⁹ For Dworkin, the constitutive justification of free speech is what counts. Yet, for Raz, the instrumental view (and more specifically, the political process rationale) is most relevant. In essence, how we resolve the dispute will depend in large measure on which particular justificatory conception of the right is advanced. Protecting despicable expression because it treats the speaker as a moral person is very different from giving primacy of protection to political speech, which is in the public interest.

The Issue of Autonomy

As a general rule, liberals are committed to the ideal of autonomy and resist any imposition of particularized forms of the good life by the state on its citizens. David Dyzenhaus describes the relationship between autonomy and the conception of the good life in these terms:

Liberals are committed to an ideal of individual autonomy, according to which individuals should be left to decide for themselves both what the good life is and how to pursue it. So liberals require that the state remain neutral on the question of how individuals should live their lives, at least to the extent of refraining from coercively imposing any conception of good on individuals.⁷⁰

If we return to Dworkin's idea of a constitutive justification for free speech, we notice that his position reflects a concern for both speaker and listener autonomy. The government respects the autonomy of the speaker by allowing him to engage in

⁶⁹ The values and interests which ground the right to equality are likewise controversial and subject to great dispute. They likewise must be considered in the analysis. In my thesis, I have focused primarily on those values that relate to freedom of speech.

⁷⁰ "Regulating Free Speech" (1991) 23(2) *Ottawa Law Review* 289-318 at 301.

discriminatory and hateful forms of expression because to censor him would violate the government's sacred obligation to treat him with equal concern and respect as a moral and responsible member of society. In terms of listener autonomy, the government should not be entitled to silence citizens who engage in controversial speech for fear that others will hear what he has to say or, worse still, be convinced of the rightness of his beliefs or position. Hence, in all three scenarios, others should be entitled to make up their own minds about what the private citizen has to say about homosexuality. In essence, regulation of the odious nature of the speech becomes impermissible because acting otherwise fails to respect speaker and listener autonomy.

Within the liberal paradigm, the critics of autonomy argue for a refinement of the concept rather than its outright rejection. Owen Fiss⁷¹ claims that the state has a duty to preserve the integrity and quality of public debate and thus should play an interventionist role in protecting listener autonomy. Unlike conventional positions on autonomy which view the state as the enemy, Fiss argues that autonomy justifies state intervention:

Autonomy, in its inflated version, would remain as the key value, but note that while in the received Tradition it operated as a response to government intervention, under this strategy it would serve as a justification of such intervention. Autonomy would be saved, but put to a different use.⁷²

Dyzenhaus is highly critical of the denuded notion of "global neutrality" which underlies many autonomy-based arguments. According to this view, the only appropriate adjudication among conceptions of the good life is by individuals deciding the question for themselves in an unfettered market of ideas. Embraced most fervently by libertarians, the focus is on formal equality. Dyzenhaus maintains, however, that autonomy is only truly meaningful if exercised in a social context where substantive equality is assured. He points out that

⁷¹ "Free Speech and Social Structure" (1986) 71 Iowa Law Review 1405-1425.

⁷² *Ibid.* at 1417.

autonomy “stems in large part from one’s ability to articulate or nurture an identity derived from membership in a cultural or religious group.”⁷³ In essence, a precondition of autonomy is a community of mutual respect, which venerates the equality of all persons. Dyzenhaus’ call for “egalitarian liberalism” requires the state to create a culture of social and political equality:

[L]iberalism is an egalitarian doctrine which requires the state to be neutral between conceptions of the good life only insofar as particular conceptions do not aim to support existing inequalities or to create new ones. The state is thus not only permitted but is even required to act to create a public culture of social and political equality, because it is only with such a culture as the backdrop that individuals will be able to lead autonomous lives.⁷⁴

In the context of racist speech, he argues that since hate propaganda by definition seeks to denigrate the group it targets, this type of expression should be restricted because it “seeks to deny the possibility of autonomy to members of that group.”⁷⁵

If we apply Dyzenhaus’ reasoning to our scenario 3, one could argue that the discriminatory speech directed towards gays is analogous to hate speech and that it seeks to interfere with their ability to act autonomously because of the loathsome and destructive message that the speaker is generating. The attendant loss of self-esteem among some members of the gay community makes it more difficult for these persons to integrate into society and to feel confident in their sense of who they are. This type of speech may well create conditions of social and political inequality where it will be more difficult for all members of the gay community to lead healthy and flourishing lives.⁷⁶

⁷³ *Supra* note 70 at 314. Here, he borrows from Chief Justice Dickson in the *Keegstra decision*. *Supra* note 66 at 184.

⁷⁴ *Ibid.* at 314.

⁷⁵ *Ibid.*

⁷⁶ This speech may also affect members of the general public who have yet to make up their mind on the question of homosexuality or who have only mildly anti-gay attitudes. If the speech helps to generate a negative and discriminatory disposition toward homosexuals, this in turn may possibly affect the autonomy of gays if they are held in contempt or disregard by a sufficient number of members of the general public.

Yet, the potential loss of autonomy among gays in scenario 1 is unlikely to justify restrictions on the speech because of the political nature of the expression.

However, once again, scenario 2 presents special challenges. The interference with autonomy may be stronger for those who feel especially vulnerable and see the *person/conduct* distinction as a subterfuge for a more insidious attack on homosexuality. Others in the gay community may suffer less, in terms of their capacity to act autonomously, and may view scenario 2 as being substantively different from scenario 3. Although no easy resolution emerges here, a concern for the autonomy of gays requires a different type of analysis from one whose focus is exclusively on the autonomy of the speaker. Our conceptualization of autonomy will therefore shape how we resolve the conflict.

The Individual/Collective Divide

In our earlier critique of Dworkin⁷⁷, we have already drawn on the work of Raz to challenge the individualist thesis of rights. This critique goes to the very nature and foundations of rights. Yet once more, we are confronted with the types of bedrock or core values upon which rights are constructed. The individualist thesis makes it clear that the interests of the individual stand in sharp contrast to those of the public or collectivity. Free speech thus protects the rugged and fearless dissenter who stands against the menacing majority. In our three scenarios, a strong emphasis on the right of the speaker may well lead us to embrace the individualist thesis and its concern with the need to shelter the private citizen from those members of society who want to shut him down simply because they find his speech discriminatory and morally outrageous.

⁷⁷ Starting on p. 49 of the thesis.

Yet, we may well reach a different result in scenario 3 if we view individual rights as being integrally connected to the common good as Raz suggests is the case. From this perspective, the interests which justify the right to free speech are the interests of the public at large as well as the interests of the right-holder. Raz claims that the cultivation of a culture and a social ambience is an especially important type of common good, which we should foster. He suggests that disputes about discrimination on the basis of sexual orientation are prime examples of disputes over common goods. He also states:

In what way is it a common good to live in a tolerant society which does not discriminate against people on the basis of valuable aspects of their lifestyle which are central to their own sense of who they are? Is that not a matter which concerns only people who either discriminate or are discriminated against? The answer is that there are more ways in which we all benefit from living in a tolerant and non-discriminatory society that can be discussed and illustrated here. A prejudiced and intolerant society affects adversely the options available to every one of its members. It colours the nature of the social relations each can have. It threatens to make each member complicitous with its bigotry through association with bigots, through involvement in projects which involve the display of prejudice and the practice of discrimination.⁷⁸

Based on scenario 3, the strong anti-gay speech constitutes a “display of prejudice” or “practice of discrimination” that should be censored. This speech undermines the common good because it makes it more difficult for minority groups to participate in the polity and to be treated with respect like all members of the political community. This type of discriminatory speech can stand in the way of human flourishing and undermine the identity of individual homosexuals as well as the gay community’s group identity, both of which may be fragile and vulnerable at the best of times.⁷⁹ Thus, this type of

⁷⁸ *Supra* note 13 at 88.

⁷⁹ John Finnis also claims that human rights cannot be dissociated from the common good. Commenting on how conflicts of rights should be resolved, he states:

There is, I think, no alternative but to hold in one’s mind’s eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, one needs some

speech not only interferes with the interests of individuals who have a right to be free from discrimination but it also cannot be reconciled with the common good.⁸⁰ As our discussion shows, our formulation of fundamental rights, along the individualist/collectivist divide, will impact on how we resolve the disputes in question.

The Question of Harm

How we resolve conflicts of rights will also depend on how we define harm. For Dworkin, before we restrict a fundamental freedom like freedom of speech, we need a high standard of proof that the speech has caused harm:

When lawyers say that rights may be limited to protect other rights, or to prevent catastrophe, they have in mind cases in which cause and effect are relatively clear, like the familiar example of a man falsely crying “Fire!” in a crowded theatre.⁸¹

He also claims that the right to speak protects provocative speech and that when the effects of such speech on violence are uncertain, the government is not entitled to censor the expression.⁸² Dworkin acknowledges that fundamental rights, including freedom of expression, are not absolute and are subject to certain limitations. Yet, when the government imposes restrictions on the free speech rights of its citizens then compelling reasons must exist to justify the censorship. As Dworkin states: “ But the emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude.”⁸³

conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing.

See *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 219-20. He claims that friendship and respect for human personality are threatened by hatred and group bias.

⁸⁰ The special challenges associated with scenario 2 also apply here. The question is to what extent does the expression of the *person/behaviour* divide constitute a form of discrimination, which threatens to undermine the common good as exemplified by a tolerant and open society.

⁸¹ *Supra* note 1 at 203.

⁸² *Ibid.*

⁸³ *Ibid.* at 195.

In our scenarios, and along Dworkinian lines, there is no *clear and present danger* or a danger of *magnitude*. To be sure, and especially in scenario 3, the speaker's remarks have caused fear and a loss of self-esteem among members of the gay community. Yet, a slight or affront to one's dignity is not enough for Dworkinian liberals. Something more is required such as an exhortation to violence or acts of discrimination against gays. Furthermore, there is no empirical evidence to suggest that these comments encourage or persuade others to treat gays in a discriminatory manner such as refusing them the provision of services in areas such as health, education and housing. Absent concrete evidence showing that the private citizen has actively discriminated against gays or encouraged others to do so, there is no compelling proof of harm, which justifies restrictions on this discriminatory and hurtful expression.

But, others might view the question of harm differently. Virulently anti-gay speech is detrimental both to the target group and to the common good. Raz explains the harm that flows from discrimination on the basis of religion, nationality, and race in these terms:

Discrimination on grounds of religion, nationality or race affects its victims in a more fundamental way. It distorts their ability to feel pride in membership in groups, identification with which is an important element in their life.⁸⁴

Similar reasoning can apply to discrimination on the basis of sexual orientation. A reading of Raz makes it unclear whether his comments apply only to discriminatory acts or whether they also include discriminatory words. Both actions and speech have the potential to harm in the same way. If as a gay person, I feel equally diminished as a human being because in one situation I am refused a job (due to my sexual orientation) or because somebody tells me that I am immoral or abnormal, the harm in both situations

⁸⁴ *Supra* note 13 at 254.

may be comparable. If this is the case, then one plausible reading of Raz may be that this type of harm justifies restrictions on both discriminatory acts and discriminatory expression. As for Finnis, he frames the harm resulting from hate speech in these terms:

Inciting hatred amongst sections of the community inciting hatred is not merely an injury to the rights of those hated; it threatens everyone in the community with a future of violence and of other violations of right, and this threat is itself an injury to the common good and is reasonably referred to as a violation of public order.⁸⁵

On this basis, Finnis is willing to restrict freedom of expression. If one views the anti-gay expression, and especially in scenario 3, as akin to inciting hatred, then one can make an equally convincing case for placing restrictions on the speaker's speech.

But, the potential harm flowing from scenario 1 is unlikely to justify restrictions on free speech (even with some loss of self-esteem and some fear among the gay community) because of the legitimate, albeit controversial, policy issues the speech raises. Scenario 2 presents the usual difficulties. For some, the distinction between *person/conduct* is legitimate and this enables us to distinguish the speech from that found in scenario 3. Therefore, less harm ensues (because the loss of self-esteem is not as great and the speech does not generate as much fear) and the controversial speech can be justified because the relevant threshold of harm has not been reached. For others, the harm this causes is really no different from the harm that results in scenario 3 even if the self-esteem and fear levels are different. The nature of the expression is inherently harmful and it also undermines the common good. Consequently, the speech should be muted. In sum, how we define and how we measure the question of harm colours our response to the different scenarios.

⁸⁵ *Supra* note 79 at 217.

I wish to make one final point. Raz reminds us that the implications of a right and the duties it grounds “depend on additional premises and that these cannot in principle be wholly determined in advance.”⁸⁶ This is what he calls the “dynamic character” of rights and as he explains, “With changing circumstances[r]ights can generate new duties.”⁸⁷ This is a helpful reminder because it makes us realise that a contextual approach to solving conflicts of rights is warranted. A brief example will illustrate the point. In our three scenarios, let us imagine that we replace “private citizen” with “public school teacher.” What impact, if any, might this have on our analysis? As we all know, public school teachers wear many hats. They have a duty to act as responsible and obedient employees. But, they also have a duty to act as educators, role models and professionals. These multiple duties may well impact on their ability to engage in controversial and discriminatory expression. In other words, a contextual approach to resolving conflicts of rights must be sensitive to changing circumstances and new facts, which may well affect the analysis of the conflict. It seems plausible that we might well treat a public school teacher’s right to free speech differently (and less expansively) from the right to speech enjoyed by a private citizen. This is so because the teacher is a public person who is subject to a host of duties. These constraints naturally will be relevant considerations in ascertaining, under the guise of freedom of expression, what he or she can morally and legally say.⁸⁸

⁸⁶ *Supra* note 13 at 185.

⁸⁷ *Ibid.* at 186.

⁸⁸ As I have argued elsewhere, teachers have a legal and moral duty to foster an inclusive, respectful and tolerant educational environment that is open to all students, including gay students. Teacher expression, which opposes homosexuality, as well as homosexual behaviour, I claim, cannot be reconciled with the multiple roles and duties teachers must strongly and publicly embrace. See Paul T. Clarke & Bruce MacDougall, “Crossing the Line: Homophobic Speech and Public School Teachers” (2004) 5 *Encounters* 125-140, at 129-130.

Conclusion

Dworkin's account of rights as trumps offers a powerful rejoinder to utilitarian and majoritarian ways of thinking which leave minorities vulnerable to the numerical preferences and whims of the majority. As we have seen, this has significant implications for how we think about resolving conflicts, which we characterize as involving fundamental rights and social utility. Yet, his analysis of how we tackle inter-right conflicts is wanting. Waldron offers more substance in this regard. His diagnosis of rights conflicts is particularly incisive because he shines an analytical light on the conflicts of duties, which conflicts of rights generate. Since rights generate multiple duties and not all duties are of equal importance, he helps us understand that there is no tidy or straightforward way to approach the resolution of rights conflicts. Sometimes we embrace qualitative precedence and in other circumstances we favour quantitative weight.

Yet, Waldron does not sufficiently account for the conflicts of values in his analysis. As our discussion of the three scenarios illustrates, when we begin to analyze the reasons for having the right in the first place, this makes rights claims and the limits of rights a controversial matter. Even rights theorists disagree about free speech and its underlying justification. Is it primarily instrumental or constitutive? The issue of autonomy also divides liberals in the area of hate speech. Do we focus on the autonomy of the speaker or the autonomy of the person who is the subject of his attack? At an even more foundational level, disagreement abounds. Do we view rights with the individualist thesis in mind or do rights also have a collective nature? Furthermore, we must not forget that there is no consensus about how we categorize rights disputes (*rights versus utility* or

rights versus rights) and how we define harm. Both of these factors are crucial and play an important role in terms of how we resolve conflicts of rights. Finally, context and changing circumstances suggest that conflicts of rights are not reducible to a “one size fits all” approach.

In spite of these challenges, we must not lose heart when confronted by conflicts of rights. We are not responsible for the hard cases and the conflicts they generate. As Waldron reminds us: “It is not the fault of the theorist who proposes trade-offs that there are sometimes several drowning people and only one lifeguard.”⁸⁹ In a pluralistic society like our own, it is only natural to expect vigorous debate and discussion about the values and interests that ground rights and inform our understanding of those rights. Conflicting duties of varying strengths generated by the rights likewise come as no surprise. Once we acknowledge that there are no magic or infallible formulas that will help us solve conflicts of rights, we can approach the question with a greater sense of clarity and resolve. If we embrace Raz’s intermediary nature of rights discourse, where rights sit halfway between ultimate values and duties, we can then focus squarely on the conflicts of duties as well as the conflicts of values that conflicts of rights generate. This will not of course solve all our problems. This conceptualization will, however, enhance our understanding of what is at play when rights do conflict. If we understand the problem better, our chances of resolving rights conflicts in a more coherent and principled manner will be increased.

⁸⁹ *Supra* note 19 at 210.

CHAPTER THREE: ANALYSIS OF RELEVANT JURISPRUDENCE

Introduction

In Canada's primary and secondary education system, there are ongoing debates about who should ultimately maintain control of the formal and informal curriculum in our Canadian schools. These debates about curricular battles sometimes play out through rights conflicts, which our courts are required to resolve. These conflicts typically involve claims relating, directly or indirectly, to fundamental freedoms such as freedom of religion and freedom of expression as well as claims associated with the right to equality. As we saw in Chapter Two, Waldron argues that we can better approach the resolution of conflicts of rights if we understand that rights conflicts are really about conflicts of duties. In the realm of primary and secondary education, conflicts of rights may occur in different settings. These include: public and secular schools, public and denominational schools (as protected under s. 93 of the *Constitution Act, 1867* and related constitutional provisions), and private schools. Conflicts may also arise in the context of home schooling. Rob Reich¹ suggests that our best hope of resolving the curricular struggles requires a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the state and children.

In this chapter, I will draw principally on Reich's work to identify the matrix of overlapping and potentially conflicting interests of parents, the state and children as these interests relate to the control of children's education. I will also identify a fourth stakeholder, namely, the teacher, who has a professional and personal interest in matters such as freedom of expression. This interest has implications for how we understand the

¹ "Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling" in Stephen Macedo & Yael Tamir, eds., *Moral and Political Education* (New York: New York Univ. Press, 2002).

issue of curricular control over children's education and is thus included in our analysis. As we will see, parents, children and teachers are also right claimants who have constitutionally protected rights under our constitution. These rights represent morally significant or special interests that parents, children and teachers have.

More important, I want to offer a critical assessment of the relevant Canadian jurisprudence where curricular disputes involving (directly or indirectly) conflicts of constitutional rights have been adjudicated. My critique will draw on the theoretical insights offered by Reich and Waldron. Applying Reich's matrix of the various interest holders to the relevant case law², I want to analyse the decisions to ascertain whether or not our judges are alive to these various interest holders, as well as to consider what value or weight, if any, our judges attach to their respective interests, when they reconcile the different conflicts of rights they encounter. Drawing on Waldron's work, I will suggest that a helpful way to understand what judges are really doing when they attempt to reconcile rights is to reconcile conflicting duties.

A trilogy of interests

In the context of who gets to decide how children are educated, legal and political theorists³ have identified a trilogy of interests, which come into play. These include the interests of parents, the state and children.

² This analysis draws on the leading (i.e. decisions of Canadian appellate courts and those of the Supreme Court of Canada) Canadian curricular cases where conflicts of constitutional rights arise. The case law incorporated into this study is meant to be fairly comprehensive although I do not claim to make an exhaustive study of every relevant case.

³ See Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Clarendon Press, 1997); James G. Dwyer, *Religious Schools v. Children's Rights* (Ithaca: Cornell Univ. Press, 1998); Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of *God v. John Rawls?*," (1995) 105 *Ethics* 105 468-496.

Parental interest in children's education

According to Reich⁴, parents have two primary interests in their children's education. They are self-regarding interests and other-regarding interests. In the first category, parents have an interest in children's education that reflects deep meaning for the lives of parents themselves. Eamonn Callan describes this as the "expressive significance" of child rearing and notes: "By the 'expressive significance' of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child's life as a virtual extension of our own." He suggests that our judgement of how well we parent and the way parenting helps shape our identities have profound significance for our lives. Callan also acknowledges that measures of success vary widely within and across cultures, but "they almost always include broadly educational ends of one sort or another." Hence, the educational hopes and ambitions parents have for their children are closely intertwined with the expressive interest in child-rearing.

The second interest parents have in their children's education is an other-regarding claim. Reich depicts this interest as follows:

Of course, the parents' interest in exerting authority over the educational provision of their children is also grounded in the interest of the children themselves. Children are dependent beings, not yet capable of meeting their own needs or acting in their own interest. Parents, it is generally understood, are best situated (better situated than the state and the children themselves) to act in the best interests of their children, or, in an alternate formulation, to promote their general welfare. In modern society, the welfare of a child depends in part on being educated. Therefore, as the guardian of their children's best interests or welfare, parents have an interest in the education that their children receive.

However, the "best-interests" standard has been criticized, as Reich points out, because, "Given plural conceptions of the good life, there will be no readily identifiable consensus

⁴ *Supra* note 1 at 283.

about the best interests of the child in all cases.”⁵ Parental interests of course are not the whole story. One must also consider the interests of the state as well as those of children.

State interest in children’s education

Reich notes that the state also has an interest in exercising educational authority over its youngest citizens. These interests are twofold. First, the state wants children to become able citizens. Second, it wants children to develop into independently functioning adults. As for the first interest, there is great debate about the appropriate scope of civic education the state should offer its young. On the more demanding side of the spectrum, Reich observes:

[S]ome argue that the state must teach children not only basic literacy but knowledge of public policy issues, the conclusions of contemporary science, a foundation in world and national history, the structure and operation of federal, state, and local government, and a broad palette of critical thinking and empathy skills necessary to facilitate democratic deliberation amidst a complicity of competing interests and among diverse races, religions, and worldviews.⁶

Yet, others argue for a middle of the road approach while some even adopt a minimalist view about the ambit of civic education. As Reich states:

Others indicate that the state’s civic interest in education lies more generally in assuring that children will have the opportunity to participate in public institutions and come to possess a number of political virtues, such as tolerance, civility, and a sense of fairness. And on the less demanding side of the spectrum, some argue that civic requirements are more minimal, encompassing the teaching of tolerance and, as one theorist puts it, ‘social rationality’.⁷

Concerning the second interest, Reich notes that the state must perform a ‘backstop’ role to parents to ensure that their children develop into independently functioning adults.⁸ In

⁵ *Ibid.* at 285.

⁶ *Ibid.* at 287.

⁷ *Ibid.*

⁸ *Ibid.* at 288. According to Reich:

By ‘independently functioning’ adults, I mean persons who are self-sufficient, productive members of society, who are able to navigate and participate in the familiar social and economic

the literature, this interest does not appear to be the subject of much controversy. The state wants to enable children, through education, to become self-sufficient and self-reliant as they make the transition from childhood to adulthood.

Children's interest in education

Children themselves obviously have a significant interest in their own education.

According to Reich, this interest can be accounted for in two ways. First, children have an interest in becoming independently functioning adults. This interest mirrors the state's interest (previously discussed) and does not seem to be contested by political and legal theorists. Second, children have an interest in becoming minimally autonomous. Reich defines minimal autonomy as follows:

It refers simply to the capacity of the child to develop into an independent adult who can seek and promote his or her own interests, as he or she understands them, and who can participate, if he or she chooses, in political dialogue with others. This conception requires, to be sure, significant development of one's rational capacities, an ability to articulate and defend one's political positions, and a willingness to treat civilly those with whom one disagrees.⁹

This interest is controversial and not all agree with the promotion of minimal autonomy for children.¹⁰ For the purposes of my research, I assume that children have an interest in minimal autonomy to prevent them from becoming, what one theorist has called, "ethically servile."¹¹

institutions of society. We would rightly consider a child unfairly deprived if he or she were denied the opportunity to receive an education. *Ibid.*

⁹ *Ibid.* at 292.

¹⁰ William Galston, for instance, argues that liberalism properly values diversity over autonomy and that the state should permit wide, though not unlimited, tolerance of parents who do not wish to lead autonomous lives nor want their children to lead autonomous lives. See "Two Concepts of Liberalism" (1995) 105 *Ethics* 516-34.

¹¹ See Eamon Callan, *Supra* note 3. Someone might ask why children have an interest in being "minimally autonomous" rather than just being autonomous. For some, minimal autonomy might be an attempt to compromise with those who do not believe in full-fledged autonomy. In my thesis, I use the term "minimally autonomous" to indicate that a life of Socratic reflection and inquiry need not be the *summum bonum* for a successful or flourishing life. Yet some capacity to question the world and to develop one's rational abilities is still integral to an understanding of minimal autonomy.

Qualifications to Reich's conceptualization of interest holders

Reich's conceptualization of the triad of interest holders is a helpful way to understand who has a legitimate voice in discussions concerning curricular control over children's education. Yet, two important qualifications obtain. First, Reich only enumerates two important interests for each of the three interest holders. In some sense, we might say that his description of the relevant interests is underinclusive. For example, what he says about children's interest in their own education is incomplete. Reich concentrates exclusively on their interest in *becoming*, whether that relates to becoming an independently functioning adult or becoming minimally autonomous. The focus on *becoming* relates more to the development of the self and the uniqueness of each individual, what tends to distinguish him or her from others in the social world. Yet, children surely have an interest in an education that teaches them about *belonging* as well. As social creatures who typically do not live solitary lives, they interact with one another in families, in social institutions like schools, athletic clubs, artistic groups and religious organizations, as well as with other people in the larger society. Their sense of self is defined in large measure by the connections that they have with others, by the multiple communities that they belong to. Hence, they have an interest in learning how to relate to others, how to build healthy bonds of interdependence, and how to live in community with those who share both similar and different values.¹² It is likewise

¹² Jean Vanier describes the value of belonging in these terms:

Belonging is important for our growth to independence; even further, it is important for our growth to inner freedom and maturity. It is only through belonging that we can break out of the shell of individualism and self-centredness that both protects and isolates us.

See *Becoming Human* (Toronto: Anansi Press, 1998) at 35. Reich's account of children's interests is a good description for why one might teach the liberal arts in high school. Yet, he offers no explanation as to why, for example, we should teach children mathematics or physics. One could argue that students simply have an interest in learning various subject matters that are potentially part of the established and evolving curriculum. Furthermore, one could posit that there is an equality-based argument for teaching children

conceivable that parents and the state may also have interests, not identified by Reich, in children's education that emerge from a study of the relevant case law. Hence, for the purposes of our analysis, we may have to consider additional interests in our critical examination of curricular control.

Second, the work of Reich and other theorists fails to include another stakeholder who has a direct interest in important matters that are relevant to the issue of children's education and curricular control. This stakeholder is the teacher who has an interest in moral rights such as freedom of expression. This interest is both professional and personal.¹³ As professionals who must exercise some degree of independent judgement, I argue that teachers should have an interest in exerting some measure of curricular control over both *what* gets taught and *how* it gets taught. We might refer to this as teachers' professional or academic freedom.¹⁴ First and foremost, as educators, teachers have an interest in creating and maintaining a learning environment that stimulates, challenges, nurtures and strives to bring out the best in our students. In their personal lives, teachers (as private citizens) also have an interest in freedom of expression and expressing views which may not necessarily be held by the majority or others. This is a self-regarding interest which has implications for the kind of life teachers may wish to lead in the private realm.

In sum, according to Reich, the parental interest in children's education is self-regarding and other regarding. The state also has a dual interest in the education of its young: to help children become able citizens and to assist them as they become

math and physics. This could be viewed as giving all children an equality of opportunity since some or many children might not otherwise learn these subjects on their own.

¹³ One might argue that teachers, at least in the public schools, are *state* agents and therefore do not constitute a separate class of actors. Yet, this argument fails in the context of private schools and even as far as public school teachers are concerned, their interests in children's education may not always be the same as the state's interest in children's education. Hence, it is best to represent teachers as a separate class of actors who shape curriculum choices in our schools.

¹⁴ I return to this notion when examining the cases related to teachers' freedom of expression.

independently functioning adults. As for children themselves, they have an interest in minimal autonomy and an interest in becoming independently functioning adults. To this list, we have added the teacher's interest in important matters such as freedom of expression. Professionally, s/he has an interest in creating a stimulating learning environment for students so they can develop and mature as learners and human beings. Personally, teachers may have interests in expressing controversial opinions as this may enable them to lead lives (as private citizens) that are rich and meaningful. In our analysis, what remains fixed is the category of interest holder. The interests so far identified are important but they may not encompass all the possible and relevant interests in the case law.

Interests and Constitutional Rights

It is important to realise that some of the interests just discussed may give rise to rights because of the special nature and significance of those interests for human flourishing. For instance, parents have a right to educate their children at home if they so choose. They also have a right to educate their children in accordance with their religious beliefs and values. In the constitutional context, parents have a right to freedom of religion as protected under s. 2(a) of the *Canadian Charter of Rights and Freedoms*. They also enjoy equality rights under s. 15 of the *Charter* to protect them from attempts by the state to deny their children an education should their children have special physical and/or mental needs which require reasonable accommodation.

Children likewise have certain rights. They have a right to an education and enjoy similar constitutional protections as their parents under the *Charter*. For example, they have a right to freedom of religion, freedom of expression and enjoy equality rights.

Finally, teachers have rights guaranteed by the *Charter*. As we will see, those most frequently exercised are the rights to freedom of religion and freedom of expression. Not all interests, of course, can be translated into rights claims. The state's interests in children's education are a prime example. Likewise, a teacher's interest in having more or better resources for her students does not typically constitute a rights claim.

Claims about Authority over Children's Education

How do the interests identified, as well as emergent interests, and the rights associated with fundamental freedoms and equality translate into arguments for educational authority and control of children's education? In some circumstances, the interests and/or rights will overlap or complement one another. For instance, all stakeholders share a common interest in having children develop into independent and responsible adults. In other circumstances, the interests and/or rights will conflict with one another. For example, in public schools, parental objections to the use of controversial teaching materials (such as the Harry Potter books) based on religious beliefs may well be founded on a parental right to freedom of religion.¹⁵ At the same time, this right may conflict with the teacher's interest in professional freedom and his or her right to freedom of expression. In these circumstances, where the dispute occurs in a public school, the state also has an interest in upholding the secular nature of public schools.

When a conflict of rights occurs, as Waldron notes, it will typically take one of two forms. The conflict will involve a tension between a right, such as a parental right to freedom of religion, and an interest, like the state's interest in maintaining the secular

¹⁵ I recognize that, in certain circumstances, parents opposed to certain controversial materials might claim that their opposition has to do with their children becoming responsible adults rather than evil people influenced by witchcraft.

character of our public schools. Alternatively, the conflict will involve two competing rights, such as a parental right to freedom of religion and a teacher's right to freedom of expression. The state's interest may also figure in the rights/rights conflict if a constitutionally guaranteed right is breached and the state, under s. 1 of the *Charter*, is required to justify why it is necessary to place reasonable limits on the right in the name of some compelling state interest such as protecting a teacher's ability to do his or her job by assuring that s/he has a certain measure of curricular freedom.

To resolve the conflict, we must therefore consider both the interests and the rights involved. We agree with Reich that no single interest holder, and by extension no single rights holder, can claim to always have the final say. As he reminds us:

Given the triad of interest holders, and the significance of their respective interests, a theory of educational authority that claimed only the interests of one party mattered could potentially establish a kind of parental despotism, state authoritarianism, or child despotism. Any defensible theory of educational authority, then, will strike some balance among the three parties.¹⁶

Along with teachers, this quadripartite matrix of interest holders (who have overlapping and competing interests) furnishes an analytical lens to examine critically how courts have balanced the concerns and rights of the various stakeholders when it comes to exercising curricular control in our schools. Given that our educational jurisprudence involves conflicts between rights and interests, on the one hand, and rights versus rights, on the other, our examination of the relevant case law will also be critically informed by Waldron's work on conflict of rights.

