

MY BODY, MY CHOICE? RE-EVALUATING THE FORGOTTEN RIGHT TO FREEDOM OF CONSCIENCE THROUGH COVID-19 VACCINE MANDATE CASES

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For decades, “my body, my choice” has been a rallying cry for abortion rights activists to underscore the importance of decision-making autonomy free from government constraint. The slogan was recently co-opted by conscientious objectors to COVID-19 vaccine mandates, who invoked the same rhetoric of conscientious autonomy and freedom from government coercion to seek exemptions from these mandates. These cases engage section 2(a) of the Charter, which protects individuals’ right to freedom of conscience and religion. They also offer an opportunity to explore what it would mean practically to reinvigorate the section 2(a) right to freedom of conscience. Firstly, this paper models the ways the relationship

Depuis des décennies, « mon corps, mon choix » est un cri de ralliement des militants en faveur du droit à l’avortement pour souligner l’importance de l’autonomie décisionnelle, libre de toute contrainte gouvernementale. Ce slogan a récemment été repris par les objecteurs de conscience à l’obligation vaccinale contre la COVID-19, qui ont invoqué la même rhétorique d’autonomie de conscience et de liberté face à la coercition gouvernementale pour demander à être exemptés de cette obligation. Ces affaires font appel à l’alinéa 2(a) de la Charte, qui protège le droit des individus à la liberté de conscience et de religion. Elles offrent également l’occasion d’explorer ce que signifierait concrètement de redynamiser le droit à la liberté de conscience prévu à l’al. 2(a). Tout d’abord, cet

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between freedom of conscience and freedom of religion have been conceptualized by scholars and jurists. Although any definitive relationship remains elusive, opinions can be sorted into three models: freedom of religion as a subset of freedom of conscience, freedom of conscience and freedom of religion as separate rights, and freedom of conscience as a subset of freedom of religion. Though the third model ignores freedom of non-religious conscience and is the effect of current jurisprudence, this paper uses COVID-19 vaccine mandate cases to explore the practical consequences of protecting freedom of conscience under a different model. This exploration concludes that conceptualizing freedom of religion as a subset of freedom of conscience will not do enough to narrow the potentially limitless scope of freedom of conscience claims. However, if freedom of religion and freedom of conscience are understood as separate rights, with distinct justifications and purposes underpinning each, the potential for a manageable freedom of conscience right emerges.

alinéa présente les différents modèles selon lesquels la relation entre la liberté de conscience et la liberté de religion a été conceptualisée par les chercheurs et les juristes. Bien qu'il soit difficile d'établir une relation définitive, les opinions peuvent être classées en trois modèles : la liberté de religion en tant que sous-ensemble de la liberté de conscience, la liberté de conscience et la liberté de religion en tant que droits distincts, et la liberté de conscience en tant que sous-ensemble de la liberté de religion. Bien que le troisième modèle ne tienne pas compte de la liberté de conscience non religieuse et qu'il résulte de la jurisprudence actuelle, le présent article s'appuie sur des affaires relatives à l'obligation vaccinale contre la COVID-19 pour examiner les conséquences pratiques de la protection de la liberté de conscience dans le cadre d'un modèle différent. Cette analyse conclut que le fait de conceptualiser la liberté de religion comme un sous-ensemble de la liberté de conscience ne suffira pas à restreindre la portée potentiellement illimitée des revendications fondées sur la liberté de conscience. En revanche, si la liberté de religion et la liberté de conscience sont considérées comme des droits distincts, chacun reposant sur des justifications et des finalités propres, il devient possible d'envisager un droit à la liberté de conscience gérable.

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I. INTRODUCTION

“My body, my choice.”¹ For decades, these words have been a rallying cry for pro-choice activists fighting for abortion rights.² This slogan underscores the importance of decision-making autonomy – of the ability to follow the dictates of one’s own conscience to determine whether to continue a pregnancy, free from government constraint or coercion. Justice Wilson’s famous concurring decision in *Morgentaler* is consonant with this rallying cry.³ In a rare example of a Canadian court engaging with the right to freedom of conscience, Wilson found that the decision to have an abortion was “essentially a moral decision, a matter of conscience” and that laws which effectively criminalized abortion “enforce[d], on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another.”⁴ To uphold these laws would be “to deny freedom of conscience to some, to treat them as means to an end, to deprive them...of their ‘essential humanity.’”⁵

Recently, another group began to rally behind the “my body, my choice” slogan: those opposed to COVID-19 vaccination mandates.⁶ Vaccine opponents might argue Justice Wilson’s statements apply in this context too: many have described requiring COVID-19 vaccination to hold jobs, attend schools, and enter certain public spaces as a kind of “medical coercion”⁷

¹ Alaina Walberg, “Owning the Libs: Symbolic Negation of #mybodymychoice as a Conservative Rhetorical Strategy” (2023) 74:1 Communication Studies 29 at 30.

² *Ibid.*

³ *R v Morgentaler*, [1988] 1 SCR 30 at 161, 1988 CanLII 90 (SCC), Wilson J, concurring [*Morgentaler*].

⁴ *Ibid* at 175–176, 179.

⁵ *Ibid* at 179.

⁶ See e.g. Rachel Bluth, “‘My body, my choice’: How vaccine foes co-opted the abortion rallying cry”, *NPR* (4 July 2022), online: <npr.org/> [perma.cc/SUX5-YBMZ]; Nick Boisvert, “Toronto approves strategy to combat anti-vaccination as parents accuse city of ‘genocide’”, *CBC News* (23 September 2019), online: <cbc.ca/> [perma.cc/RE36-W2ZJ].

⁷ Jordan Omstead, “‘Only the beginning’: Hundreds protest Western University vaccine mandate”, *National Post* (27 August 2022), online: <nationalpost.com> [perma.cc/PFB7-2BYD].

that violates their freedom of conscience.⁸ There are important differences between the use of “my body, my choice” in the context of abortion and COVID-19 vaccination, some of which will be explored later in this essay.⁹ However, both contexts share an interesting similarity: they invite, perhaps even demand, an engagement with the often-ignored freedom of conscience.¹⁰

Section 2(a) of the *Canadian Charter of Rights and Freedoms* (*Charter*) states that “[e]veryone has the following fundamental freedoms: freedom of conscience and religion.”¹¹ Despite the inclusion of conscience, Canadian courts have tended to focus only on freedom of religion. While some decisions, such as *Morgentaler*, engage with freedom of conscience to a limited extent, only one case to date has found a freestanding violation of freedom of conscience unattached to freedom of religion.¹² No case has articulated a clear test for determining violations of freedom of conscience separate from freedom of religion, and the relationship between freedom of conscience and freedom of religion remains unclear.

Canadian court’s decision to keep freedom of conscience at a distance is understandable. The freedom raises many thorny difficulties about what section 2(a) protects and how. Section 2(a) could be understood as a single

⁸ Boisvert, *supra* note 6.

⁹ See e.g. Tina Rulli & Stephen Campbell, “Can ‘My Body, My Choice’ Anti-Vaxxers be Pro-Life?” (2022) 36:6 *Bioethics* 708 at 714 (“gestation mandates far more extensively restrict bodily autonomy than do vaccine mandates, which are only moderately invasive”); Maija Kappler, “Opinion: Why using the language of abortion rights for vaccine mandates is bogus” (2 February 2022), online: <healththing.ca> [perma.cc/W7FG-LZRM] (“[t]he freedom to get an abortion, in a place where the procedure is safe, legal and accessible, can literally be life-saving. The freedom not to get vaccinated means you can’t access certain non-essential services because you’re much more likely to get other people sick. Those two premises are wildly different”).

¹⁰ Both contexts also engage other *Charter* provisions, such as section 7 and 15, but a full analysis is beyond this essay’s scope.

¹¹ *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹² *Maurice v Canada (AG)*, 2002 FCT 69 at para 14 [*Maurice*].

broad right to freedom of conscience, with freedom of secular conscience and freedom of religious conscience as subsets. On the other hand, section 2(a) could also protect freedom of conscience and freedom of religion as separate rights. And until recently, courts have almost exclusively engaged with freedom of *religion* and freedom of *religious conscience*. One reason for the lack of engagement with freedom of secular conscience is the core difficulty of how to define the scope of freedom of conscience in a manageable way. After all, not everyone has a religion, but we would like to think everyone has a conscience. However, if anyone can claim that any of their beliefs or practices should be protected as a matter of conscience, nearly any law or policy could be subject to *Charter* challenge – even, and perhaps especially, laws which seek to protect others’ rights. Such legal challenges often pit one person’s individual freedom against other people’s freedom from harm in a manner that is difficult to reconcile.

Conscientious-based opposition to vaccine mandates illustrate this difficulty, as vaccine mandates serve to protect vulnerable groups in society,¹³ and the choice to remain unvaccinated can be harmful, even deadly.¹⁴ In addition, although opposition to the COVID-19 vaccine has been intertwined with religion, conscience also plays an important role. A 2021 study found that 58% of unvaccinated Canadians cited personal freedom as a main reason they remained unvaccinated against COVID-19, compared to only 10% of unvaccinated Canadians whose choices were based on “religious reasons.”¹⁵ These objections appear in the legal realm as well, as courts and tribunals have recently been forced to grapple with non-religious, conscientious-based challenges to vaccine mandates.¹⁶ The presence of rights-based

¹³ “Vaccinating students and staff protect vulnerable groups from covid-19: university mandates work”, *The Economist* (22 August 2022), online: <economist.com> [https://perma.cc/5HEX-E4HB].

¹⁴ Irelyne Lavery, “Unvaccinated people increase risk of COVID-19 infections among vaccinated: study”, *Global News* (25 April 2022), online: <globalnews.ca> [perma.cc/YPK8-B8UM].

¹⁵ Angus Reid Institute, *Dwindling group of unvaccinated cite ‘personal freedom’ and ‘health concerns’ as main reasons for dodging the jab*, (3 November 2021), online (report): <angusreid.org> [perma.cc/HN6V-TTCA] [“Angus Reid Study”].

¹⁶ Cases involving purely conscientious-based objections to vaccine mandates include: *Banas v HMTQ*, 2022 ONSC 999 [*Banas*]; *Costa, Love, Badowich and Madekic v Seneca College of Applied Arts and Technology*, 2022 ONSC 5111

legal challenges to COVID-19 vaccine mandates, coupled with the harmful consequences of non-vaccination, make this topic a prescient case-study to examine what section 2(a) of the *Charter* could and should look like in the future.

More specifically, this paper uses legal challenges to COVID-19 vaccination to explore the practical effects of different interpretations of the theoretical relationship between freedom of religion and freedom of conscience. Part II outlines the various ways courts and academics have conceptualized the relationship between freedom of conscience and freedom of religion. Although any definitive relationship remains elusive, opinions fall into three general models: freedom of religion as a subset of freedom of conscience, freedom of conscience and freedom of religion as separate rights, and freedom of conscience as a subset of freedom of religion. While the third model – the one which effectively ignores freedom of *non-religious* conscience – is the practical effect of the vast majority of jurisprudence, Part III explores what it would look like to protect a secular freedom of conscience in the future. Conscience-based court challenges to vaccine mandates, both under human rights codes and under the *Charter*, highlight the need for engagement with this right and illustrate the difficulties and potentialities of adopting a new approach to section 2(a). Ultimately, conceptualizing freedom of religion as a subset of freedom of conscience will not do enough to narrow the potentially limitless scope of freedom of conscience claims. However, if freedom of religion and freedom of conscience are understood as separate rights – with distinct justifications and purposes underpinning each – the potential for a manageable freedom of conscience right emerges, one which would likely have an impact on the human rights sphere as well. Part IV concludes by calling for future work to develop a distinct test for freedom of conscience which is both justified, given the theoretical underpinnings of the right, and justifiable, given the practical consequences of such a test.

[Seneca College]; *Lewis v Alberta Health Services*, 2022 ABCA 359 [Lewis]; *Milovac v Canada (AG)*, 2023 FC 1120.

