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Is Freedom of Conscience Superior to Freedom of Religion?

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I Introduction

It is an honour and a privilege to deliver the Sixth Annual Lecture on Religious Liberty. My thanks to Dean Michael Quinlan and the University of Notre Dame Australia for the invitation.

In this address I wish to ask whether the protection of religious freedom is better recast as a claim for respect for freedom of conscience. If the cause of religious liberty has had its detractors of late—given the increasing odium with which organized religion is viewed by many—is the way forward to present claims as incursions upon one’s liberty of conscience?
Although this may appear a more promising and stronger approach on a number of bases, it is my contention that it has serious weaknesses. Freedom of conscience may be too weak a reed. It is a valuable supplement to religious freedom, but not sufficient on its own to bear the weight and range of claims commonly advanced as religious liberty violations.

I will begin by asserting that the right of religious freedom is under increasing pressure from a number of quarters. At a popular level many express concern—sometimes in a strident fashion—that religious liberty has become a euphemistic banner for religious folk to engage in conduct that, to the critics, looks like plain bigotry and prejudice. No wonder then that, also at a popular level, some religious people respond, if not a little dramatically, that there has been a “seismic shift” in Western societies that has given birth to “today’s historic explosion of intolerance towards religious believers”.\(^1\) In the quieter corridors of academia and in the pages of esoteric journals, scholars question the need for exemptions from the law of the land for religionists. They write books with disarming titles like Why Tolerate Religion?\(^2\) They challenge the very core notion that there is anything special about religion in this secular age—questioning whether it deserves, for example, any form of privileged treatment by way of charitable status, continued inconvenient protection of doctors’ and nurses’ consciences, dispensation from antidiscrimination norms, and so on. To fully substantiate my argument would require another lecture\(^3\), so I trust you will indulge me if will simply take this—religious freedom is under greater attack—as my premise.

\section*{II The Promise of the Turn to Freedom of Conscience}

Given the increasing vulnerability of the right of religious freedom, is there a better basis to understand the phenomenon and sympathetically address claims brought by those whose faith


(or deepest beliefs) and practices are being infringed? If the word “religion” itself is increasingly odious, can we sidestep its negative connotations?

The most promising candidate for a reframing of the issue is to assess claims for religious liberty as claims for liberty of conscience. There at least three advantages conscience appears to have over religion.

1 Universal and inclusive

Within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status, but, rather, all core beliefs that allow individuals to structure their moral identity.4 Everyone has a conscience5; but not everyone has a religion. Nobody can be against conscience any more than being against ice-cream, clean air and the preservation of pandas; but plenty of people are hostile to religion—especially institutional or organized religion and conservative, traditional or countercultural faith communities.

Conscience appeals as a broader and, indeed, more universal basis than religion upon which to protect the deepest concerns citizens possess in liberal democratic societies6—places where a sizeable (and increasing) percentage of the population in the 21st century profess no religious affiliation.7 Citizens who are atheists, agnostics, rationalists, free thinkers, sceptics or just plain “spiritual” (in an unattached, non-affiliated way that defies simple categorization by social scientists or census compilers) can avail themselves of this right. Citizens who are religious

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6 “Conscience proves a useful concept for religious freedom because, unlike religion, it seems to be a universal concept—most would agree that they have one and would prefer for it to remain unmolested. The conscience therefore provides a convenient, publically accessible stand-in for religion, which is why so many contemporary theorists favor it. It diminishes the specialness of religion, or at least it doesn’t discriminate against the nonreligious by giving the believer something that is not given to the unbeliever.” Jonathan Leeman, *Political Church* (IVP Academic) at 74-75.
can appeal to the non-religious on the very same basis, viz, that their conscience (albeit religiously informed) requires recognition.\(^8\)

Conscience, defined broadly, seems to be the universal category, and religion, or religious conscience, is a subset of it.\(^9\) The Supreme Court of Canada put it this way:

The purpose of s 2(a) [of the Charter, protecting religion and conscience] is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humanity, nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one’s conduct and practices.\(^10\)

Profoundly personal beliefs governing one’s life are what is at stake and these may “in some cases” include beliefs in a deity or the afterlife—but not necessarily.

