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Should Conscience Be a Proxy for Religion in Some Cases?

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RELIGION, LIBERTY AND
THE JURISDICTIONAL LIMITS OF LAW

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# General Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td></td>
<td>xi</td>
</tr>
<tr>
<td>David Cayley — Preface</td>
<td></td>
<td>xiii</td>
</tr>
<tr>
<td>Ian T. Benson — Foreword</td>
<td></td>
<td>xxi</td>
</tr>
<tr>
<td><strong>Part I</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Religion in Liberal Thought</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iain T. Benson — Should There Be a Legal Presumption in Favour of Diversity? Some Preliminary Reflections</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Peter D. Lauwers — Liberal Pluralism and the Challenge of Religious Diversity</td>
<td></td>
<td>29</td>
</tr>
<tr>
<td>Paul B. Cliteur — Constitutional Principles as State Territory</td>
<td></td>
<td>65</td>
</tr>
<tr>
<td><strong>Part II</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Religious Freedom of Religious Organizations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>John von Heyking — The Challenge and Promise of Religious Associations to Liberal Democratic Order</td>
<td>89</td>
<td></td>
</tr>
<tr>
<td>Victor M. Muhiz-Fraticelli — The Social Ontology of Religious Freedom</td>
<td></td>
<td>115</td>
</tr>
<tr>
<td>Jeroen Temperman — Religious Organizations' Right to Autonomy and Collisions with other Fundamental Rights: An International Human Rights Law Analysis</td>
<td>143</td>
<td></td>
</tr>
<tr>
<td><strong>Part III</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Choices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Consequences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ian Leigh — Conceiving Freedom of Religion in Terms of Obedience to Conscience</td>
<td>175</td>
<td></td>
</tr>
</tbody>
</table>
opinion. The alternative view argues that LGBTQ rights are the result of hard-fought legislative and legal battles with these same dissenters and that equality will not be secure until, as a result of education and social pressure, such views have become so marginal as to be unacceptable.

The former is a modus vivendi approach to the essentially contested question of sexual orientation. It does not insist on resolution of debates over status versus conduct. Religionists can continue to believe and teach the moral superiority of sexual expression in the context of opposite-sex marriage. They must concede, however, that society has legislated against discrimination and hatred against persons of LGBT orientation and to confer legal recognition on their relationships with each other. This leaves some space for dissenters at various levels by limiting discriminatory actions, providing exceptions for distinctively religious activities and organizations, where the conflict over the nature of orientation is most acute, and leaving the realm of belief largely untouched.

The rise and ascendancy of LGBTQ rights in Canada and the U.K. has taken place over a single generation. It should be no surprise then that not everyone has found it easy to adjust beliefs based on deep convictions while the societal consensus and the legal environment have shifted around them. Conscience claims by religious conservatives do not threaten the new order but they do challenge its liberal credentials to the core. To (once again) quote Justice Campbell in the Nova Scotia Barristers’ Society decision:

The discomforting truth is that religions with views that many Canadians find incomprehensible or offensive abound in a liberal and multicultural society. The law protects them and must carve out a place not only where they can exist but flourish.

Should Conscience Be a Proxy for Religion in Some Cases?

Richard Haigh*

I. INTRODUCTION: IMMUNIZATION IN ONTARIO AND A FRACAS AT YORK UNIVERSITY

Two seemingly disparate case studies provide a fascinating lens through which to examine religion in the public sphere. One involves the government’s mandate to immunize school children and the allowable exemptions therefrom; the other a professor’s online course that requires some group sessions on weekends, and a student’s claim for an exemption from that activity.

1. A Religious and Conscience Exemption from Immunization

The Ontario Immunization of School Pupils Act allows parents to exempt their children from the mandatory program of vaccination for diseases such as diphtheria, measles, mumps, poliomyelitis, rubella, and tetanus. The policy behind the Act is simple: parents must ensure that their children complete a prescribed program of immunization in relation to each of a number of designated diseases. Parents are entitled to exempt their child from the mandatory program on two bases: (i) a religious or conscience-based belief that runs counter to immunization; or (ii) a health-related reason as determined by a physician or specified nurse.

* Assistant professor, Osgoode Hall Law School; director of the York Centre for Public Policy and Law. Thanks to Amy Lee for research assistance and help with the York University religious-exemption case, Lillianne Cadieux-Shaw for research assistance, Barry Bussey and lain Benson for inviting me to participate in the Canadian Council of Christian Charities symposium on “Religion: A Public and Social Good”, and the engaging discussion that took place after I spoke on this topic at the symposium. All have helped me refine my thoughts considerably.

[202 RELIGION, LIBERTY AND THE JURISDICTIONAL LIMITS OF LAW]

202
The Act is relatively straightforward, so it is worth quoting the relevant sections in their entirety:

3. (1) The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases.

(2) Subsection (1) does not apply to the parent of a pupil in respect of the prescribed program of immunization in relation to a designated disease specified by a physician or a registered nurse in the extended class in a statement of medical exemption filed with the proper medical officer of health and, where the physician or registered nurse in the extended class has specified an effective time period, only during the effective time period.