Furthermore, when rights conflict with interests, rights theorists generally agree that rights trump interests and policy considerations, save for exceptional circumstances.

¹⁶ *Supra* note 3 at 295. Given our inclusion of teachers as a relevant actor who helps shape curriculum, Reich's reference to a "triad of interest holders" should now be read to mean a "quadruple of interest holders."

However, as we will see, sometimes there may well be good reasons related to the special nature of rights claims in the educational context which occasionally justify upholding interests at the expense of certain rights. Finally, when rights conflict with one another, we will avoid espousing the position that a certain fixed hierarchy of rights exists to claim that the right to freedom of religion, for example, is more important than the right to equality or vice versa.¹⁷ Instead, we will draw on Waldron's work about the conflicting duties underpinning conflicts of rights to attempt to better understand the conflict in question and to see which right should be privileged, and why, in any given situation.

With respect to children's education in Canada, a number of cases related to educational authority involve the interests of parents, children, teachers and the state. These cases likewise implicate parents, children and teachers as respective rights claimants who advance, individually or together, constitutional law claims in the educational context.

Parents as Rights Claimants

Parents have advanced *Charter* or human rights claims related to children's education in the context of public, secular schools as well as in the context of home schooling.

¹⁷ In *Dagenais v. Canadian Broadcasting Corporation*, Lamer C.J.C. (as he then was) of the Supreme Court of Canada made the following observation about a non-hierarchical approach to *Charter* rights: A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights. [1994] 3 S.C.R. 835 at 877.

Public schools

As far as public and secular schools are concerned, parents have acted as rights holders in the following cases: *Zylberberg v. Sudbury Board of Education (Director)*¹⁸, *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*¹⁹, and *Fancy v. Saskatoon School Division No. 13*.²⁰ In all three of these cases, the rights disputes focus on curricular practices and materials of a religious character. Likewise, an analysis of the legal reasoning reveals a sensitivity to, and concern for, the educational interests of children as being distinct from those of their parents. In the three cases, we also note that there is a convergence of parental and children's educational interests.

In *Zylberberg v. Sudbury Board of Education (Director)*, a group of parents²¹ sought a declaration that s. 28(1)²² of the provincial regulations governing education was unconstitutional. According to this section:

A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

The parents argued that the religious exercises, and being Christian in nature, ran afoul of s. 2(a) of the *Charter*, which guarantees freedom of religion. As this section states:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;²³

¹⁸ (1988) 52 D.L.R. (4th) 577, 65 O.R. (2d) 64 (Ont. C.A.).

¹⁹ 65 D.L.R. (4th) 1, 71 O.R. (2d) 341 (Ont. C.A.), reversing (1988), 50 D.L.R. (4th) 193, 64 O.R. (2d) 577 (Ont. Div. Ct) ("Elgin County").

²⁰ Saskatchewan Human Rights Board of Inquiry K.R. Halvorson July 23, 1999.

²¹ At the time of the challenge, five parents were part of the application. When the Court of Appeal heard the case, two had since moved and discontinued their action. Of the remaining three, one was Jewish, one was Moslem and one did not practice religion although his wife was Roman Catholic.

²² See s. 28 of R.R.O. 1980, Reg. 262.

²³ In *R. v. Big M Drug Mart*, Dickson J. defined freedom of religion as follows:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or

It is worth noting that the applicants decided to send their children to a public rather than a separate school in order to give them a secular education. Furthermore, none of the parents chose to avail themselves of the exemption provision (under the regulations), which would have allowed them to have their children exempted from participating in the religious exercises. The parents chose this course of action because they did not want their children “singled out” from their peers because of their religious beliefs.

A majority of the court²⁴ held that section 28(1) was antithetical to the *Charter* objective of promoting freedom of conscience and religion. As they observed: “The recitation of the Lord's Prayer, which is a Christian prayer, and the reading of Scriptures from the Christian Bible impose Christian observances upon non-Christian pupils and religious observances on non-believers.”²⁵ The majority rejected the contention that the request to seek an exemption²⁶ did not constitute a form of “constraint, compulsion or coercion”²⁷ which serves to undermine freedom of religion:

While the majoritarian view may be that s. 28 confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to the religious practices of the majority. The evidence in this case supports this view. The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the class-room norms to which children

reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [1985] 1 S.C.R. 295 at 305.

²⁴ Brooke, Blair, Goodman and Robins JJ.A

²⁵ *Supra* note 18 at 586.

²⁶ At the time of the judgement, Section 50(2) of Ontario's *Education Act* provided the following exemption:

No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult. R.S.O., 1980.

²⁷ Here, the majority made reference to the Supreme Court of Canada's decision in *R. v. Big M Drug Mart*. *Supra* note 23. In particular, it incorporated the following passage of Dickson J.:

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. *Ibid.* at 336.

are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.²⁸

The majority also held that the violation of s. 2(a) of the *Charter* could not be justified under s. 1 which, states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

On the basis of the *Oakes* test,²⁹ the majority concluded that s. 28(1) did not impair the applicants' religious freedom "as little as possible." Drawing on the experience of the Toronto Board of Education, it ruled that there are less intrusive ways of imparting educational and moral values than those provided in s. 28. The majority held that it was not necessary "to give primacy to the Christian religion in school opening exercises and that they can be more appropriately founded upon the multicultural traditions of our society."³⁰

With the correction provided by the *Charter*, one notes that there exists an overlapping alignment of distinct yet complementary interests in this case, interests that

²⁸ *Ibid.*

²⁹ The *Oakes* test is derived from the Supreme Court of Canada's decision in *R. v. Oakes*. In this case, our highest Court laid down the procedure, which must be followed in deciding whether legislation infringing *Charter* rights can be justified under s. 1. First, it must be determined whether the legislative objective is sufficiently important to warrant overriding the Charter right or freedom. If it is, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This, in turn, requires the application of the three components of what the Supreme Court of Canada called the "proportionality test", which requires a balancing of the objective of the legislation with its effects. The first question to be asked is whether the legislation is rationally connected to the objective. The second is whether the means chosen impair the Charter right or freedom as little as possible. The third is whether there is proportionality between the objective and the effects of the measures in limiting Charter rights or freedoms. See [1986] 1 S.C.R. 103, at 138-140.

³⁰ *Supra* note 18 at 590. Courts in Manitoba and British Columbia have also decided that the discriminatory use of the Lord's prayer in public schools is illegal and violates the *Charter* guarantee of freedom of religion. See, *Manitoba Assn. for Rights and Liberties Inc. v. Manitoba*, [1992] 5 W.W.R. 749 (Man. Q.B.), *Russow v. British Columbia (Attorney General)* (1989), 62 D.L.R. (4th) 98 (B.C.S.C.).

are shared by three stakeholders: parents, children and the state.³¹ First, the parents have a right to select a secular education for their children and the applicants chose this form of schooling by not sending their children to the separate school system where Christian values would have been an acceptable part of the curriculum. This parental right to choose a public secular education is recognized and protected under s. 2(a) of the *Charter*, which guarantees freedom of religion.³² The case stands for the proposition that parents have a fundamental interest in selecting the type of education they believe best suits the needs of their children.

Second, the majority was alive to the interests of children in its analysis, interests related to yet distinct from those of the parents.³³ This concern for the educational interests of children is reflected in the majority's refutation of the claim of the school board's psychologist. This person believed that the religious exercises were good for minority students because they forced minority pupils to confront "the fact of their difference from the majority." The majority of the court dismissed this position for its lack of sensitivity: "This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the *feelings of young children*." (emphasis added) Emotional security, which does not ignore the beliefs and values of minority students, is an important and separate interest having special significance for the children in this case. This interest in emotional security may be seen as an instantiation of the larger interest children have in belonging. More specifically,

³¹ Teachers in a public school system also have an interest in the elimination of these Christian religious exercises as they go against the secular values that the teachers hope to instil in all of their students, whether they come from a religious culture and background or not.

³² We return to the parental right to educate children in more depth when we discuss the *Chamberlain* case later in this chapter.

³³ The court should have heard from the children themselves, especially if it believed that their right to freedom of religion had been violated. This would reinforce the idea that children have interests in their own education that is distinct from that of their parents.

minority students have an interest in fitting into a public and secular school system which honours and respects students of all faith back grounds and students with no faith back ground, not simply students from the dominant Christian group.

Third, the state has an interest in ensuring that in its public and secular schools, parents and children are not subjected to religious exercises of an indoctrinating nature. Indoctrination is wrong because it fails to treat individuals with the respect and the dignity to which they are entitled as self-regulating and autonomous oriented human beings. Hence, it is incumbent upon the state to provide individuals with the opportunity and space they require to make fundamental choices about what constitutes a good life, including whether or not to embrace or reject beliefs of a religious nature. Religious choices cannot be foisted upon individuals who have different and conflicting beliefs of a personal and/or religious nature. In addition, the liberal state cannot be seen as endorsing any particular religion in its public and secular schools. Consequently, s. 28(1) of the education regulations had to be struck down.

From a rights conflict perspective, the case can also be viewed as pitting the right to freedom of religion against the interest school authorities have in instilling morality in their students. In his dissenting opinion, Justice Lacourciere claimed that the regulation did not violate the parents' freedom of religion because students were not compelled to engage in the religious exercises by virtue of the exemption. He also suggested that the regulation had a secular educational purpose with a religious component. As he stated:

I agree with the argument of the respondent board that exercises with a religious component which are aimed at fostering moral principles encouraging honesty, integrity and good citizenship constitute a worthy educational goal ... It is important, in my opinion, for the educational system to instil personal values in its pupils so that they may be prepared for the challenges of life.³⁴

³⁴ *Supra* note 18 at 593.

Few would disagree with Justice Lacourciere that schools have an obligation to teach students about morality. Unfortunately, his prescription for attaining this goal, in the context of public and secular schools, is not convincing. One may still teach students about morality without recourse to religious exercises and religious indoctrination.

Two years later, in 1990, the Ontario Court of Appeal decided another case involving Christian curriculum in the context of public and secular schools. Once again, the parental *Charter* right of freedom of religion served as the basis of the constitutional challenge to Ontario's curriculum. Likewise, the interests of the parents, the children and the state converge in the judicial analysis. And the court does consider the separate interests of all three interest holders in its reasoning. In *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*³⁵, the Canadian Civil Liberties Association and a group of parents brought an application for judicial review to challenge both a provincial regulation³⁶ authorizing religious instruction in Ontario's schools and the curriculum of religious studies for the Elgin County Board of Education. The applicants argued that the regulation and the instruction amounted to Christian indoctrination and consequently ran afoul of their religious freedom as guaranteed by s. 2(a) of the *Canadian Charter of Rights and Freedoms*.

The school board required its students to take two periods of religious instruction per week, although the relevant legislation also had an exemption from this instruction for students whose parents opposed their participation.³⁷ At the time of the application,

³⁵ *Supra* note 19.

³⁶ See s. 28 of R.R.O. 1980, Reg. 262, as amended by O. Reg. 617/81.

³⁷ See s. 28(10). *Ibid.* Parents were given one of three choices about their children's participation in the program: (a) take part; (b) opt for an alternate program taught in classes by clergy; or (c) opt out

only members of the Elgin County Bible Association provided the religious instruction.³⁸ The initial instruction was also largely from a fundamentalist Christian perspective. In 1986-87, the school board made curriculum changes to add references to other faiths. And finally, after the litigation had commenced, the board decided that in 1987-88, classroom teachers rather than lay volunteers would provide elementary religious education. Ontario's Court of Appeal ruled that the three curricula indoctrinated school children in Ontario in the Christian faith³⁹. The court then held that this constituted an infringement of s. 2(a) of the *Charter*:

State-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities. Although s. 2(a) of the Charter is not infringed merely because education may be consistent with the religious beliefs of the majority of Canadians ... , teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the class-room. It creates a direct burden on religious minorities and non-believers who do not adhere to majoritarian beliefs.⁴⁰

As in *Zylberberg*, the court held that an exemption from the religious instruction did not constitute a satisfactory answer to the twin problems of inequality or coercion flowing from the exemption:

The judgment of this court in *Zylberberg* ... is, indeed, determinative of the issue: '[T]he exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non conformists and setting them apart from their fellow students who are members of the dominant religion.'⁴¹

completely. The court rejected this approach and referred to its earlier decision in *Zylberberg v. Sudbury (Board of Education)*, *supra* note 18.

³⁸ Section 28(7) of the provincial regulation permitted a board to allow clergy or lay people to give religious instruction in lieu of teachers.

³⁹ As the court stated:

The pre-1986 curriculum is substantially of an indoctrinating nature and may appropriately be declared to be inconsistent with s. 2(a). ... [T]he other two curricula present a mixed picture. Notwithstanding the efforts which appear to have been made to effect changes in these curricula, it is our opinion that they contain sufficient indoctrinating material to preclude us from regarding it as trivial or inconsequential. *Supra* note 19 at 39.

⁴⁰ *Ibid.* at 23-24.

⁴¹ *Ibid.* at 23.

It also found that section 1 of the *Charter* could not be used to justify the violation of the appellants' freedoms conferred by s. 2(a). As a result, the court struck down the relevant regulation authorizing religious instruction and issued an order enjoining the school board from continuing to require or permit the curriculum to be offered in its schools.

Like for *Zylberberg*, the parental interest in an education free from indoctrination stems from the fact that parents are at liberty to make educational choices about the type of moral education their children will receive. When these parents enrol their children in a public and secular system, they are entitled to have their children receive, from a religious perspective, an education which is free from a Christian slant or bias. This interest is front and centre in the judgement and is protected by s. 2(a) of the Charter which upholds freedom of religion. One of the parents, Elizabeth C. Sebestyen, had two children aged five and seven attending a board school. She gave evidence by affidavit expressing her objection to indoctrination in the Christian faith. She also found the alternatives either of having her children sit on a bench outside the class-room, or of their sitting in on the class, to be unacceptable as she feared that her children would be seriously ostracized by their classmates.⁴² This represents the parental perspective and may well have coincided with the beliefs and perceptions of her children although the evidence does not speak to this point.

The court also recognizes an interest of the children, independent from the interest of both the state and the parents. This is most noticeable when the court highlights (and accepts) the expert opinion of Dr. Freedman on the effect on children of being exempt from religious education classes:

⁴² *Ibid.* at 26.

Dr. Freedman deposed that children whose religion is different from that being taught in the class-room will feel pressure to conform and experience stress and discomfort if they remain in the class-room. This stress and discomfort arises from the fact that children are caught between the opinions and wishes of two authority figures, their teachers and their parents. If they decide not to participate, they will feel deviant and worry about the consequences. In his opinion, participation may make them especially likely to be influenced by what they hear. He concluded that merely telling children or their parents that they may claim exemption and opt out of classes on religious education does not serve to remove the “great pressure to remain in the classroom”.⁴³

This sensitivity to the needs of children suggests that to become independently functioning adults and to become minimally autonomous, children cannot be forced to take religious courses in public schools or to be told what to believe in matters religious. In conjunction with their home life and family upbringing, children in public schools must remain free to determine for themselves what religious obligations, if any, they should espouse. The state cannot dictate otherwise.

The state’s interest in having children develop into able citizens and independently functioning adults suggests that their education should equip them with the intellectual skills and moral values needed to make their way in the world. Teaching about morality should not, however, be confused with indoctrination and, like its earlier decision in *Zylberberg*, the Ontario Court of Appeal once again underlined this idea in its analysis. In other words, preparing children to live moral lives in a democratic and culturally diverse society does not necessarily require children to embrace a life founded upon the Christian ideal. In the context of public and secular education, the state cannot

⁴³*Ibid.* One of the applicant families, the Millingtons, belonged to the Baha’i faith. The parents were raising their children in that faith, which is premised upon principles of tolerance and respect for other religions. Their seven-year-old daughter, Andrea, who was in Grade 2 at one of the Elgin County schools, had been taught in the religious education class offered by her school that if she was not a Christian she would “go to hell”. During the time she was receiving such instruction, she had recurring nightmares in which she was pursued by the Devil and felt that she was burning in hell. *Ibid.* at 25-26. This rather dramatic evidence once again highlights the interests of the children, as distinct from the interest of others in this case.

endorse religious indoctrination and at the same time promote the educational interests of its young.

It is worth noting that the Court of Appeal makes a distinction in its judgement between indoctrination and education about religion.⁴⁴ It notes that the *Charter* prohibits the former but does not prohibit the latter.⁴⁵ The state has an interest in educating children about religious diversity and different religious cultures to better prepare students for life in a complex and pluralistic world. In this regard, I have suggested elsewhere that education about religion can be justified in public and secular schools on a variety of grounds.⁴⁶

In terms of conflicts of rights, the Ontario Court of Appeal in both *Zylberberg* and *Canadian Civil Liberties Association* must reconcile the parental right to freedom of

⁴⁴ As the court states:

While this is an easy test to state, the line between indoctrination and education, in some instances, can be difficult to draw. With this in mind it may be of assistance to refer to the following more detailed statement of the distinction: 1. The school may sponsor the study of religion, but may not sponsor the practice of religion. 2. The school may expose students to all religious views, but may not impose any particular view. 3. The school's approach to religion is one of instruction, not one of indoctrination. 4. The function of the school is to educate about all religions, not to convert to any one religion. 5. The school's approach is academic, not devotional. 6. The school should study what all people believe, but should not teach a student what to believe. 7. The school should strive for student awareness of all religions, but should not press for student acceptance of any one religion. 8. The school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief. *Ibid.* at 27-28.

⁴⁵ In response to this decision, the Ontario Ministry of Education issued a policy memorandum and amended relevant regulations dealing with religion in schools. The Ministry memorandum stated that henceforth Ontario public schools and programs, including programs in education about religion, under the jurisdiction of boards of education (except s. 93 boards) had to meet two conditions; a) they must not be indoctrinational; and b) they must not give primacy to any particular religious faith. A number of parents challenged this arguing that the Ministry's action was unjustifiable. In *Bal v. Ontario (Attorney General)*, the court rejected the parents' application thereby upholding the validity of the new policy. (1994), 121 D.L.R. (4th) 96, 21 O.R. (2d) 681 (Ont. Gen. Div.), affirmed (1997), 151 D.L.R. (4th) 761, 34 O.R. (3d) 484 (Ont. C.A.), leave to appeal refused (1998), 113 O.A.C. 199 (note) (S.C.C.). In its ruling, the court highlighted the non-denominational nature of public education: "The public school is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to promote non-denominational education." *Ibid.* at 130.

⁴⁶ Paul T. Clarke, "Religion, Public Education and the *Charter*: Where Do We Go Now?" (2005) 40(3) *McGill Journal of Education* 1-31. In this paper, I argue that philosophical, pragmatic and educational reasons justify the inclusion of religion discussion and expression in our public schools. The limits of this discussion and expression, I maintain, are governed by the values enshrined in our *Canadian Charter of Rights and Freedoms*.

religion with the state's interest in ensuring that students have a moral foundation to their education. Since the state can teach about morality without using the vehicle of Christianity to do so, the reconciliation is relatively straightforward given the state's duty not to indoctrinate in any particular religious faith. This means that the state is under a duty to provide secular curricular materials which do not reflect a religious bias or perspective. Likewise, the state must hire teachers who will deliver the curriculum in a fair minded manner without imposing their own religious beliefs, or the religious beliefs of others, on the students. The secular state is also under a duty to preserve the separation between state and church, thereby guaranteeing the integrity of the public, secular education system. Finally, the state is under a duty to take corrective measures to address any attempt to indoctrinate children in any specific faith tradition in its public and secular schools. By upholding these duties, the state respects the constitutionally protected right of the parents to freedom of religion.

The decisions in *Zylberberg and Canadian Civil Liberties Association* can be contrasted with the ruling in *Fancy v. Saskatoon School Division No. 13*⁴⁷. In the Saskatchewan case, a Board of Inquiry had to adjudicate on the complaints of several parents against the use of the Lord's prayer and Bible readings in Saskatoon public schools. More specifically, the parents alleged that the religious exercises interfered with their right to freedom of religious practice and denied their children's right of education without discrimination because of religion, as guaranteed respectively by ss. 4 and 13 of *The Saskatchewan Human Rights Code*.⁴⁸ Drawing on the overwhelming evidence of

⁴⁷ *Supra* note 20.

⁴⁸ S.S. 1979, c. S-24.1 According to s. 4 of the Code:

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

both parents and students, the Board of Inquiry had little difficulty concluding that the complaints of discrimination had been substantiated. By way of illustration, one Jewish student testified that while in public elementary school he had to attend assemblies in the gymnasium. At the end of the assemblies, he had to stand for “O’ Canada” and remain standing for the Lord's prayer. The student would stand respectfully, but would not bow his head or repeat the prayer. On one occasion, a substitute teacher told him it was impolite not to bow. He complained to the principal who said the student could be exempted, but he was not informed until much later that he could leave the gym. The student, however, did not exercise the right because leaving caused confusion for him and he did not know where to go, or with whom.⁴⁹ Commenting on the interest of the student in an environment free from religious discrimination, the Board of Inquiry observed: “Max believed the school should not impose on him or others, a value system which was not theirs and which left them feeling segregated.”⁵⁰

In *Fancy*, the parental and children’s interests in a secular education are synonymous. Both want an education which is free from religious coercion or indoctrination. These interests are expressed as rights claims. For the parents, the claim is about freedom of religion. For the children, the claim is a right to equality. These interests, giving rise to human rights claims, are similar to the parental and children’s interests in the Ontario Court of Appeal cases. Notwithstanding the finding of discrimination, the Board of Inquiry ultimately held that recitation of the Lord's prayer at

Section 13 (1) states:

Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of his or their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, nationality, ancestry, place of origin, or receipt of public assistance.

⁴⁹ *Ibid.* at para. 11.

⁵⁰ *Ibid.* at para. 12.

the opening of the school day is a constitutionally entrenched right. Unlike the result reached in the Ontario cases of *Zylberberg* and the *Canadian Civil Liberties Association*, it came to this conclusion because of the wording of s. 17 of the *Saskatchewan Act* and an earlier Ordinance of 1901 pre-dating Saskatchewan's entry into Confederation in 1905.⁵¹ These constitutional provisions offer an anomalous protection for the Lord's prayer in spite of the fact that the Saskatoon school board was (and still is) a public and secular board.

In terms of a conflict of rights, the Board of Inquiry had to reconcile the parental right to freedom of religion and the children's right to education free from religious discrimination, protections enshrined in Saskatchewan's human rights legislation, with the state's obligation to uphold its constitutional mandate. Although the state has a duty, as we have seen, not to indoctrinate its young in any particular faith in the context of public and secular schools, it also has a duty to adhere to the dictates and terms of its own constitution. The ruling makes it clear that provincial human rights legislation cannot be used to invalidate constitutional guarantees as enshrined in the *Saskatchewan Act* and the *Ordinances* of the Northwest Territories. Thus, on one level, one might contend that the

⁵¹ According to s. 17(1) of the *Saskatchewan Act*:

Section 93 of the Constitution Act, 1867 shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph.

- (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

Section 137(2) of the 1901 School Ordinance states:

It shall however be permissible for the board of any district to direct that the school be opened by the recitation of the Lord's prayer.

On the evidence presented, the Board of Inquiry found that the Lord's prayer often occurred later in the school day and that the board of education had failed to "direct" that the school be opened by the recitation of the Lord's prayer. Instead, it delegated its responsibility to the discretion of individual teachers as to whether or not the prayer would be recited. As the Board of Inquiry concluded: "On the facts before the Board of Inquiry, it is apparent, however, that the Board of Education has lost its constitutional immunity for use of the Lord's prayer because the requisites of s. 137(2) have not been met." *Ibid.* at para. 79.

reconciliation is not a difficult one. Our constitutional order and imperative leave little doubt as to the final result. Furthermore, the human rights protection for religion and equality is not without substance in other circumstances. It will still protect the parents and the children from other types of impermissible conduct in public and secular schools. For instance, these schools cannot mandate that students take faith based classes or require that students study the formal curriculum (e.g. certain subjects) from a certain religious perspective.

Nonetheless, constitutional permissibility does not in itself make for sound and good educational policy, especially in a diverse world where tolerance and appreciation for difference are important pedagogical and societal goals to pursue. The Board of Inquiry draws our attention to this when it recommends that the Board of Education for Saskatoon avoid directing schools to use the Lord's Prayer as part of their institutional routine. After all, just because the Ordinance authorizes the use of the Lord's Prayer does not mean that the school board has to compel use of the prayer. It may use its discretion not to.⁵²

⁵² As the Board of Inquiry so aptly remarked:

Elementary schools are a powerful environment in which to manipulate the minds of children. Derogatory or demeaning comments or attitudes by teachers may be accepted even where they conflict with family values. It is because of the vulnerability of these children that a fair and tolerant atmosphere must be maintained within the public school system. Focusing on the dominant religion runs counter to this objective. *Ibid.* at para. 101.

*Home schooling*⁵³

Parents may also advance *Charter* claims in the realm of private education. In *R. v. Jones*⁵⁴, a parent claimed that the state violated his constitutional right to freedom of religion in the context of home schooling. Unlike the previous cases, all situated in the public sphere, the parental right in *Jones* conflicts with the state's interest in maintaining some measure of educational control in the private realm. The case is also different because the court gives no consideration at all to the children's interests or rights in this case.

In the *Jones* decision, Larry Jones refused to send his children to the local school. He preferred to educate them along with 20 or more other children in a schooling program called the "Western Baptist Academy." The academy operated in the basement of a fundamentalist church where Jones worked as a pastor. He refused to seek permission from school authorities to educate his children at home. The school legislation⁵⁵ made allowances for home schooling. Jones could have applied to the Department of Education for approval of his academy as a private school. Alternatively,

⁵³ In my thesis, I assume that home schooling is a legitimate type of education. Here, I draw on the work of Rob Reich who claims that parents who homeschool their children can realize the state's and the child's interests in education. *Supra* note 1. Reich's research demonstrates that, in certain circumstances, children's autonomy may be threatened in public schools where the pressure to conform can undermine independence. He also notes the existence of certain studies showing that home schooled children "often outperform their public and private school counterparts in scholastic achievement." *Ibid.* at 296. Moreover, Reich suggests that practical considerations justify home schooling as a legitimate alternative. For example, some children with rare or severe physical or mental challenges "may have such specific learning needs or require such a tailored learning environment that public or private schools simply cannot accommodate them." *Ibid.* Families living in rural or sparsely populated regions far from schools may choose to home school and the state may find it cost ineffective to build a public school to meet the needs of these families. With these considerations in mind, Reich concludes:

On account of the fact that homeschools can feasibly realize the state's and child's interests in education, and because homeschooling may in some circumstances be the only practical educational option, it would be unjust for the state to ban homeschooling. Educating children at home under the direction and authority of their parents must be a legitimate form of schooling. *Ibid.* at 297.

⁵⁴ [1986] 2 S.C.R. 284.

⁵⁵ See *School Act*, R.S.A. 1980, c. S-3, ss. 142(1), 143(1)(a), (e), 180(1).

his children could have been excused from attending school if he had obtained a certificate from the education authorities indicating that the children were receiving “efficient instruction” at home or elsewhere. Jones chose not to avail himself of either option. Consequently, his actions led to charges of truancy under the relevant school legislation.

Jones maintained that seeking permission from the Department of Education violated his freedom of religion guaranteed by s. 2(a) of the *Charter*. He argued that requesting the state’s permission to do what God authorized him to do would violate his religious convictions. Jones also claimed that by limiting evidence of efficient instruction to a certificate deprived him of his liberty contrary to the principles of fundamental justice guaranteed by s. 7⁵⁶ of the *Charter*. He posited that this evidentiary limitation prevented him from making a full answer and defence to the charge. A unanimous Supreme Court of Canada rejected Jones’ freedom of religion claim while a majority of the Court rejected his s. 7 argument. The Court thereby upheld the constitutionality of Alberta’s compulsory education scheme.

This case is important because our highest Court acknowledged, in clarion terms, that the parental interest in children’s education, as recognized and constitutionally protected by virtue of s. 2(a) of the *Charter*, is not the only interest that counts. As Justice La Forest declared:

If the appellant has an interest in, and a religious conviction that he must himself provide for the education of his children, it should not be forgotten that the state, too, has an interest in the education of its citizens.⁵⁷

⁵⁶ Section 7 of the *Charter* states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁵⁷ *Ibid.* at para. 22.

He then went on to quote with approval the following passage from the United States Supreme Court's decision in *Brown v. Board of Education of Topeka*⁵⁸ which, explains the nature of the state's interest:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁵⁹

La Forest J. ruled that, since the state's interest in the education of its young is "compelling", this entitled the state to place reasonable limits on the freedom of those like Jones who "believe that they should themselves attend to the education of their children and to do so in conformity with their religious convictions."⁶⁰ The Court then considered Jones' s. 2(a) and s. 7 claims.

With respect to the s. 2(a) analysis, the Court highlighted the importance of having a legitimate legislative scheme for compulsory attendance to guarantee a reasonable standard of education. As Justice Wilson declared:

In my view, the School Act does not offend religious freedom; it accommodates it. It envisages the education of pupils at public schools, private schools, at home or elsewhere. The legislation permits the existence of schools such as the appellant's which have a religious orientation. It is a flexible piece of legislation which seeks to ensure one thing--that all children receive an adequate education.⁶¹

⁵⁸ 347 U.S. 483 (1954) at 493.

⁵⁹ *Ibid.* at para. 22.

⁶⁰ *Ibid.* at para. 23.

⁶¹ *Ibid.* at para. 62. Writing for four of the seven justices on this issue, Justice Wilson held that the school legislation did not violate Jones' religious freedom under s. 2(a) of the *Charter*. Writing for the three remaining justices, Justice La Forest found that the effect of the *School Act* did constitute "some interference with the appellant's freedom of religion" because the legislation required Jones to acknowledge that the government, rather than God, had the final authority over the education of his children. Nonetheless, he accepted that requiring Jones to apply to the educational authorities for

From a pragmatic perspective, Justice La Forest recognized that school officials need administrative flexibility to implement policy. Hence, he underlined the practical difficulties that would arise should the state be required to chase after Jones to ensure that his teaching met provincial standards. He therefore concluded that the obvious way to administer a compulsory education system was to require “those who seek exemptions from the general scheme to make application for the purpose.”⁶² Justice La Forest held that this requirement constituted a reasonable limit on Jones’ religious freedom.⁶³

Under the s. 7 analysis, Jones argued that restricting proof of efficient instruction to the presentation of a certificate issued by the educational authorities violated his right to life, liberty and security of the person.⁶⁴ Justice La Forest, writing for the majority, rejected his claim. He stated that ascertaining what constitutes adequate instruction was a policy choice best left to the educational authorities. Furthermore, Justice La Forest refuted Jones’ claim that the process engaged in by the school authorities in certifying instruction as efficient amounted to a judicial hearing best left to the courts. Although he acknowledged that the judicial process was used in other provinces, La Forest J. stated

certification that his teaching complied with provincial standards of efficiency constituted only a “minimal” intrusion on his religious liberty and therefore constituted a reasonable limit on his s. 2(a) rights.

⁶² *Ibid.* at para. 30.

⁶³ It is important to remember that the educational context is a relevant consideration for the Court under its more general s. 1 analysis. In other words, when attempting to ascertain what constitutes a reasonable limit on any right or freedom, the Court must always look to the specific context when it attempts to reconcile the various rights and interests. In our study, the educational context is thus always germane as far as s. 1 is concerned.