2 Existing legal recognition

Appealing to the right of conscience is not promoting something new. The seminal international human rights instruments were all worded in terms of the right of religion and conscience. Thus, for example, Article 18 of the UN Universal Declaration of Human Rights 1948 begins: “Everyone has the right of freedom of thought, conscience and religion…”\(^11\) The domestic formulations of the right of religious freedom similarly place “conscience” alongside “religion” as equally deserving of recognition and protection.\(^12\) Appeals to the protection of conscience simply emphasize something that was always there, but was kept in the shade by its more prominent cousin (religion).

3 Definitional problems are avoided

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\(^{8}\) Leeman, *Political Church*, at 75.

\(^{9}\) Maclure and Taylor, *Secularism and Freedom of Conscience*, at 90.

\(^{10}\) *R v Edwards Book and Art Ltd* [1986] 2 SCR 713 at 759 [97] per Dickson CJ (emphasis added).


\(^{12}\) See, eg, Charter of Human Rights and Responsibilities Act 2006 (Vic), s 14. Section 46 of the Constitution Act 1934 (Tas) provides: “Freedom of conscience and the free profession and practise of religion are, subject to public order and morality, guaranteed to every citizen.” See also, eg, ss 13 and 15 of the NZ Bill of Rights Act 1990; s 2(a) of the Canadian Charter of Rights and Freedoms 1982.
The legal protection of religious freedom necessarily requires courts and tribunals to eventually
determine what counts as “religion” or “religious” belief. Now the US courts, faced with a
bewildering variety of claims under the First Amendment, have battled long and hard with this
and come up with some reasonably workable definitions. The European Court of Human
Rights has had its own tentative exploration of this concept too. The High Court of Australia
in *Church of the New Faith* has, in my opinion, one of the best judicial tests.

Whichever test is propounded there will be some eccentric person—or a fledgling group
of such citizens—that will find it hard to fit their novel or idiosyncratic claim within the
boundaries of “religion” as defined. All definitions exclude. Thus, some citizens may miss out
on their deepest and cherished beliefs about the meaning of life being safeguarded.

“Conscience”, by contrast, seems a very big tent indeed. Everyone has one and we do not
appear to have much difficulty in agreeing upon exactly what it is. Granted, there are, if one
probes more deeply, different understandings of what the notion is, but the latitude for
disagreement over its core meaning is narrow—certainly much narrower than over the
definition of “religion”.

Once the definitional hurdle is out of the way, the only question of significance becomes
the genuineness or sincerity of the person’s (or group’s) beliefs. Is their claim of conscience
genuine? We need not be concerned with the content of the beliefs, but only with their sincerity.
Here the law is on much firmer ground. It has some very well-developed tests to assess the
sincerity of a claim and to screen out opportunist, bogus or sham protestations.

### III Weaknesses with Freedom of Conscience—Or Why it may Fail to Deliver

Freedom of conscience initially appears superior to freedom of religion as a basis for claims.
Yet I believe it has some major drawbacks. But first, a brief look at the term “conscience” itself
seems called for. In earlier times its meaning would emphasize its divine source: “the sanctuary

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16 *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120 at 136 (Mason ACJ and Brennan J) and 174 (Wilson and Deane JJ).
of man, where he is alone with God whose voice echoes within him.”

There are various definitions of conscience in modern usage, but the Kantian notion of an inner judge or witness is perhaps the most prevalent:

the core idea is, roughly, . . . a capacity to sense or immediately discern that what he or she has done, is doing, or is about to do (or not do) is wrong, bad, and worthy of disapproval.

the faculty of subjective moral judgment

that person’s judgment of the moral quality of his or her conduct

1 Erroneous Location within the *Forum Internum*

If we take “conscience” to be an inner voice, witness or judge, then its obvious location would seem to be within what international human rights law calls the *forum internum.* This describes “the internal and private realm of the individual against which no State interference is justified in any circumstances.”