(3) Subsection (1) does not apply to a parent who has filed a statement of conscience or religious belief with the proper medical officer of health.

The definition section clarifies some of the terms above as follows: “‘designated diseases’ means diphtheria, measles, mumps, poliomyelitis, rubella, tetanus and any other disease prescribed by the Minister of Health and Long-Term Care” and “statement of conscience or religious belief” means a statement by affidavit in the prescribed form by a parent of the person named in the statement that immunization conflicts with the sincerely held convictions of the parent based on the parent’s religion or conscience....

The religious exemption was first introduced when the Act was passed in 1982. At the time, Larry Grossman, the Progressive Conservative health minister, stated that the legislation would virtually eliminate measles, rubella, tetanus, and mumps. The mandatory nature of the provision was incorporated in an attempt to ensure “herd immunity”. To this effect, parents had to show proof of their immunization. The Act did, however, allow parents to exempt their children for medical and religious reasons but not for conscience-based reasons. The Opposition approved of the legislation as well, noting the importance of the provisions safeguarding religious viewpoints.

As he said later, during the Bill’s second reading, the added exemption was not expected to affect the overall efficiency of the program. Minister Norton noted that since its inception in 1982 the religious exemption had been claimed by only 0.125 per cent of the pupils assessed to that date. Adding a conscience objection would not likely exceed 0.25 per cent of the school population. Ultimately, it was the Government’s belief that including conscience would ensure the entire Bill complied with the Charter’s intent.

The Bill passed into law with little fanfare. Rare for a statute centred on rights, the Act enjoyed virtually universal support. The opposition Liberal party spokespersons congratulated the Progressive Conservative party for timely legislation, both in its original form and the amended 1984 version. Only a few, modest, reservations were observed:

Mr. Sweeney: I want to take a minute to draw to the minister’s attention that, because this conscience clause has been put in, some people in Ontario are going to have a small problem – for some people it may be a very large problem – in regard to the measles vaccine.
I would like to read a couple of comments into the record. I have a letter from one of my constituents that I was asked to bring to the minister's attention. 'When people feel so trapped in an ethical problem they can see no way out...this I will admit is where many people may feel they would be, once aware of the situation regarding live attenuated vaccines."

The minister is well aware that it has been brought to our attention that these vaccines come from human cell culture that originally came from aborted foetuses.... The point my constituent has drawn to my attention that this new legislation she finds herself, as a matter of conscience, 'trapped in an ethical problem'. ... [T]here may be a considerable number of people who also find themselves trapped in this ethical problem [due to the source of the vaccine].

Minister Norton assured Mr. Sweeney that a foetus had never been aborted anywhere in the world for the purpose of manufacturing a vaccine.

Robert Nixon, Liberal MPP for Brant-Oxford, feared that adding conscience would greatly increase the number of requests for exemptions and that the reasons for doing so would be trivial. As he said in the legislature, adopting the persona of a curious child, "Daddy, do I have to [get the needle]?" He went on: "There are people who will say, 'No honey, you do not have to get the needle'.... [It] is broadened to the point where any kind of objection—I hesitate to use the word 'rational' in this connection — is at least referred to in the bill." In other words, Nixon was concerned that adding "conscience" as a basis for exemption could not be controlled in the way that a purely religious exemption could be. Norton did not respond to this floodgate concern.

The Act has now been in place for almost 30 years. The process for obtaining an exemption is simple and has remained unchanged since 1984. Parents must complete a pro forma affidavit stating simply that the requirements of the Act "conflict with my sincerely held convictions based on my religion or conscience" and sign it. There is no requirement to indicate on which of the two bases the exemption is sought. No further details are required regarding the specifics of the religious or conscientious belief. The affidavit is then filed with the Medical Officer of Health.

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The latest statistics related to exemption requests are contained in the report Immunization Coverage Report for School Pupils: 2012-13 School Year and show the following: in 2013, the exemptions for religion/conscience were much higher than exemptions for medical reasons/prior immunity (1.3–2.0% of the seven-year-old school population for religion/conscience reasons, depending on disease, as compared to prior immunity (0–0.1%) and medical reasons (0.1–0.4%)). Exemptions from polio (in 2013, 2.0% of seven-year-olds) and tetanus (1.7%) have steadily increased from 2008 to 2013. The MMR vaccine has the fewest number of exemptions (approximately 1.5%). Even at these levels, the percentage is still significantly higher than Norton's prediction that religious/conscience exemptions would not exceed 0.25 per cent of the school population; however, since the form does not distinguish, the specific breakdown between religious- versus conscience-based exemptions is unknown.

The Report provides little more than a tentative conclusion. "It appears," it states, "that religious or philosophical exemptions may be increasing over time in Ontario as evidenced by an increasing proportion of 7-year-old students reporting religious and conscientious objections to tetanus and polio over the period of 2008–09 to 2012–13." This is rendered even more tentative by a recognition that the five-year time frame is likely too short to draw firm conclusions given that the MMR exemptions have remained relatively stable over the same period.