II. FREEDOM OF CONSCIENCE AND RELIGION: THREE RELATIONAL MODELS

The precise relationship between freedom of conscience and freedom of religion remains unclear in the caselaw and debated among academics.¹⁷ One central point of uncertainty is whether freedom of conscience operates as an overarching right, with religious conscience as a subset, or whether freedom of conscience and freedom of religion are separate rights. Justice Wilson's concurring decision in *Morgentaler* illustrates this lack of clarity:

'[F]reedom 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.¹⁸

Here, Wilson endorses the view that freedom of conscience encompasses all conscientiously held beliefs, including religious ones. At the same time, she also states that freedom of conscience and freedom of religion have their own independent meanings, which implies that freedom of religion is more than just a subset of freedom of conscience.¹⁹

¹⁷ Jocelyn Downie & François Baylis, "A Test for Freedom of Conscience under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care" (2017) 11:1 McGill JL & Health 1 at 7.

¹⁸ *Morgentaler*, *supra* note 3 at 179. Justice Wilson's comments here were also cited with approval in *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (CA), 1994 CanLII 3453 (FCA) at para 45.

¹⁹ Academics also disagree about what section 2(a) relational model Wilson is proposing here. For scholars who interpret Wilson as proposing freedom of religion as a subset of a larger freedom of conscience right, see: Brian Bird, "Rediscovering Freedom of Conscience in Canada" (2021) 84 Sask L Rev 23 at 52 ["Rediscovering Conscience"]; Brian Bird, "The Call in Carter to Interpret Freedom of Conscience" (2018) 85:2 SCLR 107 at 116 ["Carter"]; Léonid Sirota, "True Allegiance: The Citizenship Oath and the *Charter*" (2014) 33:2 NJCL 137 at 149. For scholars who interpret Wilson to be construing freedom of religion and freedom of conscience as separate rights, see Downie & Baylis, *supra* note 17 at 13–14; Michael Manley-Casimir, Kirsten Manley-Casimir & Alan Wilkinson, "Opening Exercises and Freedom of Conscience and Religion: A Constitutional Perspective" (2013) 22:2 Educ & LJ 189 at 199; Owen

Despite the lack of clarity around the precise relationship between freedom of conscience and freedom of religion, there is support for three distinct relational models. First, freedom of religion as a subset of freedom of conscience. Second, freedom of religion and freedom of conscience as separate rights. Third, freedom of conscience as a subset of freedom of religion. I will canvas each model in turn.

A. *Freedom of Religion as a Subset of Freedom of Conscience*

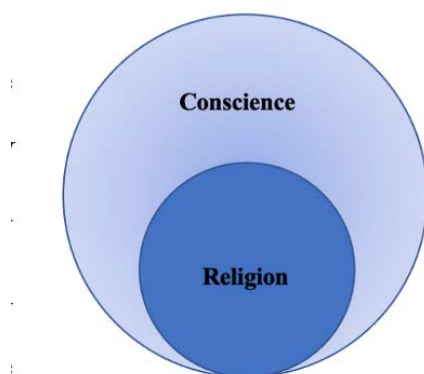


Figure 1: *Freedom of religion as a subset of freedom of conscience*

On a plain textual reading of section 2(a) of the *Charter*, Canada protects both religion and conscience as a single freedom: the “freedom of conscience and religion.”²⁰ *R v Big M Drug Mart Ltd*, the first Supreme Court case to thoroughly explore freedom of conscience and religion, arguably interpreted them in this way.²¹ Justice Dickson (as he then was) for the majority called the freedom a “single integrated concept” which protects individuals freedom “to hold and to manifest whatever beliefs and opinions

Crocker, “Freedom of Conscience: A Communal-Based Approach” (2024) 29 Appeal 25 at 37.

²⁰ *Charter*, *supra* note 11, s 2(a).

²¹ *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) [*Big M*].

his or her conscience dictates.”²² For Justice Dickson, religious beliefs are a “historically prototypical and...paradigmatic” subset of conscientious beliefs.²³ Hence every religious belief is a conscientious belief, but not vice versa. This conception of section 2(a) is driven by what Justice Dickson views as its purpose: to uphold our democracy.²⁴ As Justice Dickson states, “[t]he ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.”²⁵ Some scholars have pointed out that *Big M*, taken as a whole, is not entirely clear on the relationship between freedom of conscience and religion.²⁶ However, Justice Dickson’s clearest statement on this relationship – that of freedom of conscience and religion as a “single integrated concept” – fits best with a model of freedom of religion as a subset of freedom of conscience.²⁷

²² *Ibid* at paras 120, 123.

²³ *Ibid* at para 123.

²⁴ *Ibid* at para 122.

²⁵ *Ibid*.

²⁶ Bird, “Rediscovering Conscience”, *supra* note 19 at 51; Downie & Baylis, *supra* note 17 at 9–10.

²⁷ Other academics agree with this interpretation as well. See Victor M Muñoz-Fraticelli & Lawrence David, “Religious Institutionalism in a Canadian Context” (2015) 52:3 Osgoode Hall LJ 1049 (noting how *Big M*’s integrated concept model “subordinates the enjoyment and belief of religious freedom under the *Charter* to the ability to hold conscientious belief” at 1083); Downie & Baylis, *supra* note 17 (also reading this paragraph as suggesting “that freedom of religion is a subset of freedom of conscience” at 10); Richard Haigh & Peter Bowal, “Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis” (2012) 35:1 Dal LJ 89 (“Chief Justice Dickson referred to the possibility of conscience as a secular parallel to religion, the latter simply a ‘prototypical’ and ‘paradigmatic’ system of belief and practice that might well be subsumed under the larger body of a conscience-based liberty” at 114). The only other way to make sense of this statement is to construe freedom of conscience as a subset of freedom of religion – in other words, to read section 2(a) as protecting only religious conscience. Such a reading is directly contradicted by Justice Dickson’s statement that “expressions and manifestations of religious non-belief” are equally protected under section 2(a) (see *Big M*, *supra* note 21 at para 123). See also Bird, “Carter”, *supra* note 19 (“I do not read (nor have I encountered other scholars who read) *Big M* as clearly indicating that freedom of conscience protects only religious conscience” at 113).

Justice Dickson is not alone. Justice Bastarache, writing for the dissent in *Amselem* in 2004, took the same position when he stated that “religion is, first and foremost, a question of conscience.”²⁸ In 2009, Justice Abella’s dissent in *Hutterian Brethren* also endorsed this view by quoting with approval the statement that “religious freedom is primarily a matter of individual conscience.”²⁹ Most recently, in a 2024 case about vaccine mandates, the Supreme Court of British Columbia held that “freedom of religion may be viewed as a subset of freedom of conscience.”³⁰

Academics have also argued that freedom of religion should be conceptualized as a subset of freedom of conscience. For instance, the Bouchard-Taylor report on accommodating cultural and religious differences in Quebec stated that freedom of religion “belongs to a broader class or category of freedom of conscience.”³¹ Brian Bird also favours the “interpretation of freedom of conscience...which asserts that the freedom protects moral judgments regardless of their [religious or non-religious] source.”³² Ng, Haigh, and Kislowicz similarly argue for conceptualizing “all religious c

²⁸ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 140 [*Amselem*]. Here Bastarache’s dissent “suggests that religious beliefs and practices are protected by freedom of conscience.” See also Bird, “Rediscovering Conscience”, *supra* note 19 at 54.

²⁹ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 128 [*Hutterian Brethren*]. See also Downie & Baylis, *supra* note 17 at 17 (“Justice Abella’s text suggests a return, almost 25 years later, to the conception of freedom of conscience and religion as a single integrated concept”).

³⁰ *Hoogerbrug v British Columbia*, 2024 BCSC 794 at para 239 [*Hoogerbrug*], appeal dismissed as moot 2025 BCCA 181. See also *Harjee v Ontario*, 2022 ONSC 7033 [*Harjee*], appeal dismissed as moot 2023 ONCA 716 (“[c]entral to freedom of religion is individual conscience and the inappropriateness of government intervention to compel or constrain its manifestation” at para 57).

³¹ Quebec, Commission de Consultation sur les Pratiques d’Accommodement Reliées aux Différences Culturelles, *Building the Future: A Time for Reconciliation* (Gouvernement du Québec, 2008) (Gérard Bouchard and Charles Taylor) at 144 at note 23, online (pdf): <numerique.banq.qc.ca> [perma.cc/FS8R-A342].

³² Bird, “Carter”, *supra* note 19 at 117.

claims (or at least a significant number of them)...as belonging under the umbrella of conscience.”³³

B. Freedom of Conscience and Freedom of Religion as Separate Rights

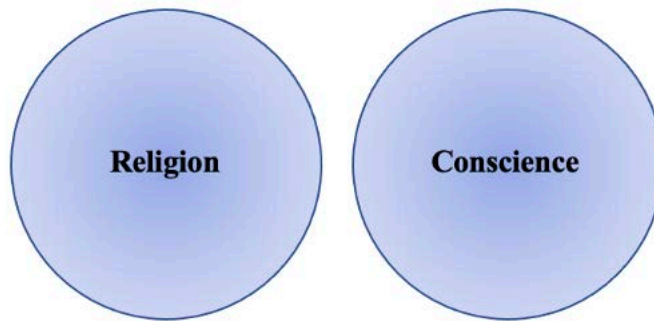


Figure 2: Freedom of religion and freedom of conscience as separate rights

While the text of s. 2(a) of the *Charter* suggests it protects a single unified right – the right to “freedom of conscience and religion” – many scholars have argued for freedom of conscience as separate from freedom of religion. Most often, these scholars argue that freedom of conscience protects non-religious or secular conscientious beliefs and practices, while freedom of religion protects religious beliefs and practices.³⁴ This argument

³³ Adrienne Ng, Richard Haigh & Howard Kislowicz, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48:3 *Alta L Rev* 679 at 703.

³⁴ See e.g. Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29:10 *SCLR* (freedom of conscience adds “constitutional protection of some non-religious belief systems” at 192); Bird, “Rediscovering Conscience”, *supra* note 19 (“academic viewpoints on freedom of conscience in the early days of the *Charter* [had] a general consensus that the target audience for freedom of conscience is non-religious persons” at 49); Richard Moon, “Conscience in the Image of Religion” in John Adenitire, ed, *Religious Beliefs*

has ample support in the case law as well. In the 1984 *Videoflicks* case, the Ontario Court of Appeal noted that “freedom of conscience would generally not have the same relationship to the beliefs or creed of an organized or at least collective group of individuals” and that “freedom of conscience necessarily includes the right not to have a religious basis for one’s conduct.”³⁵ This suggests that freedom of religion and freedom of conscience are distinct.³⁶ Similarly, in the 2004 case *Amselem*, the majority of the Supreme Court of Canada distinguished “beliefs, convictions and practices rooted in religion” from those that are “secular, socially based or conscientiously held.”³⁷ Under *Amselem*, which is still the governing authority for freedom of religion claims,³⁸ religious convictions and practices are protected under freedom of religion, while secular convictions and practices are not.³⁹ As Bird notes, this “implies that ‘conscience’ and ‘religion’ in s 2(a) do some work independently of one another.”⁴⁰ Bird also argues that Justice LeBel’s dissent in the 2009 *Hutterian Brethren* case identifies freedom of conscience “as a standalone freedom” from freedom of religion.⁴¹ Most

and Conscientious Exemptions in a Liberal State (Oxford: Hart Publishing, 2019) 73 (“Freedom of conscience, in contrast to freedom of religion, is concerned with the protection of fundamental beliefs or commitments that are not part of a religious or spiritual system” at 73) [Moon, “Conscience”].

³⁵ *Regina v Videoflicks LTD*, 1984 CanLII 44 (ONCA) [*Videoflicks*], aff’d in part *R v Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC).

³⁶ Downie & Baylis, *supra* note 17 at 12.