This is a problem because protection of the *forum internum* by the international legal organs has been rather haphazard and limited, if not to say non-existent. What one thinks or believes in one’s innermost mind is typically assumed to be inaccessible and invulnerable; the inner sanctum is commonly seen to be impervious to outside interference, and hence requires no protection. The authoritative General Comment No 22 of the UN Human Rights Committee observes:

The right to thought, conscience and religion . . . in article 18(1) is far-reaching and profound . . . . The fundamental character of these freedoms is . . . reflected in the fact that this provision cannot be derogated from, even in time of public emergency. . . .

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19 See eg Nussbaum, *Liberty of Conscience* at 19, who describes it as “the faculty in human beings with which they search for life’s meaning”.
25 Ibid.
Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally. . . 26

In domestic courts, the well-established belief/action dichotomy operates a similar way. The American Supreme Court way back in Reynolds observed: “Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”27 And later the Court affirmed that the First Amendment “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct must be subject to regulation for the protection of society.”28

Thus, the inner forum is not subject to the standard limits upon state interference that govern the law guaranteeing the right to act upon or “manifest” one’s religion or belief. If there is no way it can be interfered with by the state, then, logically, any explicit limits upon attempted state interference in this inner realm are superfluous. You do not need to tell the state to back off if the state cannot penetrate this sanctuary anyway.

But there are two problems. First, if forms of insidious and incessant state psychological coercion, propaganda or “indoctrination” cannot dent one’s inner realm—remember, nothing can—then these, it seems, receive a pass. Paradoxically then, conscience is absolutely protected whilst simultaneously not being protected at all. Second, the factual presupposition is unsound. The idea that “while your entire world in the public sphere might be completely demolished, [nonetheless] your private sphere somehow remains intact”29 is naïve and fanciful in the extreme. It rests, as Peter Petkoff notes, upon a misunderstanding of the reality of the inevitable transference or overlap between belief and action, the private and public realms.30

By contrast, the forum externum—the realm of conduct or actions that sees individuals (and groups) express or “manifest” their inner beliefs—always needs protection by the law. Actions unlike “mere religious beliefs and opinions” can be restricted by the state. But unlike innermost thoughts—which receive unqualified and absolute protection in a hermetically

26 Italics added. The Comment is reproduced in Taylor, ibid, at 378-79.
28 Cantwell v Connecticu, 310 US 296 at 303-304 (1940)(italics mine).
29 Petkoff “Forum Internum”, at 188.
30 Petkoff, “Forum Internum”, passim.
sealed inner space—the right to act upon those beliefs can never be absolute, for actions can impinge upon others. So the usual limitations permitting state interference with fundamental human rights apply: religious conduct cannot threaten “public safety, health, morals or the fundamental rights or freedoms of others.”

If we could get conscience placed in the forum externum it would appear to be better safeguarded. It would at least get qualified protection. Can we do that? My answer is yes.

A brief digression

It is only if we go back to the early Christian understandings of conscience that see that, strictly speaking, the inner judge or voice is not conscience but rather something called synderesis. Christian theologians beginning with Jerome, but most fully developed by St Thomas Aquinas, drew a distinction between synderesis and conscientia. The inner faculty or “spark” that illuminates every human being, and always habitually inclines them towards good and away from evil, is synderesis. By contrast, conscientia comes after synderesis and is the application of that understanding or light to particular concrete circumstances. Robert Vischer puts it well: “Although a person’s faculty of apprehension was called ‘synderesis,’ only the faculty of application—action derived from apprehension—received the label ‘conscientia.’”

Whilst synderesis is infallible and cannot be extinguished, people can, through their free will, and the exercise of judgment, act in a way contrary to the dictates of synderesis. The conscientia is free and can err; but synderesis is not free, and it always points to the good, is intrinsically upright and so cannot err. The Catechism of the Catholic Church refers to this duality as follows:

Conscience includes the perception of the principles of morality (synderesis): their application in the given circumstances by practical discernment of reasons and goods; and finally, judgment about concrete acts yet to be performed or already performed.

31 Article 18(3) of the ICCPR.


33 Conscience and the Common Good: Reclaiming the Space Between Person and State (Cambridge: Cambridge University Press, 2010) at 3 (original italics).

