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Neutrality or Privilege? A Comment on Religious Freedom

David M. Brown*

I. INTRODUCTION

The critiques by Professors Richard Moon and Bruce Ryder of the *Amselem*, *LaFontaine Village* and *Same-Sex Marriage Reference* cases offer useful insights not only into the decisions themselves, but also into the continuing issues that surround an understanding of the guarantee of freedom of conscience and religion contained in section 2(a) of the *Canadian Charter of Rights and Freedoms*. In this comment I do not intend to deal at any length with the cases,¹ but I propose to take up and examine some of the conclusions ventured by Professors Moon and Ryder.

II. THE FOUR AMBIGUITIES

Moon describes, quite accurately I think, four ambiguities characterizing current jurisprudence under section 2(a) of the Charter:

- (1) does section 2(a) protect both religious and non-religious beliefs and practices, or does it give special constitutional protection to religious beliefs?
- (2) what wrongs are addressed by the freedom? does section 2(a) merely prohibit state coercion or does it preclude the state from supporting/favouring one religion?
- (3) what role may religion, or religiously-formed or articulated views, play in public debate?

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¹ I have commented elsewhere on the decisions in *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650. See David M. Brown, "Where Can I Pray? Sacred Space in Secular Land" (2005) 17 N.J.C.L. 122.

- (4) what role does “public secularism” play in contemporary Canadian politics and jurisprudence? Is secularism the safe harbour of neutrality or is it a partisan principle?

These ambiguities provide a good working framework in which to consider the issues of religious liberty raised in the cases.

III. THE FIRST AMBIGUITY: WHAT IS THE SCOPE OF SECTION 2(A)? DOES IT ACCORD SPECIAL CONSTITUTIONAL PROTECTION TO RELIGIOUS FREEDOM?

In *Amselem*, Iacobucci J., writing for the majority, stated that in interpreting of the scope of freedom of religion the emphasis is on “personal choice of religious beliefs,” and, as a result:

In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make...²

As Moon correctly observes, the majority’s understanding of which religious beliefs attract the protection of section 2(a) differs from that found in the minority judgment authored by Bastarache J. which reflects a more prescriptive, hierarchical view of religious belief. Moon characterizes the majority’s approach as a Protestant conception of religious belief; there is certainly truth in this observation, although I would liken the approach more to that taken by Henry James in his 1901-1902 Gifford Lectures, subsequently published under the title, *The Varieties of Religious Experience*, where James ventured a psychological definition of religion as “the feelings, acts and experiences of *individual men in their solitude*, so far as they apprehend themselves to stand in relation

² *Amselem, id.*, at para. 43.

to whatever they may consider the divine.”³ James regarded the religious experience of the individual as primary; religious life derived from the teaching of a community or church was quite secondary to him.⁴ For James, the real locus of religion is in individual experience, and not in corporate life.⁵

Since under the majority’s approach in *Amselem* freedom of religion protects religious beliefs and practices that are both obligatory and non-obligatory, Moon queries whether such an analytical approach results in “special constitutional treatment” being accorded to religious beliefs and practices. Towards the end of his paper Moon puts it this way:

If religious commitment is a matter of individual choice, can it also be fundamental (a part of the individual’s identity or “self-definition”) and can it be distinguished from personal, deeply held, non-religious views? If freedom of religion is about individual autonomy, rather than cultural identity, it is difficult to explain why non-religious beliefs, which are also the product of individual choice or judgment, should not receive the same protection as religious beliefs/practices. It is also difficult to explain why public and private actors should sometimes be required to compromise their pursuit of legitimate purposes to accommodate minority religious practices. Or, from the other direction, it is difficult to explain why freedom of religion should protect more than the individual’s liberty to make and follow moral judgments, which may be limited if it interferes with the rights and interest of others.⁶

Moon poses a valid question about the content of freedom of conscience under the Charter — a question infrequently faced by courts in cases brought before them — but I take issue with the suggestion implicit in his analysis that protecting non-mandatory religious practices strays beyond the proper bounds of section 2(a) of the Charter or in some way privileges religious conscientious belief over non-religious

³ N. James, *The Varieties of Religious Experience* (New York: Penguin Books, 1982), at 31.

