A response to the political argument against religious conscience

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Abstract

In response to scholars who argue that religious conscience should not be accommodated if it is deemed "political," this paper argues that individuals who seek accommodation are in fact adopting a personal, deeply moral stance rather than a political one. To reject the conscientiously held positions of individuals such as civil marriage commissioners is to run counter to what we have long understood liberal democracy to affirm with regard to accommodating conscientious objectors. Such a rejection excludes these persons from full participation and represents a failure to treat them as dignified citizens with equal value in society.

Keywords accommodation, marriage commissioners, religious freedom, secularization.

1. Introduction

Taking a stance that is emblematic of modern secularized societies, Richard Moon (2018) argues that accommodation of conscience or religious belief ought not to extend to accommodating those practices which, in his view, call into question the law and the civil rights of others. Rather than characterizing such practices as conscientious, he describes them as political in nature and therefore not worthy of accommodation. However, if the secular state can determine which conscientious beliefs are "political," it can undermine the ability of religious adherents to follow their consciences. Rather, religious adherents should be able to determine their own beliefs and practices.

Moon uses the example of the conscientious objections claim made by marriage commissioners who decline to perform same-sex marriages. Moon characterizes their claim as a political statement against the newly acquired civil right of same-sex partners to be married, and not as a matter of personal conviction. Rejecting the nexus with deeply held religious or conscientious beliefs in this case allows Moon to argue that such a claim is not worthy of accommodation.

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This paper explains why I disagree with Moon's characterization and why it poses a significant threat to the exercise of religious conscience. Although Moon has sought to justify his argument in superficially liberal terms, I contend that his position is ultimately illiberal and undemocratic and violates freedom of religion or belief.

Moon's arguments are paradigmatic of a new orthodoxy in the secular West. In the area of sexual ethics, he dismisses conscientious objections to the newly acquired civil right to same-sex marriage on the basis of the presumed moral rightness of the law. His argument rests on two underlying assumptions: (a) upon the passage of a law in a liberal democracy, there can be no further challenge to the law; and (b) a free and democratic society cannot ever be said to have made an immoral law. In other words, if something is legal, it is moral and unassailable. Those two propositions are not persuasive, and they certainly do not preclude accommodation of conscientious objectors.

Moon's position is superficially attractive because of his use of liberal democratic terms, including individual freedom. The pursuit of individual freedom is the identifiable marker of democracy. Herein lies the genius of the modern nation-state that rejects the whimsical execution of power by authoritarian regimes. Rule of law, popular sovereignty, and representative government are all indicators of the emphasis on individual freedom that has made modern democracies the freest jurisdictions of the world.

At first glance, Moon's position appears to advance this ideal of democratic liberty, yet his argument is unsustainable upon closer examination. To reject the conscientiously held positions of individuals who hold minority religious views and often belong to minority religious groups is to run counter to what we have long understood liberal democracy to affirm. Liberal democracies, in their most "liberal" manifestation of freedom, support the right of people to live in accordance with their conscientiously held beliefs. Nevertheless, Moon presupposes that same-sex marriage is fundamentally an issue of equality that is morally unassailable and that no conscientious position to the contrary is worthy of accommodation. His is the current normative position in Canada.

In short, the normative moral presuppositions on same-sex marriage are at the heart of this debate. Could it be that marriage commissioners who object to performing same-sex marriages are not carrying out a political act but are simply adhering to a different moral perspective than those who support the liberalization of the concept of marriage? Is it not the liberal tradition to allow room for reasonable people to disagree on this and other moral issues?

2. The essence of conscientious objection

For the purposes of this paper, the term "conscientious objector" refers to a person who strives to maintain faith with her or his personal convictions. This conception

reflects a philosophical and historical understanding of conscience that has come to inform our notion of freedom within a liberal society.

Every human being must wrestle with four fundamental questions: Where did I come from? Where am I going? Why am I here? What must I do to fulfill my purpose? The answers to these probing questions – whether they involve or reject the transcendent – can be reached only through a process of deep reflection on what it means to be human. Observing that similar questions on the nature and purpose of life can be found in a variety of cultures and religious traditions, Pope John Paul II (1998) noted that these fundamental questions "have their common source in the quest for meaning which has always compelled the human heart. In fact, the answer given to these questions decides the direction which people seek to give to their lives."