34 Somme, “Indestructibility of synderesis”, at 410.

35 Catechism of the Catholic Church at para 1780.
This might all seem like an arcane digression into Scholastic theology, but it is relevant to my argument. *Synderesis* does belong in the *forum internum*, the repository of pure belief and thought. But *conscientia* (conscience)—the *act* of judgment prompted by the light of *synderesis*—does not. It belongs in the *forum externum*. So, if we understood conscience correctly then it might receive a darn sight more protection.

## 2 The Rise of the Unanchored Conscience

In modern usage, the notion of conscience is a truncated or distorted one. It retains the idea of an inner voice. But the inner voice is not an infallible, unerring one, and the speaker is not articulating “the principles of morality” (as the *Catholic Catechism* terms it), the universal basic moral law,\(^{36}\) the natural law\(^{37}\)—or, more simply—the speaker is not God. Rather, the inner judge is really the autonomous self’s best grasp of the good and right, an individual’s “culturally influenced, personally generated, subjectively held moral opinions.”\(^{38}\) If there is an external voice, it is Walt Disney’s Jiminy Cricket—but then he just passes the buck back to Pinocchio and tells him (after giving a little whistle) to “always let your conscience be your guide.”\(^{39}\)

Conscience in modern times has become detached or unanchored from *synderesis*. You might say it is unhinged. I am making fun of this. but it is no laughing matter. Just as the word has fallen into desuetude, the importance of what it signifies has also.

The point was made presciently by Cardinal John Henry Newman in the 19th century. In his *Letter to the Duke of Norfolk* in 1875 he wrote: “When men advocate the rights of conscience, they in no sense mean the rights of the creator, nor the duty to Him, in thought and deed, of the creature; but the right of thinking, speaking, writing, and acting, according to their judgement or their humour, without any thought of God at all.”\(^{40}\) And in a later (1897) Letter to the good Duke he was blunter:

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\(^{38}\) Stolzenberg, “Jiminy Cricket”, at 66.

\(^{39}\) “Give a little whistle” (music and lyrics by Leigh Harline and Ned Washington) from the film, *Pinocchio* (1940): [https://www.disneycclips.com/lyrics/lyrics79.html](https://www.disneycclips.com/lyrics/lyrics79.html) and [https://www.youtube.com/watch?v=51x532yW1lY](https://www.youtube.com/watch?v=51x532yW1lY)

Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience. Conscience is a stern monitor, but in this century, it has been superseded by a counterfeit, which the eighteen centuries prior to it never heard of and could not have mistaken for it they had. It is the right of self-will.\textsuperscript{41}

Professor Robert George’s recent work carries on this tradition.

Conscience, as Newman understood it, is the very opposite of “autonomy” in the modern liberal sense. It is not the writer of permission slips. It is not in the business of licensing us to do as we please…. [By contrast, today] conscience as “self-will” is a matter of feeling or emotion, not reason. It is concerned not so much with identifying what one has a duty to do or not do, one’s feelings and desires to the contrary notwithstanding, but rather with sorting out one’s feelings. Conscience as self-will identifies permissions, not obligations. It licenses behavior by establishing that one doesn’t feel bad about doing it…\textsuperscript{42}

Conscience is no longer the “stern monitor” (as Newman called it) imposing duties that originate from outside the individual. Instead, it has become “the writer of permission slips” based upon one’s earnest feelings. The secularization of the concept of conscience\textsuperscript{43} is thus complete, and so we should not be surprised that “one critical element is completely missing: namely the idea that conscience is an echo of the voice of God in man or a manifestation of divine law.” Of course, this secularization is perfect for a secular liberal polity that puts a premium on personal autonomy.

3 The Implications of the Unanchored Conscience

Does it matter that conscience today is not connected to, or constrained, by the objective moral order, however that is defined? Does it matter the individual conscience is “radically

\textsuperscript{41} Quoted in Robert P George, “Two Concepts of Liberty…. And Conscience” in his Conscience and Its Enemies (Wilmington: ISI Books, 2013) ch 10 at 111.

\textsuperscript{42} George, ibid, at 112.