⁶⁴ In dissent, Justice Wilson noted:

In my view, ss. 143(1) and 180(1) do not give the appellant the opportunity to adequately state his case. Restricting proof of efficient instruction to the introduction of the certificate is an evidentiary limitation. It is a clog on the unimpeded conduct of defence by counsel. It prevents the introduction of evidence that is relevant to the case. It was this injustice that led the trial judge in this case to regard the legislation as in violation of s. 7. I respectfully agree with him.

Ibid. at para. 82.

She likewise held that the s.7 violation could not be justified under s.1 of the Charter maintaining that the government had put forward no justification for the one exclusive means of establishing efficient instruction. She also noted that it had proffered no argument as to why exclusivity is necessary to achieve the province's objective of insuring adequate instruction for its children.

“provinces must be given room to make choices regarding the type of administrative structure that will suit their needs. . . .”⁶⁵

Finally, he was not prepared to second-guess the ability of educational authorities to decide what constitutes efficient instruction. In this sense, the Court deferred to the expertise of the relevant school officials. As Justice La Forest observed:

[I]t seems normal enough to refer a question of efficient instruction within the meaning of the School Act to a school inspector or a Superintendent of Schools who is knowledgeable of the requirements and workings of the educational system under the School Act.⁶⁶

Hence, *Jones* stands for the proposition that the state’s interest in curricular control must also encompass reasonable ways and means to ensure that children are receiving appropriate and adequate instruction even when this instruction is taking place in a private setting. In this regard, Justice La Forest commented briefly on how far the province could go in imposing conditions on the way Jones provides instruction, if he had applied for registration of his academy as a private school or for certification of the efficiency of his instruction:

Certainly a reasonable accommodation would have to be made in dealing with this issue to ensure that provincial interests in the quality of education were met in a way that did not unduly encroach on the religious convictions of the appellant. In determining whether pupils are under "efficient instruction", it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the Charter. Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified.⁶⁷

This judgment makes it clear that the rights conflict over curricular control engages both the constitutional right to freedom of religion, of the parent, and the interests of the state

⁶⁵ *Ibid.* at para. 41.

⁶⁶ *Ibid.* at para. 40.

⁶⁷ *Ibid.* at para. 25.

in maintaining some control over what gets taught, and by whom, even in the context of home schooling. Yet, what can we say about the interests or rights of children in their own education? The Court gave no separate consideration to this issue. We know, from the state's perspective, the purpose of the school legislation was to ensure that "all children receive an adequate education."⁶⁸ It seems plausible to suggest that children themselves have a similar interest or right and the state has a duty to act on their behalf to promote this interest or right should parents fail to do so. In the context of home schooling and private religious schools, a difficult but obvious question emerges. If children's interests or rights in education are independent from those of their parents, what constraints might the state place on the parental right to educate, in accordance with the parent's deeply held religious and conscientious beliefs, to balance the interests of the parent with those of the child and the state?

Wisconsin v. Yoder: Disentangling parent rights and interests from those of the children in the realm of private religious education

Canadian courts have yet to determine what interests, or rights, children themselves have when their education is of a religious nature and is conducted in the private sphere. The issue came to the fore in the United States' Supreme Court's ruling in *Wisconsin v. Yoder*⁶⁹ in 1972. In this case, a group of Amish parents⁷⁰ challenged the state of Wisconsin's compulsory attendance legislation requiring students to stay in school until they had reached the age of 16. The parents were prepared to have their

⁶⁸ *Ibid.* at para. 62.

⁶⁹ 406 U.S. 205 (1972).

⁷⁰ Two of the respondent parents, Jonas Yoder and Wallace Miller, were members of the Old Order Amish religion. The other parent respondent, Adin Yutzy, was a member of the Conservative Amish Mennonite Church. At the time of the Court's decision, the respondents and their families were residents of Green County, Wisconsin.

children educated in school until they completed the 8th Grade. But, the parents opposed the two years of mandatory, public high school (Grades 9 & 10) because they believed this would violate their freedom of religion and ultimately undermine their ability, as members of a deeply religious and reclusive community, to continue to survive and to perpetuate a way of life, nearly 300 years old.

The US Supreme Court ruled that the First⁷¹ and Fourteenth Amendments⁷² of the US Constitution prevent a state from compelling Amish parents to send their children to school until they reach the age of 16. Chief Justice Burger, writing for a majority of the Court, focused his analysis on the urgent need of the Amish community to control the religious education of its young members to avoid assimilation. Most importantly, he ruled that the parental right to rear children, combined with both the parental and children's rights to freedom of religion, justified the exemption sought by the respondent parents to Wisconsin's mandatory school attendance legislation. The Chief Justice also considered the state's dual interest in the education of children: to promote citizenship and to facilitate the goal of self-sufficiency. On both counts, he held that the Amish met these important state interests.⁷³ Justice Douglas wrote the sole dissenting opinion. He argued that the majority failed to consider the rights and interests of the children as separate persons, distinct from their parents. He ruled that one should not impose parental views of religious education on a child, and thereby exempt the child from Wisconsin's

⁷¹ According to the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. U.S. Consti. Amend I, s. 1.

⁷² According to the relevant section of the Fourteenth Amendment of the US Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Consti. Amend. XIV, s.1.

⁷³ Justice Stewart (joined by Justice Brennan) and Justice White (joined by Justice Brennan and Justice Stewart) wrote brief concurring opinions.

compulsory attendance laws, without first canvassing the child's views on the matter. In other words, the religious views of the adolescent child should be determinative of whether or not s/he attends a public high school.

Yet, the reasoning of both the majority and minority judgments is problematic. Writing for the majority, Chief Justice Burger ignores the interests of children in their own education. In dissent, Justice Douglas wrongfully suggests that children's religious beliefs settle the matter. One cannot properly address the question of how one balances the different interests until one accepts that children have an educational interest in minimal autonomy, an interest that is neither recognised nor defended in the *Yoder* decision.

Chief Justice Burger portrays the balancing of interests as involving only two parties, namely, the parents and the state: "[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."⁷⁴ This approach is troubling because it fails to consider the interests of those most directly affected by the educational decision-making, namely, the children. As Justice Douglas in dissent notes:

The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.⁷⁵

For the Chief Justice, the interests of the children are assumed to be identical to those of their parents. This conflation of interests is reflected in the following statement he makes:

⁷⁴ *Supra* note 69 at 232. I return to a consideration of these interests later in this chapter.

⁷⁵ *Ibid.* at 241.

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance on their rights and the rights of their children to the free exercise of the religious beliefs they and their forbears have adhered to for almost three centuries.⁷⁶

The Chief Justice is correct to point out that it is the parents who are subject to criminal prosecution for failing to send their children to school and that, technically speaking, the children are not parties to the litigation. Yet, this narrow reading misses the point. The children, with their own interests in education, merit separate consideration on their own terms. Children deserve this type of consideration because they are, morally speaking, persons who are separate from their parents. As Reich reminds us, children possess “independent interests”⁷⁷ and “it is important to identify children’s interests as distinct and not to subsume them under those of their parents or of the state.”⁷⁸ The Chief Justice’s failure to treat children as distinguishable from their parents is not consistent with a moral theory of the family. His treatment suggests that the interests of children do not count and that children serve only to further the religious interests of their parents who are opposed to public education at the high school level. As Eamonn Callan explains:

A moral theory of relationships in the family that says only the interests of one or both parents count is despotic. That is the sin of patriarchy, which entails that all members of a family are properly subject to the father. Patriarchy is no less gross a denial of the truism that we are all free and equal citizens as moral doctrines that argue for the subjection of one race to another. ... No one would now deny that if a moral theory interprets the child’s role so as to make individual children no more than instruments of their parents’ good it would be open to damning moral objections.⁷⁹

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 1 at 290.

⁷⁸ *Ibid.*

⁷⁹ *Supra* note 3 at 114-5. At the same time, Callan recognizes that “a moral theory of the family that says only the interests of children really count merely inverts the despotism of patriarchy” and that we should object to any theory “that interprets the parent’s role in ways that make individual parents no more than instruments of their children’s good.” *Ibid.* 144-5.

If children are indeed moral persons in the family, their interests must be considered separately from those of their parents.

In dissent, Justice Douglas is alive to the separate moral status of children. As he notes: “Recent cases... have clearly held that the children themselves have constitutionally protectible interests. These children are ‘persons’ within the meaning of the Bill of Rights.”⁸⁰ He claims that the parents’ religious opposition to their children attending public high school should not be foisted upon their 14 or 15 year-old children. For Justice Douglas, these children are morally and intellectually capable of making up their own mind and it is the views of the children that count. As he declares:

It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.⁸¹

Justice Douglas notes that, of the three respondent parents, only one of their children (Frieda Yoder) testified that her own religious views were opposed to high-school education. As for the remaining two children, he declared:

But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.⁸²

In the final analysis, Justice Douglas concludes that it is the children’s religious views about their education that trump all other considerations. Yet, simply equating Amish children’s religious beliefs with their interests in education should be avoided for two main reasons. First, the Amish child Frieda Yoder who testified and expressed

⁸⁰ *Supra* note 69 at 243.

⁸¹ *Ibid.* at 245-6.

⁸² *Ibid.* at 247.

opposition to attending public high school may simply have been parroting the wishes of her parents and their views about what constitutes suitable education for children of Frieda's age. Secretly, she may have yearned to attend high school but suppressed such a yearning on the basis of a variety of motivations such as obedience, fear of damnation, guilt, or an excessive desire to please her parents. In this case, Frieda's religious convictions would have been a mask for other educational intentions and interests, namely those of her parents. Under such conditions, her separate personhood would be morally compromised.

Second, even if Frieda had been testifying in good faith and genuinely believed that her religious beliefs precluded further studies, this should not by itself necessarily settle the matter. Although the child's views about religion are important and should be canvassed, there is still the real possibility that sincerely held religious convictions may conflict with other independent and important educational interests, which children of Frieda's age might have in their own education.⁸³ One such interest, which the Justices in *Yoder* failed to consider, is children's interest in minimal autonomy.

In *Yoder*, there exists a legitimate concern that children who grow up in the reclusive religious community might become ethically servile. After all, the roles and expectations for boys and girls are clearly delineated and set down by others, namely, the parents and adults in the Amish community. These expectations also account for a rigid organisation of life in the Amish community along gender lines. Commenting on the

⁸³ Once again, for various reasons, Frieda may have been unable or unwilling to understand or appreciate these other educational interests. Furthermore, as Dwyer remarks:

Justice Douglas ... appeared to overlook the psychological harm that could have resulted from placing these children in the position of having to make such a momentous decision, as well as the fact that thirteen-year-olds, particularly those who have spent their entire lives in an insular, illiberal religious community, are probably not capable of making, an informed, rational decision about whether they should go to school. *Ibid.* at 53.

demands made on Amish children during the formative adolescent period of life, Chief Justice Burger states:

During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor.⁸⁴

Deviation from these roles does not appear to be tolerated. Here, Amish children have no educational choices other than those predetermined by the adults in their lives.

Yet, during adolescence, children are often experiencing unprecedented growth and development of a physical, emotional, cognitive and psychological nature. Adolescents often have many questions and, in some cases, are more willing to take risks, to experiment and to challenge the status quo. Exposure to some form of high school education in an appropriate setting⁸⁵ is arguably necessary to develop (at least nominally) one's rational capacities. Furthermore, high school education may expose Amish children to (at least the idea of) other social groups and other modes of being. Even in a diminished form, the development of one's rational capacities and exposure to others are both consistent with the promotion of minimal autonomy. This does not mean that one must maximize his or her life options or even be able to make his or her way in the world after selecting from a multitude of choices about what constitutes the good life.

According to Reich:

But nothing in this conception implies that children must lead Socratic lives of sustained critical reflection or that they be weaned away from the lives of their parents in order for them to choose a way of life for themselves. A person need not subject his or her interests to Socratic critical scrutiny on a regular basis to be considered minimally autonomous; a person need not have the widest possible array of choices to be considered minimally autonomous.⁸⁶

⁸⁴ *Ibid.* at 211.

⁸⁵ I return to this idea later in the chapter.

⁸⁶ *Supra* note 1 at 292.

Hence, minimal autonomy does not mean that individual autonomy must be trumpeted as the supreme value. For obvious reasons, this approach would be inconsistent with the value of community extolled by the Amish community. Nonetheless, minimal autonomy does suggest that some alternative possibilities and some choices may be glimpsed into or entertained by Amish teenagers. A female adolescent who is led to believe that her only option in life is to be a dutiful mother and submissive wife may consciously, or unconsciously, long for some other choice that life has to offer.

This approach may sit uncomfortably with those who oppose any high school education for Amish children because minimal autonomy, and exposure to other ideas that it implies, carries the possibility, however remote, that the child so exposed will want to chart his or her own path and leave behind the Amish community.⁸⁷ Yet, this risk is necessary if one wants to fight against “ethical servility” and the purely instrumental treatment of children as ends either of their parents or the community’s good.

Children’s interests/rights: The Canadian context

Canadian courts have yet to address the issue of children’s educational interests and rights in the context of home schooling, or private schools, where religious instruction figures prominently in the curriculum. In 2006, Quebec’s Ministry of Education launched a crackdown on unlicensed evangelical schools, saying the province would shut down any institution that does not follow the provincial curriculum and teach

⁸⁷ The risks of assimilation for the Amish community are serious. The Chief Justice highlighted this by referring to the expert evidence of Dr. Hostetler:

Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States. *Supra* note 69 at 212-3.

Darwinism.⁸⁸ Setting aside the licensing issue, it is unclear whether the state can compel private and religious schools to teach evolution, contrary to the beliefs of those who run the school as well as the beliefs of supportive parents and their children.⁸⁹ Is such an order constitutional and how might we balance the trilogy of interests in this case? From the state's perspective, children should not be subjected to bad science and those who firmly believe that the world was created in seven days (or alternatively is only a few thousand years old) are simply wrong and should not be allowed to foist their ignorance upon their unwitting children regardless of the depths of their convictions. As the state prepares its children for the demands of citizenship and adulthood, it is incumbent to pass on to those children the methods and tools of analytical and rational inquiry so they will not be duped by those who hold false opinions, regardless of how well intentioned the holders of these opinions are.

Critical thinking and religious instruction

In broader terms, the secular state has an interest in a particular type of children's education, namely one that encourages the promotion of critical thinking. H. Siegel⁹⁰ offers a number of compelling reasons for accepting critical thinking as a fundamental educational ideal. First, morality and respect for person call for critical thinking.⁹¹

⁸⁸ See Caroline Alphonso & Rheal Seguin, "Teach Darwin, Quebec tells evangelicals", *Globe and Mail* (Wednesday, Oct. 25, 2006, A6). The article notes that all Quebec schools require a permit to instruct students and that schools must follow the curriculum which includes the teaching of Darwin's theory of evolution. The article goes on to state that, "Elsewhere in Canada, governments tend not to interfere with what is taught in independent schools, unless a particular school is using the provincial curriculum." *Ibid.*

⁸⁹ It is unclear from the actual article whether the evangelicals actually need to teach "Darwinism" or just tell students about the theory of evolution. The analysis of this scenario may well lead to different results depending on whether the schools are just required to present a theory, whether they must present the theory as factual or correct, or whether they must indoctrinate the students with a broader ideology in mind, etc.

⁹⁰ *Educating Reason: Rationality, Critical Thinking, and Education*. (NY: Routledge, 1988).

⁹¹ As Siegel explains:

This first consideration is simply that we are morally obliged to treat students (and everyone else) with respect. If we are to conduct our interpersonal affairs morally, we must recognize and honor

Second, self-sufficiency and preparation for adulthood justify critical thinking.⁹² Third, initiation into the rational traditions provides support for critical thinking.⁹³ Fourth, democracy itself requires critical thinking.⁹⁴ Siegel's four points reflect "liberal" values of equality, autonomy, self-responsibility, and democracy. Nonetheless, these values are consistent with a contemporary theory of pedagogy and are in large measure both assumed and embraced by our political society. In light of this, one could posit that teaching children "falsehoods" based on creationism or some other religious viewpoint which seek to deny the scientific veracity and underpinnings of evolution is inconsistent with the Quebec Ministry of Education's interest in the promotion of critical thinking amongst the province's youth.

On the other hand, accommodating the teaching of creation alongside evolution might best promote critical thinking as students would then have to assess the different approaches and merits of the two theoretical approaches. Furthermore, if we are to respect the parental interest in children's education, along with the parental right to

the fact that we are dealing with other persons who as such deserve respect - that is, we must show *respect for persons*. This includes the recognition that other persons are of equal moral worth, which entails that we treat other persons in such a way that their moral worth is respected. *Ibid.* at 56.

⁹² According to Siegel:

The second reason for taking critical thinking to be a worthy educational ideal has to do with education's generally recognized task of preparing students to become competent with respect to those abilities necessary for the successful management of adult life. We educate, at least in part, in order to prepare children for adulthood. . . . That is, we seek to render the child *self-sufficient*; to *empower* the student to control her destiny and to *create* her future, not submit to it. *Ibid.* at 57.

⁹³ As Siegel states:

If we can take education to involve significantly the initiation of students into the rational traditions, and such initiation consists in part in helping the student to appreciate the standards of rationality which govern the assessment of reasons (and so proper judgment) in each tradition, then we have a third reason for regarding critical thinking as an educational ideal. *Ibid.* at 59-60.

⁹⁴ For Siegel:

The fundamentality of reasoned procedures and critical talents and attitudes to democratic living is undeniable. Insofar as we are committed to democracy, then, that commitment affords yet another reason for regarding critical thinking as a fundamental educational ideal, for an education which takes as its central task the fostering of critical thinking is the education most suited for democratic life. *Ibid.* at 61.

control this education as protected by s. 2(a) of the *Charter*, we must be sensitive to the fact that parents will want to instill in their children certain moral and religious beliefs. This may especially be true for those parents who have consciously chosen to remove their children from the public and secular schools so they can furnish them with a religious education. Some of the parental beliefs, premised perhaps more on faith than on logic or reason, may at times be inconsistent with scientific truth and thus not easily reducible or amenable to the standards of critical thinking and rationality. Where private schools are concerned, and where these schools exist primarily to promote a religious agenda and religious ideals, some accommodation of the parental interest may be required when the curricular materials and approaches of the private schools do not always square with the provincially mandated curriculum. Ascertaining what exceptions to make to the standard curriculum, and why, is not an easy task reducible to some magic and infallible formula but will require a case-by-case review of the particular facts of each situation.

As far as the Quebec scenario is concerned, accommodating the teaching of a non-Darwinian approach may not necessarily be beyond the pale. First, it may be entirely possible to expose children to both the secular and religious theories about the origins of the universe including the beginnings of humanity. This would allow the state interest to co-exist with the parental interest and right. Second, even (some of) those children who believe that their parents' views on the topic are the correct ones may come to reject those views as they grow older and become more mature, critical and autonomous. Hence, enlightenment may still be a possibility for any number of these children. Third, the secular state, which prizes tolerance for a wide variety of beliefs, may even want to

accommodate children who later become adults and still believe in a religiously based view of the origins of humankind. Although some may call this a misguided or ill-informed notion about where we come from, it is far from certain that the potential harm resulting from this view is sufficiently serious to warrant a secular only approach to the subject. It is conceivable that evangelical children and parents might have a religious take on the topic and still be able to respect their neighbors and fellow citizens who hold a secular viewpoint. Tolerance of different beliefs may well be an achievable goal in these circumstances. At the end of the day, it is unlikely that the liberal state's interest in its children's education will really be undermined if it allows some parents with non-scientific views about our humble beginnings to pass onto their children religious beliefs which differ from those of mainstream society and the scientific establishment.⁹⁵

This situation can be contrasted with a religious private school which infuses its curriculum with a strong hatred for certain groups of people based on arbitrary

⁹⁵ Shelley Burtt contends that a religious education is not incompatible with the ideals of autonomy and independent thinking. She also argues that "sustained, sympathetic exposure to different ways of life" may create a cosmopolitan person but not necessarily an autonomous one. As Burtt notes, exposure to alternative ways of being "creates the false impression that a truly autonomous relation to one's ends or identity requires individuals to 'shop' for their ideals." See "Comprehensive Educations and the Liberal Understanding of Autonomy" in Kevin McDonough & Walter Feinberg, eds., *Education and Citizenship in Liberal-Democratic Societies: Teaching for Cosmopolitan Values and Collective Identities* (Oxford: Oxford Univ. Press, 2003) 179-207 at 204. For Burtt, the idea of the autonomous individual as "informed consumer" inaccurately portrays the relationship between choice and autonomy. In this regard, she observes:

The effort to be autonomous seems better characterized as a struggle to fit our already internalized ideas of what it means to live well with various challenges we encounter in our effort actually to live a good life. Deciding what to do in these circumstances does not seem to involve first and foremost a rapid polling of all the various ways in which humans understand what it means to live well. Rather we try to sort out, as the occasion rises, what it means for me, this person, to live well given these circumstances. To think independently, at these moments (in conscious resistance to the pressures of convention, tradition and authority) requires us to look inwards not outwards. 'Is this the best understanding of what it means to be the sort of person I believe I am?' is the sort of question autonomous individuals ask in difficult circumstances. 'What sort of person am I? and why?' are necessary subsidiary questions which must be answered as well Instruction in the capacities necessary for this sort of reflection is the type of education for autonomy which could usefully be provided at the primary and secondary level, and to which parents sceptical of mainstream liberal culture would have less reason to make objection. *Ibid.* at 204.

characteristics such as one's ethnic background, country of origin or religious beliefs. The hatred might conceivably be accompanied by the encouragement of force and violence directed towards others. For example, an extreme fundamentalist group (of whatever religious persuasion) might teach its children that their purpose and mission in life is to convert others to their faith. Should these others refuse conversion, their teaching may require of them to use violence against the non-believers or infidels. Let us assume that these fundamentalist parents are sincere believers and maintain that their God requires that they educate their children in these tenets of their faith, including the promotion of violence, which they hold to be fundamental and non-negotiable.

To accommodate these religious beliefs would require the liberal state to acknowledge that tolerance has no limits. This approach should be rejected where the actual or potential harm threatens to undermine our shared humanity in a religiously and culturally diverse world. Teaching a message of violence is incompatible with our moral obligation to treat one another with respect and dignity and to resolve our most profound religious and philosophical differences peacefully. In these circumstances, we might want the state to intervene in the affairs of the school which actively fostered the use of violence against minorities or certain classes of people. This scenario might be distinguished from the case where a faith based school taught racial discrimination or taught its students that there are inherent differences between genders and differently ordained roles for men and women based on divine revelation. Although one might find these views deeply troubling, we still might tolerate this kind of teaching in a liberal society because the threat to others is not imminent or not as apparent.

How in these circumstances might we also reconcile the state and the parental interests with the distinct interests of the children in their own education? Let us not forget that children themselves have an interest in minimal autonomy and an interest in becoming fully functioning adults. These interests do not disappear just because the children attend a private religious school. Exposing the children to both the secular and religious perspectives on the sources of our humanity would respect the importance of nurturing and meeting the needs associated with both the child's rational self and her faith based self. Exposure to divergent viewpoints, and especially where the child plans to enter mainstream society to work and to live, has the potential to develop, at least minimally, her capacity for critical thinking and her ability to get along with others who see the world differently. Although younger children, who are eager to please their parents and may feel a strong tie to their religious faith, may not appreciate this need for a secular approach, the state still should act on their behalf (and even possibly against the children's own wishes) to promote the best educational interests of the children themselves. When children grow older and, most of them, separate from their families by making their own way in the world, they may come to see how the state has acted to protect their interests, as distinct from the interests of their parents.

At the same time, children have an interest in maintaining a healthy relationship with their family and religious community. This is important for the child's emotional and psychological well-being. Family connections run deep and religious faith may serve to reinforce these special ties, which bind. In this sense, a child raised in a family and communal setting where religion is important has an interest in maintaining a good sense of her own identity. Knowing who she is and having a certain measure of self-confidence

may come, in large part, from a faith based education. This interest of the child cannot simply be ignored. Thus, a state that aggressively pursues a secular policy, which is insensitive to the religious educational needs of some of its children, may risk alienating some children from their families and communities. It is hard to see how this approach can serve the educational interests of the children. It is axiomatic that children attending a private religious school who plan to enter mainstream society may at times feel trapped, conflicted, bewildered or uncertain about the intersection between the secular and religious worlds. This cannot be avoided. But if these demands placed by the secular and religious authorities on the children become too rigid, too exclusive, and too ideological, the children's educational interests may be compromised. They may be forced to choose one route, in stark opposition to the other. However, as children mature, negotiate the tensions of the social world and make their way in life, their educational interests are more likely to be met if they can take the best that both the secular and religious traditions have to offer and then chart a course that allows them to flourish as human beings.

A continuum of parental deference

On a continuum, deference to parental control of children's education (for religious reasons) is at its highest in the context of home schooling and private schooling, where no public monies are involved to support the parents and parents have the greatest freedom with respect to curricular control. In these circumstances, education and religious indoctrination will remain inextricably intertwined and a strong parental liberty interest should be respected. As we move along the continuum, however, we encounter private schools with partial or full state funding. In this setting, education and religion are

still inseparable but the state's interest in children's education grows stronger because of greater curricular control and financial support for these kinds of schools.

Next, we encounter the special category of s. 93 schools. These schools pose unique challenges because of their constitutional status, which protects group rights of a religious nature. Here, education and religion are once again indissoluble. At the same time, s. 93 schools are fully funded by public monies and subject to some measure of public scrutiny. At the other end of our continuum, we have public and secular schools. The state's interest in children's secular education is at its strongest in these schools because public policy compels a strict separation between education and religious indoctrination.

What can we say about the children's interest in their own education at the various points along this spectrum? We need to remember that the children's interest in their own education is conceptually distinct from the interests of both the parents and the state because each child has a separate moral status, which should not be obliterated by other parties. In one sense, this interest remains constant simply because the child is a distinct moral entity entitled to consideration of his or her own educational interests and as judged from the perspective of the child. In another sense, this interest is likely to change depending on the circumstances. If children have an interest in minimal autonomy, this interest grows stronger as we move away from parental and religious control of education, in the private setting, and head in the direction of stronger state and secular control in the context of public schools where rationality and critical thinking may take precedence over a faith-based education. Children's interest in their own education may also grow in strength as children age and become more intellectually and

morally sophisticated. A child's interest in his or her own education at the age of five will look quite different from his or her own interest when he or she attains the age of 16. As children become more articulate and able to advance and defend their own interests, this actual exercise of autonomy should influence how we balance the children's interests in their own education with the interests of both the parents and the state.

Children as Rights Claimants

Children have also made constitutional claims with respect to control over their education. Cases involving such claims occur in public, secular schools and in s. 93 schools.⁹⁶ With respect to public and secular schools, children have been constitutional rights claimants in the following cases: *Lutes (Litigation Guardian of) v. Prairie View School Division No. 74*⁹⁷, *Eaton v. Brant County Board of Education*⁹⁸ and *Multani v. Commission scolaire Marguerite-Bourgeois*.⁹⁹ The first and third cases focus respectively on freedom of expression and freedom of religion. The second case relates to equality rights.

Freedom of expression

In *Lutes (Litigation Guardian of) v. Prairie View School Division No. 74*¹⁰⁰, the court considered briefly the idea of a student's constitutional right to free speech. A grade nine student, Chris Lutes, received a month long noon hour detention for singing a rap tune, "Let's Talk About Sex". The student sang the song during the noon hour recess and

⁹⁶ On their own, children lack standing to appear before the courts. Consequently, parents or the child's legal guardian will make the claim on the child's behalf.

⁹⁷ [1992] S.J. No. 198, 101 Sask. R. 232.

⁹⁸ [1997] 1 S.C.R. 241, [1996] S.C.J. No. 98. There is an emerging body of jurisprudence dealing with special education which I do not consider in my thesis. To-date, the *Eaton* decision is the only Supreme Court of Canada decision dealing exclusively with special education. For more recent developments, see: Monica A. Williams & Robert B. Macmillan, "Litigation in Special Education and the Law: From Placement to Programming" (2005) 15(1) *Education & Law Journal*, 31-59.

⁹⁹ [2006] S.C.J. No. 6.

¹⁰⁰ *Supra* note 97.

while off school property. In the presence of classmates, Chris broke into song as he approached the assistant director of his school division.¹⁰¹ The school official took offence to the student's actions, describing them as "insolent, rude and disrespectful." Upon learning of this incident, the vice-principal of Chris' school imposed the noon hour suspension to discipline him. The vice-principal then sent a letter to the student's parents informing them of the suspension. He explained that the song had been banned in school and that it was inappropriate. The school officials later changed their position, claiming that Chris had been disciplined for rude behaviour.¹⁰²

Acting as litigation guardian, Chris' mother challenged the suspension in court. She claimed, among other things, that the school had violated her son's right to freedom of expression. She noted that the song "does not contain any offensive lyrics and has been used in the schools in North America pursuant to an Aids Awareness Program."¹⁰³ The trial judge agreed, noting that the song was intended to educate young people about safe sex and aids. Barclay J. described the song as "an inoffensive song that carried a powerful message."¹⁰⁴ The judge held that Chris had established a strong prima facie case that this s. 2(b) rights had been violated and that the actions of the school could not be justified under s. 1.¹⁰⁵ Since Barclay J. was dealing with the matter on the basis of an interim injunction, the trial judge gave no further consideration to the s. 2 and s. 1

¹⁰¹ It is conceivable that Chris' actions could have been interpreted as sexual harassment of the school official. Yet, it was considered not to arise on the facts of this case.

¹⁰² The court rejected this argument stating that the student's rights had "crystallized" when his parents received the school letter informing them of the suspension.

¹⁰³ *Ibid.* at 237.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at 240.

arguments. Barclay J. concluded that Chris could pursue his free speech arguments at trial.¹⁰⁶

Although the *Lutes* case offers only a superficial consideration of free speech, students, like teachers¹⁰⁷, should have a constitutional right to free speech.¹⁰⁸ As students explore new ideas and challenge traditional practices and assumptions, some measure of free speech is necessary if we wish to educate our children in accordance with a liberal model of education. This justification of free speech is consistent with the search for truth rationale, often cited by courts who defend freedom of expression. Hence, one might conclude, for example, that a frank and open discussion among teenage students about sex and safe sexual conduct (including the analysis of songs promoting safe sex) may help students better understand the nature of human sexuality and learn the facts about safe and unsafe sexual practices.¹⁰⁹

As students are future citizens, one can also posit that the political process rationale has some relevance here. Allowing and encouraging students to express unpopular or discomfoting views is a political statement or act because it gives voice to a segment of the population that has often been neglected or marginalized. Creating space for students to speak up may help to ensure that they are heard in the diverse, and at times controversial, conversations that we as a society must engage in. If we want our students to become active politically and to act as responsible citizens, we must provide them with the opportunities to be involved in the dialogic process. One might suggest that students

¹⁰⁶ It appears that Chris abandoned the proceedings because no trial of the matter ever took place.

¹⁰⁷ I return to the question of teacher free speech later in the chapter.

¹⁰⁸ I leave aside for the moment the issue of disrespectful or rude expression. I return to this later in our discussion.

¹⁰⁹ A discussion of abstinence, in this context, would obviously be appropriate in terms of informing teenagers of other choices they might also entertain when it comes to ascertaining what constitutes appropriate and respectful human behaviour.

who dare to engage in legitimate expression that is polemic or taboo, such as speech related to sexuality or religion, invoke the political process rationale because they show others that it is possible to participate in societal discussions. By their example, they refuse to be excluded from these discussions simply because of their status as children or students.