³⁷ *Amselem*, *supra* note 28 at para 39.

³⁸ For instance, the Supreme Court of Canada applied *Amselem*’s test regarding the scope of freedom of religion in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 63 [*Trinity Western University*].

³⁹ *Amselem*, *supra* note 28 at para 39.

⁴⁰ Bird, “Rediscovering Conscience”, *supra* note 19 at 53. See also Richard Moon, “Religious Commitment and Identity: *Syndicat Northcrest v Amselem*” (2005) 29:2 SCLR 201 (“The majority judgment of Iacobucci J. seemed to regard freedom of religion as a distinct right, and not simply as part of a more encompassing freedom of conscience and religion” at 213); Downie & Baylis, *supra* note 17 (“This text suggests that conscience and religion are distinct concepts” at 15).

⁴¹ Bird, “Rediscovering Conscience,” *supra* note 19 at 55. See also Downie & Baylis, *supra* note 17 (“Justice LeBel suggested that freedom of religion is not subsumed under other fundamental freedoms (including freedom of con-

explicitly, in 2024 the Alberta Court of King's Bench found that "the law is evolving towards, and should settle upon" an understanding of section 2(a) as protecting "'freedom of conscience *and* freedom of religion' – two related but distinct rights."⁴²

Arguably the strongest endorsement of freedom of conscience and freedom of religion as separate rights comes in *Maurice v Canada*, a case about the Correctional Service of Canada's (CSC) policies on accommodating special diets.⁴³ The CSC had a policy of authorizing special diets for religious beliefs, and accommodated Maurice's vegetarian diet when he was a member of the Hare Krishna faith.⁴⁴ However, after Maurice renounced his faith, he continued to demand a vegetarian diet based on his freedom of conscience.⁴⁵ The CSC refused to accommodate his diet without a religious belief, so Maurice brought multiple grievances which eventually came before the Federal Court.⁴⁶ Justice Campbell found in favour of Maurice: his right to freedom of conscience meant his diet should be accommodated.⁴⁷ Many academics have pointed to this case as a recognition of freedom of conscience as an independent right, separate from freedom of religion because Maurice was successful despite not relying on any religious beliefs.⁴⁸ Even beyond the result, however, Justice Campbell's language construes

science)" at 16). But see Ng, Haigh & Kislowicz, *supra* note 33, for the opposite view ("For [LeBel J], certainly, the other fundamental freedoms contained in s 2 almost cover the field of religion by proxy." at 705)

⁴² *Mills v Corporation of the City of Calgary*, 2024 ABKB 256 at para 70 [*Mills*].

⁴³ *Maurice*, *supra* note 12.

⁴⁴ *Ibid* at 1–2.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at 2.

⁴⁷ *Ibid* at para 11.

⁴⁸ See e.g. Daphne Gilbert, "Let Thy Conscience Be Thy Guide (but not *My* Guide): Physicians and the Duty to Refer" (2017) 10:2 McGill JL & Health 47 ("Maurice is a trial court decision granting a free-standing conscience right" at 75); Ryder, *supra* note 34 (Maurice is an "example of the recognition of the independent significance of freedom of conscience" at 192); Bird, "Carter", *supra* note 19 (Maurice as "adjudicat[ing] freedom of conscience in isolation from freedom of religion" at 110, footnote 13); Jodi Lazare & Camille Provencher, "Mémoire de l'équipe de la Section de droit civil" (2010) 40:2 RGD 620

section 2(a) as containing two independent rights. He notes that while the CSC's policies protected the *Charter* right to freedom of religion, "freedom of conscience had effectively been ignored" and "[t]he CSC cannot incorporate s 2(a) of the *Charter* in a piecemeal manner; *both freedoms* are to be recognized" [emphasis added].⁴⁹ Justice Campbell therefore understood section 2(a) as containing two separate freedoms: one protecting religious beliefs, and one protecting non-religious or conscientious beliefs.

C. Freedom of Conscience as a Subset of Freedom of Religion

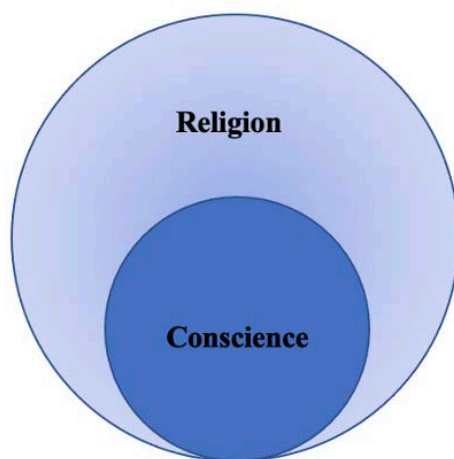


Figure 3: Freedom of conscience as a subset of freedom of religion

Finally, there is an interpretation of the relationship between freedom of religion and freedom of conscience which could exclude any type of non-

("[t]he idea that freedom of conscience exists as an independent right was also confirmed...in *Maurice*" at 631).

⁴⁹ *Maurice*, *supra* note 12 at para 8.

religious conscience at all, if the conscience protected under this freedom is read as religious conscience. This vision of freedom of conscience “largely spans the pre-*Charter* legal history,”⁵⁰ and while some post-*Charter* cases have referenced the idea of a “religious conscience,” none of these cases have explicitly stated that section 2(a) only protects religious conscience.⁵¹ This is consistent with jurisprudence regarding state neutrality under section 2(a), which has made it clear that the state must treat the religious and non-religious equally.⁵² Put another way, the “state’s duty to protect every person’s freedom of conscience and religion” means it cannot “promote the participation of certain believers or non-believers in public life to the detriment of others.”⁵³ This duty seems to negate an interpretation of s. 2(a) that excludes non-religious conscientious beliefs from protection.⁵⁴ However, while the courts have not excluded non-religious conscience through their rhetoric, the practical effect of their decisions does just that. Despite repeated calls from academics for courts to engage with freedom of conscience on its own footing, *Maurice* remains the only case to protect a non-religious conscientious belief or practice.⁵⁵

⁵⁰ Bird, “Rediscovering Conscience”, *supra* note 19 at 23.

⁵¹ *Bruker v Marcovitz*, 2007 SCC 54 at para 113 [*Bruker*]; *R v Lewis*, 1996 CanLII 3559 (BCSC) at para 65.

⁵² See e.g. *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*].

⁵³ *Ibid* at para 76.

⁵⁴ Such an interpretation would also be “contrary to the longstanding constitutional principle of large and liberal interpretation” and contrary to Canada’s international commitments (see Lazare & Provencher, *supra* note 48 at 630, 632–633).

⁵⁵ See e.g. Richard Haigh, “Should Conscience Be a Proxy for Religion in Some Cases?” in Iain T Benson & Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada, 2017) 203 (“the deliberate inclusion of ‘conscience’ in section 2(a) of the Charter ought to be taken seriously” at 217); Haigh & Bowal, *supra* note 27 (freedom of conscience “needs to be treated as more than just a synonym or substitute for religion” at 113); Bird, “Rediscovering Conscience”, *supra* note 19 (“[t]o realize societies that are just and equitable, freedom of conscience is nothing short of indispensable” at 63); Ng, Haigh & Kislowicz, *supra* note 33 (“[f]rom the standpoint of using euthanasia to develop a concept of conscience-based freedom, the decision in *Rodriguez* is a disappointment. It could have offered much more to the discussion” at 710).

III. RELATIONAL MODELS IN PRACTICE: FREEDOM OF CONSCIENCE AND COVID-19 VACCINE MANDATES

The precise relationship between freedom of conscience and freedom of religion has so far been a mostly theoretical concern. However, any resolution of this theoretical question will have practical consequences. Different relational models provide different ways to narrow the potentially limitless scope of freedom of conscience based on distinct understandings of what these rights should protect. Conscientious objections to COVID-19 vaccine mandates have renewed the call to engage with the real-world impacts of freedom of conscience. They also offer a lens through which to understand the practical consequences – both positive and negative – stemming from adopting a new model of section 2(a) that protects the secular conscience.

A. *One Test for Freedom of Conscience and Religion*

If freedom of religion is considered a subset of freedom of conscience, it follows that a single test for violations of freedom of conscience, both religious and secular, would govern. The Supreme Court's current approach to section 2(a) is incompatible with such a unified test. The *Amselem* freedom of religion test, still the governing authority, requires that a practice or belief has a nexus to religion to qualify for protection.⁵⁶ However, the *Amselem* test could be modified to encompass both rights, if a claimant was required to show:

1. They sincerely hold a belief or practice that has a nexus to conscience, whether that conscience is religious or secular.

2. The government action or provision at issue interferes in more than a trivial or insubstantial way with the claimant's ability to act in accordance with their conscientious belief.⁵⁷

⁵⁶ *Amselem*, *supra* note 28 at para 56.

⁵⁷ The BC Supreme Court adopts a similar test in *Hoogerbrug*, *supra* note 30 at para 239. Daphne Gilbert also proposes a similar test when she discusses how courts would treat a freedom of conscience challenge to physician's duty to refer patients who want to receive an abortion (see Gilbert, *supra* note 48 at 91).

1. Advantages of an Integrated Model of Freedom of Conscience and Religion

A single test for freedom of religion and conscience has an important advantage: avoiding the difficulty of trying to untangle religious and conscientious beliefs. Whether something is a conscientious belief or a religious belief is not always clear. Often, people's beliefs have both aspects, and trying to binarize them is difficult if not impossible.⁵⁸ Human rights claims for religious exemptions to vaccine mandates, which also involve "secular" concerns, illustrate this difficulty.

In *Wilfrid Laurier University*, two university employees filed grievances with the university after they were denied religious exemptions from a mandatory COVID-19 vaccination policy.⁵⁹ Both employees voiced religious objections to the vaccine, including objections to the use of fetal cells in the research and development of the vaccines and the belief that vaccines defile not only the body, but also one's relationship with God.⁶⁰ However, both employees also voiced what the Ontario Labour Arbitrator called "secular" objections to the vaccine, including a belief in *Charter*-protected bodily autonomy and a characterization of the vaccine mandate as a "threat to use an experimental injection as a term of employment."⁶¹ The university denied the accommodation request for both employees on the basis that the employees' religious beliefs, while sincere, did not ultimately relate to what was essentially a conscientious or personal choice to be unvaccinated.⁶² In one email by the university, they noted that the employee "outlined how [her] personal beliefs are influenced by religious teachings but ultimately are applied based on [her] conscience/personal choice to be unvaccinated."⁶³ Since the university was bound by the Ontario Human

⁵⁸ See e.g. *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 ("[t]o the extent the individual appellants raise issues of conscience, they are inextricably grounded in their religious beliefs" at para 85).

⁵⁹ *Wilfrid Laurier University v United Food and Commercial Workers Union*, 2022 CanLII 120371 (ONLA) (Arbitrator: Mark Wright) [*Wilfred Laurier*].

⁶⁰ *Ibid* at paras 82–83.

⁶¹ *Ibid* at paras 63.

⁶² *Ibid* at paras 19, 38.

⁶³ *Ibid* at para 38.

Rights Code, not the *Charter*, such “secular, socially based or conscientiously held beliefs are not protected.”⁶⁴

Similarly, in *IWK Health Centre*, a nurse was denied a religious exemption from a mandatory COVID-19 vaccination policy by her employer.⁶⁵ The nurse’s religious opposition to the vaccine included beliefs that the vaccine “may be used as the platform for the Mark of the Beast, which [is] the ultimate denial of Christ.”⁶⁶ Her conscientious objections included her affiliation with the Nova Scotia Civil Liberties Association, “a secular organization created to oppose coerced vaccines,” as well as concerns around the efficacy and harm of the vaccine.⁶⁷ The *IWK Health Centre* also denied the nurse’s accommodation request on the basis that her belief she could not receive the vaccine was a personal one – “a matter of conscious” [*sic*] rather than of religion.⁶⁸ In another case, a BC employer also refused to give an employee a religious exemption to their COVID-19 vaccine mandate under similar circumstances: they acknowledged that the employee had “sincerely held religious convictions,” but maintained that the “real objection to the vaccine is secular in nature.”⁶⁹

These cases all reveal the difficulty in parsing the religious from the conscientious – a difficulty faced by both the employer tasked with the decision to approve or deny the accommodation and by the arbitrator reviewing that decision.⁷⁰ In *IWK Health Centre*, the arbitrator acknowledged this

⁶⁴ *Ibid* at para 19.