\textsuperscript{43} See Rafael Domingo, “Restoring freedom of conscience” (2015) 30 J of L & Religion 176 at 183. For an excellent historic account see Martin Fitzpatrick, “Enlightenment and Conscience” in John McLaren and Harold Coward (eds), Religious Conscience, the State and the Law (Albany: State University of New York, 1999) at ch 4. Interestingly, Fitzpatrick (at 56) clarified: “Ideas of conscience undoubtedly were naturalized, universalized, made democratic and, to a degree, secularized” (italics added). He continued (ibid at 56-57): “Enlightenment thinkers retained a sense of the intimate relationship between the religious and moral dimensions of conscience and were well aware that the obligations to follow conscience ultimately arose from a religious duty”.

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subjectivist”\textsuperscript{44}, “the faculty of subjective moral judgment”\textsuperscript{45} and its decisions cannot be gainsaid as “erroneous”—as long as they be sincere and authentic?\textsuperscript{46} I believe so.

1 Unpredictable claims and unpalatable outcomes

First, it can give rise to an expanding number of claims over some highly-contentious activities, not to mention, at times, some perverse or outlandish outcomes.\textsuperscript{47} The most flagrant historical example is perhaps those Nazis, such as Adolf Eichmann, who had no problems with conscience despite supervising the sending of millions to the gas chambers.\textsuperscript{48} Perhaps it is more accurate to say that, as Hannah Arendt so persuasively argued, Eichmann’s conscience was warped by his peers and Third Reich society:

His conscience was indeed set at rest when he saw the zeal and eagerness with which “the good society” everywhere reacted as he did. He did not “close his ears to the voice of conscience,” as the judgment has it, not because he had none, but because his conscience spoke with a ‘respectable voice,” with the voice of respectable society around him.\textsuperscript{49}

Notoriously, the US Supreme Court grounded the right to abortion in, effectively, a citizen’s right of conscience.\textsuperscript{50} Could one’s subjective moral judgment—sincere and genuine, to be sure—lead some to one day confidently assert a conscience claim to euthanize their suffering next-of-kin, to marry their brother or sister, and so on?

2 A downgrading of conscience

\textsuperscript{44} Veritatis Splendor at para 32.
\textsuperscript{45} Stolzenberg, “Jiminy Cricket”, at 53.
\textsuperscript{46} “In a liberal pluralistic society, the objective truth or falsity of an individual's moral commitments cannot form the justification for determining when to accommodate conscience”: Elizabeth Sepper, “Taking Conscience Seriously” (2012) 98 Virg L Rev 1501 at 1529.
\textsuperscript{47} Leeman, Political Church, at 89.
\textsuperscript{49} Arendt, Eichmann in Jerusalem, at 111-112. See also ibid at 131: “For the sad and very uncomfortable truth of the matter was that it was not his fanaticism but his very conscience that prompted Eichmann to adopt his uncompromising attitude ['to make the Final Solution final'](130) during the last year of the war…”
\textsuperscript{50} In Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US 833, 850-51 (1991), the Court noted that “men and women of good conscience can disagree” about abortion and that matters such as the right to abortion are found in “the right to define one’s concept of existence, of meaning, of the universe, and of the mystery of human life.”
Secondly, the status of conscience as something the state ought to respect is diminished, even downgraded, once we see it stripped down to no more than an expression of a person’s self-will or autonomy, to his or her “personal inscrutable moral code”\(^\text{51}\). Marie Failinger speaks of “the transmutation of religious conscience into a type of human choice.”\(^\text{52}\) Our solicitude for those caught in the throes of obedience to the divine voice is one thing. Our respect for conscience because it is what a person really believes to be right—“which in turn seems pretty much equivalent to saying that ‘a person should do what he believes he should do’”\(^\text{53}\)—is another matter.\(^\text{54}\) Thus, as Steven Smith explains:

attaching freedom of conscience to autonomy may have the effect of both transforming and trivializing the commitment. In its formative period, after all, the commitment to freedom of conscience rested precisely on a belief that people are not autonomous, but rather are dependent on—and obligated by—a higher and personal Power. That belief was what justified special respect for people who were acting not just from the normal mundane motives, and certainly not as autonomous agents, but from conscience. Dissolving conscience into autonomy turns conscience on its head and deprives it of this justification for special respect.\(^\text{55}\)