The self-fulfilment rationale may likewise be applicable to justify student expression. The word “educate” comes from the latin *educare*, which means “to cause to grow.” If one of the goals of a liberal education is to help students reach their full potential as human beings or to become all they can be, then the protection of some student expression becomes important as a means of realising this objective. Students who articulate unpopular ideas, express opinions that embarrass others, or challenge the status quo may in the process or journey engage in self-awakening and self-discovery. In doing so, they call into play the self-fulfilment rationale.

The right to freedom of expression, of course, is not absolute. And in some circumstances, the school context will justify more stringent restrictions on student speech than would otherwise be tolerated for ordinary citizens. The school, for instance, has an interest in educating students and youth about civil behaviour and good manners. In *Bethel School District No. 403 v. Fraser*,¹¹⁰ the United States Supreme Court elaborated on the meaning of “the habits and manners of civility” in these terms:

These fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching

¹¹⁰ (1986) 92 L.Ed. 549 (U.S.S.C.).

students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.¹¹¹

On this basis, the same Court held that school boards may determine the appropriate manner of expressing oneself in the school context:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the “fundamental values necessary to the maintenance of a democratic political system” disfavor the use of terms of debate highly offensive or threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of values is truly the “work of the schools.” . . . The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.¹¹²

Hence, disciplining students who, for no legitimate reason, engage in swearing¹¹³, the use of inappropriate language, or rude expressive behaviour would be consistent with the inculcation of social values, a function that we expect of our schools. In the *Lutes* case, the student’s expressive action could be viewed as insolent because of what appears to have been an attempt to embarrass a school official. Normally, this type of expression should not be protected under the guise of s. 2(b) because it undermines the values of civility the school is attempting to instill in its students. Although we might rightly object to such deportment in the public square, and offer good reasons for our objections, we are

¹¹¹ *Ibid.* at 557. The Court also noted:

In our Nation’s legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of “impertinent” speech during debate and likewise provides that “[n]o person is to use indecent language against the proceedings of the House.” *Ibid.*

¹¹² *Ibid.* at 558.

¹¹³ A student might have a good reason for swearing if s/he were using such language in a school play where it was a required part of the script. In certain circumstances, swearing might be justified on the grounds that it is a way of expressing frustration at something.

unlikely to allow the state to impose sanctions for this type of behaviour as this degree of societal control would be viewed as over reaching or oppressive.

The school also has an interest in presenting information to students that is age appropriate. Students in high school studying Grade 12 English might read a novel where an explicit sexual assault occurs. The novel may also contain ethically ambiguous scenes and many swear words that some might find offensive. Assuming that the novel is pertinent to the course of study and has pedagogical and literary merit, the high school students might argue that, under the guise of free speech, they have a right to this kind of information and literature. They might maintain that it enhances the quality of their educational experience by confronting them with social reality and moral dilemmas with which they need to contend as they prepare for adulthood and the demands of a changing and complex world.

Yet, presentation of the same material to a class of Grade 6 students would be unsuitable for their needs and these students could not justifiably claim that their free speech rights had been violated by school authorities who forbade them access to this novel. In these circumstances, and unlike their older counterparts, the younger students would not have the cognitive, psychological, and moral capacities and sophistication to study and to assess the merits of the novel. Certain among them might parrot the swear words, for instance, and find this amusing. Others, however, might be confused or frightened by the scenes presented. Given their inability to engage with the text in a meaningful way, school authorities would have reasonable grounds for denying the Grade 6 students access to these materials simply because the curriculum is not age appropriate.

From a conflict of rights perspective, the *Lutes* case suggests that a student's constitutionally protected right to free speech may collide with the state's interest in ensuring that it teaches students the values of politeness, civility and respect. To uphold the student's right places certain duties on the state. For example, the state must not censor expression simply because it is offensive. It must also create opportunities for students to exercise their free speech rights. And the state must educate other students about the value of free speech in a democracy. At the same time, the student's right to free speech is not absolute. Expression which is inherently disrespectful of others, rude or insolent should not be protected when it undermines the school's ability to teach students the values of getting along with others in a respectful and decent manner. In the *Lutes* case, the reconciliation between the student's right to free speech and the state's interest in civility posed little difficulty for the court. Since the song was about safe sex, a subject entirely appropriate for Grade 9 public school students, the school erroneously categorized the song as inappropriate and thus attempted to restrict the student's free speech without any valid justification. In other words, the school wanted to ban the song simply because it did not like the song's content. Had the school discipline imposed on the student, however, been justified on the grounds that the expressive actions were disrespectful, a valid restriction could have been placed on Chris' speech to further the school mission to teach civility.

Freedom of religion

In *Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys*¹¹⁴, the Supreme Court of Canada had to reconcile a minority student's constitutional right to freedom of religion with the state's interest (as represented by a Quebec school board) in

¹¹⁴ *Supra* note 99.

a school community safe and secure for all students. In this case, the principal of a French language school in Montreal told a Khalsa Sikh student, Gurbaj Singh Multani, that he could not wear his *kirpan*, a ceremonial dagger, at school. Yet, Gurbaj's religious beliefs, and his status as a baptized orthodox Sikh, required him to wear the kirpan while attending school. The issue came to the fore when the *kirpan* accidentally fell from the boy's outer clothing while in the schoolyard. The school board later met with the family and agreed to allow Gurbaj to don the *kirpan* at school, provided that the flap covering it in its sheath was sewn securely. Moreover, the school authorities were entitled to inspect the flap sealing the kirpan to ensure safety compliance with the wearing of the ceremonial dagger.

The school governing board¹¹⁵ would not accept the compromise reached between the parties, alleging that the wearing of the *kirpan* violated the school's Rules and Regulations regarding dangerous and forbidden objects. The parents appealed this decision unsuccessfully to the school board, which oddly maintained the decision of the school governing board. The family then took the matter before the courts, seeking a declaratory judgment that Gurbaj had the right to wear the *kirpan* at school in conformity with his religious beliefs and his basic human rights, namely freedom of religion, as set out in the Quebec *Charter of Human Rights and Freedoms* and the *Canadian Charter of Rights and Freedoms*.

¹¹⁵ This body has delegated authority, under Quebec's *Education Act* (ss. 76, 77), to adopt school rules as proposed by the principal and developed in collaboration with school staff.

Given the initial compromise agreement between the parties, the Quebec Superior Court¹¹⁶ declared the decision of the school board to be null and void.¹¹⁷ The Court ordered that Gurbaj be permitted to wear the *kirpan* to school provided:

- that the kirpan be worn underneath his clothes;
- that the scabbard containing the kirpan be made of wood, not metal, thereby eliminating its offensive character;
- that the kirpan be placed in its scabbard, wrapped in a secure manner . . . ;
- that school staff may, in a reasonable manner, verify that the above conditions are respected;
- that the plaintiff may not at any time withdraw the kirpan from its scabbard and that its loss must be reported immediately to school authorities;
- that the failure by the plaintiff to observe any of the conditions of this judgment shall cause him to lose the right to wear the kirpan at school.¹¹⁸

Quebec's Court of Appeal overturned this decision. It had little difficulty holding that the school board's final decision to disallow the wearing of the kirpan violated Gurbaj's freedom of religion because the decision had the effect of prohibiting an act that was an important aspect of the practice of the student's religion. Nonetheless, the Court ruled that the restriction on Gurbaj's freedom of religion could be justified under s. 1 of the *Charter* as constituting a reasonable limit on his constitutional rights. Uppermost in the Court of Appeal's mind was a concern for safety. In addition, Lemelin J.A. noted that case law upheld a ban on the kirpan aboard commercial aircraft and in the courtroom:

The uncontradicted evidence described an upsurge of violent incidents where dangerous objects were used. School staff have an important challenge to meet, namely, the obligation to provide an environment for learning and to combat this

¹¹⁶ [2002] J.Q. No. 1131 (Que. Sup. Ct.).

¹¹⁷ The Court offered four brief introductory phrases, which could be construed to justify its position:

- considering that for the plaintiff, the wearing of the kirpan is based on a genuine religious belief and not a simple caprice;
- considering that the evidence has not revealed any examples of violent incidents involving kirpans in any Quebec school;
- considering the state of Canadian and American law on this issue;
- considering that the school board has proposed measures of accommodation that have been accepted by the parties. *Ibid.* at para. 6.

¹¹⁸ *Ibid.* at para. 112-113.

violence. I can not convince myself that the security requirements of schools are less than those required for the courts or airplanes.¹¹⁹

The Supreme Court of Canada¹²⁰ reversed the decision of the Court of Appeal, holding that the school board's actions violated the student's freedom of religion and that this violation could not be justified under s. 1 of the *Charter*.

The rights' conflict in this case requires us to consider both the state's obligations vis-à-vis the minority student, as a rights holder who is exercising his constitutionally protected right to freedom of religion, and the state's corresponding obligations to ensure that all students are able to attend a school that is a safe and secure. In other words, religious freedom must be reconciled with school safety. With respect to the student, and as a preliminary matter, the state has an obligation to inquire about the student's claim to ensure that his freedom of religion has actually been infringed. As the majority of the Supreme Court of Canada noted, to establish an infringement, the right claimant:

[M]ust demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.¹²¹

In this case, the majority held that Gurbaj Singh sincerely believes that his faith requires him at all times to wear a kirpan made of metal.¹²² It also noted that his refusal to

¹¹⁹ *Ibid.* at para. 84.

¹²⁰ Five of the nine Justices reached their decision on the basis of a constitutional law analysis. They included: McLachlin C.J., Bastarache, Binnie, Fish and Charron JJ. Two of the Justices arrived at the same result but chose an administrative law analysis instead. They were Deschamps and Abella JJ. Major J. took no part in the judgment. In separate reasons, Le Bel J. ruled that the dispute as presented made a constitutional analysis unavoidable. He likewise agreed with the final result.

¹²¹ *Ibid.* at para. 34.

¹²² As the majority noted:

Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times. The affidavits of chaplain Manjit Singh and of Gurbaj Singh explain that orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly known as the Five Ks: (1) the kesh (uncut hair); (2) the kangha (a wooden comb); (3) the kara (a steel bracelet worn on the wrist); (4) the kaccha (a special undergarment); and (5) the kirpan (a metal dagger or sword).

wear a replica made of a material other than metal was not capricious. As the majority remarked: “He genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan.”¹²³ Finally, the majority concluded that interference with the student’s freedom of religion was neither “trivial” nor “insignificant.” The prohibition against wearing the kirpan deprived the student of his right to attend a public school.

Waldron’s framework of conflicting duties helps to explain what is happening in this case from a conflict of rights perspective. The right to freedom of religion and the interest of students in a safe learning environment impose different duties on the state and it is this tension between the competing duties that has to be resolved. To ensure the student in *Multani* can exercise his constitutionally protected right to freedom of religion, the state must commit to a number of obligations. Chief among these, the state must allow the right holder to express his religious beliefs through words and actions without fear of sanctions. It must also ensure that opportunities exist, both in the private and public realm, so the student can exercise his right to freedom of religion. In this case, the public school setting was a place where the student was allowed to exercise this right, at least under certain conditions. Likewise, the state must prevent others from interfering with the practice of the right holder’s religious beliefs. In the *Multani* case, the school board attempted to restrict the student’s s. 2(a) rights and the Supreme Court of Canada deemed this action unjustifiable. Finally, the state has a duty to educate others about

Furthermore, Manjit Singh explains in his affidavit that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation. *Ibid.* at para. 36.

¹²³ *Ibid.* at para. 39.

religious minorities and their religious beliefs. This is consistent with the state's interest in teaching students about political virtues, such as tolerance, so that students may become able citizens. The majority of the Court framed the school's obligation in these terms:

Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is at the very foundation of our democracy.¹²⁴

To be sure, the right to freedom of religion is not absolute. As the majority of the Court in *Multani* observed: "This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others."¹²⁵ The prevention of harm is consistent with the state's interest in having a safe and secure learning environment for all students. If students are entitled to this kind of environment, certain duties fall on the state to meet to ensure that this entitlement is satisfied. Consequently, the state must ensure that its schools are safe and non-threatening spaces for its young. It must provide appropriate resources to meet this obligation. In addition, the state may require schools to adopt policies that specifically address the issue of violence in their institutions. In the *Multani* case, the school's governing board had actually adopted a code of conduct, which prohibited the carrying of weapons and dangerous objects.¹²⁶ The state must also take measures to discipline those who would attempt to violate the school's commitment to safety and to respect for others. Furthermore, the state must educate its students about

¹²⁴ *Ibid.* at para. 76

¹²⁵ *Ibid.* at para. 26.

¹²⁶ *Ibid.* at para. 4.

safety issues and explain why students need to learn to control themselves and to solve their problems and differences through rational and non-violent means.

The reconciliation of the rights conflict in *Multani* proposed by the majority of the Court is a good one. First, the majority recognized that a complete prohibition against wearing a kirpan would send the wrong message by frustrating the student's s. 2(a) rights. As the majority declared:

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.¹²⁷

Moreover, the majority made an important distinction between “absolute safety” and “reasonable safety.” An absolute safety standard would require the removal of all potentially dangerous objects such as scissors, knives and baseball bats from our schools. For obvious reasons, this approach is neither possible nor desirable. A reasonableness standard also squares with the evidence the majority considered. It noted that in a 100 years of Canadian schooling, not one school incident involving a *kirpan* had occurred.¹²⁸ Finally, the reconciliation acknowledged that the right holder himself had to make certain concessions or accommodations in order to exercise his constitutionally protected right. The student had to wear his blunted *kirpan* in a sheath, sewn inside his clothing. He also had to submit to school authorities to ensure that he was following these dress requirements. Should he fail to respect these conditions, he would lose his right to wear the *kirpan*. In sum, this reconciliation upholds the value of religious freedom yet does not forget the safety needs of those who attend our schools.

¹²⁷ *Ibid.* at para. 79.

¹²⁸ *Ibid.* at para. 56-67.

Equality rights

The leading decision that relates to students' constitutionally guaranteed equality rights is *Eaton v. Brant County Board of Education*¹²⁹. In this case, a unanimous Supreme Court of Canada (SCC) ruled that the withdrawal of Emily Eaton from the regular classroom did not violate her s. 15 equality rights. The Court also ruled that the interests of the parents are not the only interests to be considered when ascertaining what constitutes the best placement for a child with special needs.

This case focused on the educational needs of Emily Eaton, a 12-year-old girl with cerebral palsy. Emily was unable to communicate through speech, sign language or other alternative communication systems and had some visual impairment. She had mobility problems and, although she could bear her own weight and walk a short distance with the aid of a walker, she mostly used a wheelchair to get around. Emily attended her local school when she began kindergarten. The Identification, Placement and Review Committee ("IPRC") of her school board identified Emily as an "exceptional pupil." At the request of her parents, it was determined that she should be placed on a trial basis in her neighbourhood school. The school board assigned Emily a full-time educational assistant whose principal function was to attend to Emily's special needs. At the end of the school year, the IPRC determined that she would continue in kindergarten for the following year. This arrangement was continued into Grade 1. A number of concerns arose as to the appropriateness of Emily's continued placement in a regular classroom. The teachers and assistants concluded, after three years of experience, that the placement was not in her best interests and might well harm her.

¹²⁹ *Supra* note 98.

The IPRC then determined that Emily should be placed in a special education class. Her parents appealed this decision to a Special Education Appeal Board, which unanimously confirmed the IPRC placement. The parents appealed again to the Ontario Special Education Tribunal (the “Tribunal”), which also unanimously confirmed the decision. Alleging a violation of their s. 15 equality rights, the parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. A unanimous Supreme Court of Canada reversed the decision of the Court of Appeal holding that the placement of Emily in a special education class did not violate the equality guarantee set out in s. 15(1)¹³⁰ of the *Charter*.

In *Eaton*, our highest court enunciated the following test to help determine whether a violation of section 15 exists:

There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.¹³¹

The Court acknowledged that Ontario’s *Education Act* drew a distinction between “exceptional” children and other children. The latter were placed in integrated classes while the former, in some cases, faced an inquiry leading to an integrated or separate placement. This distinction was based on the disability of the individual child, a prohibited ground under s. 15. The SCC refused, however, to conclude that the school board’s decision to place Emily in a segregated setting amounted to the withholding of an

¹³⁰ This section states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹³¹ *Supra* note 98 at para. 62.

advantage or benefit from Emily, or alternatively, to the imposition of a disadvantage or burden on her.

Here, the Court deferred to the expertise of the respective educational authorities. These authorities found that Emily's needs were not being met in the regular class. The SCC also noted that the school board had "made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports."¹³² The Court likewise stated that the Special Education Tribunal had undertaken a "thorough and careful examination"¹³³ of Emily's situation to ascertain whether her needs could be best met in a regular class or a segregated class:

The Tribunal considered the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence from the literature on placement; the testimony of experts in the matter of classroom placement; the Ontario Ministry of Education and Training's proposed directions regarding the integration of exceptional pupils; and the Charter and Ontario Human Rights Code ... in reaching its conclusion that the IPRC placement decision was the best placement for Emily.¹³⁴

In essence, the SCC recognized that it did not have the relevant expertise to second-guess the educational authorities provided those authorities would promote the best interests of Emily.¹³⁵ The Court concluded that the educational authorities were best placed to assess the educational needs of Emily. Consequently, it held that the placement of Emily into a segregated class did not amount to a violation of s. 15 of the *Charter*.

¹³² *Ibid.* at para. 23

¹³³ *Ibid.* at para. 72.

¹³⁴ *Ibid.* at para. 15.

¹³⁵ According to the Court:

[T]he decision-making body must . . . ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must . . . determine that the form of accommodation chosen is in the child's best interests.

Ibid. at para. 77.

In its analysis, the SCC noted that the Tribunal had balanced the various educational interests of Emily by taking into account her special needs and had concluded that the best possible placement for her was in the special class.¹³⁶ In *Eaton*, the Ontario Court of Appeal ruled that s. 15 of the *Charter* mandated a presumption in favour of integration. Consequently, it ruled that the Special Education Tribunal would not have inevitably arrived at the same conclusion had it appreciated that the *Charter* required that segregated placement be used only as a last resort. The SCC, however, rejected this presumption of integration when it came to the placement of exceptional children. Moreover, the Court made it clear that parental wishes alone, as to what constitutes the best interests of the child, would not carry the day. As Justice Sopinka stated:

In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question.¹³⁷

¹³⁶ Commenting on the Tribunal's findings concerning the needs and interests of Emily, the Court stated: The Tribunal grouped its findings into several categories of needs and interests implicated in education. With respect to Emily's communication needs, the Tribunal clearly found that "[b]ecause this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for [individualized, highly specialized, extremely intense, one-on-one] instruction". While the Tribunal did not indicate how Emily's academic or social needs would be better met in the segregated placement than in the integrated placement, it clearly concluded that these needs were not only unsatisfied, but that she was being isolated in a "disserving and potentially insidious way". The Tribunal also found that, with respect to Emily's physical safety, the special classroom was superior to the integrated classroom. The Tribunal looked at several categories of needs and pointed out that some, including the most important for Emily, would be better met in the segregated classroom. With respect to the others, while an express conclusion was not drawn as to how the segregated classroom would be superior, the inefficacy of the integrated classroom was established. *Ibid.* at para. 75.

¹³⁷ *Ibid.* at para. 79. Had the Court concluded that a constitutional presumption of integration existed under s. 15, the onus of rebutting this presumption would have been placed squarely on the shoulders of the educational authorities. These authorities would arguably have faced a higher onus of justification for segregated placements in the educational context.

Hence, when parents exercise equality rights, on behalf of their child who is young or unable to communicate his or her needs or wishes, the SCC reminds us that,

[T]he decision-making body must ... ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life.¹³⁸

As children mature and become more capable of expressing their own wishes and needs, the Court held that, “their own views will play an important role in the determination of best interests.”¹³⁹ If, in the context of special education, parental opinion about the child’s best interests is not conclusive, then the interests of parents concerning curricular control writ large should not be the only consideration when it comes to deciding who has the final say about what gets taught in our schools.

From a rights conflict perspective, the Court had to reconcile Emily’s s. 15 equality rights with the wishes of her parents and the state’s interest in providing Emily a suitable educational placement and environment. Drawing on Waldron’s work, it becomes clear that the state has a number of duties to meet to uphold Emily’s constitutionally protected equality rights. The state must provide Emily with an education commensurate with her needs and abilities. It has a duty not to discriminate against her because of her special needs. The state must provide the requisite resources to satisfy Emily’s educational needs. The state should also educate other students about the challenges students with special needs face as well as foster a positive attitude of acceptance among these students towards all students. Likewise, the state has a duty to consider the wishes of Emily’s parents and the opinions of the relevant educational

¹³⁸ *Ibid.* at para. 77.

¹³⁹ *Ibid.*

authorities who have something pertinent to say about Emily's placement. In its analysis, the Court ultimately held that there was no s. 15 violation of Emily's rights. Based on the best evidence available, the reconciliation of the parental and state interests with Emily's own equality rights led the Court to conclude that a special placement outside the regular classroom would be in the best interests of the student. This reconciliation seems reasonable given the diverse communication, mobility, and safety challenges that Emily had to face and given the serious difficulty school officials had meeting these special needs in the regular classroom.

Denominational rights

In *Hall (Litigation guardian of) v. Powers*¹⁴⁰, the Ontario Superior Court of Justice had to reconcile a Roman Catholic student's s. 15 equality rights with his school board's religious freedom as protected by both s. 93 of the *Constitution Act, 1867* and s. 2(a) of the *Charter*. In this case, a gay Grade 12 student (Marc Hall) attending a secondary school in Oshawa asked for permission from his school principal to attend the annual Prom with his boyfriend. The principal refused his request noting that if permission were granted, "this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings." The school board¹⁴¹ endorsed the principal's decision.

In court, Hall challenged the decision on the grounds that the school board's decision discriminated against him solely because of his sexual orientation. Since heterosexual couples were entitled to attend the Prom, he argued that it was unfair and unjustified to keep homosexual couples away. The school board and the principal

¹⁴⁰ [2002] O.J. No. 1803, 59 O.R. (3d) 423.

¹⁴¹ The Durham Catholic District School Board

responded by maintaining that they were simply exercising their constitutionally protected right to freedom of religion and that approval of the student's request would be contrary to their understanding of Catholic beliefs.

Since the Prom date was rapidly approaching, Hall sought an interlocutory injunction restraining¹⁴² the defendants from preventing his attendance at his Prom with his boyfriend. MacKinnon J. applied a three-part test to determine whether a granting of the injunction was appropriate in the circumstances.¹⁴³ For each arm of the test, he concluded that there were adequate grounds for granting the injunction. First, he noted that there was a serious issue to be tried. In this regard, he stated: "Exclusion of a student from a significant occasion of school life, like the school Prom, constitutes a restriction in access to a fundamental social institution."¹⁴⁴ Second, he ruled that preventing Hall from attending the Prom constituted harm that could not be properly compensated in damages. Given that attending the high school Prom with his peers amounted to a once a lifetime opportunity, MacKinnon reasoned that, "Being excluded from it constitutes a serious and irreparable injury to Mr. Hall as well as a serious affront to his dignity."¹⁴⁵ Finally, with respect to the balance of convenience, the judge concluded that the impact on the defendants resulting from the granting of the injunction would be "far less severe" than

¹⁴² It is important to note that Hall's immediate interest was in attending the Prom and hence his move for an interlocutory injunction. But, in the long term he sought trial declarations that his *Charter* rights had been violated. The matter was finally set for trial in 2006 but for some reason Hall decided to abandon the case at the last moment.

¹⁴³ Here, he relied on the test articulated by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada* (1994), 111 D.L.R. (4th) 385 at 400. MacKinnon J. summarized the test as follows:

- A. Is there a serious issue to be tried? The court must be satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of the court in making the order sought prior to trial.
- B. Will the applicant suffer irreparable harm if the interlocutory injunction is not granted?
- C. Does the balance of convenience favour granting the relief? This can also be stated as follows - which party will suffer greater harm from the court granting or refusing to grant the interlocutory remedy pending a trial decision on the merits? *Supra* note 140 at para. 11.

¹⁴⁴ *Ibid.* at para. 15.

¹⁴⁵ *Ibid.* at para. 53.

the effect on the student if the injunction were not granted. The school board could still seek to have its rights vindicated at trial but Hall would lose his chance to attend the Prom after the happening of the event.¹⁴⁶

In terms of a rights conflict, the case pits the rights of an individual student against those of his employing school board.¹⁴⁷ The conflict also engages a set of conflicting duties. From the student's perspective, Hall's right to be free from discrimination on the basis of his sexual orientation requires the publicly funded denominational school board (and by extension the state) to embrace a host of different duties. At a basic level, the school board must ensure that its schools are open (for attendance) to all students, including gay students. Once the students are within the school gates, the school board must likewise provide a discrimination free environment in its schools for every student, which obviously encompasses every gay student. By extension, this means that the school board also has a duty to provide a similar environment at all school-sponsored events, including high school Proms. This concern for the provision of a discrimination free setting goes to the very heart of why we have s. 15 protection in the first place. As MacKinnon J. stated:

In my view, the clear purpose of Section 15 is to value human dignity in a free society where difference is respected and equality is valued. The praiseworthy object of Section 15 of the Charter is to prevent discrimination and promote a society in which all are secure in the knowledge that they are recognized as human beings equally deserving of concern, respect and consideration.¹⁴⁸

¹⁴⁶ *Ibid.* at para. 54-56.

¹⁴⁷ Describing the rights of the student, the judge highlighted what the intervenor (Canadian Foundation for Children, Youth and the Law) had to say in this regard: "It supports Mr. Hall in his position, arguing that children and youth in Canada hold rights as individuals in and of themselves, not at the discretion or through the benevolence of their parents or those standing in their place." *Ibid.* at para. 6.

¹⁴⁸ *Ibid.* at para. 19. The judge also highlighted the discrimination and stereotyping to which gays have been subjected:

The social history evidence before me clearly discloses that gay men and lesbian women have been treated as less worthy and less valued than other members of society. Canadian law has accepted that homosexuality is not a mental illness or a crime but rather an innate characteristic

Furthermore, the state has an obligation to allow gay students an opportunity to exercise their equality rights. In this case, Hall wanted to do this very thing by inviting his boyfriend to the Prom. He did not ask for special or additional rights. Hall simply wished to do what every other heterosexual couple attending the special event was able to do, to attend the ceremony with the date of his choice. Moreover, the state has a duty to prevent others from inflicting discriminatory actions upon gay students in the school context. In this case, the school board attempted to discriminate against Hall by denying him permission to attend the Prom with his boyfriend. The granting of the injunction by the court in this case could be viewed as an attempt by the judiciary to ensure that the state upholds its duty to prevent others from undermining the equality rights of gays. In addition, as highlighted by the Canadian Foundation for Children, Youth and the Law,¹⁴⁹ schools “have a duty to foster a respect in their students for the constitutional rights of all members of society.”¹⁵⁰ This duty includes respect for the constitutionally protected right to equality as guaranteed under s. 15 of the *Charter*.

By the same token, the defendants’ rights to religious freedom impose conflicting and different obligations on the state. By virtue of s. 93 of the *Constitution Act, 1867*, the state has a fundamental duty to uphold and to respect the constitutionally entrenched denominational rights of all Roman Catholic schools in Ontario, including the specific

not easily susceptible to change. Stigmatization of gay men rests largely on acceptance of inaccurate stereotypes - that gay men are mentally ill, emotionally unstable, incapable of enduring or committed relationships, incapable of working effectively and prone to abuse children. Scientific studies in the last fifty years have discredited these stereotypes. *Ibid.* at para. 18.

¹⁴⁹ An intervenor in the case.

¹⁵⁰ *Ibid.* at para. 6. In this regard, we note that the The Ontario Schools Code of Conduct (promulgated under Section 301 of the *Education Act*, R.S.O.) mandates that all school members treat others fairly regardless of “... religion, gender, sexual orientation, age or disability”.

school Hall attended.¹⁵¹ This duty means that the special nature of these schools must first be recognized. MacKinnon J. described this specificity in these terms:

The School Board points out that Catholic schools are not the same as non-denominational public schools. The education that takes place there is one of the central means by which the Roman Catholic Church accomplishes its mission - the nurturing and development of young persons in a Christian community so that Catholic values, Catholic life and Catholic faith become integrated in their students' lives. The material demonstrates that a Catholic education involves the development and inculcation of knowledge and values as viewed from the perspective of the religious believer.¹⁵²

The state also has a duty to allow these denominational schools to act or to conduct themselves in a manner consistent with their religious mission. As the judge remarked: “Publicly funded Catholic schools both develop particular guidelines, texts and curricula and also employ teachers who are expected to teach the Catholic faith.”¹⁵³ The state must also protect s. 93 schools from those who would seek to interfere with these constitutionally entrenched religious rights. In this case, the arguments proffered by the defendants could be construed as attempts to have this duty of protection respected by the court. Lastly, the state has an obligation to educate Ontarians about the special nature of s. 93 schools and s. 93 rights. This is necessary so that the population will understand that Roman Catholic schools have a different status and operate on a religious, as opposed to a secular, basis.

The reconciliation of the conflicting rights, and conflicting duties, proposed by MacKinnon J. is an acceptable one. Most significantly, the judge acknowledged that

¹⁵¹ In this case, it was Monsignor John Pereyma Catholic Secondary School.

¹⁵² *Ibid.* at para. 28.

¹⁵³ *Ibid.* In addition, the judge noted:

School Boards are exclusively composed of Catholic trustees elected by Roman Catholic School supporters and are permitted to take matters of religious faith into account in hiring teachers and in setting and enforcing policy. A Principal's duties under the Education Act including the duty to maintain discipline are carried out with a Catholic orientation. *Ibid.* at para. 28.

Hall's equality claim was neither "frivolous nor vexatious."¹⁵⁴ Rather, the violation of the student's equality rights was a serious one and went to the very centre of the protection afforded by s. 15. The denial of permission to attend the prom with his boyfriend constituted an affront to Hall's basic dignity and right to equal treatment. The only reason he could not attend the Prom was because he was gay and wanted to go with his boyfriend. Straight students had no similar restrictions placed upon them with respect to the dates of their choice.¹⁵⁵ Since s. 15 of the *Charter* prevents discrimination on the basis of a number of enumerated grounds, including sexual orientation, the school principal and school board's actions constituted a blatant violation of equality.

At the same time, the decision clearly acknowledges that s. 93 schools have constitutionally protected rights and that these rights are important to protect the religious character of Roman Catholic schools.¹⁵⁶ The critical question becomes whether or not allowing Hall to attend the Prom represented a significant diminishment or attack on these denominational rights. It seems plausible to suggest that granting the student the

¹⁵⁴ *Ibid.* at para. 13.

¹⁵⁵ In his analysis, MacKinnon J. cited the following passage from the Supreme Court of Canada's equality decision in *Law v. Canada*, [1999] 1 S.C.R. 497 at 529:

It may be said that the purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. *Ibid.* at para. 20.

In the *Hall* case, we can say that straight students were not burdened by the same disadvantage or stereotyping imposed on gay students since they could attend the dance with no corresponding restrictions on the dates of their choice. Conversely, gay students like Hall did not enjoy the same benefits as their heterosexual counterparts simply because of their sexual orientation.