Historically, free and democratic countries, through much trial and error, have concluded that society is best served when each citizen has the liberty to determine the answers to these fundamental questions and the ability to live accordingly.[2] The individual – not the state – determines how best to live a fulfilling life. As former Chief Justice Brian Dickson of the Supreme Court of Canada pointed out, "An emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The 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" (*R. v. Big M Drug Mart* 1985: para. 122).

The very core of individual conscience, then, entails living one's life in congruence with the truth of those personal decisions made regardless of majority opinion. Failure to do so can be costly. As Brian Bird (2019:14) argues, conscience "enables individuals to lead lives that are coherent narratives – and the stakes can be high when that freedom is jeopardized." He further explains, "A person who violates her conscience injures her integrity and identity, and suffers harm. The experience of betraying our moral commitments … can cause psychological harm, erode one's sense of self-worth, and injure dignity" (18).

According to Martin van Creveld (2015:7), "Conscience should not be confused with morality: that is, the ability to distinguish between good and evil. Rather, it is that part of the human soul, built-in or acquired, that makes us behave and act on the basis of that distinction." Creveld's definition presumes that the individual has a clear understanding of what is morally appropriate. The individual's internal compass, the conscience, then directs him or her to pursue the right course. Failure to carry out this internal directive has huge costs that often outweigh the violation of the conscience, even where the external repercussions for dissent are likewise costly.

[2] See, e.g., Article 18 of the *International Covenant on Civil and Political Rights* (1966).

Paul Strohm (2011:1) observes, "Conscience lives in time and its most prepossessing trait is a capacity for constant self-modification and adaption to new circumstances, a limitless responsiveness to new and urgent conditions of relevance." Each generation presents new problems for citizens as they navigate the moral context, from worshipping the Roman emperor to taking up arms. For some, these do not even register as dilemmas; for others, these issues may provoke an intense personal conflict between social pressures and spiritual imperatives.

2.1 Conscience before modernity

The idea of conscience was discussed extensively by the ancient Greeks and Romans.[3] The word itself is rooted in the Latin *conscientia* – that is, knowledge (scientia) held together with (con) or in common with others (Strom 2011:10). Rome's great politician, Cicero, ascribed to Epicurus the idea that conscience causes us to be watched, thereby averting wrongdoing and directing us to do right (Sorabji 2014:24).

Later, St. Augustine of Hippo developed the Apostle Paul's teaching in Romans 2:14-16 that God's law is written on human hearts. In his *Confessions*, Augustine warned his friend Maximin not to fear the censure or power of "any man," but to recognize that what is deemed an honour in this world will ultimately be assessed at the judgment seat of Christ (Schaff 2004:243). Ancient authority, therefore, holds firm the proposition that a person convicted by conscience is not swayed by majority opinion.

Although the medieval Church attempted to dictate the consciences of adherents, some contended for the right of individuals to make decisions based on their own search for truth as found in the Scriptures. For instance, John Wyclif in the fourteenth century argued that individual Christians should be free to determine their own consciences independent of the Church, "[f]or each one shall bear his own load" (Galatians 6:5, NKJV; see Strohm 2011:16).

Martin Luther epitomized this shift. He believed that conscience, tempered by Scripture and the Holy Spirit speaking to the heart, directed the individual. When summoned to the Diet of Worms in 1521 and ordered to recant his criticisms of the Church, Luther insisted, "My conscience is bound in the word of God: I can not and will not recant any thing, since it is unsafe and dangerous to do any thing against the conscience" (Schaff 1995 [1910]:304-305).

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[3] Sorabji (2014:36) identifies eight attributes of moral conscience that have "remained comparatively stable" for two thousand years. They include personal self-awareness, retrospective and prospective functions, secular as well as religious dimensions, and a conception of conscience as "very much concerned with what was or would be wrong for the *particular* individual in a *particular* context."

Erasmus, in opposition to Luther, saw conscience as "an inborn faculty of rational choice among competing alternatives" (Strom 2011:25). By contrast, Luther's individualistic view of conscience had the Holy Spirit writing on the human heart "not doubts or mere opinions" but "assertions more sure and certain than life itself and all experience" (Strom 2011:25). It was Luther's individual conscience, so guided by the Holy Spirit, that undergirded the political and social developments of the Reformation. However, a conscience determined solely by the individual, whether innate, as Erasmus supposed, or guided by the Holy Spirit, as Luther argued, could nevertheless be manipulated to side with sinful self-interest of the individual rather than truth.