⁶⁵ *Nova Scotia Nurses’ Union v IWK Health Centre*, 2022 CanLII 57410 (NSLA) (Arbitrator: Karen R Hollett) [*IWK Health Centre*].

⁶⁶ *Ibid* at para 57.

⁶⁷ *Ibid* at paras 27, 65.

⁶⁸ *Ibid* at para 44.

⁶⁹ *British Columbia Rapid Transit Company Limited v Canadian Union of Public Employees, Local 7000*, 2022 CanLII 100817 (BCLA) (Arbitrator: Randall J Noonan) at paras 44, 46 [*BC Transit*].

⁷⁰ See also *J.R. v University of Alberta*, 2024 AHRC 82 at paras 19–21. Although not about COVID-19 vaccine mandates, several cases involving objections to mask policies also show arbitrators wrestling with how to draw the line between religious and secular objections: see *The Worker v the District Managers*, 2021 BCHRT 41 [*The Worker*]; *Pelletier v 1226309 Alberta Ltd o/a*

difficulty, holding that “the secular information [the employee] presented muddled the waters in terms of the IWK’s assessment of her request for a religious exemption to the policy.”⁷¹ It is easy to understand why, when employees explicitly connected their conscience with their religion; for instance, in *Wilfred Laurier* the arbitrator noted:

that “part” of the reason for not taking a COVID-19 vaccine was medical...is not inconsistent with [the employee] being guided by her conscience not to take a COVID-19 vaccine; if anything, the two rationales reinforce each other ... [The employee] believes that to go against her conscience is to go against God and act sinfully.⁷²

The fact that the arbitrators in all three cases ultimately disagreed with the employer’s decisions to deny religious exemptions only underscores the difficulty of trying to separate secular and religious conscientious beliefs.⁷³

Community Natural Foods, 2021 AHRC 192 [*Pelletier*]. This also seems to be a difficulty with school vaccination requirements: Ruth Graham, “Vaccine Resisters Seek Religious Exemptions. But What Counts as Religious?” *The New York Times* (11 September 2021), online: <nytimes.com > [perma.cc/VHJ8-Z9JC] (“pre-pandemic research into school immunization requirements suggests that most objections described as religious to vaccines are really a matter of personal – and secular – beliefs.” at 6).

⁷¹ *IWK Health Centre*, *supra* note 65 at para 65.

⁷² *Wilfred Laurier*, *supra* note 59 at para 102. See also *IWK Health Centre*, *supra* note 65 at para 12; *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company*, 2023 CanLII 44118 (CA LA) (Arbitrator: Graham J. Clarke) (“[t]he arbitrator does not dispute...that one can have a sincerely held religious belief and also contest the COVID-19 vaccination for secular reasons...other awards have confirmed that principle” at para 105). But see footnotes 83-84 and related text for cases expressing the opposite view.

⁷³ *BC Transit*, *supra* note 69 at 87; *IWK Health Centre*, *supra* note 65 at para 68; *Wilfred Laurier*, *supra* note 59 at paras 107–8.

A core reason for this difficulty in the COVID-19 vaccine context is that many major religious figures and organizations have issued statements endorsing, rather than prohibiting, the COVID-19 vaccine.⁷⁴ The lack of a religious prohibition is not a bar to a successful claim for freedom of religion. In both *IWK Health Centre* and *Wilfred Laurier*, the arbitrators note that under *Amselem*, whether or not a religious belief will be protected does not depend on whether it is “required by official religious dogma or is in conformity with the position of religious officials.”⁷⁵ All that is required is a sincere belief with a nexus to religion.⁷⁶ Hence in *Wilfred Laurier*, the fact that neither of the Christian groups the employees identified with “requires that adherents refrain from getting vaccinated does not, by itself, undermine their respective claims for a religious exemption to the Policy, nor does it suggest that the claim lacks the required nexus to religion.”⁷⁷ Without a religious tenet that is clearly connected to the employee’s decision to refuse vaccination, it becomes more difficult to distinguish whether the choice to refuse vaccination is really related to religion or secular concerns. These cases illustrate Bruce Ryder’s provocative question: “[w]ithout any demonstrated religious connection apart from the claimant’s asserted

⁷⁴ See e.g. “On COVID vaccinations, Pope says health care is a ‘moral obligation’”, *NPR* (10 January 2022), online: <npr.org> [perma.cc/P3DP-QW7J]; Jonathan Levin, “U.S. Evangelical Leaders Preach Covid Vaccine Benefits to Their Followers”, *Bloomberg* (26 March 2021), online: <bloomberg.com> [perma.cc/XX66-VTZF]; National Muslim Task Force on COVID-19 & National Black Muslim COVID Coalition, Press Release, “Statement Regarding COVID-19 Vaccines” (21 December 2021), online: <imana.org> [perma.cc/YN2R-8YGX]; Central Conference of American Rabbis, Press Release, “Central Conference of American Rabbis Resolution on the COVID-19 Vaccination” (26 April 2021), online: <ccarnet.org> [perma.cc/4KL7-7BLV].

⁷⁵ *Amselem*, *supra* note 28 at para 46; *IWK Health Centre*, *supra* note 65 at para 51; *Wilfred Laurier*, *supra* note 59 at para 12. See also *Public Health Sudbury & Districts v Ontario Nurses’ Association*, 2022 CanLII 48440 (ON LA) (Arbitrator: Robert J. Herman) (“[t]he fact that the Latin Mass community takes the position that each member must as a matter of their own conscience determine whether getting vaccinated is condoning, cooperating with, or participating in abortion does not render the decision merely a preference or a singular belief, separate and apart from the overarching doctrine of the Latin Mass community” at para 48).

⁷⁶ *Amselem*, *supra* note 28 at para 56.

⁷⁷ *Wilfred Laurier*, *supra* note 59 at para 89.

sincere belief, is it possible to determine when personal opinions become ‘religious’?”⁷⁸

Since *IWK Health Centre*, *Wilfred Laurier*, and *BC Transit* were all decided under human rights codes, which generally do not protect freedom of conscience,⁷⁹ employees and arbitrators were forced to try to distinguish personal opinions from religious ones. However, section 2(a) of the *Charter* could avoid this difficult task by offering equal protection to all conscientiously-held beliefs, whether they are a result of a religious or non-religious conscience. This approach also aligns with the rationale from *Big M* (and endorsed by Justice Wilson in *Morgentaler* and the majority in *Amselem*) that section 2(a) exists to preserve decision-making autonomy when it comes to matters of conscience.⁸⁰ As Richard Moon, a leading Canadian scholar on freedom of conscience, points out: “[i]f freedom of religion is about individual autonomy ... 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.”⁸¹ If section 2(a) is about protecting the freedom to make personal choices, someone who believes putting medication in their body is morally wrong should not have less decision-making autonomy than someone who believes putting medication in their body goes against their religion.⁸²

⁷⁸ Ryder, *supra* note 34 at 197.

⁷⁹ Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 16.

⁸⁰ *Big M*, *supra* note 21 at para 123; *Morgentaler*, *supra* note 3 at 176–179; *Amselem*, *supra* note 28 at paras 40–42.

⁸¹ Moon, “Amselem”, *supra* note 40 at 219. See also Kerri Froc, “What gets lost in using the notwithstanding clause”, *The Canadian Bar Association National Magazine* (16 December 2019), online: <nationalmagazine.ca> [perma.cc/3R9A-TUGH] (“it would seem anomalous to have a less subjective test for conscience simply because those with fundamental moral commitments akin to religion do not associate them with belief in a higher being” at 4).

⁸² Brian Bird offers a helpful illustration of this: “[w]ould the Mennonite and the secular pacifist, both of whom refuse to bear arms for moral reasons, respectively invoke freedom of religion and freedom of conscience? They might, but this approach disregards the fact that the Mennonite and the secular pacifist

2. Disadvantages of an Integrated Model of Freedom of Conscience and Religion

If the upside to approaching freedom of religion as a subset of freedom of conscience is ease of application and equal protection of decision-making autonomy for religious and non-religious individuals, the downside is the worryingly broad scope of freedom of conscience claims. Other labour arbitration cases dealing with vaccine mandates have observed the same issue, and rejected religious exemption claims based on a religious belief that an employee must follow their conscience.⁸³ In *MacRae*, Arbitrator Rootham found an employee's religious belief that she must "follow [her] conscience" was a "conscientious objection, not a religious one".⁸⁴ He then quoted an unreported arbitral decision for the proposition that if such an objection were accepted "it could result in a potential 'religious' exemption request for anything the [employer] requires of [an employee]".⁸⁵

Such dangers of scope are partially due to the broad and subjective test for freedom of religion test under *Amselem*. Justice Binnie, writing for the dissent in *Amselem*, criticized the majority's ruling for precisely this reason, arguing it creates an imbalance between rights of an individual and the rights of other members of society given that freedom of religion is a "right of immense potential scope."⁸⁶ This kind of scope is why Moon argues that extending the *Amselem* test to freedom of conscience would be unworkable:

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... It simply cannot be the case that any practice (not tied to a religious belief system) that an indi-

share the same moral judgment – the bottom line is the same for both persons" (see Bird, "Carter", *supra* note 19 at 118).

⁸³ *MacRae v. Treasury Board (Department of Fisheries and Oceans)*, 2025 FPSL-REB 33 (CanLII) (Arbitrator: Christopher Rootham) at paras 60–63 canvasses a number of such cases.

⁸⁴ *Ibid* at para 59.

⁸⁵ *Ibid* at para. 60, quoting *Canadian Union of Public Employees, Local 129 v. The City of Pickering (Flowers)*, (unreported) May 23, 2023.

⁸⁶ *Amselem*, *supra* note 28 at para 191.

vidual considers important but not morally necessary, is protected under the Charter and subject to restriction by the state only on substantial and compelling grounds.⁸⁷

Moon's position reflects perhaps the most pressing concern with recognizing freedom of conscience: that its scope will be without limit. These concerns were present even during the Parliamentary debates before the *Charter* was passed.⁸⁸ The Canadian Association of Chiefs of Police, for example, took the position that including freedom of conscience introduced "a real risk that the word 'conscience' could be given so broad an interpretation by the courts as to make various sections of the criminal law inoperative."⁸⁹ This worry is not merely that individuals would be able to disregard any laws they did not agree with, but also that disregarding such laws would "risk harm to the vulnerable."⁹⁰

Such a risk is introduced by opposition to COVID-19 vaccine mandates, which were instituted to protect not only public health generally,⁹¹ but also to safeguard the elderly and immunocompromised.⁹² This is why vaccine

⁸⁷ Moon, "Amselem", *supra* note 40 at 215.

⁸⁸ Canada, House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 32-1, No 14 (27 November 1980), online: <primarydocuments.ca> [perma.cc/Q567-AYLQ].

⁸⁹ *Ibid* at 7.

⁹⁰ Waldron, *supra* note 80 at 202.

⁹¹ David N Fisman, Afia Amoako & Ashleigh R Tuite, "Impact of population mixing between vaccinated and unvaccinated subpopulations on infectious disease dynamics: implications for SARS-CoV-2 transmission" (2022) 194:16 CMAJ E573 ("[a]lthough risk associated with avoiding vaccination during a virulent pandemic accrues chiefly to people who are unvaccinated, their choices affect risk of viral infection among those who are vaccinated in a manner that is disproportionate to the portion of unvaccinated people in the population" at E573).