¹⁵⁶ It is important to note that s. 93 rights, like all rights, are not absolute. MacKinnon J. observed that although Roman Catholic schools have the right to manage their affairs, as guaranteed by s. 93, this does not mean they have "unfettered authority to do whatever they like on any matter." *Ibid.* at para. 41.

permission to attend his Prom did not amount to a serious challenge to the school board's s. 93 rights. After all, MacKinnon J. did not require the school board to renounce its religious beliefs or abandon its Christian mission. Religious celebrations would continue at the school and the hiring of teachers and the use of curriculum would all reflect a particular religious worldview. The judge did not rule that the Roman Catholic Church had to change its teachings and views, disputed though they are¹⁵⁷, about homosexuality. Furthermore, he observed that the Prom was not a core religious or educational activity:

It is important to note that the Prom in question is not part of a religious service (such as a Mass), is not part of the religious education component of the Board's activity, is not held on school property, and is not educational in nature.¹⁵⁸

Considering these various factors, it comes as no surprise that MacKinnon J. concluded:

“[I]t cannot be said that the conduct in question in this case goes to the essential denominational nature of the school.”¹⁵⁹ In essence, the reconciliation proposed by the judge was a good one because the seriousness of the equality violation was given a higher priority than the relatively minor impact the decision (to allow Hall to attend the Prom) had on the school board's s. 93 rights.

¹⁵⁷ As the judge observed:

The Church's Catechism, in three paragraphs, first declares that homosexuality is contrary to natural law and can under no circumstances be approved, but goes on to direct both that homosexuals should be accepted with respect, compassion, and sensitivity and also that every sign of unjust discrimination should be avoided. There is, on the material before me, a substantial diversity of opinion within the Catholic community regarding the appropriate pastoral care and the practical application of Church's teachings on homosexuality. This is apparent from various initiatives to develop resources: to provide Catholic educators with appropriate responses to gay and lesbian youth; to educate both Catholic students and the broader school community about difficulties faced by homosexual youth in Catholic high schools; and to develop discussion themes to build respect for homosexuals. There is no evidence of a single position within the Catholic faith community about what constitutes the most appropriate pastoral response to this issue. *Ibid.* at para. 23.

¹⁵⁸ *Ibid.* at para. 26. It should be noted that this argument is very contentious. One could posit that the Prom is a part of the unofficial curriculum and that allowing gay students to bring their partners sends the clear message that Roman Catholic school boards should not discriminate against students on the basis of their sexual orientation. If, for example, Hall's school allowed straight students to hold hands in the hallways, it would be odd for them to deny gay students the same privilege just because the holding of the hands occurred on school property.

¹⁵⁹ *Ibid.* at 46.

Teachers as Rights Claimants

Under the *Charter*, teachers have made a number of constitutional claims related to fundamental freedoms, including expression and religion, and to the right to equality. The cases involving teachers include: *Chamberlain v. Surrey School District No. 36*¹⁶⁰, *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*¹⁶¹, *Ross v. New Brunswick School District No. 15*¹⁶², *Kempling v. British Columbia College of Teachers*¹⁶³, *N.T.A. v. Newfoundland (Treasury Board) (Nfld. C.A.)*¹⁶⁴ and *Trinity Western University v. British Columbia College of Teachers*.¹⁶⁵ The first two cases, *Chamberlain and Morin*, involve curricular expression inside the school gates. The remaining cases focus on the informal curriculum and the impact of teacher behaviour, occurring outside the school gates, on the integrity of the school system as a whole.

Inside the school

In *Chamberlain v. Surrey School District No. 36*¹⁶⁶, the Supreme Court of Canada addressed the issue of curricular control in the context of a heated debate, at the local school board level in British Columbia, about the use of teaching materials depicting gay families. By way of background, James Chamberlain, a Kindergarten-Grade One ("K-1") teacher in Surrey, asked his school board to approve the use of three books¹⁶⁷ as supplementary learning resources. All three books depicted same-sex parented families. Chamberlain wanted to use the books to help teach about family diversity within

¹⁶⁰ [2002] S.C.J. No. 87.

¹⁶¹ [2002] P.E.I.J. No. 36 (C.A.).

¹⁶² [1996] 1 S.C.R. 825.

¹⁶³ [2005] B.C.J. No. 1288 (C.A.).

¹⁶⁴ [1988] N.J. No. 287, 53 D.L.R. (4th) 161.

¹⁶⁵ [2001] 1 S.C.R. 772, [2001] S.C.J. No. 32

¹⁶⁶ *Supra* note 160.

¹⁶⁷ Rosamund Elwin & Michele Paulse, *Asha's Mums*, (Toronto: Women's Press, 1990). Leslea Newman, *Belinda's Bouquet* (Boston: Alyson Wonderland, 1991). Johnny Valentine, *One Dad, Two Dads, Brown Dad, Blue Dads*. (Boston: Alyson Wonderland, 1994).

the confines of the provincially mandated family life education curriculum. The board rejected the request and passed a formal resolution declining to approve the books. It was concerned that the materials would engender controversy given some parents' religious objections to the morality of same-sex relationships. The board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents. It also maintained that children of this age were too young to learn about same-sex parented families and that the material was not necessary to achieve the learning outcomes in the curriculum. Chamberlain¹⁶⁸ initially argued that the school board's actions violated his rights to freedom of expression and equality, guaranteed respectively by ss. 2(b) and 15 of the *Charter*.¹⁶⁹

The British Columbia Supreme Court quashed the school board's resolution, holding that board members who had voted in favour of the resolution were significantly influenced by religious considerations. The Court of Appeal set aside the decision on the basis that the resolution was within the Board's jurisdiction. The Supreme Court of Canada allowed Chamberlain's appeal. The Court presents two very different visions about how we should strike the balance when it comes to resolving the question of curricular control. For the majority, led by Chief Justice McLachlin, parental interests are important but they must be balanced with other interests and considerations.¹⁷⁰ Yet, for the minority, led by Justice Gonthier, parental interests are supreme.¹⁷¹ They trump any state interests, which might bear on the question. Although one might read some concern

¹⁶⁸ Chamberlain was joined in his initial action by four other plaintiffs. These were: a parent, a student, an author and another teacher.

¹⁶⁹ The courts chose not to entertain his constitutional arguments, deciding the case rather on the basis of administrative law principles.

¹⁷⁰ L'Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ. concurred. LeBel J wrote separate concurring reasons.

¹⁷¹ Justice Bastarache concurred with Justice Gonthier.

for the educational interests of children, as separate from the interests of both parents and the state, into the opinion of the majority, the minority never considers the interests of children in its analysis.

The reasoning of Chief Justice McLachlin focuses exclusively on the principles of administrative law. She only considers whether the school board acted outside its mandate, as governed by the *School Act*¹⁷² of British Columbia. She does not take up the appellant's contention that the school board resolution banning the three books also violates the *Canadian Charter of Rights and Freedoms*. The Chief Justice underlines the fact that s. 76 of the school legislation provides that "[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles."¹⁷³ The section also emphasizes that "[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school." For the Chief Justice, the *School Act's* focus on secularism means "that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity."¹⁷⁴

In the context of British Columbia's secular and public schools, she emphasizes the state's interest in educating students for two primary purposes: one is for service as active and competent democratic citizens and the other is to help students realise their full potential as learners and contributors to society. She does this by citing the preamble to the province's *School Act*, which states:

WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;

¹⁷² See R.S.B.C. 1996, c. 412.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at para. 21.

AND WHEREAS the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;¹⁷⁵

She then concludes: “The message of the Preamble is clear. The British Columbia public school system is open to all children of all cultures and family backgrounds. All are to be valued and respected.”¹⁷⁶ For the Chief Justice, the secular nature of public schools means that school boards must engage in decision-making on all matters, including the approval of supplementary resources, in a way that respects the views of all members of the school community. Thus, these boards can neither privilege the religious views of some people in their community nor deny the equal validity of the lawful lifestyles of others in the school community.¹⁷⁷ As McLachlin CJ. Declares: “The Board must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves.”¹⁷⁸

The state’s interest in promoting a secular school system open to all students is not the only educational interest that the majority considers. The Chief Justice recognises that parents play an important role in directing their children’s education. This includes, in consultation with other parents and the teacher, selecting what materials are used in their children’s classrooms.¹⁷⁹ If this partnership proves impossible to obtain, she notes that parents are free to home school their children or to send them to private or religious schools where their own values and beliefs may be taught.¹⁸⁰ In the context of public

¹⁷⁵ *Ibid.* at para. 22.

¹⁷⁶ *Ibid.* at para. 23.

¹⁷⁷ *Ibid.* at para. 25.

¹⁷⁸ *Ibid.*

¹⁷⁹ Normally, as McLachlin CJ. remarked, parental involvement in the selection of appropriate materials to be used in particular classes occurs after the board has approved the materials for general use in its schools. *Ibid.* at para. 32.

¹⁸⁰ *Ibid.* at para.s 29-30.

secular education, the Chief Justice held that there are limits to the amount of control that parents can exert on the selection of the curriculum:

[A]lthough parental involvement is important, it cannot come at the expense of respect for the values and practices of all members of the school community. The requirement of secularism in s. 76 of the School Act, the emphasis on tolerance in the Preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.¹⁸¹

She also considered the parental claim that cognitive dissonance would ensue should the three books be used in the classroom. As she explained: “The argument based on cognitive dissonance essentially asserts that children should not be exposed to information and ideas with which their parents disagree.”¹⁸² This claim, she remarks, stands in tension with the curriculum's objective of promoting an understanding of all types of families. The Chief Justice noted that such dissonance cannot be avoided and is not harmful. Rather, children encounter it every day in the public school system as members of a diverse student body.¹⁸³ She therefore rejected this approach because it was inconsistent with the teaching of tolerance, which demands that we respect the beliefs and values of others even when these worldviews differ from our own:

Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. As my colleague points out, the demand for

¹⁸¹ *Ibid.* at para. 33.

¹⁸² *Ibid.* at para. 64.

¹⁸³ As she observed:

[Children] see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others. *Ibid.* at para. 65.

tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.¹⁸⁴

This part of the judgement suggests that exposing children to different viewpoints is an important educational interest and should be protected even if some parents do not favour such an approach.¹⁸⁵ But, it is unclear from the Chief Justice's comments whether this interest in tolerance is an interest belonging primarily to the state, to the children themselves or to both parties. One possible interpretation is that this is a state interest as this is consistent with the view that the state must offer its young a secular education and that to do so in a complex and diverse world requires the state to offer an education which prizes the development of tolerant attitudes among children. Implicitly, one might also read into the reasoning here that children themselves have an educational interest in becoming tolerant as this is part of what it means to be fully human.

¹⁸⁴ *Ibid.* at para. 66. The majority also rejected the Board's contention that the materials were age inappropriate. As it noted:

The Board's concern with age-appropriateness was similarly misplaced. The Board's regulation on appropriate selection criteria requires it to consider the age-appropriateness of proposed supplementary materials. However, here the curriculum itself designated the subject as age-appropriate by stating that all types of families found in the community should be discussed by K-1 students, including same-sex parented families. The Board was not entitled to substitute its contrary view. *Ibid.* at para. 67.

¹⁸⁵ The Chief Justice gave short shrift to the idea that the books might generate difficult and embarrassing questions for parents:

It is suggested that, while the message of the books may be unobjectionable, the books will lead children to ask questions of their parents that may be inappropriate for the K-1 level and difficult for parents to answer. Yet on the record before us, it is hard to see how the materials will raise questions which would not in any event be raised by the acknowledged existence of same-sex parented families in the K-1 parent population, or in the broader world in which these children live. The only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate. *Ibid.* at para. 69.

If we accept that children have an interest in minimal autonomy, then they should be exposed to different beliefs and attitudes so they can better understand themselves and others and ultimately make up their own minds about the types of lives they wish to live and the kinds of values they wish to embrace. This kind of education which results from the collision of diverse and, at times, contentious world views is impossible without some exposure to difference and others who help us see the world from different perspectives. Equally plausible, one could posit that both the state and children share a similar interest in this concern for tolerance. Nonetheless, nowhere in the judgement does the Chief Justice expressly state that children have an interest in their education that is distinct from the interest of both the state and the children's parents.¹⁸⁶ In any event, her rejection of the cognitive dissonance argument makes it clear that the need to learn about tolerance is an interest, by implication, of either the state or of the children or of both parties and that this interest merits special protection even in the face of strong parental opposition.

By contrast, the minority judges in *Chamberlain* take a very different position about which party should control the education of children including the choice of suitable curricular materials. The parental interest dwarfs all other considerations in the minority's analysis. Furthermore, the minority expressly recognises only two interests in deciding how children are educated: the primary interests of the parents and the secondary interests of the state. As Justice Gonthier declares:

While this case specifically concerns the non-approval of particular books by an elected school board, it more generally raises contextual issues concerning the right of parents to raise their children in accordance with their conscience,

¹⁸⁶ Strictly speaking, one might argue that there is no need for the Chief Justice to consider the interests of the children in her analysis because she decides the case on administrative law principles. Nonetheless, the *Charter* values of equality and religious freedom provide the backdrop for her analysis and she does make a strong case for the teaching of tolerance in our schools. In this sense, the children's interest in some exposure to tolerance becomes relevant.

religious or otherwise. In my view, the general nature of the interplay of the roles of parents and the state is clear: “[t]he common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being”: ... Thus, parents are clearly the primary actors, while the state plays a secondary, complementary role.¹⁸⁷

He also ruled that the parental right to educate children is protected by two provisions of the *Charter*. First, a parent’s right to freedom of religion and conscience, as guaranteed under s. 2(a), encompasses the right to educate one’s child. As Justice Gonthier noted:

Parental decision making about what is in their children's "best interests" concerns the core of the private sphere. In *B.(R.)*, ... *La Forest J.*, for a majority of the Court, clearly situated the right of parents to rear their children according to their conscience, religious or otherwise, as a fundamental aspect of freedom of conscience and religion, protected by s. 2(a) of the *Charter*.¹⁸⁸

Second, the parental right to control a child’s religious and moral education is protected by section 7¹⁸⁹ of the *Charter*. Drawing once again on *La Forest J.*’s analysis in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*¹⁹⁰, Justice Gonthier describes this liberty interest as follows:

This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions

¹⁸⁷ *Ibid.* at para. 102.

¹⁸⁸ *Ibid.* at para. 104.

¹⁸⁹ According to this section:

Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹⁹⁰ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141.

itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children.¹⁹¹

This parental liberty comprises two interests: an other regarding interest where parents are seen to be in the best position to promote their children's welfare¹⁹² and a self-regarding interest where parental concern for their children's education reflects deep meaning for the lives of the parents themselves. Justice Gonthier also noted that the parental right to educate, whether supported by the common law or the *Charter*, is not an absolute right and is premised on the notion that, "Parents will be presumed to be acting in their children's 'best interests' unless the contrary is shown."¹⁹³ He went on to add the following caveat: "Generally, it is only when parental conduct falls below a 'socially acceptable threshold' that the state may properly intervene."¹⁹⁴

In the context of the *Chamberlain* case, Justice Gonthier held that, "In my view, nothing in the record lends itself to the view that parents who were concerned about the appropriateness of the Three Books have been shown to have failed to act in the 'best

¹⁹¹ *Ibid.* at para. 106. In *R. v. Jones*, Wilson J. likewise articulated the view that s. 7 includes the parental right to bring up and educate one's children in line with one's conscientious belief. While describing this right, she stated:

The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept. This has been widely recognized. Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), states in part "Everyone has the right to respect for his private and family life ..." Particularly relevant to the appellant's claim is Article 2 of Protocol No. 1 of the Convention:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. [1986] 2 S.C.R. 284.at 319-320.

Furthermore, article 18(4) of the *International Covenant on Civil and Political Rights*, and to which Canada is a signatory, reads as follows:

The States Parties to the present Covenant undertake to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions. See 999 U.N.T.S. 171(entered into force March 23, 1976).

¹⁹² In this situation, one might argue that the deference consideration related to the parental interest in the child's welfare stems from institutional factors rather than from a substantive decision about interests.

¹⁹³ *Ibid.* at para. 108.

¹⁹⁴ *Ibid.* at para. 103. Neglect and abuse are obvious examples where state intervention is justified.

interests' of their children.”¹⁹⁵ In fact, he ruled that the facts of the case were particularly well suited to the primacy of parental choice and freedom in their children’s moral and religious upbringing. As Justice Gonthier declared:

A parental determination of what is appropriate subject matter for their children's education involves an examination of the psychological age or maturity of their children, as well as a parental reflection upon what conscience-based guidance they seek to impart. As one parent's affidavit puts it: ‘As my children's mother, I feel I am in the best position to determine their ability to understand and deal with complex and contentious value-based issues involving human sexuality.’¹⁹⁶

In the final analysis, for the minority, the privileged role of parents to determine what serves the well-being of their children, including their ‘moral upbringing’, was “central to analyzing the reasonableness of the School Board's decision in the case at bar.”¹⁹⁷

The minority’s reasoning is problematic on two grounds. First, it pays too little attention to the state’s interest in children’s education in the context of public and secular education. Second, it fails to accord sufficient attention to the interests children themselves have in their own education, interests which are independent from both those of the parents and the state. The analysis of Justice Gonthier leaves one with the impression that the only interest that counts, when it comes to curricular control, is the parental interest.

As we have already indicated, the state has an interest in ensuring that its young are well prepared, both intellectually and morally, to meet the demands of life in a diverse and ever changing society. In *Chamberlain*, the majority noted that children attending B.C.'s public schools come from many different kinds of families. These

¹⁹⁵ *Ibid.* at para. 119.

¹⁹⁶ *Ibid.* at para. 117.

¹⁹⁷ *Ibid.* at para. 118. The minority went on to hold that the School Board’s resolution was a reasonable one and that the concerns related to age appropriateness and parental disquiet were legitimate concerns. Moreover, it held that homosexuality is morally controversial and that the board had effective policies in place to address any instances of discrimination on the basis of sexual orientation. *Ibid.* at para.s 153-186.

families include “traditional” families with both biological parents, “single-parent” families with a mother or a father, families with step-parents, families with adopted children, foster families, interracial families, families with parents of different religious or cultural backgrounds, families composed of siblings or members of the extended family who live together, and same-sex parented families.¹⁹⁸ The majority observed that children attending schools in the Surrey School district reflect this great family diversity. This means that some children come from families where two mothers or two fathers make up the family unit.

In a public and secular school, where family diversity cannot be avoided and where the state has a legitimate interest in promoting respect and tolerance for difference, according primacy to parental opposition, on religious grounds, to the use of supplemental teaching materials depicting same-sex parented families cannot be justified. To do otherwise would mean that some parents might then ‘legitimately’ oppose, and once again for religious reasons, the representation of interracial families or interfaith families (where parents come from different religious backgrounds) in the curricular materials. Although we must be careful not to demonize religion and religious belief, we must also ensure that religious conviction does not undermine sound educational policy and the secular nature of the public school system, which the state has every interest in protecting and promoting. Furthermore, we must not forget that parents unhappy with the decision to use the three books still have a number of options that they can pursue. As the majority noted, they can send their children to private schools or home school them where they have greater religious control over the curriculum. Even if they choose to stay within the public and secular school system, other options exist. They might ask for an

¹⁹⁸ *Ibid.* at para. 20.

in-class exemption to the use of the three books. They are also obviously free to express their disagreement about same-sex relationships at an appropriate time and place (for example at home around the dinner table) with their children. The minority judgment is defective because it overlooks the state's legitimate interest in promoting tolerance and does not consider the possible forms of accommodation that are available to those opposed to homosexuality and same-sex parented families.

In addition, the minority reasoning is troubling because it does not give sufficient consideration to the interests of those most directly affected by the educational decision-making, namely, the children. Justice Gonthier simply equates the interests of parents with the interests of children. In one sense, he is correct to point out that parents have a strong and obvious interest in their children's education. Furthermore, absent abuse, neglect or some other compelling reason for state interference, one might posit that, under normal conditions, parents are better placed than others to know what is best for their children in matters educational and religious. Yet, children, with their own interests in education, should merit separate consideration on their own terms. Children deserve this type of consideration because they are, morally speaking, persons who are separate from their parents. As Reich reminds us, children possess "independent interests"¹⁹⁹ and "it is important to identify children's interests as distinct and not to subsume them under those of their parents or of the state."²⁰⁰

The minority's failure to treat children as distinguishable from their parents is not consistent with a moral theory of the family and is therefore problematic. This treatment suggests that the interests of children do not count and that children serve only to further

¹⁹⁹ *Supra* note 1 at 290.

²⁰⁰ *Ibid.*

the religious or moral interests of their parents who are opposed to the depiction of same-sex parented families in the Kindergarten and Grade 1 curriculum. As Eamonn Callan explains:

A moral theory of relationships in the family that says only the interests of one or both parents count is despotic. That is the sin of patriarchy, which entails that all members of a family are properly subject to the father. Patriarchy is no less gross a denial of the truism that we are all free and equal citizens as moral doctrines that argue for the subjection of one race to another. ... No one would now deny that if a moral theory interprets the child's role so as to make individual children no more than instruments of their parents' good it would be open to damning moral objections.²⁰¹

If children are to be counted as distinct moral members or persons²⁰² in the family, their interests must be considered separately from those of their parents. One interest that all children arguably have is an interest in minimal autonomy. In the context of public and secular schooling, parents may undermine children's interest in their own education by being able to veto any curricular exposure they object to simply because they are the children's parents and they believe they should have the final say. This approach seems inconsistent with recognizing that children have some interest in minimal autonomy. In this sense, I believe the Courts are better placed to protect this autonomy when parents act unreasonably and solely to further their own ends and beliefs, however genuine and sincere they may be.

Reich claims that children have an interest in becoming minimally autonomous to prevent the possibility that they will become "ethically servile." Here, he draws on the work of Callan for whom the concept of servility implies a kind of 'slavishness' to others

²⁰¹ *Supra* note 3 at 114-5. At the same time, Callan recognizes that "a moral theory of the family that says only the interests of children really count merely inverts the despotism of patriarchy" and that we should object to any theory "that interprets the parent's role in ways that make individual parents no more than instruments of their children's good." *Ibid.* 144-5.

²⁰² I am not suggesting here that children are "moral equals." One can assume that children do not have an equal claim to prevent their parents from moving to take up career opportunities as their parents have to move.

and is predicated on “a gross failure to understand or appreciate one’s equal standing in the moral community as a right-holder on a par with others.”²⁰³ Callan suggests that servility for children may take one of two forms: the child may be a “Deferential Child” or an “Ethically Servile Child.” The Deferential Child “believes she has an overriding duty to serve her parents and acts and feels accordingly.”²⁰⁴ The Ethically Servile child is reared so “that as an adult she maintains an ignorant antipathy towards all alternatives to the ethical ideal I inculcated during childhood.”²⁰⁵ Though the means of establishing servility differ in both cases, the servility for the two children is the same. As Callan remarks: “In each case the field of deliberation in which the agent operates as an adult has been constrained through childhood experience so as to ensure ongoing compliance with another’s will.”²⁰⁶ For both Reich and Callan, children have an interest in minimal autonomy in order to overcome the vice of ethical servility.

In the context of *Chamberlain*, the minority might posit that children in Kindergarten and Grade 1 are far too young as five and six-year olds to exercise minimal autonomy. The age constraint means that they cannot make up their own minds, either in intellectual or moral terms, about the morality of same sex relationships and same-sex parented families. These concepts are beyond the children of tender years and for obvious reasons. Hence, parents must make these moral choices for them and this will inevitably lead to an imposition of what each parent deems is appropriate in the ethical realm. But this approach fails to grasp a significant point. Even young children in the early years of their schooling have a potential capacity to exercise minimal autonomy, by asking

²⁰³ *Supra* note 3 at 152.

²⁰⁴ *Ibid.* at 153.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.* at 154.

questions for example, and it is this potential of children, as bearers of a separate moral identity, that should be honoured and respected. Exposing young children, in appropriate ways, to diverse family models (including same-sex parented families) through curricular materials is one way to respect the child's interest in minimal autonomy. If young children cannot advance their interest in this autonomy, who will? In the context of public and secular schools where parental religious belief alone cannot serve as the foundation for curricular choices, the state may have no alternative but to act as an agent for the child to promote his or her own separate interest. This may strike some as a soft form of state paternalism. Yet, it is necessary to safeguard the interests of children in their own education. If these interests of children are both conceptually and morally distinct, they cannot simply be subsumed by the interests of the parents. This understanding of children's interests in their own education is essential if we are to attempt to balance the trilogy of interests presented in the *Chamberlain* decision, namely the interests of the parents, the state and the children, in a fair and coherent manner.

In terms of understanding the case from a conflict of rights perspective, the reasoning of the minority is problematic because it unduly privileges the religious freedom of parents, as protected by s. 2(a) of the *Charter*, to the detriment of the separate interests of children, the equality interests of gays and the promotion of tolerance. The reasoning of the majority, however, offers more hope as to how we might reconcile the conflicting rights and interests. Although the majority decided the case on the basis of administrative law principles, the *Charter* values of religious liberty and equality loom large in the background of the majority's analysis. In terms of religion, the majority stated: "Religion is an integral aspect of people's lives, and cannot be left at the

boardroom door.”²⁰⁷ By the same token, the majority highlighted the concern for equality in these terms:

The School Act's emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights. ...²⁰⁸

In terms of freedom of religion, the state has a duty to ensure that parents are free to hold religious views and to express those religious views, even in the context of a public and secular education system.

Nonetheless, there are limits to religious freedom. Although the Surrey school board was free to address the religious concerns of parents, it had to act in a manner that gave equal recognition and respect to other members of the community. As the majority declared: “[R]eligious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group.”²⁰⁹ To uphold this equality principle, the state must ensure that all members of the public school community have access to a discrimination free environment. Hence, gay students and same-sex parented families cannot be shut out because of their sexual orientation. One might also posit that the right to equality requires the state to incorporate gay friendly materials in the curriculum so that gay students can be legitimised and see themselves reflected in the learning materials just like their heterosexual counterparts. Consistent with the concern for equality is both the state and the children’s interest in tolerance. By exposing all children in the public school system to different and legitimate types of

²⁰⁷ *Supra* note 160 at para. 19.

²⁰⁸ *Ibid.* at para. 21.

²⁰⁹ *Ibid.* at para. 19.

family configurations, including same-sex parented families, the state can teach children about peacefully co-existing with, and perhaps even celebrating, others who are different.

Children themselves also have an interest in learning and being in a discrimination free environment. The promotion of tolerance will help gay children more readily embrace who they are and may foster more positive attitudes among straight students who are simply ignorant about gays or who have negative views (based on stereotypes and/or an active dislike) of this sexual minority. The reconciliation of the rights and interests proposed by the majority is a reasonable one because it does not require religious believers to abandon their opinions about human sexuality. At the same time, the majority upholds the values of equality and secularism. Hence, public school boards cannot enact school board policy and practice which discriminate against gays and lesbians simply because of their sexual orientation. Finally, the majority recognizes the importance of teaching tolerance in public schools. Although it does not state whether this interest in tolerance belongs to the state and/or to children, both stakeholders should have a compelling interest in this political virtue.

With respect to the issue of age appropriateness, this may affect the exercise of children's rights as children evolve and grow. For example, children cannot vote until they reach the age of majority. They cannot drive until they reach a certain age. Under the *Youth Criminal Justice Act*, children are normally held to a lesser standard of criminal responsibility because of their age. If an 11 year old kills somebody, s/he cannot be charged with murder. They are not yet fully responsible because we do not consider them to be autonomous and mature like adults who are held to account for their actions. In the constitutional context, we accept under the guise of religious freedom that a competent

and consenting adult is free to join a cult if s/he so chooses. We do not accept, however, that an 11 year old is free to make the same choice on the basis of the child's freedom of religion. We might also say that the ambit (and nature) of freedom of expression for an 18 year old is greater than that of a 10 year old and hence worthy of greater protection. Thus, the idea of rights and responsibility evolves as children grow up. We expect more from them as they near adulthood. Rights are in this sense contextually bound by the notion of age.

In a second case where a teacher claimed that a school board violated his right to free speech in the classroom, an appellate court addressed the *Charter* issue head on. In *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*²¹⁰, a teacher (Richard Morin) in Prince Edward Island showed a controversial film to a Grade 9 language arts class entitled "Thy Kingdom Come, Thy Will be Done." The film described the fundamentalist approach to religion in the United States. Morin intended the film to be the basis of an assignment²¹¹ whereby students would interview people outside the classroom about the role of religion in their lives. Between ten to 15 parents called the Principal's office to express concerns about their children having been shown the documentary. The school administration intervened and ordered the teacher not to show the film to any other students. It also prevented him from proceeding with his planned assignment.²¹² The school board ultimately decided that the film could be shown

²¹⁰ *Supra* note 161.

²¹¹ The project was called *What Religion Means to Different People*.

²¹² A curriculum committee, established to provide the school board an expert opinion on the appropriateness of Morin's assignment, offered its own assessment. As the P.E.I. Court of Appeal noted:

In summary, the Curriculum Committee found the assignment:

- to be acceptable in terms of theme, topic, skills (viewing, reading, writing), and learning materials;
- to be wanting in terms of preparation, review of prerequisite skills, presentation, and evaluation; and

and the project carried out only if the teacher prepared it in a manner that was suitable to the principal and the Superintendent of Programs.

The teacher challenged the board's actions before the courts. Among other things²¹³, he alleged that the board had violated his right to freedom of expression, as guaranteed by s. 2(b) of the *Charter*. A majority of the Court of Appeal sided with the teacher in this regard. It held that Morin "was attempting, through the film and assignment, to communicate certain information and opinions that would stimulate discussion and challenge his students."²¹⁴ The majority also ruled that the reasons offered to mute the teacher's free expression did not constitute reasonable limits under s. 1 of the *Charter*. As the majority of the court observed: "[T]he whole context of the evidence suggests that the purpose and intent of the impugned actions was to avoid controversy by prohibiting any possibly controversial content from being expressed in the classroom."²¹⁵

- to be questionable in terms of meeting the expectations of students and parents with regard to the sensitivity of the topic and the provision of an alternate assignment. *Ibid.* at para. 3.

At the time, Morin was in his second year as a probationary teacher at the school. He appealed the order of his principal not to show the film and was partially successful in his appeal through the school system. The respondent board placed him on an involuntary leave of absence for the rest of the school year and did not rehire him for the following year.

²¹³ Morin also alleged that the school board violated his s. 7 *Charter* rights, wrongfully dismissed him and defamed him. See trial decision, [1999] 2 P.E.I.R. 220.

²¹⁴ *Ibid.* at para. 56.

²¹⁵ *Ibid.* at para. 91. In this regard, the majority noted:

While a philosophical debate about freedom of expression in a democracy and the relevance of education in supporting this aspect of democracy may not be necessary, it is hard to avoid an expression of concern about the implications of endorsing such an arbitrary use of administrative powers to suppress the expression of what might be controversial opinions in an educational environment. Neither the principal nor the vice principal talked to any so-called objecting parents prior to banning the film. The evidence is a secretary told the vice principal a few parents had called about the film. He then banned the film. The secretary never gave evidence at trial. The vice principal reported what he had heard from the secretary to the principal who, after one discussion with the appellant and no further inquiry, banned the film and stopped the project. *Ibid.* at para. 95.

While addressing the teacher's claim about freedom of expression, the majority of the Court of Appeal was tangentially alive to the educational interests of students. As it stated:

If part of the value behind freedom of expression as set out in s. 2(b) includes a consideration of the importance of that expression to those who are the recipients of the content ... then the school context raises special issues. This becomes partially a right of students in a democratic society to have access to free expression by their teachers - encouraging diversity, critical thinking and vigorous debate.²¹⁶

Regrettably, the court does not flesh out this educational interest that children have.²¹⁷ In fact, it is unclear from the judgement whether these interests in critical thinking and diversity belong to the child alone, to the state or to both parties. In its analysis, the court does not expressly consider the interests of children in having some control over their own education. Yet, the liberal state has an interest in a certain kind of education, which highlights the need to ask probing and searching questions and to challenge authority in appropriate ways. If the state wishes to prepare children for the demands of citizenship in a diverse and pluralistic world, it cannot do so without teaching them about critical thinking and the frail, fallible nature of human judgement.