2.2 Bonhoeffer and conscience

Continuing this line of thought in the twentieth century, Dietrich Bonhoeffer, a Lutheran pastor in Germany, was driven by his conscience to resist the Nazi regime during World War II. While imprisoned in 1944, he wrote his well-known poem "Stations on the Way to Freedom" (2009:512-513). In the second stanza, he urged readers to "boldly reach for the real," since "in action alone is found freedom." Bonhoeffer's internal compass required disciplined action in "seeking the right thing." He "[d]ared to quit anxious faltering and enter the storm of events" by standing firm in his faith (2009:512-513). Today, many would say that Bonhoeffer was on the right side of history for courageously opposing the atrocities of Nazi Germany. However, that was not his perspective or goal. Rather, he was true to his conscientious conviction that he must follow "God's good commandments, / then true freedom will come and embrace your spirit, rejoicing" (2009:512-513).

Bonhoeffer (2009:40) stated, "The man of conscience has no one but himself when resisting the superior might of predicaments that demand a decision." He realized that more than conscience is required to enable a person to do the right thing. The prerequisite is to know right from wrong; as van Creveld noted, conscience is distinct from morality. The person who stands firm, said Bonhoeffer, is the one who is prepared to sacrifice everything else "when, in faith and in relationship to God alone, he is called to obedient and responsible action. Such a person is the responsible one, whose life is to be nothing but a response to God's question and call" (40).

Bonhoeffer presupposes that the conscientious objector is concerned with his or her own personal conscience, not the opinions of others. The objector is committed to doing the right thing *despite* the political climate and outcome. No amount of political manipulation changes the resolve of such people. It is a matter of being faithful to the truth they live by. They do not seek to align their consciences with the ideological perspective of the majority but, rather, to live in accordance with their principles.

2.3 Civil servants and conscientious objection

The image of civil servants who stand their moral ground in the face of government infringement of their consciences is not a new or foreign concept (Mueller 2019:462-463). Religious conscience continues to play an important role in giving the civil servant the strength to stand firm. For example, when Jesselyn Radack, a lawyer at the U.S. Department of Justice advising on ethics and professional responsibility, observed malfeasance within the department and spoke out against it, she was vilified by the government. However, she remembered her bat mitzvah at age 13, at which she heard the admonition, "*Lo ti'eh aharay rabim*" ("Thou shalt not follow a multitude to do evil"). Tom Mueller (2019:488) recounts:

> This verse warns not to follow the majority of the people blindly for evil purposes, especially to disrupt justice," she had told the congregation that day. "I hope that I will always be able to make the right decisions about my actions." Seventeen years later, she decided to live by these words. "Jewish teachings were always there in the deep recesses of my mind," she says today. "I'm not sure how much they guided my choices, and how much they simply affirmed what I had already decided to do.

This determination to make the right decisions – which may be admired or berated depending on how the dissenting position lines up with current secular opinions – reveals the strength of conscience, which takes precedence over every external pressure to conform.

3. Moon's argument

Moon suggests a methodology to be used in evaluating whether to accommodate a particular claim of conscientious objection. This involves evaluating "the proximity of the act … which the conscientious objector refuses to perform, to the act … which he/she believes is immoral in itself" (2018:275). According to Moon, "The more remote the act (required of the objector) is from the necessarily 'immoral act' the more likely it is that the courts will view the objector's refusal as a statement about how others should act or the morality of the law (that recognises same-sex marriage), rather than simply as an expression of personal conscience" (2018:275).

Moon argues that the state cannot be neutral on civic matters such as homelessness, same-sex marriage, and reproductive rights. Religious beliefs on these issues can be neither excluded nor insulated from political decision-making. In Moon's assessment, "If the state prohibits discrimination against gays [and] lesbians in the provision of public or market services (rejecting the view that same-sex relationships are immoral), an individual who disagrees with the law has no constitutional right to be exempted from the prohibition" (2018:276).