⁴ C. Taylor, *Varieties of Religion Today: William James Revisited* (Cambridge: Harvard University Press, 2002), at 4.

⁵ *Id.*, at 7.

⁶ Richard Moon, “The Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*” on page 1 of this volume.

conscientious belief. Let me offer three observations about Moon's approach.

1. Dealing with Religion on its own Terms

For the constitutional protection of religious belief and practice to offer tangible protection to the believer, judges and lawyers must be prepared to understand religion on its own terms. This is no easy task in this day and age when popular culture has become increasingly irreligious. It should come as no surprise then that often the law succumbs to a temptation to re-fashion religion in its own image, regarding its essence as constituting nothing more than a system of rules and obligations similar to those found in legal systems. If the scope of freedom of religion runs no further than protecting the fulfillment of obligations a religion calls its faithful to perform, then courts face an easier adjudicative task in determining whether or not a claimant's call for protection under section 2(a) merits relief. Prove to us, the court can then say, that the legal burden of which you complain interferes with an obligation your religion imposes, and we will grant you a remedy; but if that of which you complain does not touch upon a matter of obligation, then we will not regard it as a matter of religious belief or practice worthy of protection. At its roots, this seems to be the approach favoured by the minority in *Amselem* who would have required a demonstrable connection between a religious "precept" and the religious practice in question in order to "establish the *mandatory nature* of his or her religious practice."⁷

Alluring as the forensic simplicity of the minority's approach might be, in my view it fails to address religion on its own terms, a challenge more successfully met by Iacobucci J.'s conceptualization of religious belief. To illustrate why, I wish to consider two examples of religious practices. For ease of illustration the practices are taken from Roman Catholicism since, with the publication in 1992 of the *Catechism of the*

⁷ *Amselem, supra*, note 1, at para. 138. The minority then continued at para. 139:

The first step of the analysis therefore consists in examining the belief of a claimant who adopts a particular religious practice in accordance with the rites prescribed by his or her religion. To this end, evidence must be introduced to establish the nature of the belief or conviction, that is, to determine upon what religious precept the belief or conviction is based...

Catholic Church, one can access easily that church's beliefs and their links with religious practice.

In *Big M Drug Mart* Dickson C.J. characterized the essence of freedom of religion in the following terms:

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 reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that

...

Freedom means that...no one is to be forced to act in a way contrary to his beliefs or his conscience.⁸

Assume, then, the most extreme form of legal violation of religious freedom — the enactment of a hypothetical law that would proscribe specified religious practices. Imagine that one provision of the law would forbid attendance at Sunday Mass, while another would prohibit praying the Rosary⁹ in public. Would part or all of such a law violate a Catholic's freedom of religion guaranteed by section 2(a) of the Charter?

Under the approach of the *Amselem* majority both provisions of the law would run afoul of section 2(a). That likely would not be the case under the minority's approach. The proscription against attending Mass on Sunday would violate section 2(a) since one could point to the *Catechism's* use of the language of "precept" when speaking of an obligation on the faithful to attend Mass on Sundays.¹⁰ But what of publicly praying the Rosary? The *Catechism* states that the Church "*proposes* to the faithful certain rhythms of praying"¹¹ and "*invites* the faithful to regular

⁸ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at paras. 94-95.

⁹ Popularly tracing its origins to St. Dominic Guzman in the 13th Century, the Rosary consists of a combination of vocal and mental prayer, centring around meditations on the birth, life, passion and resurrection of Jesus Christ.

¹⁰ In fact the *Catechism* talks of "precepts" in respect of only five practices: attendance at Sunday Mass; confessing sins once a year; receiving Holy Communion during Easter; keeping holy days of obligation; and observing the prescribed days of fasting and abstinence. *Catechism*, at paras. 2041-43.