2. A Religious Exemption at a University

In September 2013, a male student living in the Greater Toronto Area (GTA) and enrolled in an online sociology course at York University requested to be opted out of a mandatory group assignment that required him to meet with his female classmates in person. His reason for wanting to be exempt from the group assignment was that his religion prevented him from associating with women in public. Initially, Professor J. Paul Grayson, the instructor, dismissed the request out of concern that it would give tacit

pupils who have received an exemption can be excluded from school if an outbreak of any of the named diseases occurs.


11 Ontario Agency for Health Protection and Promotion (Public Health Ontario), Immunization Coverage Report for School Pupils: 2012-13 School Year (Toronto: Queen’s Printer for Ontario 2014) [hereinafter the "Report"].
support to a negative view of women and set a disturbing precedent that sexist attitudes are acceptable at the University.

In addition to personally rejecting the student’s request, however, Grayson forwarded the student’s request to his dean and the director of York’s Centre for Human Rights. Grayson’s hope was that the School could, in his opinion, “give a principled response” to the student that would back up his own decision. In a surprise turn, both the Dean and the Centre ordered Grayson to accommodate the student’s request. At the risk of possible discipline, Professor Grayson refused the order. The School contacted the student to let him know that he was allowed to withdraw from the course with full refund.

The Dean of the Faculty of Liberal Arts and Professional Studies, Martin Singer, replied to Grayson in an open letter sent to the whole faculty, writing that two key factors underlay his decision. First, because the course was listed and offered exclusively as an online course, the student had a reasonable expectation that he would not be obliged to come to campus or to interact with other students in person. Singer cited the fact that an alternative arrangement to the in-person group assignment was made for another student of the same course who was taking the course abroad. Second, the University was bound by its obligations under the Ontario Human Rights Code to accommodate a student’s religious beliefs. The Code mandates accommodation upon the satisfaction of three conditions: (1) the applicant is sincere in his convictions; (2) the accommodation must have no substantial impact on other students’ experience in the class; and (3) the accommodation must not undermine the academic integrity of the course. The Dean’s office, the University’s Centre for Human Rights, the Office of the University Counsel, and the Office of Faculty Relations believed that the three conditions were met in this particular instance.

The matter did not end there. Grayson responded to the Dean’s letter, arguing that a commitment to gender equality should not be overborne by a claim for religious accommodation, even if it fits within the scope of the Code. In Grayson’s mind, to do otherwise was inconsistent with York’s core values and would have infringed upon the right of female students to be treated with respect by male students. He held firm to the view that if York University was legally bound by the Code to make the decision that it did, then the Code itself was unacceptable and in need of reform.

Grayson also referenced what he saw as missing, but crucially relevant, information in the Dean’s reasons. In terms of a student’s reasonable expectation of distance learning via an online course, Grayson pointed out that the student at the centre of the controversy had come to campus on at least two other occasions to participate in other in-person courses. As well, Grayson believed that the course syllabus provided adequate notice to students that there would be a component of the course requiring in-person group attendance. Grayson also rejected the Dean’s position that the student’s religious accommodation request was analogous to the student who lived outside Canada. He saw the former as a request made on the basis of preference, whereas the latter was, to him, based on a real inability to attend in-person meetings.

Moreover, Grayson contended that the proposed accommodation would have a substantial impact on other students’ experiences in the class and therefore did not meet the second requirement of the Code. Like any good sociologist, he based this on a survey he had subsequently conducted in one of his classes, which used a fictitious scenario almost identical to the one that occurred. The results of the survey indicated that the accommodation would have led some female members of the class to feel belittled and humiliated. Out of 30 female students surveyed, 15 female students indicated they would find the accommodation “ridiculous”, “unfair”, “offensive”, “upsetting”, “discriminating”, “outrageous”, “disappointing”, or “confusing” or perceive it as a sign of favouritism, ranging in degree of negative reaction from mild to extreme. Of course, this meant that 15 female students respected or were indifferent to the male student’s request for accommodation; of those, six approved and fully supported the decision to accommodate the student’s minority religious belief.

York’s sociology department sided with Grayson, passing a motion on October 9, 2013, stating that “whereas it is recognized that York recognizes diversity, be it resolved that academic accommodations for students will not be made if they contribute to material or symbolic marginalization of other students, faculty or teaching assistants”.

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14 Id.
15 Id., at 9-11.
16 Cited in Id., at 5.
several unsuccessful attempts to sway the University's decision, Grayson broke the story to the media in January 2014.