As separate and morally distinct persons, children themselves also have an interest in critical thinking. This is so because critical thinking and minimal autonomy are integrally connected. As Reich reminds us, minimal autonomy requires a number of preconditions, which he describes as follows: "This conception requires, to be sure, significant development of one's rational capacities, an ability to articulate and defend one's political positions, and a willingness to treat civilly those with whom one

²¹⁶ *Ibid.* at para. 67.

²¹⁷ This is understandable, of course, because the children did not bring a freedom of expression claim.

disagrees.”²¹⁸ To develop one’s rational capacities, one should be exposed to some form of critical thinking to gain an appreciation for what Siegel calls “the standards of rationality which govern the assessment of reasons (and so proper judgement) in each tradition.”²¹⁹ Furthermore, critical thinking itself as an educational ideal is premised, in part, on the idea of autonomy. As Siegel explains:

The ... reason for taking critical thinking to be a worthy educational ideal has to do with education's generally recognized task of preparing students to become competent with respect to those abilities necessary for the successful management of adult life. We educate, at least in part, in order to prepare children for adulthood. . . . That is, we seek to render the child *self-sufficient*; to *empower* the student to control her destiny and to *create* her future, not submit to it.²²⁰

Autonomy then acts as a justification for critical thinking. At the same time, a child or student cultivates his or her own sense of autonomy by engaging in critical thinking. As the child grows, s/he will normally be confronted with different viewpoints and judgements about human affairs. S/he starts to exercise some measure of autonomy when s/he is capable of articulating and defending her or his own political position when asked to account for the reasons justifying a stance taken. For these reasons, children should have some say about the type of curriculum they encounter in their schools and how that curriculum gets delivered. If children have an interest in minimal autonomy, then the conditions, which enable this autonomy to take hold and to grow, cannot be ignored. In other words, student autonomy is less likely to develop where questioning, debate and critical thinking are avoided, discouraged and actively frowned upon. In the educational context, the teacher’s exercise of his free speech thus becomes necessary to ensure that an

²¹⁸ *Supra* note 1 at 292.

²¹⁹ *Educating Reason: Rationality, Critical Thinking, and Education*. (NY: Routledge, 1988).at 59-60.

²²⁰ *Ibid.* at 57.

environment conducive to critical thinking exists. In turn, this type of environment enables growth and respect for the children's autonomy.

In its analysis, the majority of the Court of Appeal reminds us of the three rationales that are often cited to justify freedom of expression: the search for truth, political participation and self-fulfilment.²²¹ The majority explained how the teacher's exercise of his right to free speech facilitated the truth and political participation rationales as far as students are concerned:

The appellant wanted to show the film "Thy Kingdom Come, Thy Will Be Done" and have the students use it as a catalyst to interview other people and consider and write about the topic "What Religion Means to Different People". Learning the skills of critical thinking and interviewing are essential in enabling students to seek the truth in any area of life. These skills were part of the goals of the established curriculum. The subject matter required consideration of political, social and religious values and how they can be intertwined and impact upon one another. Such an exercise can only enhance the students' ability to participate effectively in social and political decision-making and their ability to seek and find the truth.²²²

Once again, critical thinking plays a central role in children's education and as it enables learners "to seek the truth" and to participate meaningfully in social and political life, two powerful ideals which justify the constitutionally protected right of free speech. The majority noted the benefits accruing to students from the type of teacher expression Morin sought protection for meant that, "the students have a right to hear this expression and benefit from it."²²³ It concluded that, "this right of students is fundamental to their being citizens in a truly democratic state and students of that state's educational system."²²⁴

²²¹ *Ibid.* at para. 104.

²²² *Ibid.* at para. 107.

²²³ *Ibid.*

²²⁴ *Ibid.*

It is worth noting that this view of teacher speech is an instrumental one. This means that the exercise of teacher expression is justified to the extent that it furthers the interests of others, namely, students. But, one might argue that this justification for teachers' interests in children's education is underinclusive. We should also include a constitutive justification for this interest which does not depend on the good teacher expression does for others. We might say, for instance, that the exercise of free speech in the classroom is integral to what teachers do as educators and that their professional enjoyment and integrity cannot really exist without some measure of freedom of expression. Although this does not preclude the accrual of pedagogical benefits for students, it recognizes that the teacher interest in children's education is also self-regarding.²²⁵

From the state's perspective, the whole purpose behind a democratic education is preparation for citizenship. Hence, the state's interest in this aspect of children's education is consistent with a reading of the majority's reasoning. With respect to the children's own interest, another interpretation of the majority's analysis may be to suggest that students themselves also have an interest in becoming democratic citizens because living in a democracy, as opposed to a totalitarian state, is more likely to respect the children's more fundamental interest in autonomy. Hence, a democratic form of secular education predicated on open discussion and robust dialogue is more likely to respect children's interest in autonomy. This would appear to be so as children will be in a better position to make up their own minds about important issues and questions if they are confronted with, and exposed to, a diversity of opinions and beliefs as opposed to

²²⁵ In more general terms, we might even say that teachers have a general educational interest in getting a teaching job or teaching whatever subject (e.g. math or social studies) attracts them to the teaching profession.

being force-fed traditional or orthodox opinions that have not been subjected to critical examination.

This discussion about the *Morin* case leads one to the conclusion that the interests of teachers cannot automatically be discarded when the question of who controls the curriculum arises. In the appropriate circumstances, these interests must then be added to the interests of the state, the parents and those of the children in our analysis. As we have seen, the teacher interests are both self-regarding and instrumental in nature. I have argued elsewhere, and at some length²²⁶, why teachers should have some measure of academic freedom in terms of *what* they teach and *how* they teach and why academic freedom is necessary in order to teach critical thinking. In the following few paragraphs, I summarize the main arguments.

With respect to *what* gets taught, teachers who find provocative and well-written articles in a national newspaper, such as *The Globe & Mail*, should be able to share the contents of these articles with their high school English or Social Studies class. If teachers find a documentary of high quality (for example, one produced by the National Film Board) that is relevant to the study of history, teachers should not be precluded from bringing this alternative source into the classroom because they do not have prior approval. The same could be said for other pedagogically valid sources of information, which are not part of the formal prescribed curriculum. Not only might teachers supplement the core curriculum where appropriate, but they might also challenge it when it is no longer acceptable. For instance, the use of prescribed materials, which are biased against women, Aboriginals, or other minority groups needs to be called into question

²²⁶ See Paul T. Clarke, *Free Speech & Canada's Public School Teachers: An Employment Law & Constitutional Law Analysis* (Ph.D. Thesis, The University of Saskatchewan, 1997) [unpublished], at 170-211.

and even replaced by something which is educationally more sound. Likewise, pre-approved materials that are out-dated or factually incorrect have to be supplanted by relevant and accurate texts. In these circumstances, without some measure of academic freedom, public school teachers would be very reluctant to come forward to challenge the status quo as it relates to curricular content.

In terms of pedagogy, or *how* the material is taught, there may be an even stronger argument for granting public school teachers some measure of academic freedom.

Through the use of prescribed curricula, we recognize that governments may tell teachers *what* they must teach. But do they also want to tell them *how* to teach it? If teachers are no more than bureaucratic employees who are programmed to use pre-approved teaching strategies, then the need for academic freedom in public schools is non-existent. Viewed as professionals, a different result ensues. Normally, teachers are hired because they know how to teach. They should be entitled to exercise some degree of independent judgment. To perfect their craft and to improve on existing methods, teachers should be allowed to experiment within the bounds of reasonableness and appropriateness with different pedagogical practices. Academic freedom should protect unconventional or creative teachers who are able to stimulate and challenge students because they are willing to follow independent judgment as to what constitutes the best pedagogical approach in a given situation. If we do not have confidence in our teachers' ability to teach, the case for academic freedom is greatly diminished. On the other hand, if we trust our teachers, acknowledge their expertise, and respect their decision-making capacities within the parameters of professionalism, the argument for some degree of academic freedom in the public school context is quite compelling.

But how does critical thinking relate to academic freedom? Simply put, academic freedom is the lifeblood of critical thinking. Academic freedom is a necessary condition for the development of critical thinking. Hence, if we wish to take education seriously, we must ensure that teachers have academic freedom in the classroom to fulfil the democratic state's mandate as educator. Even the origins of the word *educate* compels this reasoning. Derived from the latin *educare*, educate means “to cause to grow.” If public education is a constantly evolving, growth oriented endeavour, then critical thinking, within the bounds of academic freedom, is the engine that drives the process. It ensures that teachers and students are free to question tradition, explore alternative solutions and grapple with the problems that we as a society face today and in the future.

In the *Morin* case, the reasoning of the majority of the Court of Appeal is consistent with the arguments just outlined in favour of some degree of academic freedom for teachers who are committed to teaching their students about critical thinking. As the majority stated:

[T]he facts of the instant case suggest that the appellant was attempting to teach the critical thinking and analytical skills essential to citizens in any democracy. His choice of religion as a subject for this process was not in and of itself a discriminatory or negative act. He was not attempting to teach any particular religious view. He was dealing with religion as an important element in society, one representative of our society's diversity, and in doing so was teaching in a manner consistent with the approved curriculum.²²⁷

Not surprisingly, the majority rejected the notion put forward by the school board that teachers cannot have a right to free speech because control of schools rests with principals. The majority held that this claim was “tenable neither in logic nor in law.”²²⁸

²²⁷ *Ibid.* at para. 73.

²²⁸ *Ibid.* at para. 71. This is not to suggest that there are no limits to teachers' free speech and academic freedom. As the majority noted:

It noted that Morin made extensive arguments about the need, in a democratic society, to protect teachers' freedom to teach "in a manner that stimulates and encourages the exchange of opinions and ideas."²²⁹ The majority then went to hold: "Such values are inherently within the rationale behind the Supreme Court's liberal approach to the interpretation of the *Charter*'s scope of protected speech. ..."²³⁰

In dissent, Justice McQuaid rejected the teacher's arguments concerning freedom of expression. Drawing on the Supreme Court of Canada's decision in *Irwin Toy Ltd. v. Quebec (Attorney - General)*²³¹, he noted that a two-step analysis was to be employed in determining whether a certain form of expression was entitled to constitutional protection. The first step in the analysis is to determine if what has been restricted is expression. Justice McQuaid agreed that the teacher, through the selection of the film and with his intended assignment, was engaged in expressive activity. As for the second step in the analysis, one must determine whether either the purpose or effect of the legislation or governmental action was to limit Morin's expression. He concluded that neither the purpose nor the effect of the school board's actions was to restrict the teacher's expression. Justice McQuaid held that the purpose of the school board's actions was to exercise supervisory control over Morin as one of the teachers in its employ. This meant that the board had the authority to supervise the teacher and direct his projects so they

The argument that if teachers are found to have such a right there will be chaos in the school system, because all principals' decisions will end up being decided by the courts, is also not tenable. Even the appellant acknowledged that within the structure of the school system there must be rules and regulations, curriculum and programming guidelines. What he was arguing for was a reasonable approach. If these rules or regulations limited free expression, they would be justifiable under s.1 of the Charter. Thus, only actions by school authorities that were alleged to go beyond any s.1 justifiable limitations would be challengeable. This is a rational approach to the balance between rights and limitations thereon. *Ibid.*

²²⁹ *Ibid.* at para. 75.

²³⁰ *Ibid.*

²³¹ [1989] 1 S.C.R. 927.

could be delivered on the condition that they met with the approval of the school principal and the superintendent without violating Morin's right to freedom of expression.²³² As Justice McQuaid remarked: "The purpose of the actions taken for and on behalf of the respondent was to fulfill this mandate and not to restrict the appellant's constitutional protected right to free speech."²³³

He also ruled that the effect of the board's actions did not limit Morin's right to free speech. In this regard, Justice McQuaid noted that the teacher had the burden of identifying the meaning he sought to convey by his form of expression. In addition, Morin had to show that the school board's actions restricted his ability to convey that meaning. This required Morin to demonstrate that his expressive activity furthered at least one of the values underlying the protection afforded free speech.²³⁴ Justice McQuaid categorically rejected the idea that the teacher's expression promoted the values that undergird s. 2(b) of the *Charter*:

Expression by a teacher in the classroom of a school in the public school system is not in the furtherance of, nor does it promote the values underlying the constitutional protection afforded expression by s-s. 2 (b) of the Charter. The expression here had nothing to do with the search for truth, the maintenance of the democracy, and the promotion of self autonomy as values which underlie the protection of free expression.²³⁵

As for the truth rationale, Justice McQuaid held that Morin's expression did not promote the search for truth because he could not "put all views out there for the students so they may assess the relative truth."²³⁶ The teacher did not have the unrestrained right to articulate unlimited views for two reasons. First, he was working with a captive audience

²³² *Supra* note 161 at para. 227.

²³³ *Ibid.* at para. 227.

²³⁴ *Ibid.* at para. 229.

²³⁵ *Ibid.* at para. 234.

²³⁶ *Ibid.* at para. 235.

of students who were in the classroom because they were compelled to be there. Second, the students might not have the choice or the capacity, depending on their age and level of maturity, to properly assess and evaluate Morin's views.²³⁷

Justice McQuaid also found that the teacher's expression did not further the democracy rationale. As he stated: "This value underlying the protection of free expression is intended to promote the free speech of all citizens on social and political issues with a view to holding the democratic government accountable."²³⁸ With respect to the self-fulfilment rationale, Justice McQuaid observed that the values of self-fulfilment and human flourishing "relate to the intellectual aspect of human autonomy."²³⁹ He noted that there were no restrictions placed on Morin to engage in his expressive activity for this purpose. At the same time, Justice McQuaid ruled: "He just couldn't do it in the classroom without the supervision of the respondent."²⁴⁰ For Justice McQuaid, Morin could seek remedy, under employment law, in the collective agreement if he believed that the board's actions constituted an improperly imposed sanction.²⁴¹

The reasoning of Justice McQuaid should be rejected for a variety of reasons. First, he pays too little attention to the interests children themselves have in their own education. This is disappointing because at one point in his judgement he appears to be sensitive to the issue. As he comments on the importance of school, he declares:

²³⁷ *Ibid.*

²³⁸ *Ibid.* at para. 236.

²³⁹ *Ibid.* at para. 237.

²⁴⁰ *Ibid.*

²⁴¹ In this regard, he states:

The teacher is not without a remedy against the unreasonable intrusions of supervisory personnel. The remedy is founded in collective agreements and the grievance procedures provided for in such agreements. The remedy is also found in all the principles of employment law. However, redress is not found in the violation of his or her constitutionally protected right to free expression. A teacher may establish there was an improperly imposed sanction thereby providing the right to a grievance under the collective agreement without establishing a violation of a Charter right. *Ibid.* at para. 243.

It is a place where our youth have the opportunity not only to obtain empirical knowledge but most importantly a school is a forum where they should be encouraged, as might be fitting with their age and level of maturity, to develop the skills to search out the truth in relative terms and to think critically.²⁴²

Yet, in his analysis, he does not return to this idea that the interests of children merit special consideration. Rather, the interests of the school board in supervisory control and the claim of the teacher for free speech are really the only issues he seriously considers.

Second, the distinction he makes between teachers as employees who do not enjoy a constitutionally protected right to free speech in the classroom and teachers as private citizens who have such a right outside the classroom seems tenuous at best. Although teachers are employees of a particular school board and must work within the parameters of prescribed guidelines and curricula, they are also professionals who should enjoy some measure of professional and academic freedom. As educators, one of their primary tasks is to teach their students to engage critically with their subject matter and in this way to promote the ideal of critical thinking. In spite of Justice McQuaid's claims to the contrary, and as argued and defended by the majority in *Morin*, the pursuit of the educational ideal of critical thinking is indeed consonant with the *Charter* values of truth, political participation and self-fulfilment that justify free speech under s. 2(b). Hence, by recognizing the responsible and reasonable exercise of teachers' right to freedom of expression in the classroom, we can be seen as supporting the serious educational work that teachers are called to perform. This supports a teacher interest in children's education which is constitutive in character and based on more than simply a consequentialist justification which recognizes the importance of teacher speech to the extent that it advances the interests of students.

²⁴² *Ibid.* at para. 231

Third, strangely enough, Justice McQuaid states that, “Academic freedom (free expression in the classroom of the public school system) does not equate with freedom of expression protected under s. 2(b).”²⁴³ By implication, he seems to suggest that teachers enjoy academic freedom in the classroom. Yet, he claims that this freedom is not protected by s. 2(b). I have argued elsewhere²⁴⁴ that, to the extent that academic freedom and free speech are both fundamentally concerned with the pursuit of truth, the concepts are interrelated. Yet, I maintain that academic freedom is a more restrictive concept. It relates primarily to the degree of autonomy that teachers exercise within the confines of the established curriculum. Therefore, the selection of teaching materials and the use of teaching methods would go to the heart of academic freedom. It is axiomatic that the exercise of academic freedom must, of necessity, invoke some measure of free speech. Without the freedom to communicate ideas and thoughts that free speech makes possible, academic freedom cannot be realized. Thus, academic freedom is actualized through academic speech.²⁴⁵ Justice McQuaid errs when he fails to clarify the true distinction between academic freedom and free speech while overlooking the interconnected nature of the two concepts. He also unwittingly emasculates the concept of academic freedom by suggesting that it can still have some academic bite when it is divorced from free speech as protected by s. 2(b) of the *Charter*.²⁴⁶

²⁴³ *Ibid.* at para. 242

²⁴⁴ *Supra* note 226 at 203-05

²⁴⁵ *Ibid.*

²⁴⁶ I have also argued that that the exercise of academic freedom will normally fall within the scope of expressive activity encompassed by s.2(b). Furthermore, I maintain that some measure of protection for academic freedom *per se* is essential because teachers’ exercise of academic freedom raises fundamental constitutional values:

In essence, the most frequently cited rationales advanced to defend free speech - the pursuit of truth, the political process, and self-realization/autonomy rationales - are equally applicable to an understanding and defence of academic freedom. Since the state has a duty to educate its young in a democratic tradition, one might expect that the state will make special allowances to ensure that

In terms of a conflict of rights, the Court of Appeal in *Morin* had to reconcile a teacher's constitutionally protected right to freedom of expression with the state's interest in ensuring that principals can do their jobs so schools run efficiently and are not subject to undue and unreasonable disruption caused by school employees. The reconciliation proposed by the minority should be rejected because it emasculates teacher expression and places too much control in the hands of school administrators. Let us remember that the constitutional protection of teachers' s. 2(b) rights places a number of corresponding duties on the state. The state must protect teacher expression that offends, disappoints, and unsettles. From a pedagogical perspective, the state must support curricular expression that is integral to the type of work that teachers engage in with their students. As educators, teachers must challenge and provoke their students and thus the state has a duty to ensure that these conditions ensue so teachers can do their jobs and students may benefit from this type of learning environment. The state must also protect teachers from those, including school authorities, who wish to censor them because of the content of their expression. Furthermore, the state must also educate its youth about the value of free speech in a democracy.

In *Morin*, the reconciliation offered by the majority is a defensible one. The teacher had valid pedagogical reasons to show his students the film about the role religion plays in the lives of people. He wanted to stimulate thought and encourage discussion and he prepared supplementary teaching materials, appropriate for the teacher's Grade 9 students, to facilitate these goals. Hence, the materials were relevant and age appropriate. This type of expression goes to the heart of the search for truth and political process rationales which are

teachers are able to fulfil this mandate. Consequently, the *Charter* may extend protection to teachers' exercise of academic freedom beyond that guaranteed by employment law because of the special constitutional values that academic freedom invokes. *Ibid.* at 276.

frequently cited to justify freedom of expression. The only reason offered by the school administrators to mute the teacher was that his curricular activity and expression offended certain parents who opposed the teacher's actions because of certain religious opinions held by the parents. In other words, the majority rightly concluded that there existed no legitimate pedagogical basis to ban the teacher's curricular speech.

This is not to suggest that teacher expression can never be limited. Freedom of expression is not an absolute right. The freedom must always be reconciled with other important interests. The state has an interest in ensuring that school administrators can regulate and monitor the working environment in the school to foster harmonious, respectful and professional working relationships. This places certain duties upon the teacher. S/he must agree to minimal cooperation with others so the school can function in an efficient and collegial manner. The teacher must also be able to justify and to explain to others why s/he is taking a certain pedagogical tack with respect to the curricular materials s/he is using in the classroom. Hence, for example, curricular expression that serves no valid pedagogical purpose, that is age inappropriate or that is insulting or disrespectful of others could be limited under a s. 1 analysis.

Outside the school

Teachers also exert influence over the informal curriculum and this influence has been considered by the courts in a number of cases including, *Ross v. New Brunswick School District No. 15*²⁴⁷, *Kempling v. British Columbia College of Teachers*²⁴⁸, *N.T.A. v.*

²⁴⁷ *Supra* note 162.

²⁴⁸ *Supra* note 163.

*Newfoundland (Treasury Board) (Nfld. C.A.)*²⁴⁹ and *Trinity Western University v. British Columbia College of Teachers*.²⁵⁰

In *Ross v. New Brunswick School District No. 15*²⁵¹, the Supreme Court of Canada upheld the decision of a Board of Inquiry with respect to a finding of discrimination against a school board. This ultimately led to the removal of a teacher, Malcolm Ross, from the classroom. An elementary mathematics teacher in Magnetic Hill, New Brunswick, Ross wrote various publications²⁵² and appeared on television to defend his anti-semitic opinions.²⁵³ He alleged that Western Christian civilization was being undermined and destroyed by an “International Jewish Conspiracy.” Public concern about Ross’ views, and out of school conduct, prompted the school board to commence disciplinary action. This consisted of repeated reprimands and warnings to the teacher to stop making anti-Jewish statements. The school board’s actions did not deter Ross. A concerned Jewish parent ultimately filed a complaint with the New Brunswick Human Rights Commission. The parent believed that the ineffective disciplining of Ross meant that the school board had actually condoned his conduct. The parent maintained that the school

²⁴⁹ *Supra* note 164.

²⁵⁰ *Supra* note 165.

²⁵¹ *Supra* note 162.

²⁵² *Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of power and Christianity vs. Judeo-Christianity (The battle for truth).*

²⁵³ Commenting on the nature of Ross’ expression, the Supreme Court of Canada noted the following findings of the Board of Inquiry:

The Board of Inquiry heard evidence of the nature of the respondent's writings, publications and statements, which include a letter to the editor of *The Miramichi Leader*, a local television program interview, and the four books or pamphlets listed in the order. The Board found, without hesitation, that these publications contain prima facie discriminatory comments against persons of Jewish faith and ancestry. Their effect, in its view, was to denigrate the faith and beliefs of Jews and to incite in Christians contempt for those of the Jewish faith by their assertion that they seek to undermine freedom, democracy and Christian beliefs and values. The Board further found that the respondent's comments speak of Jews as the synagogue of Satan, and accuse Judaism of teaching that “. . . Jesus Christ is a bastard, a lewd deceiver, a false prophet who is burning in Hell” and that the Virgin Mary is a whore. The respondent was also found to have continuously alleged that the Christian faith and way of life are under attack as a result of an international conspiracy headed by Jews. The Board characterized his primary purpose as being “to attack the truthfulness, integrity, dignity and motives of Jewish persons”. . . . *Ibid.* at para. 38.

board's actions (or rather lack of action) discriminated against his children and other Jewish students because of their religion or ancestry.²⁵⁴

A Board of Inquiry held that Ross' behaviour violated the province's human rights legislation and could not be justified. Although the school board did not intend to discriminate, it did so by failing to address the numerous complaints against Ross and by continuing his employment. In support of its findings, the Board of Inquiry ordered, among other things, the removal of Ross from the classroom.²⁵⁵ The Court of Queen's Bench upheld Ross' removal from the classroom. But, the Court of Appeal overturned this decision maintaining that Ross was entitled to express his unpopular views outside the classroom. The Supreme Court of Canada reversed the judgment of the Court of Appeal thereby reinstating the Board of Inquiry's initial decision to remove Ross from the classroom.

From an administrative law perspective, the Supreme Court of Canada held that the Board of Inquiry was justified in finding that the school board had discriminated against the Jewish parent by continuing to employ Ross. The evidence supported this finding. The Court also found that the Board of Inquiry had the jurisdiction to issue an order removing Ross from the classroom.²⁵⁶ From a constitutional law perspective, the Supreme Court of Canada ruled that the order constituted a reasonable limit on Ross' fundamental freedoms, namely, freedom of religion and freedom of expression.

²⁵⁴ See s. 5(1) of the *Human Rights Act for New Brunswick*, R.S.N.B. 1973, c. H-11.

²⁵⁵ The order specified that Ross be placed on leave of absence without pay for 18 months. During this period, the Board had to offer him a non-teaching position if one became available. If nothing came open, the Board had to release Ross without pay. A "gag order" also prohibited him from writing or publishing anything that mentioned a Jewish conspiracy. Even if the school board continued Ross' employment on a non-teaching basis, the "gag order" would remain in effect. The Supreme Court of Canada struck down the gag order holding that it did not constitute a reasonable limit on Ross' free speech as a non-teaching employee.

²⁵⁶ *Supra* note 162 at para. 33.

Speaking for a unanimous Court, Justice La Forest underlined the special nature of the school community. As he noted, “The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”²⁵⁷ He then considered the critical role teachers play in upholding the integrity of the educational system:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community’s perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community’s confidence in the public school system as a whole.²⁵⁸

Justice La Forest also quoted with approval the work of Alison Reyes²⁵⁹ who claims, “Teachers are a significant part of the unofficial curriculum because of their status as ‘medium.’”²⁶⁰ Justice La Forest commented that, as “medium” and through their conduct, teachers “must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system.”²⁶¹

The *Ross* case is important because it illustrates a convergence of interests in children’s education. The state, parents and children themselves all have an interest in an education environment which does not discriminate against people on the basis of arbitrary and impermissible grounds such as their religious or ethnic backgrounds. This interest is in fact translated into a legal and moral duty imposed on the school board “to

²⁵⁷ *Ibid.* at para. 42.

²⁵⁸ *Ibid.* at para. 43.

²⁵⁹ “Freedom of Expression and Public School Teachers” (1995) 4 *Dal. J. Leg. Stud.* 35- 53.

²⁶⁰ *Supra* note 162 at para. 43.

²⁶¹ *Ibid.* at para. 44.

maintain a positive school environment for all persons served by it.”²⁶² Teacher conduct has the potential to affect this common interest and when it does, it will be carefully scrutinized to ensure that the conduct does not undermine the principles of tolerance and openness upon which a public school system is founded.

In *Ross*, the teacher’s racist attitudes caused fear in Jewish families (or minority groups) that he and the school (or school board) would not treat Jewish children fairly. The Supreme Court of Canada recognized that his anti-semitic diatribe was anathema to a positive and discrimination-free learning environment. The Court agreed that the removal of Ross from the classroom amounted to a prima facie infringement of his freedom of religion and freedom of expression under s. 2 of the *Charter*. Yet, it held that this infringement amounted to a reasonable limit on Ross’ constitutional rights under a detailed s. 1 analysis.²⁶³

It is worth noting that Ross never expressed his opinions about Jews in the classroom or while on school property. His anti-semitic expression occurred exclusively outside the school gates. At the same time, the Board of Inquiry heard evidence of a “poisoned” environment in the educational community where Ross worked. Two Jewish students testified that they witnessed repeated and continual harassment. This took various forms. Some students called Jewish students derogatory names while other students carved swastikas into their own arms and into the desks of Jewish children. Some students drew swastikas on blackboards. These events created a climate of general intimidation for Jewish students.²⁶⁴ As Justice La Forest remarked: “What this evidence discloses is a poisoned educational environment in which Jewish children perceive the

²⁶² *Ibid.* at para. 42.

²⁶³ *Ibid.* at para. 77 to 110.

²⁶⁴ *Ibid.* at para. 40.

potential for misconduct and are likely to feel isolated and suffer a loss of self-esteem on the basis of their Judaism.”²⁶⁵ The Board of Inquiry heard no direct evidence linking Ross’ conduct to the taunting and intimidation of Jewish students. Yet, Justice La Forest concurred with the board’s finding that Ross’ public statements of anti-Semitism contributed to the “poisoned” environment in the school system. In turn, it was reasonable to anticipate that his statements and writings had influenced the anti-Semitic sentiment in the schools. La Forest J. based his reasoning on the nature of the teaching position:

The reason that it is possible to “reasonably anticipate” the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove the respondent from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that the educational services are discrimination-free.²⁶⁶

In his analysis of what constituted reasonable limits on the freedom of speech and the freedom of religion rights of Ross, Justice La Forest adopted a contextual approach under s. 1 of the *Charter*. One key aspect of this analysis deserves attention. It focuses on the educational context.²⁶⁷ Justice La Forest highlighted the state’s interest in education in these terms:

In discussing the interest of the State in the education of its citizens in *Jones* . . . I stated that “[w]hether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society”. And I adopted . . . much of what was said in the American case of *Brown v. Board of Education of Topeka* . . . (1954), in the following passage . . . “Today, education is perhaps the most important function of the state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”²⁶⁸

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.* at para. 101.

²⁶⁷ The SCC also highlighted the relevance of the employment context and the anti-Semitic context.

²⁶⁸ *Supra* note 162 at para. 81.

He also observed that modern educational theory stresses “the inculcation of those fundamental values upon which a democratic polity rests.”²⁶⁹ These values include equality, respect and tolerance for difference. Ross’ views, based on hatred, intolerance and discrimination, could hardly be reconciled with current educational thinking. Even if the teacher did not express his views about Jews in the classroom or on school property, and was otherwise competent as an elementary mathematics teacher, his actions tainted his ability to act as an appropriate conduit or medium for the values espoused by the larger school community. As La Forest J. remarked: “The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond.”²⁷⁰ Moreover, given the poisoned environment in the school community, it was reasonable to anticipate that Ross’ anti-semitic expression contributed to this environment.

In addition, La Forest J. highlighted the vulnerability of young children who may be influenced by teacher expression and conduct:

Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between

²⁶⁹ *Ibid.* at para. 80.

²⁷⁰ *Ibid.* at para. 44. Where precisely to draw the line when it comes to scrutinizing the private lives of teachers remains a challenge. As La Forest J. noted:

I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. *Ibid.* at para. 45.

In the *Ross* case, there was evidence of a “poisoned” environment in the teacher’s school system. Evidence showed that Jewish students were subjected to anti-Semitic taunts and that inscriptions of swastikas were carved into some student desks. Although this conduct was not directly traceable to Ross’ behaviour, the Court held that it was reasonable to anticipate that the teacher’s expressive activity contributed to the anti-semitic environment in the school community. Hence, the off-duty conduct of Ross became relevant.

falsehoods and truth and more likely to accept derogatory views espoused by a teacher.²⁷¹

Finally, by implication, he stated that teacher behaviour can neither undermine, nor be seen to undermine, the need for equality and anti-discriminatory measures in the educational setting:

The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.²⁷²

As educators and role models, and as illustrated in the *Ross* case, teachers' influence on the unofficial curriculum has the potential to be pervasive and powerful.

Another decision dealing with the impact of teacher conduct on the unofficial curriculum is *Kempling v. British Columbia College of Teachers*.²⁷³ In this case, Chris Kempling, a secondary school teacher and school counsellor in Quesnel, B.C., made a number of public statements between 1997 and 2000 condemning homosexuality. The most visible of the statements were in an article and letters to the editor of a local newspaper, wherein he associated homosexuals with "immorality, abnormality, perversion, and promiscuity."²⁷⁴ In these writings, Kempling identified himself on three different occasions as a teacher and counsellor, thereby explicitly linking his personal views to his professional standing as a teacher and counsellor. The teacher had a long and unblemished teaching career and a notable record of community service. Following a complaint, the British Columbia College of Teachers²⁷⁵ conducted an investigation. The

²⁷¹ *Ibid.* at para. 82.