¹¹ *Catechism*, at para. 2698.

prayer.”¹² There is no precept or express obligation imposed to pray, as there is to attend weekly Mass, but the *Catechism* provides that “*prayer and Christian life are inseparable*.”¹³ While the *Catechism* describes several types of prayer, it does not contain an express command or obligation for the faithful to pray any particular prayer, such as the Rosary. In the absence of language of precept or obligation, an argument could be made that under the *Amselem* minority’s analysis prayer is not a practice of a “mandatory nature” that would attract the protection of section 2(a), yet it would be difficult to conceive of leading a Catholic life without engaging in prayer.¹⁴

By reducing protected religious belief and practice to the adherence to binding obligations the minority in *Amselem* ignored much of what constitutes religious practice in the day-to-day lives of religious adherents. While some religions may specify a group of mandatory practices, most religions exhort their faithful to demonstrate their piety, and their desire to achieve the holy, by engaging in practices that go well beyond any set of obligatory rules. The legal protection offered by the minority in *Amselem* would stop precisely where the richness of religious life begins.

2. Applying a Consistent Analytical Approach to Fundamental Freedoms

A second concern I have with Moon’s criticism that the *Amselem* majority’s scope of religious freedom risks creating a privileged place for religious belief is its implicit departure from the analytical techniques that the Court has brought to interpreting the scope of fundamental freedoms contained in the Charter. Freedom of expression, for example, has been defined broadly to encompass all forms of expressive activity save those that involve violence.¹⁵ The simple right to vote found in section 3 has been expanded generously by the Court to include

¹² *Id.*, at para. 2720.

¹³ *Id.*, at para. 2757.

¹⁴ In *Ontario (Attorney General) v. Dieleman*, [1994] O.J. No. 1864, 117 D.L.R. (4th) 449 (Gen. Div.) the court rejected an argument that an injunction against a woman protesting against abortion by praying on the sidewalk in front of an abortion clinic would violate her s. 2(a) rights. The court concluded that the protest activity she engaged in was not one shared by the vast majority of her co-religionists and therefore not protected by s. 2(a).

¹⁵ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927.

the right to “effective representation”¹⁶ and to “meaningful participation in free and fair elections.”¹⁷ In light of the broad, expansive approaches taken to the interpretation of the scope of other fundamental freedoms, it would seem highly incongruous to suggest that courts should shift gears and adopt a minimalist approach to interpreting the scope of freedom of religion under section 2(a).

3. Comparison with the Scope of “Freedom of ...Conscience”

Moon questions the scope of the protection for religious freedom developed by Iacobucci J. in *Amslem* by speculating that “it is difficult to see how a court could take such a broad approach to freedom of conscience and extend protection to any belief/practice that an individual might consider important or valuable, but not obligatory.” He continues:

It simply cannot be the case that any practice (not tied to a religious belief system) that an individual considers important but not morally necessary, is protected under the Charter and subject to restriction by the state only on substantial and compelling grounds.¹⁸

It is useful for Moon to remind readers that section 2(a) consists of a double-protection: freedom of conscience and religion. But I question whether the majority decision in *Amslem* really permits him to speculate as he has.

Twenty-three years after the enactment of the Charter it remains true that few cases have called on the courts to interpret the scope of “freedom of conscience,” and those that have ventured an interpretation of the clause did so in *obiter*. In *Big M Drug Mart*,¹⁹ the Court drew upon the historical link between freedom of conscience and the freedom to dissent from the established religion to hold that section 2(a) of the Charter protects not only the right to hold and manifest religious beliefs, but also the right to hold and manifest non-belief and to refuse to participate in religious practice. In *Morgentaler*²⁰ Wilson, J. stated that “...it

¹⁶ *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158.

¹⁷ *Figuroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912.

¹⁸ *Supra*, note 6.

¹⁹ *Big M Drug Mart*, *supra*, note 8, at para. 123.

²⁰ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a).²¹ In her view, integral to a free and democratic society is the existence of "...the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life."²² Accordingly,

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.²³

Beyond these two cases the Supreme Court offers little further assistance on the meaning of "freedom of conscience," and the offerings by the lower courts are also few in number.²⁴ However, the broad interpretation of freedom of conscience favoured by Wilson J. in *Morgentaler* inclines closer to the approach of Iacobucci J. in *Amselem* than to Moon's conjecture of a limited interpretation of that freedom.

In the result, of course, one just cannot say how the Supreme Court might interpret "freedom of conscience" in a case where the outcome would turn on such an interpretation because no case has yet arisen. One can say, however, that in the cases to date the Supreme Court has viewed freedom of conscience and freedom of religion as distinct, but closely related, concepts. In *Big M Drug Mart* Dickson C.J. stated: "Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations

²¹ *Id.*, at para. 251.