Predictably, when it comes to contentious religious matters, the story went viral. Much criticism and many comments came from a wide swath of members of the public. Even federal politicians, who in some sense should have no business discussing religious accommodation in the university sector, couldn't contain themselves. On Thursday, January 9, 2014, Justice Minister Peter Mackay piped up, saying that "we did not send soldiers to Afghanistan to protect the rights of women to only see those same rights eroded here at home." He was joined by federal opposition leader Tom Mulcair, who also spoke out against the University's decision. 17 At the provincial level, the Parti Québécois Minister responsible for Democratic Institutions, Bernard Drainville, and Ontario's Minister of Training, Colleges and Universities, Brad Duguid, also sided with Professor Grayson. Duguid acknowledged that the University had the authority to make its own decisions but added that "our universities should not be obliged to alter course curriculum in any way that would be seen as discriminatory with regard to gender equality." He considered this to be a "sacrosanct" principle. 18

York did have its supporters. Raj Anand, a human rights lawyer and former Chief Commissioner of the Ontario Human Rights Commission, opined that the University's decision was legally defensible, as religious-accommodation laws are designed to protect individuals against majority opinion. Alan Shefman, a former director of communication and education with the Ontario Human Rights Commission, also affirmed York's decision to accommodate the student's request as a fair balancing of the factual circumstances of the request. 19

The general feeling in the media, however, seemed to be that the University had got it wrong. The typical response was that religious freedoms did not operate in isolation and needed to be considered alongside other fundamental rights and values. Christopher D'Souza, an equity expert and author, challenged the University's opinion that the accommodation was not creating undue hardship for the women: "[t]he message [that the University] sent about gender equality was very skewed," he stated. 20 David Matas, a lawyer specializing in human rights law, noted that distinctions needed to be made between freedom of religion in a public setting — call them external restraints on freedom of religion — and freedom of religion within a religious context — the internal debates over what is contemplated as religious. Discrimination that exists within a religion should not, for him, be projected into the public sphere via a simplistic claim of freedom of religion. This could potentially violate the rights of people who hold different religious beliefs or have no religion. 21 Both Matas and D'Souza were of the opinion that, although there is no fixed hierarchy of human rights, the right to gender equality must predominate in this particular context.

To defend the University's decision from the public criticism, York Provost Rhonda Lenton tried to decouple the student's religious motivations from the online nature of the course. In an official statement from the University, and in a number of newspaper and radio interviews, she argued that if the student had made the same request in an in-class course, it would have been highly unlikely that the University would have agreed to grant the accommodation request. In her statement she emphasized that the School does not prioritize religious accommodation over other types of rights and strove to point out that accommodation of pluralistic values is in fact made to encourage individuals to engage with public institutions. She made a personal promise to review York's decision-making processes regarding religious accommodation with
other Ontario universities to “share the best way forward in these types of requests”.  

Lenton’s responses were insufficient to placate some commentators, which led inevitably to the matter escalating to York’s President and Vice-Chancellor, Mandouh Shoukri. On January 13, 2014, he released a statement on religious accommodation. In it, he emphasized that every request for accommodation is considered according to the individual merits of the request, with a view to reaching all decisions in a fair and reasonable manner. Surrounding all such requests was the context of the School as a secular institution. He referenced an earlier “Presidential Statement on the Secular University” issued by York in 2007, which affirmed York as a “tolerant, diverse and multicultural place” where “democratic and pluralistic values of Canadian society” are reflected. The 2007 statement forewarns that “those who have strong commitments to various faith communities or political ideologies may find their beliefs challenged by others.” It reminded everyone that “religious accommodation cannot be implemented at the expense of the infringement of the rights of others.”

As with much that captivates the media these days, the matter ended almost as abruptly as it started. The student at the centre of the controversy reached a resolution with Professor Grayson, and he eventually met with his co-ed group. According to Grayson, the student was ultimately satisfied that the matter was handled fairly, although he continued to maintain that his religion did allow for exceptions of this nature.

II. WHAT DOES ALL THIS MEAN?

Clashes like the one at York are becoming common in the west — sometimes playing out as small incidents in classrooms and workplaces, sometimes as singular and tragic events, such as the massacre of Charlie Hebdo staff in Paris.

For the most part, Canada’s broad and open immigration policies, multiculturalism, increased diversity, and pluralism have combined to give rise to an amazing social and cultural mosaic, but they have no doubt also contributed to flashpoints like the one at York. Accommodating religious beliefs can be complex, partly because of the nearly infinite ways in which religious beliefs are manifested and partly because there is a need among the non-religious or differently religious to adopt an imaginative perspective regarding beliefs and practices that is not always achievable.

The Supreme Court of Canada’s test for assessing whether something is religious is tremendously broad. To meet the test, all one need do is show that a practice — such as not sitting down face-to-face with female students — is, firstly, connected with a higher purpose. That higher purpose itself is not easily established. But as the majority of the Supreme Court put it in Syndicat Northcrest v. Anselem, at least if the outer limits are defined as “beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held,” it is safe to say that they are protected by the guarantee of freedom of religion. The majority went on to note that “religion typically involves a particular and comprehensive system of faith and worship” that tends to manifest itself as a “belief in a divine, superhuman or controlling power.”