⁹² See e.g. Government of Ontario, "Ontario Makes COVID-19 Vaccination Policies Mandatory for High-Risk Settings" (17 August 2021), online: <news.ontario.ca> [perma.cc/H6HG-YPNE]; Government of British Columbia, "COVID-19 vaccination requirements for health-care system workers remain in place" (15 September 2022), online: <news.gov.bc.ca> [perma.cc/Y7L5-9L3Z].

mandates were often required for hospitals and long-term care facilities.⁹³ In addition, as the pandemic progressed it became increasingly clear that unvaccinated individuals were more likely to become seriously ill, be hospitalized, or even die from COVID-19.⁹⁴ This also adversely impacted public health by putting increased pressure on our health care system, taking away limited medical resources from other people who needed them.⁹⁵ Protection from COVID-19 can occur through herd immunity, but exemptions from vaccination threaten this protection: as a recent study found, “when clusters of exemptions [from vaccination on the basis of personal or religious belief] are accommodated, they are co-located with outbreaks of those preventable diseases.”⁹⁶ The harm to others from choosing to remain unvaccinated is one reason why people have decried the co-option of the “my body, my choice” slogan: it “fram[es] the decision to vaccinate as a singularly personal one,” like abortion, and thus “obscures its public health consequences [...] because vaccines are used to protect not just one person but a community of people by stopping the spread of a disease to those who can’t protect themselves.”⁹⁷

⁹³ Government of Ontario, *supra* note 90.

⁹⁴ Government of Canada, “COVID-19 epidemiology update: Cases following vaccination” (last visited 17 April 2023), online: <health-infobase.canada.ca> [perma.cc/GB57-FFVA].

⁹⁵ See e.g. Sean M Bagshaw et al, “Avoidable intensive care unit resource use and costs of unvaccinated patients with COVID-19: a historical population-based cohort study” (2022) 69:11 Can J Anesthesia 1399; Paige M Farrenkopf, “The Cost of Ignoring Vaccines” (2022) 95:2 Yale J Biology Med 265; Colton Fehr, “Mandatory Covid-19 Vaccinations and the *Charter*” (2022) 31:1 Const Forum Const 7 at 11.

⁹⁶ Colum P Dunne & Elmeare Spain, “Compulsory vaccination against COVID-19: a legal and ethical perspective on public good versus personal reticence” (2023) 192:1 Irish J of Medical Science 221 at 223.

⁹⁷ Bluth, *supra* note 6. While anti-choice activists may argue that abortion must also be criminalized to help fetuses who cannot protect themselves, this comparison fails under current Canadian law. A fetus only becomes a human with human rights once it is born alive: until then, a “woman and her fetus are considered ‘physically one’ person under the law”: Abortion Rights Coalition of Canada, *Position Paper #63: Fetal Rights and Canada* (Vancouver: Abortion Rights Coalition of Canada), online (pdf): <arcc-cdac.ca> [perma.cc/Z8NL-P592] at 1.

3. Limiting the Scope of 2(a) under an Integrated Model

The clear harm that can result from the choice to remain unvaccinated underscores the need for any freedom of conscience test to grapple with the potential for one person's conscientious beliefs and practices to harm others. Several mechanisms already operate within *Amselem*'s section 2(a) framework which might limit such harms. Most obviously, all *Charter* rights are limited by section 1, which subjects them "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁹⁸ But even if section 1 could deal with harm stemming from freedom of conscience *Charter* challenges, requiring the government to justify all infringements of conscientious beliefs would be unworkable. As the Ontario Superior Court of Justice noted when considering a section 2(a) challenge to a vaccine mandate, a democratic society "can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land."⁹⁹ However, there are three important ways in which the scope of the freedom can be limited under the section 2(a) test alone: the harm proviso, the requirement of a non-trivial interference, and a restrictive definition of conscience. I turn to these three limits next.

In *Big M*, Justice Dickson made it clear that the freedom "to hold and to manifest whatever beliefs and opinions his or her conscience dictates" is subject to the harm proviso: that "such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."¹⁰⁰ This harm proviso was affirmed in *Amselem*, when the Court noted that "[c]onduct which would potentially cause harm to or interference with the rights of others would not automatically be protected."¹⁰¹ On its face, the harm proviso appears to be a potential limitation on conscience-based claims to vaccine exemptions, since remaining unvaccinated can cause serious physical harm and even death to others. It could be especially useful in limiting conscience-based claims since the proviso

⁹⁸ *Charter*, *supra* note 11, s 1.

⁹⁹ *Harjee*, *supra* note 30 at para 60, citing *Christian Education South Africa v Minister of Education* [2000] ZACC 11 (S Afr) at para 35. Justice Abella cited the same text in *Bruker*, *supra* note 51 at para 74.

¹⁰⁰ *Big M*, *supra* note 21 at para 123

¹⁰¹ *Amselem*, *supra* note 28 at para 62.

is directed at acts rather than beliefs, which are arguably more central to freedom of conscience than freedom of religion.¹⁰² In fact, the basic idea of the harm proviso is already present in popular rhetoric about resistance to vaccination: as the former Toronto Board of Health chair Joe Cressy put it, “[p]eople have the fundamental right to believe what they want, but they do not have a right to endanger others”.¹⁰³

However, courts have yet to rely on the harm proviso in vaccine mandate cases. This may be because it is unclear what level of harm will exclude a belief or action from section 2(a)’s protection. In the 1995 *Children’s Aid Society* case, the majority of the Supreme Court of Canada found that a parent’s religious decision to withhold potentially lifesaving medical treatment from their children was protected under freedom of religion and any state infringement to protect the child’s life could only be justified under section 1.¹⁰⁴ Only a concurring minority of the Supreme Court argued that “a parent’s freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health, or life of the child”.¹⁰⁵

On the other hand, in 2009 the Ontario Superior Court of Justice found that a number of terrorism offences in Part II.1 of the *Criminal Code* did not infringe freedom of religion, even though they captured acts committed

¹⁰² Waldron, *supra* note 80 (“there is a broad range of the religious sphere that is, in fact, concerned with internal belief...[in contrast] conscience is a moral judgment about right and wrong that compels the actor to do something or to avoid doing something...[t]he emphasis is on the act” at 196).

¹⁰³ Boisvert, *supra* note 6. See also Mazen Maurice Guirguis, “Opinion: Is Premier Smith calling for a constitutional right to harm?”, *Calgary Herald* (3 November 2022), online: <calgaryherald.com> [perma.cc/ZHT2-E9MY] (“[t]he biggest misconception in this whole debate [over COVID-19 vaccination] is conflating a limit on harming others for an infringement on liberty”); Reid Rusonik, “There is no Charter right to endanger others”, *Toronto Star* (9 August 2021), online: <thestar.com> [perma.cc/45E2-E2UK].

¹⁰⁴ *B.(R.) v Children’s Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC) at 390–391 [*Children’s Aid Society*].

¹⁰⁵ *Ibid* at 435. Interestingly, the concurring minority opinion in *B.(R.)* also found that the parent’s refusal of the blood transfusion infringed their child’s freedom of conscience, “which arguably includes the right to live long enough to make one’s own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief” (see *ibid* at 437).

for a religious purpose, because they targeted “conduct that causes great harm to others”.¹⁰⁶ Citing *Big M*’s harm proviso, the Court affirmed that “[f]reedom of religion does not authorize or condone activities in the name of religion that injure or impair the rights of others.”¹⁰⁷ More closely related to vaccine mandates, in a recent case involving COVID-19 limitations on religious gatherings, the Manitoba Queen’s Bench approvingly quoted Manitoba’s argument that “freedom of religion [...] must be exercised with due respect for the rights of others and subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others.”¹⁰⁸ However, the Court still found an infringement of section 2(a), albeit a justified infringement under section 1.¹⁰⁹

The jurisprudence therefore remains unclear on what harm will be necessary to exclude conduct from section 2(a) protection. That said, it is hard to imagine a court would find the harms from remaining unvaccinated sufficient to invoke the harm proviso when even endangering the life of a child was insufficient in *Children’s Aid Society*.¹¹⁰ This is especially so because the harms from non-vaccination are indirect. While non-vaccination has the potential to cause serious harm or even death to others,¹¹¹ it is nearly impossible to trace COVID-19 illnesses and deaths back to any one individual’s decision to refuse the vaccine, and much of the harm from non-vaccination only materializes if many people choose to remain unvaccinated.¹¹² In these

¹⁰⁶ *R v Ahmad*, 2009 CanLII 84774 (ONSC) at para 137.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219 at para 325.

¹⁰⁹ *Ibid* at para 361.

¹¹⁰ Mark Carter argues that the harm proviso identified in *Big M* “was if not completely ‘abandoned’ then at least seriously undermined by the majority’s approval of the parent’s freedom of religion argument in *B.(R.)*” (see Mark Carter, “Debunking’ Parents’ Rights in the Canadian Constitutional Context” (2008) 86:3 Can Bar Rev 479 at 495).

¹¹¹ Lucie White, “Justification for Coercion in a Public Health Crisis: Not Just a Matter of Individual Harm” (2024) Monash Bioeth Rev (online edition, May) 1 at 5.

¹¹² For more discussion of the harms of non-vaccination, see footnotes 91–97 and accompanying text.

circumstances, it is unlikely the courts would exclude beliefs regarding non-vaccination from the scope of section 2(a) altogether.

While the harm proviso is unlikely to narrow the scope of 2(a), especially for indirect harms like non-vaccination, the requirement that an interference be non-trivial may still operate as a limiting factor.¹¹³ After all, vaccine mandates are not the same as compulsory vaccination: “what is at stake... is not forcible vaccination but rather the consequences of one’s choice to remain unvaccinated.”¹¹⁴ Courts have rejected section 2(a) arguments on this basis. For instance, in *Harjee* the Ontario Superior Court of Justice rejected the argument that a regulation requiring proof of vaccination to enter certain businesses infringed applicants’ freedom of religion.¹¹⁵ The Court noted that “[w]hile the proof of vaccination requirement imposes the consequence of not attending the specified businesses or organizations as a result of adherence to a religious objection to vaccination, it in no way constrain[s] the Applicants’ ability to hold or observe their religious beliefs.”¹¹⁶ A similar case was decided by the same court in the same year that involved restaurant owners’ opposition to vaccine and mask mandates for patrons entering businesses.¹¹⁷ The Court also held that “[the restaurant owner] says she has a conscientious objection to the mask and vaccination requirements. But that does not mean the mask and vaccination requirements infringe her freedom to hold and maintain this objection.”¹¹⁸ In these cases, the courts linked the consequences of non-vaccination to the individuals’ personal beliefs and decisions, rather than government vaccination mandates. Thus, while the consequences may be significant from the rights-holding individuals’ perspective, the government interference remains trivial.

Perhaps the most dramatic example of this type of reasoning is the 2022 case of Annette Lewis.¹¹⁹ Lewis was seeking an organ transplant ne-

¹¹³ *Amselem*, *supra* note 28 at para 58.

¹¹⁴ *Neri v Canada*, 2021 FC 1443 at para 59.

¹¹⁵ *Harjee*, *supra* note 30.

¹¹⁶ *Ibid* at para 61.

¹¹⁷ *Banas*, *supra* note 16.

¹¹⁸ *Ibid* at para 27.