The state is neutral, says Moon, regarding beliefs or practices that are "spiritual" – that is, "personal to the individual or internal to the spiritual community" (2018:276). However, beliefs that play a role in political decision making qualify as civic or public and can be restricted by law (2018:276). This distinction between personal or spiritual views on one hand and public or civic views on the other raises the question "whether the objection should be viewed as an expression of personal conscience or instead as a position on a civic issue (on the morality of the actions of others)" (2018:276).

Moon therefore posits that the conscientious objections of marriage commissioners to performing same-sex civil marriages should not be accommodated because these objections "rest on a belief not about how the claimant should live his/her personal life but instead on how others in the community should act and what the law should say" (2018:276). Persons holding such positions are "legally required to facilitate the 'immoral' act of another only because they occupy a particular civic position or exercise a form of public power. In their private lives, they may decide whether or not they wish to enter or support a same-sex marriage or relationship; but in their civic role they must act in accordance with their public duties" (2018:276).

Moon observes that Canadian courts have accommodated spiritual practices concerning dress, diet, and holidays "if this can be done without significant costs to public policy or to the interests of others" (2018:279). These accommodations are due to the pragmatic concern that minority religions not be marginalized. The justification is to prevent social conflict when adherents of minority religions express their cultural identity. But such accommodation "can never be more than minor or marginal" since it does not have large civic interests at stake (2018:279).

Moon argues that courts "have not, and should not" accommodate beliefs and practices that "address civic concerns – the rights and interests of others in the community" (2018:280). Though religious, these beliefs are "political positions that are subject to the give-and-take of ordinary democratic decision-making" (2018:280). Courts require states to make minor compromises at the margins of the law but do not exempt a belief or practice contrary to public norms. Hence, there is no "constitutional claim [for a marriage commissioner] to be exempted from his/her public duties under non-discrimination law" (2018:282).

Therefore, Moon understands the courts' role to be to determine whether the individual's objection to performing an act is an expression of personal conscience with only a minimal impact on public policy. If it is, then it should be accommodated. But if the court finds that the objection is a political or civic position about the actions of others or the merits of the law, then "that falls outside the scope of religious freedom" (2018:282) and should not be accommodated.

4. Objections to Moon's assessment of conscience

Moon's astute and careful scholarship in law and religion is comprehensive and has had a profound impact in the development of Canadian law, as evidenced by the citations of his work by the courts, including the Supreme Court of Canada (SCC).[4] His scholarship has closely followed and favoured the advancement of human rights in relation to sexual orientation and gender identity. He, along with others, advocated for an expanded definition of marriage and a curtailment of the perceived bias in the law toward traditional marriage in favor of a more progressive view of marriage. Given his focus on human rights, it is inexplicable that Moon argues so strenuously against freedom of conscience and religion.

4.1 Failure to appreciate the current context

The definition of marriage was changed in Canada through a series of court cases between 2000 and 2005. In 2005, the Canadian Parliament passed the Civil Marriage Act, changing the definition of marriage from "between a man and a woman" to "between two persons." The Act includes several protections for religious freedom: a preamble stating that holding diverse views on marriage is "not against the public interest," a statement that clergy are not required to solemnize a marriage contrary to their religious beliefs, and a guarantee that federal government benefits will not be withdrawn on the basis of diverse views of marriage.

Despite the protections contained in the Civil Marriage Act, the expanded definition of marriage has made it increasingly difficult for religious individuals and organizations who maintain traditional views of marriage and sexuality to practice their beliefs as societal disapproval grows. In other words, their conscientiously held beliefs on marriage are now subject to intense secular scrutiny. This trend is evident in both political and legal settings. For instance, the federal government denied Canada Summer Jobs grants to religious organizations that held the traditional definition of marriage (Bussey 2019a; see also *Redeemer University College v. Canada (Employment, Workforce Development and Labour)* 2021). Similarly, Trinity Western University was denied approval to establish a law school because the SCC held that the law societies were entitled to impose their own moral view of marriage on TWU. The court issued this decision despite the fact that, as a private religious university, TWU was exempt from human rights law (in other words, provincial legislation accommodated its religious practices) and even though TWU had won a similar case dealing with its education degree program seventeen years

[4] See, e.g., *S. L. v. Commission scolaire des Chênes* 2012: para. 30; *Mouvement laïque québécois v. Saguenay (City)* 2015: paras. 73 and 131.