Second, the practice that must be related to the belief is one that is almost entirely within the subjective appreciation of the claimant — in this case, that the student’s own understanding of his religion forbids sitting down with women. This subjectivity allows a near infinite variety of practices: no one has to cite scripture or refer to religious experts to support their position. A religion is pretty much one’s own. All one need do is assert, in good faith and sincerely, that a particular practice or belief has a nexus with religion. Again, to quote directly from the majority decision in Amselem, these are “deeply held personal convictions or


27 Id.
28 Of course, "sincerity" and "nexus" have their own substantive components but, as is well known, these are relatively easy for a claimant to establish (however, see notes 35-40 and accompanying text below for a sampling of cases where the courts have failed to find more than a trivial infringement or a nexus with religion).
beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment”. The practice of religion allows “individuals to foster a connection with the divine or with the subject or object of that spiritual faith.”

To see how this has played out in a constitutional law context, it is worth examining some of the kinds of things that have been successfully protected as religiously based activities in constitutional cases. For example, wearing a kirpan to school in an environment where no weapons are allowed; avoiding having a photographic driver’s licence where drivers are expected to have one; seeking to install a private succah on one’s balcony (where built elements are forbidden) and a communal succah is thought by others of the same faith to be acceptable; refusing blood transfusions where the bulk of medical opinion suggests that to do so could be fatal; and refusing to participate in a daily prayer reading where the bulk of students or staff are in favour of it.

Just as instructive are those cases where a religious freedom was claimed but a court found it not to exist, either because (i) the practice or belief has no nexus with religion; or (ii) the interference was deemed to be trivial or insubstantial. In category (i) are included such cases where a claimant’s belief that the cannabis plant is sacred to his “Church of the Universe” and thus the use of marijuana is a religious one; where the fact that the British monarchy’s royal-succession rules adhere to certain sectarian principles is not connected to an individual’s own religious beliefs; and where the ideas and practices of the Humanities Institute, including a “Oneness of Reality”, are so vague as to be practically unascertainable and therefore not connected to religion. Cases where courts have found the interference to be trivial include the challenge of a Calgary by-law prohibiting amplified sound because it prohibited a person from attempting to proselytize to pedestrians in front of City Hall, a requirement to file annual tax returns being contrary to a religious or conscientious belief because of government policies allowing abortion; a Passport Canada policy that prohibited the inclusion of “Israel” as the country of birth; a Highway Traffic Act provision requiring motorcyclists to wear helmets; and Sarnia zoning legislation that prohibited a Christian fellowship organization from operating a men’s shelter.

Once religious freedom is triggered by showing that a practice has a nexus to religion, the question of whether the law’s interference with the implicated right is trivial or insubstantial is assessed objectively. If it is found to be significant enough, then there is, prima facie, an infringement of freedom of religion. That, the Supreme Court says, is enough.

It’s not a difficult burden to meet. Gurbaj Singh, a Sikh student in a grade school in Quebec, was allowed to attend school wearing a kirpan — a religious and ceremonial dagger — because he claimed it was a religious object and part of his duty as a religious practice to wear it. Non-Siks, in contrast, are not allowed to carry knives. The Supreme Court found that all Gurbaj had to do was establish that his personal and subjective belief in the religious significance of the kirpan was sincere. He did not have to establish that a kirpan isn’t a weapon or that Sikhism requires wearing one. The School had to accommodate his religious belief since it was relatively straightforward to do so.

The rationale for treating the bulk of a freedom-of-religion claim in a subjective manner is both practical and principled. Courts are public institutions — there is no place for them in the pews of the nation. But this subjective approach brings potential challenges. Under it, it is very hard for anyone to maintain that my belief — however unusual or even socially disruptive it might seem to others — is not valid. There needs to

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29 Amselem, supra, note 26, at para. 39 (emphasis added).
32 Amselem, supra, note 26.
34 Zylberg v. Sudbury Board of Education (Director), [1988] O.J. No. 1488, 65 O.R. (2d) 641 (Ont. C.A.). Of course, not all of these cases were ultimately successful, but all passed the first hurdle of establishing a breach of freedom of religion. The cases almost all turn on whether the government is justified in limiting the freedom under s. 1 of the Charter, but that is less relevant to the purpose intended here.
be sincerity in that belief and some connection to a basic idea of religion (related to the divine, or spiritual faith), but nothing more than that. So the York student fervently believed his religion did not allow contact with females (at least in a student setting). He was sincere in that belief (at least initially; he later recanted in some way, since he ended up attending the weekend session). The University accepted that belief and determined that the only reasonable way to accommodate him was granting a dispensation from the weekend retreat.

No doubt accommodation, which allows difference to flourish, may sometimes seem unfair to those who must do the accommodating (and even discriminatory to those who are not offered the same treatment). Those feelings can be hard to shake, as attested by Grayson and a significant number of the surveyed students who felt demeaned. But accommodating religion is one legal method we use in Canada to strive for a society that remains uninterested in religious beliefs. It’s a necessary paradox — by vigorously maintaining reasonable accommodation of religious beliefs, we actually protect the secular nature of our state. In my view, this is an important value to maintain.