²⁷² *Ibid.*

²⁷³ *Supra* note 163.

²⁷⁴ *Ibid.* at para. 3.

²⁷⁵ This professional body, which licenses and disciplines teachers in the province of British Columbia, is hereinafter referred to as "the College" or "the BCCTF."

College ultimately decided that Kempling was guilty of conduct unbecoming a member and suspended his professional teaching certificate for one month.²⁷⁶ The teacher unsuccessfully challenged this decision on both administrative law and constitutional law grounds.

The Court of Appeal described the rights conflict in this case as a conflict between Kempling's freedom of expression and "other values." The court described these values in the following terms: "The protection of children, the rights of a minority not to be subjected to discrimination, and the rights of an employer to regulate the work place are all countervailing values which are at stake in this case."²⁷⁷ Later on, the court qualified the rights conflict as a conflict between two competing *Charter* rights:

This case rests in large part upon a resolution of how the competing Charter rights engaged are to be balanced. On the one hand, lie the rights of Mr. Kempling to express his views concerning sexual morality which engage his s. 2(b) right to freedom of expression. On the other hand, lie the rights of homosexual students, and students in general, to a school environment that is free from discrimination and in harmony with s. 15 of the Charter.²⁷⁸

On both accounts, the teacher's right to free speech collides primarily with the equality interests and rights of students.

From the teacher's perspective, citizens, including public school teachers, have an interest in being able to express unpopular opinions based on deeply held convictions, even if these opinions offend, hurt, and upset others. In this regard, Kempling may have relied on the words of Justice McLachlin in *R. v. Keegstra*: "If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very

²⁷⁶ See BCCT Report to Members, vol. 14, no. 4, summer 2003, p. 6.

²⁷⁷ *Ibid.* at para. 60.

²⁷⁸ *Ibid.* at para. 73.

basic conceptions about our society.”²⁷⁹ He may have alleged that he sincerely believes that homosexuality is immoral, abnormal and perverse. He also may have maintained that muzzling his expression precludes his involvement in the Canadian polity. Finally, he may have claimed that expressing himself in the ways he did was important to allow him to fulfil his potential as an educator, writer and defender of conventional norms of sexual orientation. In essence, in Kempling’s eyes, his defence of free speech was consistent with the rationales that justify s. 2(b) of the *Charter*, namely, the pursuit of truth, political participation and self-fulfilment rationales.²⁸⁰

The teacher also maintained that his expression did not constitute sufficient harm to justify placing restrictions on his freedom of expression. Thus, one might argue that there exists no compelling reason to limit Kempling’s expression. The offensive speech occurred outside the school gates and the evidence suggested the teacher never expressed his opinions about homosexuality in the school, either in the classroom or the counsellor’s office. In addition, no evidence was led to indicate that Kempling treated gay students disrespectfully or unfairly. Or even that gay students withdrew from the

²⁷⁹ [1990] 3 S.C.R. 697 at 842.

²⁸⁰ Although the courts in *Kempling* did not consider the constitutive justification of free speech, Kempling could well have argued that teachers, like all citizens, have an interest in this defence of freedom of expression. For Ronald Dworkin, a constitutive justification of free speech must protect speech that expresses racial or sexual hatred or bias in order to protect the moral integrity of individuals:

It is very important that the Supreme Court confirm that the First Amendment protects even such speech; that it protects, as Holmes said, even speech we loathe. That is crucial for the reason that the constitutive justification of free speech emphasizes: because we are a liberal society committed to individual moral responsibility, and any censorship on grounds of content is inconsistent with that commitment.

See *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford: Oxford Univ. Press, 1996) at 205. From this perspective, regulation of the content of the speech becomes impermissible because acting otherwise would fail to take listener and speaker autonomy seriously. Kempling may well have argued that the BC College of Teachers should not have been able to mute him for fear that others would hear what he had to say or, worse still, be convinced of the rightness of his beliefs or position. Others should be entitled to make up their own minds about what Kempling has to say regarding homosexuality. Speaker autonomy is also important. The teacher should be able to express shocking, hurtful and deeply offensive opinions because freedom of expression demands nothing less. If this freedom protects only that with which we agree, it is indeed a hollow protection.

teacher's school. His views did not appear to contribute to a poisoned environment.

Unlike the *Ross*²⁸¹ case where incidents of anti-Semitic behaviour fuelled such an environment,²⁸² no evidence was proffered to demonstrate the existence of anti-gay behaviour in Kempling's school or other schools run by the teacher's school board.²⁸³

Yet, the courts in *Kempling* rejected the teacher's arguments relating to the nature of his expression and the question of harm. With respect to the type of expression that Kempling was engaged in, the courts held that the teacher's expression was not representative of the core values underlying s. 2(b). First, Holmes J. of the BC Supreme Court stated that, "Discriminatory speech is incompatible with the search for truth."²⁸⁴ He did not flesh this out. In *Ross*, however, a unanimous Supreme Court of Canada explained why racist speech was unlikely to promote the search of truth:

This Court has held that there is very little chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. ... However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.²⁸⁵

Racist speech refuses to accept people for who they are because of their racial and ethnic origins. Similarly, homophobic speech refuses to accept people for who they are because of their sexual orientation. Hence, anti-gay speech is analogous to racist speech and for

²⁸¹ *Supra* note 162.

²⁸² In *Ross*, the Supreme Court of Canada described the poisoned atmosphere in these terms:

The Board heard evidence from two students in the School Board, whom it found to be credible witnesses. The students described in detail the educational community in the school district. They gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas by other students into their own arms and into the desks of Jewish children, drawing of swastikas on blackboards, and general intimidation of Jewish students. *Ibid.* at para. 40.

²⁸³ As the intervenor, the Canadian Religious Freedom Alliance, stated before the Court of Appeal:

To limit Mr. Kempling's Charter rights, there must be more than a mere inference of harm based on an assessment of the content of the expression; there must be some tangible evidence that harm has been caused. *Supra* note 163 at para. 89.

²⁸⁴ *Ibid.* at para. 96.

²⁸⁵ *Ibid.* at para. 91.

the very reasons cited in *Ross* is unlikely to facilitate the search for truth. Outspoken homophobes like Kempling are likely to silence many gays and lesbians who live in fear and are often reluctant to come out of the closet because of the social costs associated with full disclosure. In addition, on a purely scientific or medical level, there is no credible evidence to suggest that homosexuality is related to “immorality, abnormality, perversion, and promiscuity” as claimed by Kempling. On the contrary, the best evidence shows that homosexuality, just like heterosexuality, is a legitimate and natural form of sexual orientation.

Second, as Justice Lowry of the Court of Appeal²⁸⁶ stated, homophobic speech is inimical to the political process rationale, which also justifies freedom of expression:

In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b).²⁸⁷

Closeted students are unlikely to advocate for the rights and interests of other gays and lesbians (if they so choose) and in this way lose an opportunity to participate in the larger polity to which they belong. Kempling's demonization of gays and lesbians is a particularly cruel yet highly effective means of ensuring that this vulnerable minority is precluded from having a political voice in the communities in which they find themselves embedded. People will rarely listen, let alone allow others to speak, if they consider them to be illegitimate. Kempling's speech is thus successful in frustrating the political process rationale as it applies to gays and lesbians, most particularly the young lesbians and gays who may be his students, attend his school or be in his school community.

²⁸⁶ In its analysis, the Court of Appeal did not consider the search for truth and self-fulfilment rationales.

²⁸⁷ *Supra* note 163 at para. 77.

Third, Holmes J. (of the BC Supreme Court) observed that the teacher's discriminatory speech precludes gays and lesbians from reaching goals of individual self-realization: "[T]he appellant's publicly discriminatory writings undermine the ability of members of the targeted group, homosexuals, to attain individual self-fulfilment".²⁸⁸ One might argue that Kempling's expressive opposition to homosexuality constitutes what Catherine MacKinnon²⁸⁹ calls a "verbal imposition of inferiority." Speaking in the context of sexual and racial harassment, pornography and hate propaganda, she maintains "social inferiority cannot be imposed through any means, including expressive ones."²⁹⁰ MacKinnon observes that free speech absolutists who defend, for example, the hate propagandist's right to have his say suggest that the unregulated marketplace of ideas, where truth and falsehood clash, should preclude censorship of this controversial expression. Yet, she believes that this mischaracterizes what is actually happening. For MacKinnon, the real struggle is between power and powerlessness.

In *Kempling*, the teacher's description of homosexuality as being abnormal, perverse, immoral and promiscuous suggests that gays are morally inferior to their heterosexual brothers and sisters. Their deviant sexual nature sets them apart from the rest of society. Since the dominant discourse is that of heterosexuality, Kempling's homophobic expression reinforces the construction of being gay as something that is different, wrong, and socially unacceptable. This depiction of the sexual *other* ultimately leads to the debasement and marginalization of gays. In this way, Kempling's expressive actions amount to a form of "verbal imposition of inferiority" which may well interfere

²⁸⁸ *Ibid.* at para. 96.

²⁸⁹ Catharine A. MacKinnon, *Only Words*. (Boston: Harvard University Press, 1993).

²⁹⁰ *Ibid.* at 106.

with the ability of some gay people to develop a positive sense of self, including self-confidence and self-esteem, elements critical to the notion of self-fulfilment.

The interests and rights of children and of students also figure prominently in the courts' analysis. Kempling's right to freedom of expression must be measured against these considerations. The BC Supreme Court noted that children have a right "to be educated in a school system that is free from bias, prejudice and intolerance", a right that is... entrenched in s. 15 of the Charter."²⁹¹ The court also observed that it would be reasonable to anticipate that homosexual students would generally be reluctant to approach Kempling for school counselling given his discriminatory views about gays.²⁹² As for the Court of Appeal, it ruled that the teacher's statements associating homosexuality with perversion, immorality and promiscuity "undermined the core value of non-discrimination by denying homosexual students an education environment accepting of them."²⁹³ This court rejected Kempling's contention that his comments did not harm any gay students as no students came forward to complain that they had been harmed:

In his writings, Mr. Kempling made clear that his discriminatory beliefs would inform his actions as a teacher and counsellor. His writings therefore, in themselves, undermine access to a discrimination-free education environment. Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment.²⁹⁴

²⁹¹ See *Kempling v. British Columbia College of Teachers* [2004] B.C.J. No. 173 (BC Supreme Court) at para. 89.

²⁹² *Ibid.* at 48.

²⁹³ *Supra* note 163 at para 45.

²⁹⁴ *Ibid.* at para. 79. The Court of Appeal pointed to the following comments as evidence that Kempling's opinions would inform his actions as a teacher and counsellor:

Sexual orientations can be changed and the success rate for those who seek help is high. My hope is that students who are confused over their sexual orientation will come to see me. It could save their life.

Under its section 1 analysis, both courts agreed that contextual factors relating to the vulnerability of children and historic disadvantage still suffered by gays and gay students were relevant in the legal analysis. Referring to the Supreme Court of Canada decision in *Ross*, the BC Supreme Court stated that, “One important contextual factor is that the disciplinary action against the appellant was aimed at protecting a vulnerable group - children.”²⁹⁵ Children often lack the cognitive wherewithal to assess critically the messages of their teachers. Furthermore, as the BC Supreme Court held, students and especially gay students would be reluctant to challenge an authority figure like Kempling: “Realistically, most homosexual students would be most reticent to challenge a teacher and counsellor who is otherwise held in high regard, while placing themselves at risk in disclosing their sexual orientation to the public.”²⁹⁶ The Court of Appeal highlighted the disadvantage faced by gay students in these terms:

It is not disputed that discrimination against homosexuals is a serious problem in public schools and the larger society. The appellant himself acknowledged that there is a problem in public schools of harassment of students presumed to be homosexual, with sometimes fatal consequences.²⁹⁷

This contextual analysis might lead one to conclude that students, and especially gay students in this case, have dual relevant interests. First, they have an interest in teachers respecting their vulnerability. Second, they also have an interest in teachers not contributing to a social environment where the gay students are subjected to acts of discrimination.

I refuse to be a false teacher saying that promiscuity is acceptable, perversion is normal, and immorality is simply "cultural diversity" of which we should be proud. Section 95(2) of the School Act states that teachers must “inculcate the highest moral standards”. *Ibid.* at para. 44.

²⁹⁵ *Ibid.* at para. 88.

²⁹⁶ *Ibid.* at para. 65.

²⁹⁷ *Ibid.* at para. 91.

The BC Supreme Court also ruled that Kempling's conduct caused harm to the student body at large.²⁹⁸ Unfortunately, it did not explain the nature of this harm. All students, and not just gay students, have an interest in an education environment that is free from discriminatory acts and influences. Straight students who are ill informed about homosexuality may be unduly influenced by the writings and opinions of a teacher, especially one who has a high profile in a small community. In turn, these students might potentially develop negative attitudes and act in discriminatory ways against their fellow gay students. The resultant harm in these circumstances is obvious. Even heterosexual students who have positive attitudes toward other students who are gay may feel Kempling's expression constitutes an attack on their dignity and their interest in having teachers who espouse educational ideals, which show respect for all human beings. Quite simply, anti-gay expression by a teacher may lead to a loss of respect that all students have for the teacher articulating such expression.²⁹⁹

Closely linked to the students' rights and interests in this case, is the state's interest in children's education. As we have already seen, the state's dual interests focus on the need for children to develop into independent adults and able citizens. To promote these interests, the state must ensure that the integrity of both the teaching profession and the learning community are not sabotaged. In *Kempling*, the teaching profession is governed and regulated by a statutory body, namely, the British Columbia College of

²⁹⁸ *Supra* note 291 at para. 102. The Court of Appeal did not address this issue.

²⁹⁹ The Court of Appeal referred to this "loss of respect" in the following quotation from *Abbotsford School District No. 34 Board of School Trustees v. Shewan* (1987), 21 B.C.L.R. (2d) 93 at 97 (B.C.C.A.):

The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, *a loss of respect by students for the teacher involved*, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the education system. (Emphasis mine) *Supra* note 163 at para. 3.

Teachers. One of the mandates of the BCCT is to promote teacher professionalism. Public teachers in BC, as elsewhere, are required to promote educational values, which do not discriminate against students on the basis of their sexual orientation. The courts in *Kempling* upheld the finding of the BCCT of conduct unbecoming a teacher because Kempling acted in a way that could not be reconciled with his professional calling. The BC Supreme Court noted that the harm, occasioned by the teacher's expression, caused among other things "loss of respect for the appellant as a teacher and other teachers."³⁰⁰ Thus, the state has an interest in guaranteeing that those who teach our children act in a professional manner so they do not interfere with the equality rights and interests of students.

Furthermore, the Court of Appeal ruled that Kempling's conduct compromised the integrity of the public education system he was required to serve. As the court noted:

Non-discrimination is a core value of the public education system; the integrity of that system is dependent upon teachers upholding that value by ensuring the school environment is accepting of all students. When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result.³⁰¹

Once again, the state has an interest in ensuring that the trust and confidence of the educational community which is the locus of children's education are not undermined by teacher conduct antithetical to the values of inclusion, respect and tolerance of difference.

The *Ross* and *Kempling* cases can be contrasted with the Supreme Court of Canada's judgement in *Trinity Western University v. British Columbia College of Teachers*.³⁰² In *TWU*, the British Columbia College of Teachers (BCCT) refused to

³⁰⁰ *Supra* note 291 at para. 12.

³⁰¹ *Supra* note 163 at para. 43.

³⁰² *Supra* note 165.

accredit the teacher education programme of Trinity Western University (TWU), a private evangelical Christian university in British Columbia. The BCCT believed that TWU's proposed programme was discriminatory and contrary to public policy and the public interest³⁰³. More specifically, it felt that TWU graduates were likely to be biased when dealing with gay and lesbians students. In support of its position, the BCCT noted that TWU students, including those wanting to be teachers, were required to (and did) subscribe on admission to a code of conduct, known as a "Community Standards" document. This code included an obligation to refrain from, among other things, homosexual behaviour. This specific requirement was found in a paragraph that contained the following:

REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness ..., all forms of dishonesty including cheating and stealing, ... involvement in the occult ..., and sexual sins including premarital sex, adultery, *homosexual behaviour* and viewing of pornography ...³⁰⁴ (emphasis mine).

Faculty and staff were required to sign a similar document.

On appeal, the College's Council upheld the decision of the BCCT. Yet, the BC Supreme Court overturned this decision.³⁰⁵ The BC Court of Appeal found the BCCT had jurisdiction to hear the matter, but the majority affirmed the trial judge's ruling on the grounds that there was no reasonable foundation for the BCCT's finding of

³⁰³ The BCCT is empowered under s. 4 of the *Teaching Profession Act* to set standards governing the teaching profession and to establish those standards while taking into account the public interest. R.S.B.C. 1996, c. 449. This was the reference to the public interest that the BCCT invoked as justification for considering the TWU admissions policy in deciding on the certification of its teacher education programme. As the majority of the Court noted: "The BCCT argues that teaching programs must be offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices as pedagogy." *Ibid.* at para. 11. The BCCT required graduates of TWU to do a year of study at Simon Fraser University in order to consider them for qualification as teachers.

³⁰⁴ *Ibid.* at para.10.

³⁰⁵ *Trinity Western University v College of Teachers (BC)* (1997), 41 BCLR (3d) 158 (SC).

discrimination.³⁰⁶ A majority of the Supreme Court of Canada rejected the BCCT's appeal, thus affirming the decision of the BC Court of Appeal.

Speaking for the majority, Justices Iacobucci and Bastarache acknowledged that the state (through the creation of the BCCT) has an interest in ensuring that the teaching profession is governed by educational, professional and competency standards. In this regard, the Justices recognized that the BCCT was empowered under s. 4 of the *Teaching Profession Act* to “establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and ... to encourage the professional interest of its members”³⁰⁷ They also noted that the power to establish standards envisaged in s. 4 had to be interpreted in a way to ensure that “the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence.”³⁰⁸ For Iacobucci and Bastarache JJ, this meant that the scope of s. 4 could not be limited to a mere determination of skills and knowledge. After all, the state has an interest in ensuring that a certain kind of quality of education takes place in our public schools. As the majority noted: “Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance.”³⁰⁹ Hence, the College had jurisdiction to consider discriminatory practices in dealing with the TWU application.

It is worth noting that unlike the prior teacher cases, no specific constitutional claims by teachers were made in this case. Justices Iacobucci and Bastarache state the

³⁰⁶ *Trinity Western University v BC College of Teachers* (1998), 169 DLR (4th) 234 (BCCA).

³⁰⁷ *Supra* note 165 at para. 9.

³⁰⁸ *Ibid.* at para. 13.

³⁰⁹ *Ibid.*

rights conflict in the decision as being “how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system. ...”³¹⁰. The BCCT argued that the anti-homosexual philosophy in the document would have a detrimental impact on the learning environment in public schools, and especially for gays and lesbians.³¹¹ Justices Iacobucci and Bastarache rejected this claim noting that there was no hard evidence to support the BCCT’s position:

[T]here is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate.³¹²

For the majority, nothing suggested that the exercise of freedom of religion by TWU students would have a detrimental impact on the school system, including the students in that system. In essence, Iacobucci and Bastarache JJ. reasoned that one could hold discriminatory beliefs and religious freedom³¹³ will protect those beliefs provided one does not act on them: “[T]he proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the

³¹⁰ *Ibid.* at para. 28. The majority noted that these concerns might be shared with the students parents and society more generally.

³¹¹ *Ibid.* at para. 32.

³¹² *Ibid.* at para. 35. From an evidentiary perspective, the majority noted:

For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions. *Ibid.* at para. 38.

³¹³ Here, the majority made reference to the Supreme Court of Canada’s watershed decision on freedom of religion under the *Charter* in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. In this decision, the Court sets out the importance of freedom of religion in Canadian society. See at 336-337. The majority in *Trinity Western* also noted that, “British Columbia’s human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion.” *Ibid.* at para. 28.

freedom to act on them.”³¹⁴ Implicit in the majority’s reasoning is the idea that students have equality interests and a s. 15 equality right to be educated in a discrimination free environment. The majority concluded, however, that no concrete evidence existed to demonstrate that training teachers at TWU fosters discrimination in B.C.’s public schools and thereby undermines the equality rights and interests of students, and especially gay students. Thus, the freedom of individuals to espouse certain religious beliefs while at TWU, and even if those beliefs were offensive and hurtful to others, had to be respected. By defining the scope of freedom of expression and equality rights as it did, the majority was able to eschew a conflict of rights in its judgement.³¹⁵

In *TWU*, the tension between the *Charter* values of religion and equality is ultimately linked to the suitability of teachers working in our country’s schools. By their words and actions, teachers inform both the official and unofficial curriculum. The state, as well as the teaching profession and all other educational stakeholders, have an interest in choosing teachers who will be able to embrace and transmit values such as integrity, fairness, tolerance, and respect – values which undergird our school system. As the majority declared:

[T]eachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program at TWU.³¹⁶

³¹⁴ *Ibid.* at para. 36

³¹⁵ As the majority stated:

In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. *Ibid.* at para. 29.

³¹⁶ *Ibid.* at para. 13.

Yet, nothing suggested that graduates from the Christian university were unable or unwilling to transmit these values in their professional capacity as teachers. Unlike the cases of *Ross* and *Kempling*, where the teachers engaged respectively in anti-Semitic and anti-gay behaviour, the graduating teachers from TWU did not (according to the evidence) conduct themselves in a discriminatory manner vis-à-vis gays and lesbians, and especially gay and lesbian students in their schools. Speculation or fear of what these graduates might do or how they might act in the future was based exclusively on perceptions related to the beliefs of those attending TWU.³¹⁷

In dissent, Justice L'Heureux-Dube rejected the majority's categorization of the issue as a conflict of rights.³¹⁸ She ruled that there was no conflict between religion and equality. Moreover, the BCCT's exclusive focus should be on the public schools students' best interests. As Justice l'Heureux-Dube declared: "At its core, this case is about providing the best possible educational environment for public school students in British Columbia."³¹⁹ She also added that this imperative constitutes a "vital public interest" because public classrooms are "the intellectual incubators of Canada's most

³¹⁷ *Ibid.* at para. 18-19 Furthermore, the majority noted:

The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. *Ibid.* at para. 36.

³¹⁸ As she stated:

I disagree with my colleagues, who believe that it was incumbent on the BCCT to "reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system"... Their reasoning amounts to changing the statutory mandate and function of the BCCT into those of a human rights body. It supposes that the BCCT should have resolved what my colleagues have retrospectively identified as a conflict of rights. I find no such conflict in this case. Donna Lindquist was not a party to the BCCT's decision and in any event her freedom of religion did not need to be considered. Nor were B.C. public school students' equality interests considered for the sake of protecting their Charter rights. Rather, the Charter or human rights value of equality was applied only as it pertains to the classroom environment. I find it problematic to force an appraisal by an administrative tribunal of the allegedly dueling Charter rights or values of TWU students like Donna Lindquist and unnamed B.C. public school students. *Ibid.* at para. 65.

³¹⁹ *Ibid.* at para. 47.

vulnerable and impressionable citizens.”³²⁰ Justice L’Heureux-Dube is correct to point out that teachers in public schools need to be “sensitive to the concerns” of gay students.³²¹ She is also right to highlight the vulnerability of gay youth both in the family and school environment.³²²

Nevertheless, her reasoning is questionable on two main grounds. First, the focus of her analysis is too myopic. She only considers the equality interests of the children. This is a necessary consideration, to be sure, but an insufficient one if we are to adopt a balanced approach to reconciling divergent and at times conflicting interests. Justice L’Heureux-Dube does not take into account the religious freedom of TWU and its adherents, including those students who choose to study there. We must not forget that TWU is a private Christian university and religious belief plays a fundamental role in its *raison d’etre*. Failure to examine the religious interests and rights of TWU and its students, or rather wholesale rejection of the religious perspective, suggests an unwillingness to entertain a more nuanced approach to the different interests at play in this case.

Second, there is no concrete evidence to suggest that graduating TWU students will treat gay and lesbian students in their classrooms with less respect and dignity compared to straight students. If TWU trained teachers do act in a discriminatory manner,

³²⁰ *Ibid.*

³²¹ *Ibid.* at para. 80.

³²² In this regard, she observes:

As the intervener EGALE pointed out, it is vital to remember in the context of the case at bar that “[b]ecause lesbian, gay, and bisexual youth are almost always ‘minorities’ in their own families, they do not enter the school environment with the same level of family support and understanding that other members of minority groups do. Thus schools are an important second line of support for students dealing with issues of sexuality, and can counter the effect of a hostile family environment” *Ibid.* at para. 81.

She then went on to hold: “Evidence shows that there is an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms.” *Ibid.* at para. 82.

measures are in place for school boards and teaching professions to discipline the teacher appropriately. A public school teacher trained at a public university may well believe, on religious grounds, that men and women have preordained social roles. He may also think that wives should submit to their husbands. Many might rightfully reject his viewpoint, deeming it both sexist and traditional. Yet, do these beliefs by themselves make him unfit to teach? Assuming he is a competent teacher, to the extent that he treats his female students with the same degree of respect and consideration he accords to his male students, there are no valid reasons to suggest that he is unsuitable for the teaching profession. Provided he does not act in a way as to undermine the equality interests and rights of his female students, he should be entitled to teach. In essence, sexist beliefs alone are not enough to disqualify one from the field of teaching. A similar logic should apply in *TWU*. Even if *TWU* teacher graduates have homophobic beliefs, they should be permitted to work in the public schools provided they respect all students they teach, including gay students.

In *N.T.A. v. Newfoundland (Treasury Board)*³²³, the majority of a board of arbitration decided just cause existed under the collective agreement for dismissal of Richard Walsh from his teaching position with the Roman Catholic School Board for St. John's. The Newfoundland Court of Appeal upheld this ruling. At the time of his hiring, and in accordance with his school board's by law, the teacher stated that he was a practising Catholic and he had agreed to participate in the religious education programme

³²³ *Supra* note 164.

at his school of employment. The by law also stipulated that the teacher “must make a positive contribution to the spirit of the Christian community within the school.”³²⁴

Subsequent to his hiring, Walsh joined the Salvation Army and, in 1983, married in that church. The school board then dismissed Walsh upon learning about these events. It maintained that the teacher’s actions were incompatible with the basic tenets and philosophy of the Roman Catholic school board. Walsh filed a grievance, challenging the board’s decision on two grounds. First, he claimed that there was no basis for just cause. Second, he alleged that his *Charter* right to freedom of religion [guaranteed by s. 2(a)] had been infringed. The Newfoundland Court of Appeal rejected both arguments.

With respect to the issue of just cause, the court ruled:

[T]he essential nature and characteristic of the denominational educational system could not render patently unreasonable the upholding of a Roman Catholic school board decision to dismiss a teacher, who had accepted employment on the expressed understanding that he was an adherent to the Roman Catholic faith and a practitioner of it and part of whose duties entailed religious instruction, for the reasons that he had married outside the requirements of that Church and had repudiated the denominational faith he had contracted to teach.³²⁵

One can posit that a Roman Catholic school board, as a religiously based institution, has an interest in ensuring that the denominational nature of its school system is not undermined by teacher conduct, which is at odds with legitimate doctrinal requirements associated with the Roman Catholic faith. Furthermore, the Court of Appeal was alive to the interests of students attending the denominational school where Mr. Walsh taught. As the court noted, at issue was “the potential ill effects upon his students that could reasonably be anticipated as a result of their being instructed in the tenets of a particular

³²⁴ *Ibid.* at 162.

³²⁵ *Ibid.* at 166.

faith by one who had openly repudiated that faith.”³²⁶ Although the court did not expand on this, the message is clear. Students learn by example and they have an interest in observing and emulating teacher behaviour, which comes closest to embracing the ideals and values of their religiously based school system.

As for the *Charter* argument, the teacher claimed that the school board had run afoul of his freedoms of conscience and religion and of association guaranteed under s. 2(a) because the board required conformity to the religious tenets of the Roman Catholic Church and continued membership in the Church as a condition of Walsh’s employment.³²⁷ The Court of Appeal refuted this reasoning. It pointed to Term 17 of the Terms of Union with Canada³²⁸, a constitutional provision which (at the time) protected denominational rights in Newfoundland, including the right of the Roman Catholic School Board for St. John’s to offer schooling from a faith based perspective. As the court stated: “[T]he action of the School Board in terminating Mr. Walsh’s services was an exercise of rights protected by Term 17.”³²⁹ Furthermore, the court noted that s. 29 of

³²⁶ *Ibid.* at 167.

³²⁷ *Ibid.* at 162.

³²⁸ According to Term 17:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union. ...

³²⁹ *Ibid.* at 166. In *Caldwell v. Stuart*, the Supreme Court of Canada recognized the requirement of the continuance and conformance to the faith by a teacher employed by a denominational school in British Columbia. See [1984] 2 S.C.R. 603. The teacher alleged that the non-renewal of her teaching contract because she had married a non-Catholic in a civil ceremony contravened the *Human Rights Code* of British Columbia. In addressing the issue, McIntyre J. observed:

The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church’s rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the Etobicoke test is thus met and that the requirement of conformance constitutes a bona fide qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of

the *Charter* provides immunity from *Charter* challenges to the legitimate exercise of denominational educational rights. As s. 29 states:

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissident schools.

Consequently, no rights claimed by Mr. Walsh under s. 2 of the *Charter* could abrogate or derogate from the denominational rights of the school board as protected by Term 17.

From a conflict of rights perspective, the court had to reconcile the teacher's right to freedom of religion with the state's obligation to uphold its constitutional mandate. Unlike the other cases involving teacher conduct, this decision is unique because it represents an exemption or anomaly from the normal rights discourse. Cases involving denominational rights are, therefore, treated differently because of the special context. Since the state has a constitutional obligation to respect and to protect denominational rights, it has an interest in ensuring that denominational school boards protected by our constitution are entitled to operate in accordance with genuinely held and legitimate faith based requirements.

which will deprive her of the protection of s. 8 of the Human Rights Code. It will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification. *Ibid.* at 624-625.

The Ontario Court of Appeal addressed a similar issue in *Re Essex County Roman Catholic Separate School Board v. Porter et al.* See (1979) 83 D.L.R. (3d) 445. The court upheld the decision of a Roman Catholic school board in Ontario dismissing two of its teachers because they had elected to enter into civil marriages. As the court stated: "[I]f a school board can dismiss for cause, then in the case of a denominational school cause must include denominational cause." *Ibid.* at 447.

CONCLUSION

In my study, I have conducted a critical assessment of the relevant Canadian jurisprudence where curricular struggles involving (directly or indirectly) conflicts of constitutional rights have arisen. From a theoretical perspective, I have drawn principally on the work of Rob Reich and Jeremy Waldron to inform my thinking. Reich maintains that the resolution of curricular battles related to the control of children's education necessitates a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the state and children. Adding to Reich's conceptual framework of the different interest holders, I identified the teacher as a fourth stakeholder who has an interest in the education of our children.

Reich claims that parents have two primary interests in their children's education. He describes these interests as self-regarding and other-regarding. In the first category, parents have an interest in children's education that reflects deep meaning for the lives of parents themselves. In the second category, parents have an interest in promoting the welfare of their dependent children as they are normally best situated to act in the best interests of their children. With respect to the state's interest in children's education, Reich offers a two-fold justification for this interest. First, the state wants children to become able citizens. Second, it wants children to develop into independently functioning adults. Finally, Reich provides two reasons to explain why children themselves, as distinct from their parents and the state, have an interest in their own education. First, children have an interest in becoming independently functioning adults. Second, children have an interest in becoming minimally autonomous. As for teachers, I have claimed that they have an interest in exerting some measure of curricular control in order to create and

maintain a learning environment that stimulates, challenges, and nurtures students to promote their human flourishing.