before. The Court thereby ignored TWU's rights, under the Canadian Charter of Rights and Freedoms (hereafter the Charter), to religious freedom.[5]

Indeed, the Supreme Court of Canada went so far as to call TWU's admissions policy – which required students to abide by a "Community Covenant" that defined marriage in traditional terms – "degrading and disrespectful" (*Law Society of British Columbia v. Trinity Western University* 2018: para. 101). The Court characterized TWU as requiring its students to "behave contrary to [their] sexual identity" (para. 101). This, said the Court, "offends the public perception that freedom of religion includes freedom from religion" (para. 101). Meanwhile, the Court gave limited consideration to religious identity, instead suggesting that the impact on the evangelical community was of "minor significance" (para. 104). The majority did not acknowledge that, by deferring to the law societies in their interpretation of the public interest, the Court sanctioned the imposition of a secular morality on TWU.

The accommodation of religious freedom and conscience in Canada was once seen as a cornerstone of liberal democratic thought (see *Saumur v. City of Quebec* 1953: 329; *R. v. Big M Drug Mart* 1985: para. 122). However, that perception has changed within the legal academy, the legal profession, and the media (Bussey 2019b). The growing antipathy toward the Christian community has been evidenced by the relative silence toward, or even the actual support of, the burning and vandalism of 45 Christian churches (many of them community centers or historic landmarks) throughout Canada in June and July 2021.[6] Ostensibly, the violence was in response to the injustice and suffering caused by the Indigenous residential school system in the nineteenth and twentieth centuries. However, such aggression must be seen within the context of a Canadian elite that has grown increasingly hostile in its rhetoric against conservative Christian communities. Conscientious claims based on religious beliefs are now seen as claims to maintain a "right to discriminate" and

[5] Given the tenor of submissions, editorials, and academic papers published during and after the litigation, it is likely that Moon, and most of the legal establishment, would dispute my characterization of the TWU law school cases, which I have outlined in numerous published pieces. I remain undeterred in my view of the TWU matter. The Supreme Court of Canada's TWU decisions were a miscarriage of justice and have laid the groundwork for increased religious tension in Canada that will take generations to resolve.

[6] See the discussion regarding Harsha Walia's tweet urging "Burn it all down" in response to the arson attacks on Christian churches (Bramham 2021). After fierce opposition, Walia claimed her comment was not meant literally, despite the clear reference to the burning of churches. She subsequently resigned her position with the BC Civil Liberties Association. Prime Minister Trudeau waited a week to respond before describing the burnings as understandable given the abuses at residential schools that had been sponsored in part by the federal government, working with churches in the nineteenth and twentieth centuries. Heidi Matthews (2021), Harvard Law School doctoral candidate and an assistant professor of law at Osgoode Hall Law School, tweeted that the arson reflected "a right of resistance to extreme and systemic injustice."

"oppress" within colonial systems of racism. To question this normative view in any way risks civil and social wrath.[7]

Within this milieu, Moon argues against the rights of a very small number of marriage commissioners who refuse to solemnize same-sex marriages that would violate their consciences.

4.2 Law should be made through democratic process, not judicial fiat

Moon's position implies that once civil rights are granted by law in a liberal democracy, then all public debate on those rights must stop. Not only must debate cease, but individuals (especially those who perform public functions) must comply by carrying out their duties regardless of personal convictions about what they consider an unconscionable public act. In other words, there is no margin for any incongruence or deviation from the accepted public narrative by any public official. Nor, for that matter, is there space for private individuals to claim an accommodation that violates or interferes with the accepted public narrative.

To understand why Moon's position is itself incongruent with the notion of a free and democratic society, we must examine more closely what we mean by "free and democratic." Although my position is at odds with "Canada's progressive legal monoculture,"[8] I maintain that a free and democratic society is always open for debate and discussion. No legislative act, no constitution, and certainly no law declared from a judicial bench is exempt from critical discussion, analysis, and advocacy to change or remove a provision by lawful means, regardless of the subject matter.

Canada's Supreme Court observed that "a functioning democracy requires a continuous process of discussion" (*Reference re Secession of Quebec* 1998: para. 68). Our democratic institutions rest "ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec* 1953: para. 330) that:

> necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live. (*Reference re Secession of Quebec* 1998: para. 68)

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[7] Consider the treatment of Canadian Senator Lynn Beyak (see Tasker 2021).