But secularity is not the same as neutrality. As a way around this false equivalence, in terms of religious legal disputes, it might be useful sometimes to frame them as grounded in conscience instead of religion. Non-religious viewpoints, based on claims of conscience, can function in a similar way to the comprehensive claims to the truth made by religions. Conscience-based claims are, for want of a better term, secular, but they also comprise a distinct point of view and therefore are not “neutral”. As Suzanne Chiodo reasons, casting secularism as neutral makes it the arbiter of “non-neutral” claims, especially religion. While public debate is centred around so-called neutral claims based on reason, more controversial claims of comprehensive truth are, she argues, relegated to the background because they cannot be resolved through reason. Not, I argue, if we give more weight to the Charter protection of conscience.

Section 2(a) of the Charter states that everyone has freedom of conscience and religion. Yet the constitutional protection of conscience is, at best, just a silent partner to religion and, at worst, often ignored or unnoticed. I have argued that the deliberate inclusion of “conscience” in section 2(a) of the Charter ought to be taken seriously; to do so, freedom of conscience must be recognized as an independent and robust freedom. A fully developed freedom of conscience might bring a less divisive, morality-based freedom into the foreground as the primary freedom, subsuming some forms of religious freedom within it and ultimately proving less contentious and less driven by emotion. The Supreme Court has hinted at a more robust approach to section 2(a) in a few instances in some of its religious-freedom cases: “conscience” could include such things as “conscientiously-held beliefs ... grounded in ... secular morality”, the positions of “atheists, agnostics, sceptics and the unconcerned”, and “profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.”

44 And despite the fact that some commentators noted that there is no religion they are aware of that forbids such a practice: see, for example, Grayson’s statement that he consulted a scholar of Judaism and two Islamic scholars, neither of whom saw any religious reason for a person not wanting to interact with women (supra, note 13, at 4) and S. Khan, “What York University forgot: Gender equality is not negotiable”, The Globe and Mail, January 10, 2014, available online: <http://www.theglobeandmail.com/globe-debate/what-york-university-forget-gender-equality-is-not-negotiable/article16278726/> (Khan characterizes the student’s request as one based on cultural preference, not religious doctrine.)

45 It might be much more preferable to think of the nature of our state as “impartial” — more analogous to judges, who are permitted to hold opinions and have sympathies but throughout must be seen to be impartial (i.e., without bias). In fact, the Canadian Judicial Council’s “Ethical Principles for Judges” refrains from using the term “neutral”, preferring “impartial” throughout. Our secular state should be free from bias as between different conceptions of the truth, of goodness, etc., but perhaps can never be neutral, since that implies there is some baseline position that somehow can be located. That said, I’m not unaware of the controversy over defining the term “secularism” and the fact that it has been described more as a continuum of ideas rather than a fixed concept; see Simonneau v. Tremblay, [2011] Q.H.R.T.J. No. 1, [2011] J.Q.J. 507 (Que. H.R.T.).


Undoubtedly, religion and conscience have much in common both historically and theoretically. But in a legal, constitutional sense they should be treated separately. Freedom of conscience can function as a fully realized, independent freedom, since its meaning is sufficiently distinct from "religion". Different religions and individual consciences manifest themselves in a nearly limitless variety of forms, often diametrically opposed to one another. The major religions, for example, have vastly different views on what might be the ultimate purpose or divine understanding of the universe. Even more everyday religious beliefs (or social customs that often are associated with religious practices) can lead in different directions: many Jews and Muslims do not eat pork, while many Hindus do not eat beef; each of them relate these practices to religious dogma. We can see similar effects surrounding conscience-based beliefs: Martin Luther’s conscience compelled him to attack the Catholic Church while Thomas More’s required him to defend it. Conscientious objectors feel compelled to object to military service while others may have a conscientious belief that fighting and dying for one’s country is the best path. As Wilhelm Mensching says, two people can arrive at opposite conclusions and yet both can be making a decision based on conscience. All of this means that claims of constitutional freedom of conscience can be modelled on requirements that are similar to the way religious-freedom claims have been delineated in cases such as Anselem.

This is where the law relating to the anti-vaccinationists and the York rule regarding male-only students part ways. I believe we should take seriously the difference that the role of conscience plays between the parent deciding whether to allow her child to be inoculated. As Minister of Health Norton noted, the reason for adding conscience to the law in 1984 was a direct result of the wording of section 2(a) of the Charter, which suggested conscience as a fundamental freedom distinct from religion: “[i]n trying to bring this bill clearly into compliance with the ... Charter of Rights and Freedoms, it extends the grounds of exemption ... to include ... matters of conscience.”

In contrast, a large part of the furor in the York case arose out of a (misplaced) belief that the student’s claim was another in a long line of examples that showed how out of touch some religious ideas (notably, and frequently, those associated with radical Islam) are to a modern state such as Canada. This view is usually couched in more palatable language, but at its heart is a feeling that some religions, or some religious practices, are inferior and less deserving of protection than others. However, if we imagine a slightly different situation at York, we can see how arguments based on conscience might tease out new ways to view religious arguments. If a student claimed he could not sit down with female students because it has been instilled in him by his parents that it is wrong to sit together for long periods of time if you are not married, would we feel differently? Would our answer change if the student had been told his entire life that men are superior and should not demean themselves by meeting with women? These questions respond to suspect values that may have been culturally or socially instilled. What about a belief that relies, instead, on “science” that may be suspect: the student could not sit with the opposite gender because mixing genders can lead to serious problems of germ transference and a heightened chance of infection?