The lower status of conscience compared to religion may, as Paul Horwitz astutely argues, rebound against claimants when tribunals conduct the usual balancing exercise whereby countervailing interests are weighed against the claimant’s cause:

Despite how seriously our constitutional culture treats claims of conscience, it is much easier to disregard a claim that rests on individual conscience than one that rests of absolute truth, or to conclude that such a claim, if it rests on conscience alone, can be outweighed by more immediate and worldly considerations.\(^\text{56}\)

\(^{51}\) Vischer, _Conscience and the Common Good_, at 18.  
\(^{54}\) See also Failinger, “Wondering after Babel” at 93, noting that freedom of conscience “began as an argument that the government must ensure a free response by the individual called distinctively by the Divine within”, but now “the word ‘conscience’…has come to mean very little beyond the notion of personal existential decision-making”.  
\(^{56}\) _The Agnostic Age: Law, Religion and the Constitution_ (Oxford: Oxford University Press, 2011) at 184. See also at 301. Roger Trigg, _Equality, Freedom and Religion_, at 106 makes the same point: “Assimilating religion to wider issues of conscience is very common. Sometimes it is made with a view to ensuring that the religious conscience cannot claim any special privileges…. The danger is that devaluing a religious conscience results in all claims of conscience being ignored. Other forms of
Why would this be so? The conversion, explains Horwitz, of all plausible claims (religious or non-religious) into matters of conscience “allows courts to treat them as mere matters of conscience, as it were.”\(^{57}\) With a well-argued religious claim the court is made fully aware of “how profound and difficult”\(^{58}\) a quandary the religious believer is in. (I would go further and suggest there is perhaps, subconsciously, an historical and cultural echo of the tragic choices that renowned believers of times past (St Thomas More, Martin Luther et al) faced—and which are being re-enacted, in a more modest way to be sure, here today.) The decision-makers can at least imagine the possible truth of religious beliefs and practices;\(^{59}\) viz, the believer maybe did hear from a deity, to whom her or she might one day account to.

By contrast, a claim of conscience—at least as conscience is currently understood—seems far less compelling. Recall that the unanchored conscience has undergone a transmogrification into a matter of personal autonomy, an expression of self-will. In the modern era, the claim of conscience is no longer concerned with the truth or content of the claim, but simply whether it is sincere. As Horwitz puts it “claims are viewed as important primarily because the person believes them to be true, not because they are (or may be) true.”\(^{60}\) Or, to be even blunter, the claim “is viewed as having less to do with the truth than with a feeling in someone’s head.”\(^{61}\)

3  Ill-suited to collective or institutional beliefs and practices

The modern understanding of conscience centres upon its critical role in personal and individual decision-making. That seems to make the claims of freedom of conscience by religious communities and institutions tenuous, if not ruled out entirely.\(^{62}\) It seems a stretch to say a religious corporation \textit{qua} corporation has a conscience.

Admittedly we sometimes do see exemptions for religious institutions in recognition that they might hold a distinct “moral identity” or “mission”. In the \textit{Hobby Lobby} case in the United States, there was an exemption written into the Obamacare law to exempt “religious

\(^{57}\) Agnostic Age at 184 (italics in original).
\(^{58}\) Ibid at 279.
\(^{59}\) Ibid at 278-279.
\(^{60}\) Ibid at 184 (italics in original).
\(^{61}\) Ibid at 278.
\(^{62}\) See Sepper, “Taking Conscience Seriously”, at 1539 et seq.
employers” from segments of the compulsory coverage of employees, specifically coverage that included contraceptives having an abortion-like operation. The issue in the case was whether for-profit “close” companies owned by religious persons could assert a religious freedom claim. But “moral identity” is not the same as conscience. More on that soon.