¹¹⁹ *Lewis*, *supra* note 16.

cessary for her survival.¹²⁰ The hospital where she was being treated required COVID-19 vaccination for a patient to be put on the organ transplant waitlist.¹²¹ Lewis refused to be vaccinated and challenged the vaccine requirement on the basis of a number of *Charter* rights, including freedom of conscience.¹²² The Alberta Court of Appeal, finding against Lewis on all grounds, noted that “[t]he state has not deprived Ms Lewis from exercising her autonomous right to refuse to be vaccinated against COVID-19... the consequences that flow from her autonomous decision to refuse the COVID-19 vaccine were not caused by the [hospital policy].”¹²³

The courts are therefore clearly willing to exclude claims that vaccine mandates violate section 2(a) on the basis that state-imposed consequences for a religious or conscientious belief or practice do not amount to a state-caused, non-trivial interference with that belief or practice. However, I suggest that this narrowing of scope may be improper, as it fails to consider the importance of coercion to section 2(a). As Mary Anne Waldron compellingly argues:

probably the strongest claim to protection of conscience is the claim against being forced to commit an act that one believes wrong by the imposition of serious penalties against those who refuse... where the violation of conscience consists of compelling others to undertake an action against their conscience at peril of serious penalty or exclusion from important parts of our social life, only the strongest justifications can serve.¹²⁴

Vaccine mandates seem to be a textbook example of the kind of coercion Waldron views as threatening the protection of freedom of conscience. Refusing the COVID-19 vaccination excluded people from businesses, res-

¹²⁰ *Ibid* at para 1.

¹²¹ *Ibid* at para 2.

¹²² *Ibid* at para 3.

¹²³ *Ibid* at para 47. While these comments were addressed at Lewis’ section 7 *Charter* claim – her section 2(a) claim was dismissed on other grounds – they are applicable to section 2(a) insofar as that right is also concerned with decision-making autonomy, especially since section 7 is where the Court chose to address concerns about coercion (see *Ibid* at para 40).

¹²⁴ Waldron, *supra* note 80 at 200, 228.

taurants, jobs, and even life-saving medical treatment.¹²⁵ It seems to defy common sense that a court could find a mandate that effectively imposes a choice between receiving a COVID-19 vaccine against one's conscience or dying is not coercive. Yet this is precisely what the Court found in *Lewis* when they held that "the pre-transplant COVID-19 vaccine requirement is not coercive."¹²⁶ If the rationale for protecting freedom of conscience is to preserve autonomous decision-making, effectively ignoring coercion to limit the scope of section 2(a) is improper and unjustified. As the majority stated in *Big M*, "[f]reedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition, and he cannot be said to be truly free."¹²⁷

A final way to restrict the scope of section 2(a) under the *Big M* model is through defining "conscience." This is a difficult task. If religion is a hard term to define, conscience is even more so.¹²⁸ The *Oxford English Dictionary* defines conscience as "[s]enses involving consciousness of morality or what is considered right."¹²⁹ John Stuart Mill's definition is similarly expansive: conscience is the "liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological."¹³⁰ These definitions, rather than constraining the scope of conscience, appear to invite a limitless scope.

¹²⁵ See e.g. *Harjee*, *supra* note 30; *Banas*, *supra* note 16; *Wilfred Laurier*, *supra* note 59; *Lewis*, *supra* note 16.

¹²⁶ *Lewis*, *supra* note 16 at para 52.

¹²⁷ *Big M*, *supra* note 21 at para 95. See also *Roach*, *supra* note 18 at para 85, where the Federal Court of Appeal emphasized the importance of showing a "coercive burden" on one's freedom of conscience or religion as evidence of an infringement.

¹²⁸ For a thorough canvassing of the definition of "conscience," see Haigh & Bowal, *supra* note 27 at 107–113 and Crocker, *supra* note 19 at 27–28.

¹²⁹ *Oxford English Dictionary* (Oxford, UK: Oxford University Press, 2023), sub verbo "conscience".

¹³⁰ John Stuart Mill, *On Liberty On Liberty* (New York: Cambridge University Press, 2012) at 26.

While plain-language definitions of conscience may not help the scope of section 2(a), jurisprudence supports the position that conscientious beliefs must stem from an overarching belief system to be protected under section 2(a).¹³¹ In the 2024 case of *Hoogerbrug*, the BC Supreme Court stated that freedom of conscience only protected behaviours or practices “based upon ‘a set of beliefs by which one feels bound to conduct most, if not all, of one’s voluntary actions’” and “embedded in a ‘larger belief system of right and wrong.’”¹³² In 2024, the Alberta Court of King’s Bench also found that freedom of conscience protected “coherent systems of belief about the right way to live.”¹³³ Similarly, in the 2022 *Seneca College* case, the Ontario Supreme Court found that conscientious beliefs must be part of a “comprehensive moral code or value system.”¹³⁴ Scholar Bruce Ryder echoes this view when he argues that freedom of conscience should protect “non-religious belief systems that have the kinds of significance in the lives of believers analogous to the significance of religion in the lives of the devout.”¹³⁵ The requirement that conscientious choices be part of a larger overarching belief system seems to be in line with the current protection of freedom of religion, since the Court in *Amselem* defined religion as “typically involv[ing] a particular and comprehensive system of faith and worship.”¹³⁶

Requiring a connection to a larger belief system may exclude a number of conscientious-based objections to COVID-19 vaccinations. For example, in *Seneca College* the Court noted that one of the student’s objections to the COVID-19 vaccine was not part of a comprehensive belief system, since

¹³¹ *Hoogerbrug*, *supra* note 30 at para 239; *Seneca College*, *supra* note 16 at para 62; *Affleck v Ontario (AG)*, 2021 ONSC 1108 at para 51 [*Affleck*]; *Videoflicks*, *supra* note 35 at para 45.

¹³² *Hoogerbrug*, *supra* note 30 at para 239, quoting *Videoflicks*, *supra* note 35 at para 40 and *Affleck*, *supra* note 131 at para 51. See also *Spasiw v Law Society of Ontario*, 2024 ONSC 1486, where the Ontario Supreme Court expressed a section 2(a) freedom of conscience test which would require the claimant to “show that he has a sincerely held and profoundly personal belief with a moral dimension” at para 65.

¹³³ *Mills*, *supra* note 42 at para 102.

¹³⁴ *Seneca College*, *supra* note 16 at para 62.

¹³⁵ Ryder, *supra* note 34 at 193–194. The Alberta Court of King’s Bench cites this quote with approval in *Mills*, *supra* note 42 at para 90.

¹³⁶ *Amselem*, *supra* note 28 at para 39.

“as a pre-condition of entering her program, [the student] agreed to and received a vaccination for Rabies” and could not explain why she objected to the COVID-19 vaccine mandate but not the Rabies vaccine mandate.¹³⁷ Similarly, in *Hoogerbrug*, the Court found that employees’ conscientious objections to their employers’ COVID-19 vaccination mandate did not violate their *Charter* right to freedom of conscience because: “[their] convictions and assessments, primarily about safety, the approval process and freedom of choice regarding vaccination, do not rise to the level of profound and overarching moral belief systems about themselves and how to live their lives.”¹³⁸

Another way to narrow the scope of section 2(a) is to define conscience as only extending to “fundamental decisions that go to the heart of what a person is, and what he or she believes in.”¹³⁹ Using this definition, “the evaluative distinction is not between religious and secular beliefs, but rather between ‘strong evaluations’ and personal preference.”¹⁴⁰ For example, the Bouchard-Taylor report takes the position that section 2(a) protects “deep-seated religious and secular beliefs” which are distinguished “from the legitimate but less fundamental preferences that we display as individuals.”¹⁴¹ As Haigh & Bowal note, many cases on freedom of conscience have focused on whether the individual was compelled by their conscientious belief, or felt duty-bound to follow it.¹⁴² For example, in *Videoflicks*, the Ontario Court of Appeal noted that for a conscientious belief to be protected under section 2(a), the “behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one’s voluntary actions.”¹⁴³ This quote is cited with approval in *Hoogerbrug*, where the Supreme Court of British Columbia also notes that “freedom of

¹³⁷ *Seneca College*, *supra* note 16 at para 62.

¹³⁸ *Hoogerbrug*, *supra* note 30 at para 262.

¹³⁹ Haigh & Bowal, *supra* note 27 at 119.

¹⁴⁰ Dia Dabby, *Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law* (LLM Thesis, Université de Montreal, 2010) [unpublished] at 139.

¹⁴¹ Quebec, *supra* note 31 at 134.

¹⁴² Haigh & Bowal, *supra* note 27 at 117.

¹⁴³ *Videoflicks*, *supra* note 35 at para 45.

conscience is aimed at protecting serious matters of conscience based on strongly held moral ideas of right and wrong.”¹⁴⁴ Similarly, in the 2021 case *Affleck*, the Ontario Supreme Court stated that a belief must have “profound moral dimensions” to be protected under freedom of conscience.¹⁴⁵

There is an issue with this narrowing factor, however. Any requirement that conscientious beliefs be compulsory, strong, profound, or fundamental to fall within the scope of section 2(a) is inconsistent with the *Amselem* test for freedom of religion. Under *Amselem*, religious beliefs need only be sincerely held; the court made it explicit that religious beliefs do not have to be compulsory and that “both obligatory as well as voluntary expressions of faith should be protected under the...*Charter*.”¹⁴⁶ This is why the Court’s approach in *Hoogerbrug* is contradictory. The Court purports to apply the *Amselem* test, merely substituting “nexus with conscience” for “nexus with religion,” while at the same time holding that, to be protected, a conscientious belief must be serious, strong, profound, and part of a belief system which “binds” followers’ behaviour.¹⁴⁷ Therefore these requirements, while perhaps justified given the differences between conscience and religion, are inconsistent with the freedom of religion test set out in *Amselem*. One could argue that such requirements form part of the *Amselem* test for proving a belief has a “nexus to conscience.” However, these differing requirements demonstrate that there are key differences between what freedom of religion and freedom of conscience protect. These differences would be dealt with more clearly and more accurately if freedom of conscience and freedom of religion are conceptualized as distinct rights, each with its own test.

¹⁴⁴ *Hoogerbrug*, *supra* note 30 at para 239.

¹⁴⁵ *Affleck*, *supra* note 131 at para 4. See also *Mills*, *supra* note 42 : “Protected [conscientious] beliefs will be identified by their depth and systemic coherence... Lifestyle choices are, on their own, unlikely to be matters of conscience” at para 102.

¹⁴⁶ *Amselem*, *supra* note 28 at para 47.

¹⁴⁷ *Hoogerbrug*, *supra* note 30 at paras 239, 262.

B. Separating Freedom of Religion and Freedom of Conscience

If courts were to recognize freedom of religion and freedom of conscience as distinct rights, with the former protecting only non-religious beliefs and practices, then door is opened to develop a new test for freedom of conscience that does not need to mirror *Amselem*. Such an approach would be beneficial because it could take into account two differences between freedom of conscience and freedom of religion: what the two freedoms are designed to protect, and the state's position vis-à-vis the freedom. Taken together, these differences provide compelling grounds for narrowing the scope of freedom of conscience claims under section 2(a).

1. What do Freedom of Conscience and Freedom of Religion Protect?

Richard Moon contends that religious freedom is necessary as a kind of equality right based on the importance of community or group membership, not to preserve decision-making autonomy.¹⁴⁸ He is not alone in identifying a collective aspect to freedom of religion that distinguishes it from freedom of conscience. Timothy Macklem points out that while freedom of religion may be an individual right, “the collective aspect of religious practice” is an “essential element in the worth of religious conduct”.¹⁴⁹ The Supreme Court of Canada has also noted that “freedom of religion, perhaps unlike freedom of conscience, has both individual *and collective* aspects”.¹⁵⁰ According to Moon, this collective aspect is evident in the way freedom of religion is protected: insulating or excluding religious practices from politics means “treat[ing] it as a matter of (cultural) identity (similar to gender or race) rather than individual judgment.”¹⁵¹ Since conscientious beliefs or practices

¹⁴⁸ Moon, “Conscience”, *supra* note 34 at 74–75. Scholar Robert E Charney agrees with Moon’s argument and “point[s] to section 27 of the Charter as the textual affirmation” in “How Can There Be Any Sin in Sincere?: State Inquiries into Sincerity of Religious Belief” (2010) 51 SCLR 47 at 71.

¹⁴⁹ Timothy Macklem, “Faith as a Secular Value” (2000) 45 McGill LJ 1 at 29.

¹⁵⁰ *R v Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC) at para 145, emphasis added.