How to assess such conscience-based reasons? Would they be treated differently? Is the reason for the conscience-based exemption itself important? If it is, does this mean the reason for a religious-based exemption is important too? Yet, since religious accommodation is granted without inquiring into the religious basis for the reason, should not conscience- and religion-based arguments be treated the same? Would the possibility of accommodating these reasons change your view of the religious accommodation?

Oftentimes (though not always!), I think assessing religious claims is analogous to Justice Potter Stewart’s famous dictum regarding pornography: “I know it when I see it.” Religious claims raise considerable

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54 See *Canada Trust Co v. Ontario Human Rights Commission*, [1990] O.J. No. 615, 74 O.R. (2d) 481 (Ont. C.A.); also see *Spence v. BMO Trust Company*, [2015] O.J. No. 353, 123 O.R. (3d) 611 (Ont. S.C.J.) (revd [2016] O.J. No. 1162, 2016 ONCA 196 (Ont. C.A.)). In *Spence*, the trial judge found that a deceased’s will against public policy as it cut out a daughter who had married and bore a child with a Caucasian husband. Although the Court of Appeal reversed, one could say that the trial decision took the public notion of human rights about as far into the private-law realm as it can go.
55 *Jacobellis v. Ohio*, 378 U.S. 184 (1964 U.S.S.C.C.) (concurring). The exact text of his judgment was “I shall not today attempt further to define the kind of material I understand to be embraced within [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” Paul Gewirtz has written an excellent article on how this phrase is much more than a judicial cop-out and, in fact, contains much that should be admired in legal reasoning (in essence, the importance of non-rational elements in judicial decision-making): P. Gewirtz, “On ‘I Know it When I See it’,” (1996) 105 Yale L.J. 1023.
emotional responses. We should acknowledge, as Potter Stewart J. did, the non-rational in helping us through these difficult questions. Many clinicians and public health workers exhibit frustration over vaccine hesitancy; it is all too common a belief that with additional education and rational understanding the hesitancy will go away. The truth is more complicated: this kind of wishful thinking is based on underestimating the power of non-cognitive dimensions of religiosity and of other deeply held convictions. Thinking about religious claims in the broader terms provided by conscience provides a helpful way out of this short-sightedness — it functions somewhat the same as knowing pornography when you see it. It helps legitimize and provide additional context to some claims at the same time it may assist in pointing out more clearly others that are spurious.

If one is able to test claims by substituting a conscience-based reason for the religious one, interesting things sometimes happen. Take Wilson Colony, Multani and Mouvement laïque québécois v. Saguenay (City) as examples. If we change the Wilson Colony claimants from Hutterites to conscientious objectors who believe strongly against having identity photographs taken, would the situation change? Similarly, would we feel the same about a schoolchild who wished to bring a knife to school because he felt compelled to do so for reasons related to his conscience? One’s reaction to these questions can help situate the problem when it is presented as a religious claim.

One of the Supreme Court of Canada’s more recent religious-freedom claims centred around religiously tinged municipal council meetings (because they included recitation of a prayer before the business of the meeting began). Would it be a problem if, instead of reciting the Lord’s Prayer at a civic meeting, a mayor recited some message about virtue, peace, and the human spirit? It is hard to imagine anyone taking issue with this: it would not offend either one’s freedom of religion or of conscience. Because the message is somewhat anodyne, and certainly unlikely to offend, it most likely would be tolerated. If this is true, then sometimes a “secular” version of activities that have religious referents may be considered acceptable (assuming for the sake of argument that

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56 Thus, Bill 198’s modification to the Act requiring parents undergo an “education session” prior to obtaining an exemption from immunization — see supra, note 1.


58 These are the basic facts that gave rise to the dispute in Mouvement laïque québécois v. Saguenay (City), id. In that decision, the Court reasoned that at a public meeting of a municipal council, a mayor should refrain from prayer, or other sectarian religious activities, as these are exclusionary. The Court took a fairly strong stand about “neutrality” of the State, which may run counter to some of the arguments I mentioned above (see, supra, text to notes 44-45).


60 A typical rationalist account is summarized in a piece by André Picard, the Globe and Mail’s health reporter: A. Picard, “Vaccination is for the greater good” in The Globe and Mail, February 3, 2015, at A12. Picard’s colourful language is instructive: “beliefs are rooted in scientific ignorance … and it’s much easier to find unshamed nonsense than easily digestible scientific fact … “; “a chilling disregard for rational argument”.

my simplified mayoral statements are treated as a form of conscience-based speech). It is not because of their secular nature, however, that I think these kinds of readings would pass constitutional muster. It is because they are examples of conscience-based information that are pan-religious and universal. A reading by a mayor that is deliberately focused on one religion is not acceptable in a pluralist society. In contrast, a moral admonition — if the mayor said, before each meeting, “We wish that everyone here does good” — is uncontroversial only because it would likely pass as valid for every religion known to humans. In sum, when replaced with a conscience-based claim, the religious analysis can sometimes be sharpened.