²² *Id.*, at para. 252.

²³ *Id.*, at para. 253.

²⁴ In *Re MacKay v. Manitoba*, [1985] M.J. No. 164, 24 D.L.R. (4th) 587 (C.A.); affd on other grounds, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, the Manitoba Court of Appeal commented that the freedom of conscience protected by s. 2(a) involved the absence of coercion or constraint by the state relating to self-judgment on the moral quality of one's conduct or lack of it; disapproval of the thoughts or conduct of another is not a matter of conscience. In *Ontario (Attorney General) v. Dieleman*, *supra*, note 14, the Ontario Court, General Division offered that freedom of conscience was not intended to protect all actions that might be said to be motivated by conscience, and the court concluded that the effect of an injunction against protest activity outside an abortion clinic would not be to conscript a person to a cause offensive to her conscience.

and are therefore protected by the Charter.”²⁵ In view of this, in my view the more appropriate working assumption should be that the Court would apply a similar approach to interpreting the scope of freedom of conscience as it did to freedom of religion in *Amselem*, rather than conjecture that freedom of conscience will receive the short end of the stick while freedom of religion will obtain a privileged status.

I concur with Ryder’s observation that “reference to conscience must add something to s. 2(a); it must lead to constitutional protection of some non-religious belief systems.” Moon, concerned about the open-endedness of possible judicial protection of non-religious conscience claims seems to doubt that courts would act to embrace such claims with any eagerness; Ryder demurs, arguing that “not all beliefs or opinions can qualify as matters of conscience.” I am inclined to think that Ryder’s distinction is correct and workable, but the concerns raised by Moon rightly point to the need to think in more depth about the scope of freedom of conscience, its practical manifestation in individual conduct and the extent to which the Charter offers protection against state action materially affecting such conduct.

IV. RELIGIOUS NEUTRALITY

The remaining three ambiguities described by Moon are closely linked: one’s view of the secular, or secularism, likely will inform one’s conception of the appropriate state stance *vis-à-vis* religion, and in turn influence one’s position on whether it is legitimate to permit a religious voice in public, liberal democratic debate. The case released contemporaneously with *Amselem* — the decision in *LaFontaine Village*²⁶ — touched, in its minority judgment, on the question of state neutrality, and Ryder’s paper tackles the implications of that principle for the relationship between state action and religions.

Before turning to the notion raised by LeBel J. in his minority judgment in *Lafontaine Village* that the state must act as a neutral intermediary with respect to religion, it is worth first considering the popular conception that the secular (and its surrogate the state) stands in contrast to the religious. We tend to describe public, political life as secular in

²⁵ *Big M Drug Mart*, *supra*, note 8, at para. 123.

²⁶ *Supra*, note 1.

character. This has two consequences. First, such a characterization leads easily to an implicit assumption that things religious stand outside, or apart from, matters of the here-and-now that form the objects of concern of the secular state. While it is quite true that many, if not most, religions formulate their ultimate ends in terms of things spiritual or eternal, it is not true to paint religions as eschewing matters of the temporal, material world.

Iain Benson has written frequently on the analytical distortions that may result from an incorrect understanding of the secular,²⁷ noting that in its origins the secular identified a worldly realm, but not one stripped of religious significance. That the secular does not exclude the religious was affirmed by the Supreme Court of Canada in the *Chamberlain*²⁸ case where the Court held that a provision of the *British Columbia School Act* requiring that schools must be conducted on “strictly secular...principles” did not preclude decisions motivated by religious considerations²⁹ but did require decisions that took into account all points of view. Justice Gonthier put the matter succinctly in his dissenting judgment:

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy.³⁰

The second consequence of characterizing political life as secular concerns the ease with which conflating the secular with the non-religious leads readily to the notion that the state espouses policies that are neutral in content and therefore somehow of a higher order than policies grounded on religious understandings. As Benson quite accurately notes, the state is not agnostic regarding metaphysical claims:

²⁷ See, e.g., I. Benson, “Notes Towards a (Re)Definition of the ‘Secular’” (2000) 33 U.B.C. L. Rev. 519, and “The Secular: Hidden and Express Meanings” (2002) 9 Sacred Web 125.