[8] Sean Speer (2021) used this term in his observation regarding Justice Russell Brown being at odds with the current normative views of the legal profession.

Just because a law has been made, just because a constitution has been ratified, just because a court has issued an order, this does not mean discussion stops. In a healthy democracy, it continues. To be free, we must have the right to speak our minds about matters that lie at the heart of who we are. And we have the right to seek change – if we can convince the appropriate powers that change is necessary. This is why laws are debated and amended or repealed, court judgments are appealed, or a legislative override may be declared.

Moon would have us accept the judicial rulings as final and non-negotiable. Only legislation that carried out the judicial fiat would be deemed appropriate, as was the Civil Marriage Act, which implemented the judicial revolution of marriage (Larocque 2006). To say that the redefinition of marriage was "democratic," meaning that it resulted from representative democracy at work in Parliament, is only a partial truth.

Parliament has, since the advent of the Charter, responded to an active judiciary. As Donald Savoie noted, "Since the Charter's introduction, we have witnessed a remarkable transfer of power to the courts 'from Parliament, Cabinet and the government.' They can tell Parliament or provincial legislative assemblies to act and then specify how long they have to act" (2019:309, quoting Macfarlane 2013:12). Judges have become "high-profile political actors" (Savoie 2019:309).

Further, I believe that the current norm described by Moon, though politically correct in the contemporary context, is not sustainable in the long term. Indeed, the speed and ferocity with which the judiciary has rejected conservative[9] legal principles is bound to jam the wheels of democratic governance, simply because the Supreme Court of Canada (and other courts) is jettisoning the legal framework that has provided stability, without regard for the long-term implications.

Current Chief Justice Richard Wagner of the Supreme Court of Canada favors a progressive approach to the law, whereby the courts are empowered to interpret the Canadian constitution in light of current social conditions. He observes:

> I don't think that we should have a strict interpretation of the meaning of words that were written say 150 years ago but we need to look at those texts [as] they're evolving with society. They are evolving with the moral values and expectations of society. So, the context at the time that the court makes its [decision] really is very important. (CPAC 2018)

[9] I use "conservative" not in reference to a political party but in reference to a traditional legal interpretation that limits the interposition of the judge's subjective view in interpreting the law. I acknowledge the objection by critical theorists that there was never a time of non-subjective judging. However, I suggest that there was previously a general aspiration toward being a non-biased judge. Today, many in the legal profession and in the judiciary reject any such conservative notion and openly accept judge-made law as if the courts are quasi-legislators.

How the court is to ascertain the "expectations of society" has not been spelled out. For example, the court is unelected and does not conduct public opinion surveys. Chief Justice Wagner sees the law as malleable according to a judge's subjective view of what society's values and expectations may be at the time.[10]

This approach will not work in the long term, for it leads to an ever-increasing dissonance between the Constitution and judicial reinterpretation. The constant revision of the law by judicial fiat makes it increasingly difficult for average citizens to voice their concerns or opinions before the law is implemented, as Moon suggests ought to be done by conscientious objectors. Judge-made law does not permit public debate as is required in legislatures before laws are passed. For that reason alone, the judiciary should allow the Constitution to be amended only in accordance with the amending formula.[11]

4.3 The fallacy of the secularization thesis

One source of the disregard for religiously motivated conscience may be found in the secularization thesis. Recognizing the overall failure of the theory – which postulated the diminution of religion as education increased in liberal democracies – sociologist Peter Berger nevertheless maintained that certain segments of society still hold to the secularization theory and act accordingly. Describing the humanities and social sciences, Berger (1999:34) wrote:

> This subculture is the principal 'carrier' of progressive, enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as they control the institutions that provide the 'official' definitions of reality, notably the educational system, the media of mass communication and the higher reaches of the legal system.

Therefore, it is not surprising that both the judiciary and legal scholars such as Moon have a diminished view of conscience. From the secularized view, there is nothing to be gained by accommodating religious conscience on these matters, and everything to be gained by supporting an expanding recognition of civil rights. This explains why, from Moon's perspective, the objections are deemed political and not religious. Public officials are expected to comply with secular demands regardless

[10] Of course, judges would not say that their position is "subjective." Perhaps Chief Justice Wagner would be more likely to accept the wording of Justice Robert J. Sharpe, who stated that when Parliament adopted the Charter the judiciary was merely accepting the invitation to "meet the expectations of justice, deeply felt by the Canadian public" (2018:234). However, Justice Sharpe also believes that judges should be responsible for "applying the Charter in a generous spirit … with a judicious sense of restraint and deference to legislative choices" (236).