¹⁵¹ Moon, “Conscience”, *supra* note 34 at 74

are often not “about the status of identity groups within the larger community,” the same accommodation requirement may not extend to them.¹⁵²

Moon’s perspective offers an intriguing possibility for limiting conscience-based claims: requiring a connection to a larger group identity. This has the potential to exclude individual conscience-based claims which have no connection to a broader community. Owen Crocker suggests this type of communal limiting factor for a freedom of conscience test, based on a view of conscience which prioritizes relationality.¹⁵³ Interestingly, however, requiring a conscience-based claim have communal connections may not exclude those opposed to vaccination. A recent American study found that people “may identify with the anti-vaccine label in order to fulfill social goals [like] a sense of belonging in a broader community.”¹⁵⁴ This seems to bear out in the Canadian context too. Anti-vaxxers have been referred to as a “cult”¹⁵⁵ and, famously, a “fringe minority” by the Prime Minister during the freedom convoy protests in Ottawa.¹⁵⁶ The Prime Minister’s moniker “became somewhat of a rallying cry for protesters, showing up on signage and merchandise promoting the protests.”¹⁵⁷ Mugs, stickers, and t-shirts were available for sale online that allowed people to declare they are “proud member of a small fringe minority with unacceptable views.”¹⁵⁸ Adding a requirement that conscientious-based claims connect to a broader group

¹⁵² *Ibid* at 75.

¹⁵³ Crocker, *supra* note 19 (“the court should also require the claimant to demonstrate that their conscience-based belief has a nexus (or connects) to an external value system or ethical framework...[this framework] must incorporate a connection or appreciation to the surrounding community and its values or principles” at 44).

¹⁵⁴ Matt Motta et al, “Identifying the prevalence, correlates, and policy consequences of anti-vaccine social identity” (2021) 11:1 Politics, Groups, & Identities 108 at 108.

¹⁵⁵ See e.g. Bob Hepburn, “Disturbing rise of the cult of hard-line anti-vaxxers”, *Toronto Star* (2 February 2022), online: <thestar.com> [perma.cc/RW3Q-7HKK].

¹⁵⁶ Megan DeLaire, “Trudeau says he now regrets ‘fringe’ views remark about ‘Freedom Convoy’ protesters”, *CTV News* (17 February 2023), online: <ctvnews.ca> [perma.cc/GB6V-STBB].

¹⁵⁷ *Ibid*.

¹⁵⁸ See e.g. Etsy Canada, “Proud Member of a Small Fringe Minority with Un-

identity may simply screen out unacceptable views that are not widely held, which seems counterintuitive. However, the question remains open as to whether we think all conscientious groups represent cultural identities deserving of protection like gender, race, or religion. As Timothy Macklem points out, “not every collective endeavour is capable of furthering human well-being”¹⁵⁹ and those opposed to vaccination may well fall within this category.

An even greater difference between freedom of conscience and freedom of religion emerges if one accepts the rationale that conscientious beliefs, unlike religious ones, must be *reasoned beliefs*. In a labour arbitration case involving employees seeking a religious exemption from a vaccine mandate, the arbitrator made the fascinating statement that “I do not think [the employee’s] beliefs are less experientially religious because they are misinformed.”¹⁶⁰ However, this statement does not necessarily remain true if applied to conscientious beliefs, which arguably have a different relationship to logic and reason than religious beliefs. For instance, Macklem argues that religion is grounded in faith, by which he means what is mysterious, ineffable, and “distinct from reason” rather than bound by it.¹⁶¹ In contrast, Macklem characterizes conscientious belief as being “sustained

acceptable Views, Freedom Convoy 2022 Shirt, Thank You Truckers, Trudeau Tshirt” (18 April 2023), online: <etsy.com> [perma.cc/3QTC-2GUR].

¹⁵⁹ Macklem, *supra* note 148 at 29.

¹⁶⁰ *Island Health v United Food & Commercial Workers Local 1518* (2023), Can-LII 2827 (BCLA) at para 80 (Arbitrator: Elaine Doyle).

¹⁶¹ Macklem, *supra* note 148 at 37. See also Brian Leiter, “Why Tolerate Religion?” (2008) 25:1 Const Commentary 1 at 17 (“Professor Macklem was correct to emphasize that the distinctively religious state of mind is that of faith – that is, believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it”); Mike Madden, “Equal, but only Conceptually: Explaining the Phenomenon of Religious Losses in Contemporary Canadian Constitutional Cases Involving Conflicting Rights” (2021) 44:2 Dal LJ 545 1 at 25 (“religion is, in many ways, inherently irrational”). However, it should be noted that not all scholars agree that religion is irrational (or at least wholly irrational), and in fact the rationality of religion is a hotly-debated topic: see e.g. *Rationality and the Study of Religion*, Jeppe Sinding Jensen & Luther H Martin, eds, (New York: Routledge, 2003); Robert Audi, *Rationality and Religious Commitment* (Oxford: Oxford University Press, 2011).

by reason.”¹⁶² Similarly, Haigh and Bowal define conscience as “the application of reason, employed about questions of right and wrong, and accompanied by sentiments of approval or condemnation.”¹⁶³ Even article 1 of the United Nations Universal Declaration on Human Rights states that everyone is “endowed with reason and conscience and should act towards one another in a spirit of brotherhood”, suggesting a connection between conscience and reason in guiding behaviour.¹⁶⁴ In *Big M* the court similarly notes that individual conscience involves the ability “to make free and *informed* decisions” (emphasis added), which suggests such decisions involve the application of reason.¹⁶⁵ Downie and Baylis go so far as to propose a test for freedom of conscience which includes a requirement that a conscientious belief be reasoned, based on the rationale that the purpose of freedom of conscience is to “nurture and facilitate a dialectical process aimed at improving human ethical practice.”¹⁶⁶ Their freedom of conscience test would therefore require claimants to show, among other things, that their “conscience claim is the result of an exercise of ethical judgment that results from the exercise of due diligence and the avoidance of undue deference.”¹⁶⁷

A freedom of conscience test that includes a requirement that conscientious beliefs be based in reason, like the one Downie and Baylis propose, could limit some conscientious-based objections to vaccine mandates. Op-

¹⁶² Macklem, *supra* note 148 at 36. But see Sirota, *supra* note 19, who holds the opposing view: “The state is not authorized to discriminate between ‘correct’ and ‘incorrect’ conscientious belief. Those who are, for reasons of conscience, opposed to taking the citizenship oath may be, in the eyes of Crown law experts and judges, misunderstanding the facts about the monarchy that underlie their beliefs, but courts are no more entitled to treat these beliefs as not deserving of their solicitude than they were entitled so to do with the beliefs of the defendants in *Amselem* on the basis that these beliefs resulted from an interpretation of the Scripture which a religious authority considered mistaken” at 164.

¹⁶³ Haigh & Bowal, *supra* note 27 at 108.

¹⁶⁴ *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

¹⁶⁵ *Big M*, *supra* note 21 at para 122. See also *Mills*, *supra* note 42: “the European Court of Human Rights has held that the: ‘freedom of thought, conscience and religion denotes views that attain a certain level of cogency (...)’” at para 101.

¹⁶⁶ Downie & Baylis, *supra* note 17 at 24.

¹⁶⁷ *Ibid* at 28.

position to vaccines is often based in adherence to misinformation, or even “conspiracy theories,” and an unwillingness to look at overwhelming scientific evidence which contradicts that belief.¹⁶⁸ This sort of opposition might fall outside the scope of “reasoned” beliefs. For instance, in *Seneca College*, a case involving students opposing the school’s vaccine mandate, the court seemed to reject the possibility that misinformed beliefs regarding the safety and efficacy of COVID-19 vaccines could form the basis for a legitimate conscientious belief. In dismissing the students’ section 2(a) claim, the court noted that “if the applicants believed that the risks of COVID-19 vaccinations were known and limited – which neither of them appears to accept – their ‘conscientious’ objections to being vaccinated would fall away.”¹⁶⁹

At the same time, any requirement that a conscientious belief be “based in reason” to fall under section 2(a) protection would have to be carefully worded to avoid making the government the ultimate arbiter of truth. If any conscientious belief based on misinformation is automatically excluded from section 2(a) protection, and any information that contradicts the government’s position is automatically labelled “misinformation,” then this requirement could work to silence voices that oppose the government. This would clearly be problematic, especially since vaccine hesitancy can stem from distrust in mainstream institutions, such as the government.¹⁷⁰ A more subjective requirement like the one Downie and Baylis propose could avoid some of these issues by focusing on the reasoning process an individual goes through, rather than evaluating the objective reasonableness of their beliefs.

¹⁶⁸ See e.g. Ed Pertwee, Clarissa Simas & Heidi J Larson, “An epidemic of uncertainty: rumors, conspiracy theories and vaccine hesitancy” (2022) 28 *Nature Medicine* 456.

¹⁶⁹ *Seneca College*, *supra* note 16 at para 62. See also *The Worker* and *Pelletier*, *supra* note 70, for similar comments dismissing the potential for opinions like ‘masks are ineffective’ to be protected under freedom of religion.

¹⁷⁰ See e.g. Jeff Karoub, “Vaccine hesitancy, rooted in institutional mistrust, could stand in way of COVID-19 herd immunity” *University of Michigan News* (12 May 2021), online: <news.umich.edu> [perma.cc/X2FS-SR4F].

2. The State's Relationship to Freedom of Conscience versus Freedom of Religion

A “reasoned belief” requirement might go some way to narrowing the scope of a separate freedom of conscience test. But it does not address another important basis for conscientious objections to vaccine mandates: that they represent government overreach into personal freedom.¹⁷¹ A 2021 study by Angus Reid found that one of the top two reasons Canadians cited for not getting the COVID-19 vaccine was “personal freedom.”¹⁷² Indeed, even some people who are vaccinated still oppose vaccine mandates for the same reason:¹⁷³ the government should not be able to dictate a personal, conscientious decision like vaccination. Curiously, these objections echo much older freedom of conscience cases involving conscientious objections to seatbelt and bicycle helmet laws.¹⁷⁴ Moon, in canvassing these cases, noted that the objections were “based not on the value the claimant attaches to the particular practice...but instead on his or her views about the importance of liberty and autonomy and the legitimate scope of state power.”¹⁷⁵

But is – or should – a conscientious objection to government overreach be protected under section 2(a)? As a practical matter, the answer seems to be no: such a protection would invoke the “spectre of anarchy,” whereby “freedom of conscience would become the freedom to disregard all laws

¹⁷¹ See e.g. “Thousands join protest in Canada against Covid vaccine mandates”, *The Guardian* (30 January 2022), online: <theguardian.com> [https://perma.cc/92WZ-AYY6]. (“[t]he so-called “Freedom Convoy” started out as a rally of truckers against a vaccine requirement for cross-border drivers, but turned into a demonstration against government overreach during the pandemic with a strong anti-vaccination streak”).

¹⁷² “Angus Reid Study”, *supra* note 15 at 1.

¹⁷³ See e.g. Gabrielle Abdelmessih, “Anti-vax mandate protest: ‘my body, my choice’”, *The Oakland Post* (8 September 2021), online: <oaklandpostonline.com> [https://perma.cc/KQJ6-PR24] (“anti-vaccine mandate, not anti-vaccine”).

¹⁷⁴ See e.g. *R v Dubbin*, 2009 BCPC 164 at paras 3–4 [*Dubbin*]; *R v Locke*, 2004 ABPC 152 at para 6 [*Locke*]; and *HMTQ v Warman*, 2001 BCSC 1771 at paras 2–3 [*Warman*].

¹⁷⁵ Moon, “Conscience”, *supra* note 34 at 84.

with which we disagree.”¹⁷⁶ This question brings up a second key difference between freedom of conscience and freedom of religion: the role of the state vis-à-vis these rights. The Supreme Court has made it clear that section 2(a) does not just protect freedom of religion, but also freedom *from* religion. The state is expected to be neutral in religious matters, not favouring or endorsing one religion over another. It would be legally incorrect to discuss a state religion in Canada.