²⁸ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710.

²⁹ *Chamberlain, id.*, at para. 59.

³⁰ *Id.*, at para. 137.

The term “secular” has come to mean a realm that is neutral or, more precisely, “religion-free”. Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word “secular” and one finds that secular means something like non-sectarian or focused on this world, on “non-faith”. States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.³¹

Ryder, too, points out that “there is no such thing as a point of view from nowhere.” Echoing Jaroslav Pelikan’s analogy of the courts in democratic constitutional regimes to religious teaching authorities,³² Ryder observes:

Secular constitutional documents like the Charter are political expressions of a particular philosophy about religion and life...The Charter is, in many important ways, the nation’s new secular religion, establishing the fundamental norms with which all laws and public policies must comply.

Corroborative evidence for the “faith dimension” of the Charter can be found in a remarkable paper presented a few years ago by McLachlin C.J. at a conference at McGill University where she boldly made a “faith claim” for the “rule of law” when she cited with approval Chicago School of Law Professor Paul Kahn who described, “the rule of law as a comprehensive system of belief: ‘there is not part of modern life’ Kahn explains “to which law does not extend.”³³

The Chief Justice contended that “the authority claimed by law touches upon all aspects of human life and citizenship ... Voting, taxation, mobility, family organization, and public discourse: the rule of law

³¹ Benson, *supra*, note 27, at 520.

³² J. Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984), at 58.

³³ “Freedom of Religion and the Rule of Law: the Canadian Perspective”, in D. Farrow (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen’s University Press, 2004), at 14.

leaves no aspect of human experience unaffected by its claim to authority.”³⁴

Just as when the Tudor monarchs fused state power with religious authority in the person of the sovereign, leaving dissenters to face the double-barrelled allegations of heretic and traitor, one may ask what place the religious “dissenters” in today’s Canada would occupy under a “comprehensive system of belief” of the “rule of law”? Ryder insightfully points out that a conflict between the faith of the Charter and other faiths may be avoided if one gives greater consideration to the “rule of law’s” twin foundational principle enshrined in the preamble of the Charter — the supremacy of God. Describing the preamble as “an interpretive opportunity thus far missed,” Ryder ventures that the preamble represents a “kind of secular humility, a recognition that there are other truths, other sources of competing world-views, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as counter-balances to state authority.” Commentary on the significance of these dual foundational principles in the Charter’s preamble remains sparse,³⁵ but the force with which the courts are asserting a Charter-metaphysics calls for a timely, and more profound, reflection on the interaction between the “secular” faith of the rule of law and the faith of religious citizens, for the two are not necessarily opposed.

In the *Lafontaine Villiage* decision, Bastarache J., writing for a minority of four judges, posited that under the Charter the state must stand in the position of a “neutral intermediary” towards religion in the sense that the state must refrain from implementing measures that could favour one religion over another or that might simply have the effect of imposing one particular religion.³⁶ Nicholas Wolterstorff, in his engaging debate with Robert Audi in *Religion in the Public Square*,³⁷ criticized Audi’s articulation of state neutrality towards religion on precisely

³⁴ *Id.*

³⁵ L. Sossin, “The ‘Supremacy of God’, Human Dignity and the Charter of Rights and Freedoms (2003) 52 U.N.B.L.J. 227; I. Benson, “Notes Towards a (Re)Definition of the ‘Secular’” (2000) 33 U.B.C.L. Rev. 519; D.M. Brown, “Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights” (2000) 33 U.B.C.L. Rev. 551.

³⁶ *Congrégation des témoins de Jéhovah de St-Jérôme Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45, [2004] 2 S.C.R. 560, at paras. 73-78.