[11] See "Procedure for Amending Constitution of Canada," Part V, ss 38-49 of The Constitution Act, 1982.

of their conscientious beliefs; when a public official does not perform a marriage ceremony because of conscience, it is taken as a great offense.

The secular perspective overlooks the fact that the conscientious objection does not take away from the civil right. Accommodating the objecting marriage commissioner does not mean that a couple cannot be married. It simply means the marriage commissioner is not coerced into acting against her or his conscience. However, the secularization of the courts and the legal academy has now reached a point of hypersensitivity to any opposing view. The mere existence of a public official who cannot perform a marriage due to conscience is itself seen as a source of dignitary harm. This is said to be so even if the government implements a system where there is no identification – or even mention – of an objecting marriage commissioner. According to Justice Khaladkar in a decision ruling against accommodation of a conscientious marriage commissioner (*Dichmont Estate v. Newfoundland and Labrador (Government Services and Lands)* 2021: para. 44), a "single point of entry" system burdens the province "to hide" discrimination and subjects minorities to "rejection", even if they are completely unaware of the accommodation.

4.4 The harm of violating conscience rights

When the focus moves from the state's effort to ensure that a couple can be married to attempting to force a particular marriage commissioner to perform the marriage, then energy is wasted and harm is done to the body politic. At this point, the state apparatus shifts to coercion of the marriage commissioner's conscience. Such an idea is, as Bird (2021) points out, "a risky path to follow." Although Bird was addressing the state's actions to impose its views on healthcare workers, his argument is equally applicable to any public official. Appropriating his warning for the present context, I would suggest that divorcing public officials from ethical considerations "should alarm all of us. Finalizing this divorce will lead to disastrous consequences for individuals and society alike" (Bird 2021).

Have we not learned from myriad historical examples that state imposition on individual conscience is dangerous? At the risk of triggering Godwin's law, we cannot help but recognize that state compulsion of personal conscience is reminiscent of the devastating abuses of state power in the mid-twentieth century. While some might resist this analogy by arguing that, unlike the atrocities ordered by totalitarian regimes, the law in question is indisputably good and any dissent must be wrong, this objection reveals a misunderstanding of the problems that arise whenever the state claims sovereignty over the moral decisions of individuals. Whether or not the state is allegedly on the right side of history, we should be very reluctant to allow politicians or judges to dictate which beliefs are acceptable and which are not. The idea that a state official must ignore personal conscience is anathema to liberal

democratic ideals. The fact that the state disagrees with the conscientious objector's stance is immaterial. No one should be compelled by the state, through the threat of employment dismissal or other repercussions, to act against their conscience.

The rebuttal to this position is that the couple is entitled to be married. Indeed, that is true. This is why the emphasis should be on the state providing that service and not on the conscientious objector. The issue at hand is not the individual conscience of the public official but whether the couple can be married. Under current law, they are so entitled. But they are not entitled, in my view, to impose on any public individual the requirement to carry out the service against conscience. Such an imposition violates the respect due to conscience. After all, if freedom of religion precludes imposing certain religious beliefs on non-adherents, then conversely "[it] is therefore not open to the state to impose values that it deems to be 'shared' upon those who, for religious reasons, take a contrary view. The Charter protects the rights of religious adherents, among others, to participate in Canadian public life in a way that is consistent with *their own* values" (*Law Society of British Columbia v. Trinity Western University* 2018: para. 331, italics in original).

Iain Benson (2008:750) observes:

> When a person seeks a same-sex marriage, the right *is to be married* – not to be married by *any particular citizen* acting as a marriage commissioner. The rights of freedom of conscience and religion exist in the citizen who exercises those rights. The right to have a same-sex marriage is not attached by way of countervailing obligation to any particular citizen for its fulfillment, whether or not the citizen occupies a public office.