Of course, thinking of potential flashpoints in terms of conscience as opposed to religion is not a panacea. Conscience-based claims make sense in two main cases: (i) where a legislature determines that there may be good reasons, even if non-rational, for broadening religious-based claims to include similar conscience-based ones; and (ii) where the framing of the analytical problem is relatively straightforward. The first case is easiest: the classic conscience-based objection to a law occurred where pacifists objected to mandatory military service. As with the evolution of vaccination exemptions described at the outset of this chapter, conscientious objection to military service was originally granted to those religions that forbade going to war. Later on, governments allowed non-religious conscientious objectors to exempt themselves from military service. In both situations, however, those in charge of assessing the veracity of the belief were clear that a person was only eligible to make the claim if they had a profound and demonstrable objection to war. In contrast, many would argue that parents who seek a vaccine exemption for their child are doing so based on purely unfounded, unscientific beliefs (or, at a minimum, highly contestable empirical evidence). So, if it makes sense for governments to allow for religious exemptions because some religions are opposed to the practice, then it makes sense to allow for conscientious exemptions on the basis that conscience-based beliefs are little different from subjective religious beliefs.
The second case, that presented by the York University situation, is more difficult. Examined through the frame of religious accommodation, the student should be offered an alternative to meeting with other students. The student felt that his religious freedom, as described in the Charter and the Ontario Human Rights Code, was infringed. As the University determined, he met the three requirements that determine whether accommodation is required. There is no requirement to go behind the subjectivity of the claimant’s belief. In other words, just as abstaining from eating pork may not be strictly rational, or scientifically valid, it is protected simply because it is a religious and cultural practice for some believers. In my view, if this was the end of the argument, then a conscience-based reason for an accommodation should exist as well. However, because the problem can also be framed as one of equality, it is more complex. A significant number of female students in the class felt they were being discriminated against because of their gender, also contrary to the Charter and the Ontario Human Rights Code. To them, accommodation of any sort is tantamount to condoning discrimination. Since the case is capable of two diametrically opposed analyses, adding conscience to the mix is of limited utility. The real struggle is determining how the problem should be framed.

In the end, I believe that the Ontario Government’s approach to vaccination is the best route to go — wherever possible, expressly allowing conscience and religion to be used in tandem, wherever there are activities that are open to a variety of approaches, clarifies the law and could help to move more problems inside the two categories described above.

In addition, allowing conscience to operate instead of, or in addition to, religion may help defuse delicate situations. As the Ontario Government report on school immunization notes, parents’ decisions whether to exempt their children on the basis of religious reasons as opposed to philosophical reasons has been completely uncontroversial. The conscience and religious exemptions are both accepted as bases for refusing inoculation. As with religious accommodation, allowing claims based on philosophical or conscience-based reasons is fundamentally about preventing marginalization of minority groups and the negative effect on the dignity of individuals whose identity is connected with such groups. What if the York rules allowed students to opt out of certain components of a course for “religious or conscientious reasons” without having to explain further the reason for so doing? Would it change the way we characterize and assess the exemption? My guess is that it would.

Our relative peacefulness in Canada — the lack of killings over religious cartoons, for instance — is not something we have stumbled upon or realized through luck. We have aligned the law with an ideal but practical kind of justice: developing broad approaches to religious accommodation and allowing, in a few instances, non-religious conscientious beliefs to be equally protected. Accommodations have generally worked, albeit with some controversy. Perhaps adding conscience protection to many other situations — where it makes obvious sense — will further improve our ability to withstand complex and difficult cultural, political, sociological, religious and legal entanglements. A modern Canada deserves no less.

See text to supra, note 13.

See Moon, supra, note 25, for an expanded version of this argument.

The Report, supra, note 11.

See R. Moon, “Accommodation and Compromise under s. 2(a) of the Charter”, Creed Report, supra, at 59.1.

As sociologists have noted, people tend to “mix and match” components of religion in idiosyncratic and often contradictory ways: see R. Bibby, Unknown Gods: The Ongoing Story of Religion in Canada (Toronto: Stoddart, 1993). And the growth of “no religion” is increasing — as Siobhan Chandler notes, the “spiritual but not religious” (SBNR) subculture is on the increase; see S. Chandler, “Private religion in the public sphere: inner life spirituality in civil society” in S. Aspers & D. Houman, eds., Religions of Modernity: Rethinking the Sacred to the Self and the Digital (Leiden: Brill, 2010), at 69. It is one reason why both religious- and conscience-based reasons for refusing to vaccinate one’s children is troubling for many health care practitioners but is a key component of a strong belief in personal autonomy. Many similarities would exist in a classroom setting.