However, the same is not true for conscience. In *Morgentaler*, Justice Wilson made the provocative statement that if abortion is a matter of conscience, the question becomes: “whose conscience? Is the conscience of the woman to be paramount or the conscience of the state?”¹⁷⁷ This question presumes the state has a conscience, and that conscience is law. I agree with this presumption. The law distinguishes right from wrong by prohibiting and allowing certain behaviours, just as a conscience does. The rule of law can be understood as “a comprehensive system of belief” with the *Charter* as “the nation’s new secular religion, establishing the fundamental norms with which all laws and public policies must comply.”¹⁷⁸ As Haigh and Bowal write, “it is the ‘public conscience’ that is reflected primarily in law: for example, the highest moral order as signified by the criminal law is said to be the ‘legislated conscience of the state.’”¹⁷⁹ The Court of Appeal for British Columbia made similar comments in *Regina v M.S.* when they dismissed a freedom of religion challenge to the *Criminal Code*’s incest offence: “The criminal law fundamentally deals with right and wrong. The *Criminal Code* gives expression to our society’s moral principles...For the good and order of our community, obedience to laws such as s 155 cannot be a matter of choice governed only by private conscience.”¹⁸⁰

Of course, as a practical matter, one cannot cleanly separate out religious morality from Canada’s legal system. As the Court noted in *M.S.*, “virtually

¹⁷⁶ Ryder, *supra* note 34 at 193.

¹⁷⁷ *Morgentaler*, *supra* note 3 at 176.

¹⁷⁸ David M Brown, “Neutrality or Privilege? A Comment on Religious Freedom” (2005) 29 SCLR 221 at 231, quoting Chief Justice McLachlin and Bruce Ryder.

¹⁷⁹ Haigh & Bowal, *supra* note 27 at 112.

¹⁸⁰ *Regina v M.S.*, 1996 CanLII 17945 at paras 55–56.

all criminal proscriptions can be traced back to a religiously based moral system".¹⁸¹ Given that Canada as a country began with an "alliance between Christian religions and governmental elites", there is unsurprisingly much correlation between Canada's public conscience and Christian-based morality.¹⁸² However, despite the religious influence on Canada's "public conscience", there is still a distinction between freedom from religion (which is a constitutional obligation) and freedom from conscience (which is not).

Put another way: the law, as Canada's conscience, means the government is by definition not neutral toward an individual's conscience in the same way it is – or at least is constitutionally obligated to be – neutral toward an individual's religion.¹⁸³ I agree with Moon that freedom of conscience claims regarding government overreach may be outside the scope of section 2(a), not merely because they are "too political and too sweeping" but also because they implicitly rely on a claim to freedom from conscience that is unsupportable.¹⁸⁴ If an individual's conscience is to win out over the state's conscience, it is not because citizens have an automatic right to be free from the state's conscience as they do from any state religion, as this would undermine the rule of law. If the public is unhappy with government overreach, the proper remedy is through our democratic process, not through freedom of conscience. This is not to say that there are no matters of individual conscience which should be shielded from state interference, as such a conclusion would render the right to freedom of conscience useless. It is merely to say there is no automatic right to be free from state conscience, as legislation, in the same way as there is for "state" religion. The understanding that Canada is not legally obliged to be neutral to conscience the same way it is neutral to religion offers a final, principled way to restrict the scope of freedom of conscience by excluding general claims against government overreach.

¹⁸¹ *Ibid* at para 5.

¹⁸² Nathalie Des Rosiers, "Freedom of Religion at the Supreme Court in 2009: Multiculturalism at the Crossroads?" (2010) 51 SCLR 73 at 76.

¹⁸³ See also Moon, "Conscience", *supra* note 34 ("while freedom of conscience may (in theory) protect the individual's freedom to conscience (freedom from interference with her fundamental practices), it does not protect his or her freedom from conscience (from the imposition of the deeply held non-religious practices of others)" at 76).

¹⁸⁴ *Ibid* at 84.

3. Changing Models: Effects of Recognizing a Distinct *Charter* Right to Freedom of Conscience on Provincial Legislation

If the courts do recognize freedom of conscience as a distinct *Charter* right, with a distinct test that narrows the right's scope by drawing on the unique purposes and state-to-citizen relationship which underlie it, other legislation may also be impacted – most obviously, human rights codes. Currently, only two provinces and one territory recognize freedom of conscience in their human rights legislation, and even in those areas claimants do not appear to be relying on the freedom.¹⁸⁵ If courts do begin to recognize freedom of conscience as its own right, it might prompt claimants to actually start invoking that right. Even in provinces which do not recognize freedom of conscience, claimants might start arguing that the definition of 'creed,' which is often a protected ground of discrimination, includes non-religious conscientious beliefs.¹⁸⁶ Indeed, in two recent Ontario human rights cases involving a challenge to mask mandates claimants relied (ultimately unsuccessfully) on a non-religious creed.¹⁸⁷

An invigoration of the *Charter*-protected freedom of conscience might also prompt political pressure to amend human rights codes to add freedom

¹⁸⁵ Quebec, Saskatchewan, and Yukon all have a protection for freedom of conscience: see *Charter of Human Rights and Freedoms*, CQLR c C-12, s 3; *Human Rights Act*, RSY 2002, c 116, s 3; *Saskatchewan Human Rights Code*, c S-24.2, s 4. I searched Westlaw, LexisNexis, and CanLII's databases of Canadian human rights cases but found no examples of claimants relying on human rights protections for "freedom of conscience."

¹⁸⁶ Ontario, New Brunswick, Prince Edward Island, Nova Scotia, and Nunavut all protect 'creed' instead of or in addition to religion: Canadian Centre for Diversity and Inclusion, "Overview of Human Rights Codes by Province and Territory in Canada" (January 2018), online (pdf): <ccdi.ca> [perma.cc/M2YN-8PPF]. Ontario has explicitly stated that "creed" can include non-religious beliefs: Ontario Human Rights Commission, 'Creed' (last accessed 18 April 2022), online: <ohrc.on.ca> [perma.cc/37JP-BUST].

¹⁸⁷ *Sharma v Toronto (City)*, 2020 HRT0 949; *St-Jean v Valliere*, 2024 HRT0 795. For an explication of *Sharma* and Ontario's protection of 'creed,' see: Adam Strömbergsson-Denora, "A sliding scale between creed and religion" (17 June 2021), online: *CanLII Connects* <canliiconnects.org> [perma.cc/99UX-VX6Q].

of conscience as a protected ground,¹⁸⁸ or potentially spur constitutional challenges to human rights codes based on their under-inclusivity. While the Supreme Court made it clear in *Vriend* that human rights legislation will not necessarily have to perfectly “mirror” the *Charter*, they also noted that such legislation must still conform to the *Charter* as the “supreme law of Canada” and such conformity may mean an omission is unconstitutional (as the omission of sexual orientation was in that case).¹⁸⁹

Although a full analysis of the potential success of a constitutional challenge to the omission of freedom of conscience is beyond the scope of this paper, it is important to note that opposition to vaccine mandates shows a need for such a challenge. Many of the freedom of conscience challenges to these mandates have occurred in spaces where the *Charter* does not, or may not, apply – for instance, places of employment, universities, and hospitals. In *Lewis*, the Court found that the *Charter* did not apply to physicians deciding on policies that set out pre-conditions for organ transplant.¹⁹⁰ Similarly, in a case involving challenges to Seneca College’s vaccine mandate, the Court concluded that “the application of the *Charter* to Seneca’s actions is somewhat uncertain.”¹⁹¹ In several Alberta human rights cases involving vaccination mandates for employment, complainants made arguments based on their freedom of conscience, despite the fact the *Alberta Human Rights Act* does not protect freedom of conscience.¹⁹² These cases show the potential need for human rights codes to address freedom of conscience as well as the *Charter*.

Of course, recognizing a freedom of conscience test under the *Charter* would likely cause ripple effects to legislation beyond human rights codes.

¹⁸⁸ Waldron argues that “[t]he fundamental freedom of conscience, which is not recognized under provincial human rights legislation, will need to find its place in the interpretation and limitation of anti-discrimination codes” and notes that its absence is “likely to [become a major issue] in the future” (see *Waldron*, *supra* note 80 at 235).

¹⁸⁹ *Vriend v Alberta*, 1998 CanLII 816 at para 106.

¹⁹⁰ *Lewis*, *supra* note 16 at paras 22–24.

¹⁹¹ *Seneca College*, *supra* note 16 at para 47.

¹⁹² *Pelletier*, *supra* note 70 at para 29. See also *Nita v Northern Alberta Institute of Technology*, 2024 AHRC 96 (CanLII) at paras 19, 30; *Smart v University of Lethbridge*, 2024 AHRC 103 (CanLII) at para 9.

Many other statutes prescribe behaviour that might impact one's right to freedom of conscience, and some even carve out exemptions for this impact. Most relevant to the topic of this article, Ontario's *Immunization of School Pupils Act* and British Columbia's *Public Health Act* both contain conscience-based exemptions to otherwise-mandatory vaccinations.¹⁹³ A *Charter* test for freedom of conscience could inform how such exemptions are interpreted and applied. It could also open the door to challenge similar legislation which does not contain conscience-based exemptions.¹⁹⁴

IV. CONCLUSION

The unprecedented measures the government took to protect public health during the COVID-19 pandemic brought renewed attention to the *Charter* right to "freedom of conscience and religion,"¹⁹⁵ as matters of individual conscience became matters of public conscience, including legislation and policy. Opposition to COVID-19 mandates quickly became one of the focal points of this renewed attention, exemplified by the co-opting of the pro-choice slogan "my body, my choice."¹⁹⁶ This opposition not only demands re-engagement with the oft-forgotten freedom of conscience, but also offers us a valuable opportunity to re-evaluate what relational model of section 2(a) we should adopt amidst the current model uncertainty. While expanding the current *Amselem* test for freedom of religion to encompass a single, integrated freedom of conscience and religion right may have practical advantages, including avoiding the difficult task of separating religious from secular conscientious beliefs, it does not account for core differences between conscience and religion necessary to create a workable scope for freedom of conscience. Treating freedom of conscience as a separate right, with its own test, is the most theoretically and practically sound course.

¹⁹³ *Immunization of School Pupils Act*, RSO 1990, c I.1, s 3(3); *Public Health Act*, SBC 2008, c 28, s 4(b).

¹⁹⁴ For a more detailed analysis of mandatory immunization legislation and s. 2(a) of the *Charter*, see: Mariette Brennan, Kumanan Wilson & Vanessa Gruben, "Mandatory Childhood Immunization Programs: Is There Still a Role for Religious and Conscience Belief Exemptions?" (2021) 58:3 *Alta L Rev* 621 at 636–47.

¹⁹⁵ *Charter*, *supra* note 11, s 2(a).

¹⁹⁶ Walberg, *supra* note 1 at 30.

Work remains to be done to formulate and apply a specific test for freedom of conscience which is both justified, considering its purpose and relationship to both freedom of religion and to the state, and justifiable, considering the consequences and potential harm of challenging laws often designed to protect others. The consequences of such a test should also be considered in more contexts than just COVID-19 vaccination mandates, building on and synthesizing other scholars' work on freedom of conscience in areas such as whistleblowing,¹⁹⁷ medically-assisted dying,¹⁹⁸ conscientious objection from military combat,¹⁹⁹ and abortion.²⁰⁰ While formulating a new test is a novel and uncertain endeavour, it offers both more avenues and more justifications for limiting the potentially-limitless scope of freedom of conscience, while finally giving this forgotten right the attention it deserves.

¹⁹⁷ Haigh & Bowal, *supra* note 27.

¹⁹⁸ Downie & Baylis, *supra* note 17.

¹⁹⁹ Bird, "Rediscovering Conscience", *supra* note 19.

²⁰⁰ Gilbert, *supra* note 48.