The conscience of all citizens is not to be subsumed to one standard. Central to our beliefs about human dignity and democracy are "the rights associated with freedom of individual conscience," which, as former Chief Justice Dickson noted, are the fundamental "*sine qua non* of the political tradition underlying the Charter" (*Big M Drug Mart* 1985: para. 122).

Therefore, "The values that underlie our political and philosophic traditions," said Dickson, "demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M Drug Mart* 1985: para. 123). Accommodating the conscientious objector does not injure any neighbour's parallel rights. They get the same rights as the objector not only to hold and express beliefs and opinions – including opinions that go against those of the conscientious objector – but also the legal right to marry whomever they desire.

4.5 Rejection of traditional approach to conscience and religion

Moon's argument that accommodation "can never be more than minor or marginal" (2018:279) gives an incomplete assessment of the law on conscience and religion. Moon appears to suggest that religious minorities cannot be given much beyond relatively superficial accommodations such as those involving Sabbath observance or religious attire. While these cases may be deeply meaningful to the individuals who seek accommodation in these areas, this approach leaves many serious and complex questions – from abortion to marriage to end-of-life decisions – off the table. Anything beyond "dress, diet, and holidays" (2018:279) is apparently asking too much.

Moon's position does not harmonize with the historical treatment given to conscience and religion throughout Canadian history. Indeed, in the Constitution Act, 1867, religion was referred to multiple times concerning such areas as education. Not only was the new country to have laws similar in principle to that of the United Kingdom, which tolerated religious diversity (Bussey 2020), but it was to provide special privileges to religious schools. In other words, religious education was to be accommodated. Although that guarantee has been refined or even removed in some provinces since Confederation,[12] the fact remains that religion was granted meaningful protection that extends beyond holy days and dress.

Further, Moon's position diminishes religious and conscience rights to a limited form of tolerance rather than recognizing the much richer understanding that these freedoms were, in fact, "original freedoms" that exist *a priori* the state (*Saumur v. City of Quebec* 1953: 330).

In an earlier essay, I observed that "the redefinition of marriage has led to an intolerance of religious institutions that maintain the belief and practice of traditional marriage," because such beliefs are deemed "wrong" (Bussey 2016-2017:200). This paper has explored the pressure on religious individuals, who are now just as likely to face contemptuous treatment as religious institutions. Such contempt is further evidence of a legal revolution against the accommodation of conscience, especially in matters of sexuality. In the secular West, sexual equality claims are asymmetrically eclipsing all other rights.

5. Conclusion

In this paper, I have refuted the claim that civil marriage commissioners in Canada who refuse to perform same-sex marriages in their civil role are engaged in a political act. Critics argue that these commissioners believe such marriages should not be recognized by the state, and are thereby engaged in "a form of opposition to the law's protection

[12] The founding of Canada in 1867.

of sexual orientation equality, and not simply a private or personal act of conscience" (Moon 2018:293).

However, conscientious objection to the redefinition of marriage is not a political statement but a personal conviction. It reflects a moral duty to witness to the truth. That this truth may not be acceptable to the majority is the whole reason for accommodation. If a conscientious objector is dismissed as "political," such a judgment reveals more about the opinions of the zeitgeist than the supposed politics of the objector. Wisdom urges us to take heed when we encounter an individual who refuses to bend the knee to the current moral tempest.

Upon leaving the Soviet Union for exile, Aleksandr Solzhenitsyn (2004 [1973]) called on his compatriots to "live not by lies." "There are no loopholes for anybody who wants to be honest," Solzhenitsyn observed. "Either truth or falsehood: Toward spiritual independence or toward spiritual servitude" (206-207). The suffering that came from rejecting state-sponsored lies could not weaken his commitment to speak truth. "It's dangerous," he admitted, "[b]ut let us refuse to say that which we do not think" (204).

Secular society, the government, and the courts in Canada are compelling religious conscientious objectors to adopt secular values. Treating civil marriage commissioners as unworthy to hold office because of their religious conscience is tantamount to denying their religious identity. It excludes them from full participation and represents a failure to treat them as dignified citizens with equal value in society. This paper has focused on marriage commissioners, but its paradigm is applicable to other religious adherents who object to participating in abortion, medical aid in dying, and other so-called progressive secular policies. Although the issues may be political, those who conscientiously object often do so on the basis of deeply held religious beliefs.

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