³⁷ R. Audi and N. Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, Md: Rowman & Littlefield Publishers, 1997).

this point. Audi argued that the liberal democratic principle of separation of church and state encompassed both principles of the equal treatment of all religions by the state and of neutrality, under which the state neither favours nor disfavors religion as such.³⁸ Wolterstorff extended the neutrality principle so that it requires an even hand by the state as between religious and non-religious comprehensive perspectives.³⁹ As Benson has observed, even non-religious claims to action involve metaphysical assertions that we do not empirically prove, reflecting a form of “natural” or non-religious faith. Under such conditions, it is highly misleading to suggest that states can be neutral towards metaphysical claims: state policy results from the selection of some “faith claim.”⁴⁰

Ryder expresses concern about the innovative aspect of LeBel J.’s opinion in extending the duty of religious neutrality to require that the state remains neutral about the value of religion generally. This, in his view, marks a step in the wrong direction. Ryder argues that the structure and content of the Charter support an interpretation under which the state fosters “a religiously-positive pluralism.” I think Ryder fairly questions this aspect of the judgment. Freedom of religion enjoys a place as one of the fundamental freedoms in the Charter, from which it is reasonable to infer that religion is a “public good” within the Charter’s realm. Whether one can take the next step, as Ryder has, and draw from the Charter an obligation on the state to foster “a religiously-positive pluralism” I think requires further consideration. Arguably a state position of “no burden; no privilege” towards religion, for example, would respect the text of the Charter without raising the danger of state or judicial entanglement in religious affairs that might accompany even a well-intentioned “religiously-positive pluralism.”

This then takes us to Moon’s final ambiguity — the place of religion in public debate and decision-making. As he puts the matter:

The courts remain uncertain whether religious belief should be seen as contestable opinion/judgment, an ordinary part of public debate and decision-making, or whether it should be seen as a matter of personal

³⁸ *Id.*, at 4.

³⁹ *Id.*, at 70.

⁴⁰ Benson, *supra*, note 27, at 519.

or cultural identity, as non-rational, and therefore outside the scope of legitimate public debate and action.⁴¹

Although the Supreme Court in *Chamberlain* clearly held that religious views may be voiced in public debates (in that case before a local board of education), there is no doubt that John Rawls' argument in favour of "public reason" under which it is impermissible to argue from religious premises to political conclusions still casts a deep shadow over this issue.⁴² It is far from clear why non-religious arguments, in the absence of some rigorous epistemology (which many seem to lack), should enjoy any *a priori* claim to reasonableness or rationality over religious arguments;⁴³ or why arguments based on reason and religion necessarily are inconsistent or incompatible with each other;⁴⁴ or why courts should adopt a principle of "public reason" that by its very nature is anti-Charter in that it restricts and reduces the kinds of arguments that can be voiced on matters of public debate. Moon does well to identify these tensions, and they merit more detailed consideration by all in the years to come.

V. CLOSING COMMENTS: IDENTITY AND CULTURE

In concluding his paper Moon observes that religious belief and practice often combine choices freely made and the influence of cultural factors. Quite so. But he then proceeds to erect a dichotomy of sorts between the two:

The challenge for the courts is to fit this ambiguous, or complex, conception of religious commitment, and individual agency, into a rights model that distinguishes between choices that are protected as matters of human liberty (subject to the rights and interests of others) and (immutable/unchangeable) traits or attributes that must be respected as part of a commitment to human equality.⁴⁵

⁴¹ *Supra*, note 6.

⁴² J. Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

⁴³ See Wolterstorff, *supra*, note 37.

⁴⁴ The late Pope John Paul II opened his 1998 encyclical, *Faith and Reason*, with the words: "Faith and reason are like two wings on which the human spirit rises to the contemplation of truth..." *Faith and Reason* (Sherbrooke: Mediaspaul, 1988), at 3.

⁴⁵ *Supra*, note 6.

Moon seems to advance a paradigm that suggests if religious practice is protected under section 2(a) it may be subject to limitation, but if protected under section 15 (an immutable/unchangeable trait) it may not. I question the utility and textual soundness of this paradigm, for two reasons. First, as a matter of the text of the Charter, religion finds express protection under both section 2(a) and section 15; to set up some kind of dichotomy simply runs counter to the constitutional text. Second, the freedoms protected by section 2 and the equality rights guaranteed by section 15 are both subject to limitation under section 1 of the Charter — grounding a claim in section 15 does not free a claimant from the ability of the community, through the government, to seek to place a reasonable limit on the equality claim. The challenge, as I see it, is to develop a jurisprudence of limitation under section 1 that is sensitive to the centrality to human existence and dignity of conscientious conviction, and practice based on such conviction.