In my analysis, I have applied Reich's matrix of interest holders (and incorporating into this matrix the teacher as a fourth interest holder), with their respective interests, to the extant body of jurisprudence in an attempt to respond to some basic questions. First, do we find all quadripartite interest holders reflected in the case law? Second, in individual cases involving conflicts of constitutional rights, are our courts alive to the different interest holders in its analysis of these cases? Third, are the interests of the stakeholders, as identified and articulated by the Canadian courts, similar to or different from the conceptualization of these interests as offered by Reich? Fourth, in what circumstances do the interests of the various stakeholders overlap or conflict with another?

Generally speaking, what interest holders are reflected in the case law?

A study of the case law involving curricular control of children's education reveals that all four interest holders, to varying degrees and frequency, have been the subject of the courts' analysis. This means that the interests of parents, children, and teachers have been considered separately or in some combination where two or all three interest holders have been the subject of the courts' analysis. In all cases treated, the state's interest in curricular control is a constant and is thus always reviewed by the courts. With respect to parents, children and teachers, the cases reflect a mix of interests and special interests that we call constitutional rights. A review of the jurisprudence shows that the decisions typically fall into one of three defined categories where the right

claimant is either the parent, the child/the student or the teacher. In one case, the *Fancy* decision, the parents and the children are both rights claimants.

In individual cases, what interest holders and interests are subject to judicial analysis?

In the cases where parents are rights claimants (i.e. the cases involving freedom of religion, namely, *Jones*, *Zylberberg*, *Canadian Civil Liberties Association* and *Fancy*), the courts do not consider the interests of teachers. In *Jones*, and in the context of home schooling, the Supreme Court of Canada does not give any consideration to the interests of children in its analysis. This decision appears to reflect a paternalistic view of children whose interests are simply conflated with those of their parents. Yet, in *Zylberberg* and *Canadian Civil Liberties Association*, the Ontario Court of Appeal is alive to the interests of children, which are seen as being separate from those of their parents and those of the state. In *Fancy*, the interests of children (in an education that is free from discrimination on the basis of religion) are articulated as separate rights along side those of the parents who challenge the use of the Lord's Prayer and religious exercises in Saskatchewan's public schools. These cases seem to suggest an evolution in terms of how we come to think of children and their interests in their own education. In *Jones*, the child's interest was absent from the court's analysis. In *Zylberberg* and *Canadian Civil Liberties Association*, the court considered the children's interest in a secular education as a separate interest and in *Fancy* the children were separate rights bearers alongside their parents requiring the Board of Inquiry to give these special interests equal consideration to the special interests of the parents.

With the exception of the *Jones* case, all three decisions demonstrate a convergence of similar or overlapping interests. Both children and parents have an interest in a secular public school system that is free from religious indoctrination. Using Reich's matrix, we might say that the parental interest in this concern for a secular education corresponds to promoting the best interests of the child since the parents have chosen not to enrol their children in a religious school and hence do not wish their children to have a religious education. As for the children's interests, we might claim that these decisions are also consistent with Reich's dual justification for such interests: to become independently functioning adults and to become minimally autonomous. After all, children should not be coerced into submitting to (Christian) religious exercises, be forced to take religious courses in public schools or be told what to believe in matters religious. To avoid religious indoctrination, children in public schools must remain free to determine for themselves what religious obligations, if any, they should espouse.

At the same time, the interests of children in their own education identified by Reich do not tell the whole story. In *Zylberberg*, a majority of the Ontario Court of Appeal rejected the school board's position that Christian religious exercises were good for minority students because they forced these students to confront "the fact of their difference from the majority." Calling this approach insensitive, the majority noted the school board failed to consider "the feelings of young children." This concern for the emotional wellbeing of minority students who have different beliefs and values reflects an important interest highlighted in this case. As I have argued, this might be associated with a larger interest children have in belonging. In other words, minority students attending public and secular schools have an interest in fitting into a larger and diverse

educational community where students of all back grounds, whether religious or non-religious, have a deep longing to make meaningful social connections with others.

In three of the four cases where children are rights' claimants (*Lutes, Multani* and *Hall*), the courts do not consider the interests of parents or teachers in these three decisions. Even though the parents act as litigation guardian in these cases, the children are *de facto* treated as autonomous agents exercising claims, on their own, as separate bearers of rights. In the *Eaton* judgment, the child's equality rights are front and centre. Yet, the Supreme Court of Canada also considers the interests of the parents who want their child (with special needs) integrated into the classroom. The parents are seen as acting in the best interests of their daughter, a description of the parental interest that squares with Reich's conceptual framework. In the *Lutes, Multani* and *Hall* cases, the respective exercise of the freedom of expression, freedom of religion and equality claims are also compatible with Reich's matrix of children's interests as these claims can be viewed as both manifestations of autonomy and a march towards becoming independently functioning adults who are capable of promoting their own interests.

The decisions involving teachers as rights claimants (*Morin, Ross* and *Kempling*) always implicate the interests of children and/or the parents. In *Morin*, the P.E.I. Court of Appeal noted that the teacher's interest in curricular free speech had special importance for those hearing the speech, namely, the students. As the majority underlined, "This becomes partially a right of students in a democratic society to have access to free expression by their teachers - encouraging diversity, critical thinking and vigorous

debate.”¹ In these terms, teacher speech becomes necessary to promote children’s autonomy, a key interest in Reich’s conceptual framework.

In *Ross* and *Kempling*, the teacher’s engagement in respectively anti-Semitic and anti-gay speech is viewed by the courts as interfering with the interests of both children and parents. This discriminatory expression undermines the equality rights and interests of children because it sends the message that the targeted minority students are somehow less worthy of consideration and respect because of their religion/ethnicity and sexual orientation. In *Ross*, the Supreme Court of Canada expressed the need for an education milieu exempt from discrimination in these terms: “The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.”² In Reich’s conceptual matrix, discriminatory speech may be portrayed as anathema to children’s interest in their own autonomy and self-development.

We might also add that discriminatory speech impedes another important interest, (not considered by Reich) that children have which is the right to belong. In the context of public education, Jewish children, gay children or other minority children who feel they are under attack, because of who they are, may have difficulties fitting in or associating with the larger, majoritarian school community. This threat of exclusion is inimical to a sense of belonging. Likewise, parents have a strong interest in ensuring that

¹ [2002] P.E.I.J. No. 36 (C.A.) at para. 67.

² [1996] 1 S.C.R. 825 at 851.

school communities, along with the teachers who work in those communities, create an educational environment that is safe, welcoming and nurturing for their children.

Destructive speech that goes unchecked may destroy parental confidence in a public school system which is supposed to be open to all regardless of personal and arbitrary characteristics such as one's ethnicity and sexual orientation. This parental interest is consistent with Reich's other regarding interest where parents devote themselves to pursuing the best interests of their children.

Conflicts of rights

In our analysis, it becomes obvious that certain interests give rise to moral rights because of the special nature and significance of those interests for human flourishing. In the case law, these moral rights are expressed as constitutional rights and include the right to freedom of expression, the right to freedom of religion and equality rights. Where constitutional rights conflict with another constitutional right or interest identified by the courts, the judiciary has had to provide a reconciliation of these competing forces. In my study, I have attempted to show that this reconciliation can best be explained by drawing on Waldron's work as it relates to conflicts of moral rights. Waldron notes that conflicts of rights take one of two forms. They involve conflicts between rights and utility, on the one hand, and conflicts among rights themselves, on the other hand. If, as Waldron argues, conflicts of rights can best be understood as conflicts involving underlying duties, then we can better explain and assess what the courts are doing by focusing on the duties associated with the rights in question.

Furthermore, and generally speaking, rights have qualitative or lexical priority over considerations of social utility. Yet, utility may some times win the day when we are

not convinced that it is necessary to satisfy every single duty associated with the right. When equally important rights collide with each other, Waldron suggests that the conflict should be resolved in a quantitative manner that involves a weighing of the respective interests and duties in order to maximize what we believe to be important.

In the cases involving parental rights and freedom of religion (*Zylberberg*, *Canadian Civil Liberties Association*, *Fancy and Jones*), a Waldronian analysis helps clarify the nature of the rights conflict. In *Zylberberg*, *Canadian Civil Liberties Association* and *Fancy*, the parental claim under s. 2(a) of the *Charter* is grounded on the state's duty to provide a public, secular education system that is free from religious indoctrination. In the first two of these cases, religious exercises and religious curriculum are struck down as being unconstitutional because they reflect a Christian perspective which is incompatible with the parents' freedom of religion. Although the state has a duty to teach morality, it can do so without the vehicle of (Christian) religion. Hence, the resolution of the rights conflict in both these cases is relatively straightforward. The *Fancy* decision is an anomaly because of the constitutional protection afforded to religious exercises and the recitation of the Lord's Prayer in Saskatchewan schools.

In the *Jones* decision, a majority of the Court held that there was no violation of the parent's right to freedom of religion. The parent was entitled to educate his children (and others) in a home schooling program. This was consistent with the state's obligation to allow for education in public schools, private schools, at home and elsewhere. Yet, the parent had to register his home academy with state officials and submit to minimal state supervision of his education program. This interference, he claimed, infringed his s. 2(a) rights. Rejecting this argument, the majority held that the requirements of registration and

modest supervision were necessary to guarantee a minimum of state control to ensure that all children receive an adequate and appropriate education.

The cases involving student rights (*Lutes*, *Multani* and *Hall*) can also be explained by reference to the various duties underlying the respective rights. In *Lutes*, respect for the Grade 9 student's right to free speech requires the state to meet a host of duties. For instance, the state must not censor speech some find offensive. It must also provide opportunities for students to exercise their free speech rights and must educate others about the importance of free speech in a democracy. In this case, the school disciplined the student (with noon hour detentions) for singing a song about safe sex, a song it considered inappropriate solely because of its sexual message. The Saskatchewan court rightly held that this was an unjustifiable violation of the student's s. 2(b) rights. At the same time, schools have an interest in teaching students about civility and respect. Speech which is inconsistent with the school's mission in this regard could be restricted to achieve these ends.

In *Multani*, the student's right to freedom of religion, as expressed through the wearing of the *kirpan* at school, is perceived by some as clashing with the imperative of student safety. The freedom of religion claim places a number of obligations on the state. It must allow the student to manifest his minority religious beliefs without fear of penalty. The state must also forbid others from interfering with the student's freedom of religion and must educate others about religious minorities and their religious beliefs. In its reconciliation of the right to freedom of religion with safety concerns, the majority of the Supreme Court of Canada correctly noted that the student had to take a number of corrective measures concerning the wearing of the *kirpan* to ensure the safety of others.

By adopting a standard of reasonableness (and rejecting a standard of absolute safety), the majority was able to uphold the value of religious freedom for minority students while acknowledging the safety concerns that modern schools must confront.

In the *Hall* case, the conflict is between equality and religious freedom. Since these values are both important, we cannot say that one should automatically have lexical priority over the other. Drawing on Waldron's conceptual framework, we can say that an assessment of the relative importance of the interests at stake, along with the contributions each of the conflicting duties makes to the importance of the interest it protects, helps us understand what decision the Ontario court made in this case. Here, the violation of the student's equality rights was a serious one and went to the core of the protection afforded by s. 15. By preventing the student from attending the prom with his boyfriend, the school's action amounted to a flagrant assault on Hall's basic dignity and right to fair treatment. The section 15 protection places a duty on the state to ensure that gay students are free from discriminatory practices solely because of their sexual orientation.

By the same token, the court recognized the importance of the school board's freedom of religion and acknowledged the denominational nature of the Catholic school board which is free to hire teachers, develop curriculum and construct policy from a religious perspective. In this sense, the state has a duty to ensure that the school board can exercise its religious freedom. But the court did point out that the Prom was neither a religious nor educational activity. Furthermore, allowing the student to attend the Prom with his same sex boy friend would not undermine the essential denominational character

of the board. In sum, in the circumstances, it was more important to protect the equality rights of the student than the religious freedom of the board.

The teacher cases (*Morin*, *Ross*, and *Kempling*) involving freedom of expression highlight an intersection of different interests and illustrate how the state's duty to protect controversial expression is related to the nature of the expression itself. In *Morin*, the teacher's exercise of curricular speech is closely linked to the students' interest in critical thinking. The state has a duty not to censor pedagogical expression that is fundamental to the teacher's role which is to educate, to stimulate and to challenge students. The state must also ensure that others not interfere with this role and must educate students about the importance of free speech in a democracy. Furthermore, the type of expression the teacher in *Morin* engaged in goes to the heart of the s. 2(b) values which include the pursuit of truth and political process rationales. Although the teacher's expression upset some parents and challenged the administrator's absolute grip on curricular control, these interests were not sufficiently weighty to justify overriding the teacher's expression in this case.

The *Morin* decision can be contrasted with the rulings in *Ross* and *Kempling*. In both these cases, the teacher engaged respectively in controversial expression related to anti-Semitic and anti-gay speech. On one hand, the state has a duty to ensure that expression which hurts, shocks, and offends is shielded from censorship. But, the state also has a duty to protect vulnerable minorities, including children who may be the subject of vicious and cruel verbal attacks which have the potential to undermine their equality interests and rights. Hence, the liberty rights of the teacher must be reconciled with the equality rights of the students and the interests of both the parents and larger

school community. The teacher also has the additional duties of acting as educator, role model and professional. These duties constrain further what he can say when he is involved in propagating discriminatory expression. In the context of public schools, which are open to all regardless of one's religious background or sexual orientation, the duty to protect vulnerable students is a more weighty consideration than the duty to shield discriminatory expression from censor. The courts in both *Ross* and *Kempling* have also ruled that expression which strays some distance from the core values associated with s. 2(b) is also deserving of less constitutional protection. In *Morin*, the expression is valuable because it is integral to the role the teacher, as educator, must fulfil. By contrast, in *Ross* and *Kempling*, the expression undermines the roles the teacher must embrace and ultimately interferes with the equality rights and interests of the minority students the teachers are called to serve.

Presence of meta-values in the cases

At first blush, the cases studied seem to focus on two key values: liberty and equality. After all, each case examined is framed in the language of freedom of expression, freedom of religion and/or equality, all constitutionally protected rights enshrined respectively in ss. 2(b), 2(a) and 15 of the *Charter*. The parental cases involving freedom of religion (*Jones*, *Zylberberg*, *Canadian Civil Liberties Association* and *Fancy*) highlight individual claims for control over one's home schooling environment (*Jones*) and freedom from state enforced religious indoctrination (*Zylberberg*, *Canadian Civil Liberties Association* and *Fancy*). Two of the student cases (*Lutes* and *Multani*) focus on the individual's claim for free speech (*Lutes*) and freedom of religion (*Multani*). In the first case, the student argues that the school cannot censor a

song about safe sex even though some find this offensive and shocking. In the second case, a student maintains that his religion must be respected and that rules interfering with his right to wear a kirpan cannot stand.

Three of the teacher cases (*Ross*, *Morin* and *Kempling*) are based on the individual's argument that the state has violated his freedom of expression as enshrined in s. 2(b) of the *Charter*. One case (*Morin*) is a challenge to restrictions placed on curricular expression while the two other are objections to state control over anti-Semitic and anti-gay expression. In all of these cases involving fundamental freedoms, the individual is asserting his liberty claims against the state as represented by school or educational authorities. Two of the cases (*Eaton* and *Hall*) focus on the equality rights of students. In the first case, the parents of the student with special needs claim that she is denied the same educational opportunity as all other students. In the second case, the student argues that he is denied equal access to the school prom because of his sexual orientation. Unlike the liberty cases where the claimants seek relief from a meddlesome and interfering state, the equality cases might be seen as attempts to highlight the disparities of opportunity and power with which disadvantaged groups must contend.

Yet, the values of liberty and equality are not the only guiding or meta values that the cases reveal. There is also a concern for two other important values, namely, efficiency and community. In *Jones*, the importance of parental liberty (as protected by s. 2(a) of the *Charter*) is recognized as parents may educate their children in a variety of ways, including the option of home schooling. At the same time, the state must be able to monitor what goes on in this type of educational environment. Hence, it is not unreasonable to make parents register their programs of home schooling and to submit to

ongoing minimal supervision to ensure basic educational standards are met for all children who do not attend traditional public schools. The onus is placed on the individual to register and to ensure compliance with basic curricular exigencies because to reverse the onus would make it administratively unwieldy, and thus inefficient, for the state to have to chase after individual parents who chose to exempt themselves from traditional schooling.

The cases involving teachers and anti-Semitic and anti-gay free speech also reflect a concern for the value of efficiency and related utilitarian considerations. The employment context and the vulnerability of children seem to account for this result. A liberal defence of free speech is most forcefully articulated and defended when the government, as state actor and state actor alone, is attempting to restrict the free speech rights of its citizens. In these circumstances, liberals like Dworkin argue that free speech is necessary to protect the moral autonomy of individuals.

Yet, when the government enters the employment context, different considerations apply which militate against a strong application of free speech premised on liberal principles. Although the government does not lose its status as state actor, it acquires an additional role as employer. When the government employs teachers, and organizes an educational system in which they work, a number of important utilitarian concerns spring forth. From the government's perspective, for instance, curricula must be developed, implemented, and evaluated. In the area of human resources, school boards must hire teachers, assign them duties, supervise their work and ensure that they are meeting minimal employment standards of competence and general suitability. The government must also

create an entire administrative and bureaucratic infrastructure that will allow it to proceed with the business of education on a daily basis in a cost effective and efficient manner.

From the teachers' perspective, contracts of employment must be signed. In terms of liberal philosophy, valid contractual limitations, *per se*, do not invalidate liberals' defence of a free speech ideal since teachers may be seen to have voluntarily consented to some prior restraint on their expressive rights. Contracts, freely entered into, require teachers to perform specific tasks and goals. For example, they must teach, administer discipline, act as role models, develop and implement educational programs. They may also have to serve on committees, coach students in sporting and scholastic endeavours, and act as liaisons with the parents and community. Hence, the contractual nature of their work clearly distinguishes teachers from citizens in general. In essence, adjudicators accord less weight to the prominence of individual rights because of the purely pragmatic dictates of the workplace. Arguments based purely on efficiency (and related concerns such as cooperation, loyalty, and obedience) are typically rejected by adjudicators when governments attempt to muzzle the citizenry's free speech rights. In the employment context, however, these same considerations are of paramount importance because school boards and teachers have specific goals and objectives which they must attempt to achieve as they deliver an educational product together. One of these goals is ensuring that all students, regardless of ethnic background or sexual orientation, have access to public education. Hence, teachers' discourse which subverts these shared plans may also be restricted for purely practical reasons.

Finally, the value of community also figures in the analysis of some of the cases and most notably those related to controversial teacher expression. By way of example,

the decision in *Kempling* might be explained, at least in part, as recognizing that community values may sometimes take precedence over the free-speech rights of individuals. Kempling's expressive behaviour is problematic because it undermines the expectations and values of two important communities to which he belongs: his professional teaching community and his local school community.

Kempling was a member of the BC College of Teachers. This professional body has statutory authority to regulate the teaching profession in the public interest. Section 4 of B.C.'s *Teaching Profession Act*³ makes this clear:

It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.⁴

Furthermore, as the BC Supreme Court noted, "the BCCT has a duty to ensure that the fulfilment of public school teaching functions is undertaken in a manner that does not undermine public trust and confidence."⁵ The College investigated Kempling's conduct subsequent to a complaint filed against the teacher. It concluded that he had made a number of written and discriminatory statements about gays and had done so in his professional capacity as teacher and counsellor. The teacher's expression violated the expectations of his professional community. He did not uphold a fundamental value of the education system, namely, non-discrimination. On this basis, the BC Supreme Court concluded that Kempling's behaviour could justify a finding of unprofessional conduct: "Because non-discrimination is a core value of the educational system, a finding that

³ R.S.B.C. 1996, c. 449.

⁴ *Ibid.* at s. 4.

⁵ [2004] B.C.J. No. 173, at para. 93.

those writings were of a discriminatory and derogatory nature can properly form part of the basis of a determination of conduct unbecoming.”⁶

Kempling also participates in a local school community. This community expected the teacher to embody the highest values associated with the teaching profession. These might include justice, fairness and tolerance. Kempling also had a high profile in this community. According to the BC Supreme Court,

Quesnel is a small community; the appellant was one of only four secondary school counsellors in Quesnel’s two public secondary schools and was active in community service, so that he was well-known in the community before this matter arose.⁷

The teacher’s deportment was inconsistent with his vocation: providing the service of public education to all students, including gay students, in an environment free from “bias, prejudice and intolerance.”⁸ His failure to meet the expectations of his local school community is reflected in the adverse inferences the courts in *Kempling* were willing to draw. For the BC Supreme Court, they were the following:

From the appellant’s published writings and his publicly linking them to his teaching and school counselling position, a negative inference could reasonably be drawn as to the appellant’s ability to be impartial as a teacher. It would be reasonable to expect that student and public confidence in the appellant and the public school system would be undermined. It would also be reasonable to anticipate that homosexual students would generally be reluctant to approach him for guidance counselling, which would impair his ability to fully carry out his professional duties in fact.⁹

The Court of Appeal ruled that, even in the absence of direct evidence of harm to the school system, Kempling’s discriminatory opinions caused injury to the integrity of the school system:

⁶ *Ibid.* at para. 39.

⁷ *Ibid.* at para. 46.

⁸ See *Ross supra* note 2 at para. 85.

⁹ *Supra* note 5 at para. 48.

Non-discrimination is a core value of the public education system; the integrity of that system is dependent upon teachers upholding that value by ensuring the school environment is accepting of all students. When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result.¹⁰

In *Ross*, the Supreme Court of Canada reminds us that teacher conduct and the integrity of the school system are inseparable:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.¹¹

Furthermore, Kempling could not escape this position of trust and responsibility by claiming that he never expressed his discriminatory beliefs while on school property. As the BC Supreme Court remarked, where "off-duty conduct negatively impacts the school system or on the appellant's ability to carry out his professional and legal obligations as a teacher fully and fairly, he can properly be disciplined for that conduct."¹²

In essence, the *Kempling* decision suggests that community values may at times trump the expressive liberties of individual teachers. Mr. Kempling belonged to two communities: his professional community and his local school community. Both communities expected the teacher to act in accordance with the core values of non-discrimination and integrity. Kempling betrayed the trust these communities placed in him. Consequently, restrictions were placed on his freedom of expression to prevent a further erosion of community morality.

¹⁰ [2005] B.C.J. No. 1288 at para. 43.

¹¹ *Supra* note 2 at para. 43.

¹² *Supra* note 5 at para. 40. Here, the court relied on the decision in *Ross* as authority for this proposition. *Supra* note 2 at para. 44.

Emergent nature of children's rights

In some of the cases, children are treated as autonomous rights holders whose claims are similar to those of adults, whether they be parents or teachers. Most notably, in the cases of *Lutes*, *Multani* and *Hall*, the courts consider the claims of students on their own terms. Hence, the children are treated as separate moral agents worthy of equal respect and consideration. Although not adults, the assumption running through these cases is that these children have the maturity and cognitive wherewithal to advance claims related, respectively, to freedom of expression, freedom of religion, and equality. This view of children as rights bearers is consistent with an argument that children of a certain age should be entitled to make constitutional claims because, first and foremost, they are persons capable of advancing certain projects and formulating certain commitments. We might say that these children have arrived at a stage in their life where society should take their moral rights seriously because they have important interests that need to be protected. Without this protection, they cannot fully develop their own freedom or autonomy. Hence, in these circumstances, it is not necessary to talk about the rights of parents, teachers or other adults.

Yet, the exact moral and legal status of disabled and younger children, as potential rights claimants, is still uncertain. In *Eaton*, the Supreme Court of Canada mentions that Emily, the child with multiple exceptionalities, has equality rights. But there is no analysis of what these rights entail for a child who has severe physical and intellectual challenges. Can a child, with severely impaired faculties, exercise moral rights? How is this possible when she is incapable of understanding the concept of rights let alone communicating in the most basic of speech forms with others?

Based on a reading of the *Chamberlain* case, it is far from clear whether children in Kindergarten and Grade 1 can ever be considered as rights claimants on their own terms. For the minority judges, the parental right to freedom of religion was the only consideration in terms of whether the controversial materials depicting same sex parented families should be included in the school curriculum. The interests and/or rights of the children were never mentioned. The majority noted that it was important for children to be exposed to different ways of being and to different family configurations to promote tolerance and understanding in Canadian schools. Yet, it did not clarify whether this interest belonged to the state, to the child or to both parties. Even if this interest belonged to the child, could one translate this interest into a right claim on behalf of a 5 or 6 year old? Put bluntly, does a very young gay child have a constitutional right to equality or freedom of expression which would enable him or her to argue that curricular materials should reflect his or her family reality? Although an adult might advance this claim, on behalf of the child, it seems problematic to think of a 5 year-old as acting as a rights claimant, on his or her own, simply because s/he would normally not have the imagination and critical faculties necessary to appreciate the nature and consequences of such an action.

Barbara Arneil¹³ suggests that one way of conceptualizing the rights of children as “beings”¹⁴ is to think of them as having three sets of rights: the rights to provision, protection and autonomy. First, we might say that the young child has the right to provision which includes the provision of basic needs, such as food, shelter, adequate care and education. Normally, this right is met by the parent but the state will intervene

¹³ “Becoming versus Being: A Critical Analysis of the Child in Liberal Theory” in David Archard & Colin M. Macleod, eds., *The Moral and Political Status of Children* (Oxford: Oxford Univ. Press, 2002) 70-94.

¹⁴ She means that children, like adults, are ‘beings’ or in Kantian terms ‘ends in themselves.’

when the parent is unable or unwilling to meet these basic needs. Second, we might add that the young child has a right to protection from the ills of abuse, neglect, danger and exploitation. Once again, the state takes on the role of monitor to ensure that parents act in a way that does not harm their children.¹⁵ Arneil notes that the rights to provision and protection can be addressed within the confines of a paternalistic framework where others make choices on behalf of the child. Yet, these rights do little to change the status of or empower children. Rather, the notion of autonomy is needed to give the child a truer sense of his or her “being.”¹⁶ As Michal Freeman notes:

To respect a child’s autonomy is to treat that child as a person and as a rights-holder ... it is clear that we can do so to a much greater extent than we have assumed hitherto If we are to make progress we have to recognize the moral integrity of children. We have to treat them as persons entitled to equal concern and respect.¹⁷

For Freeman, autonomy means “the idea that persons as such have a set of capacities that enable them to make independent decisions regarding appropriate life choices.”¹⁸

Autonomy is the freedom to make choices over one’s life, a freedom that is restricted for children by both parents and the state. Children’s rights theorists argue that children’s autonomy can only be recognized if they are given greater freedom to choose. The key

¹⁵ *Ibid.* at 75-79.

¹⁶ Arneil contrasts this with the child as “becoming.” She maintains that there are three aspects to this idea: Becoming, almost by definition, is defined by the end product, by the particular ‘being’ that one is to become. Anything described as ‘becoming’ is being viewed from the perspective not of what it currently is, but what it will be in the future. Thus the first aspect of children in liberal theory which must be examined is the specific end to which they are directed, namely the nature of liberal citizenship. The second aspect of becoming is the process by which one reaches that end goal, a subject largely subsumed under theorizing about education. The third aspect of ‘becoming’ is the scope of children included and excluded by the process. *Ibid.* at 71.

Arneil ultimately rejects both versions of the child as “becoming” and “being.” Instead, she maintains: If we begin with children, as children, and not constructed reflections of an adult citizen, the central issue that we are faced with, therefore, is not authority, status, and rights (as we find them in liberal theory), but ‘care’. How do we best care for our children, who should do it, and what are the theoretical principles that should guide us? *Ibid.* at 88.

¹⁷ “Taking Children’s Rights More Seriously” in P. Alston, S. Parker & J. Seymour, eds., *Children Rights and the Law* (Oxford: Oxford Univ. Press, 1992) 52-71 at 65.

¹⁸ *Ibid.* at 64.

question becomes when should children be entitled to decide and on what basis they should be entitled to make these decisions. As Arneil notes:

Most children's rights theorists ... would argue that, while children's freedom to choose and participate in decisions over their life should be increased, the critical question in defining the level of autonomy for the child is their rational maturity. Unlike the rights of provision and protection, which embrace all of the various needs of children, the right to autonomy embraces a conception of children focused on their rational capacity.¹⁹

Applied to our study, the right to autonomy based on rational capacity suggests that as children grow and mature, they will be able to exercise their moral and constitutional rights to the extent that they have the intellectual and cognitive ability to do so. Since this determination will vary from case to case and child to child, we cannot categorically state in advance what the magic age will be. Hence, courts will have to make an assessment of the child's rational capacity to determine whether s/he is in a position to exercise his or her constitutionally protected rights on his or her own and as a separate rights bearer.

Our initial research query focused on who should have ultimate control over children's education. Should this control belong to the parents, the state, children, teachers or some combination of these actors? We have examined this issue through the filter of constitutional rights conflicts as they have been adjudicated by our Canadian courts. We have also argued that individual moral rights are important because they protect significant interests and show a deep respect for the separate existence of individuals. We have only to imagine a society without rights (and without some constitutional framework for the expression of those rights) to conjure up the horrors that would ensue if those exercising governmental authority or power over others were not held to account for their actions.

¹⁹ *Supra* note 13 at 80.

At the same time, it is important to recognize that a “rights only” account of what happens in our schools and educational communities is only a partial account of this reality. Although rights are important, there are other morally significant values which are at play in life’s relationships. Chief among these are duty, love, friendship and compassion. In the daily interactions among students, teachers, administrators and parents, we expect our educators to model virtuous conduct and to inspire those around them. Teaching others about responsibility and healthy relationships takes time, involves hard work and serious commitment. We want adults to model high standards of ethical behaviour because we know that our children are watching and looking to them for guidance and support.

Jean Vanier claims that the life undertaking of us all is “to become human.”²⁰ He goes on to state:

We humans are called to be free, to free others, to nurture life, to look for the worth and the beauty in each and every one of us, and to make of our world a beautiful garden where each person and each society can create a harvest of flowers and fruits, and so prepare the seeds of peace for tomorrow.²¹

If the goal of education is human flourishing, then bringing out the best in people under difficult circumstances is not always likely to happen when individuals are pitted against one another in an adversarial context where “winners” and “losers” are frequently declared. Furthermore, in the school yard, life’s valuable lessons cannot be imposed by fiat through judges’ decisions and cannot be accounted for solely by a rights based morality. Control over school curriculum ultimately involves an ongoing and, at times, precarious negotiation among different stakeholders about who should have the final say about how we do things in our schools. This negotiation reflects an ever present tension

²⁰ Hence, the title of his book *Becoming Human* (Toronto: Anansi Press, 1998).

²¹ *Ibid.* at 135.

between the self and the other, a struggle between the needs of the individual and the needs of the community, and a conflict about becoming and belonging. It may also highlight at times a power imbalance between children and adults. How we address these challenges, and how we treat one another in moments of disagreement and conflict, is what defines us as human beings. Sometimes, in the field of education, we may have no choice but to seek the help of our courts to resolve difficult conflicts of constitutional rights. Hopefully, the judicial method of conflict resolution will be seen as the exception rather than the norm. The help of judges should not be seen as a substitute for our best efforts. This help should not relieve us of our ethical responsibilities and duties, and especially in the context of education, to work out our differences in a respectful and non-violent manner. If we as educators and parents fail to model this type of commitment and action, we fail to offer our children the values and skills they will need to both survive and thrive in an ever changing and complex world.

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