Conscience, whilst it looks capacious, may actually be under-inclusive. Some claims that are presently recognized as religious liberty ones may not fit under the conscience umbrella. Andrew Koppelman rightly points out that “‘conscience’ is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation as in City of Boerne v Flores.” That case involved the battle by the Catholic Diocese of San Antonio to enlarge the St Peter the Apostle Cathedral in Boerne, a town about 30 miles from San Antonio. This move to expand the size of the Cathedral was opposed by the city authorities who—concerned with architectural and aesthetic matters in an area zoned as a heritage precinct—invoked historic places legislation to thwart it. The Church and the city authorities eventually struck a compromise and the Cathedral’s expansion took place, but only after years of delay and considerable legal costs.

The New Zealand analogue is the ongoing attempt by the Anglican Diocese of Christchurch to have a modern-style, less expensive, cathedral to meet its liturgical and pastoral needs. The vehement opposition by secular groups who insist that the neo-Gothic mason and stone building be fully restored—following the calamitous 2011 earthquake—means the issue is still being fought over. I was unable to convince The Christchurch Press that there was a religious freedom issue here at all. The editors would have given even shorter shrift to the Diocese’ cause if I had said, in my op-ed piece, the Anglican Church’s “conscience” was being violated.

63 Burwell v Hobby Lobby Stores Inc, 134 S Ct 2751 (2014); 573 US (2014). The Department of Health and Human Services authorized exemptions for “religious employers” (defined as “churches, their integrated auxiliaries and conventions of associations of churches”), as well as “the exclusively religious activities of any religious order”.
66 Ibid at 134.
Robert Vischer’s book, *Conscience and the Common Good* is a valuable attempt to show that we labour under too atomized a notion of conscience:

There is a clear need to recapture the relational dimension of conscience—the notion that the dictates of conscience are defined, articulated and lived out in relationship with others…. As such conscience cannot be explained as a free standing individual construct. It might be expressed and defined by the individual, but its substance and real-world implications are relational by their very nature. Cultivating and maintaining the conditions necessary for these relationships to thrive should be a priority for our society if we are serious about freedom of conscience.  

If individuals’ consciences are nurtured and empowered by relationships, then, argues Vischer, the groups and associations that foster these relationships deserve cultivating too. But can we say a group has its own freestanding conscience independent from its members? Here even Vischer (despite penning an entire book devoted to expanding our understanding of the role of conscience) shrinks back: “It is more sensible to say that groups can serve as vehicles for conscience and that, although the relational nature of conscience makes such groups essential to conscience’s flourishing, a group’s distinct moral identity is built on the moral content of its members’ consciences.” And later, “the corporation is a moral agent with the capacity for exercising a robust institutional conscience—not in the sense that the corporation serves as a conscience-wielding being, but in the sense that the corporation serves as a venue and a vehicle for the sharing of conscience-driven claims among its constituents.” So a group’s conscience, if we want to use that expression, is simply the aggregation of all its member’s individual consciences. Groups and corporations may possess a moral identity (a reputation or “brand”, to put it crassly), but not a conscience.

Aside from being ill-suited to catch group claims, Koppelman is surely right that a lot of commonplace religious practice is engaged in “out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation and guilt, curiosity about religious truth” and so on. It has little to do with cool cerebral reflection or obedience to an inner voice. It is interesting, continues Koppelman, that in the celebrated American case of *Employment* 

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69 *Conscience and the Common Good* (2010).
70 Ibid at 3-4.
71 Ibid at 33 (italics mine).
72 Ibid at 179 (italics mine). In an article (“Conscience and the Common Good: An Introduction” (2010) 49 J Catholic Legal Stud 293 at 306) Vischer states: “Institutions do not possess conscience in any real sense, but they do embody distinct moral identities that are shaped by their constituents’ consciences” (italics added).
73 Koppelman, *Defending American Religious Neutrality*, at 134.
*Division v Smith* (the peyote case) neither of the religious freedom claimants—who sought to use peyote, a controlled drug, as a sacrament in their Native American Church—was motivated, it seems, by his conscience. One was motivated primarily by his interest in exploring his Native American ethnic identity, and the other was merely curious about the Church.74

4 *Difficult clashes of conscience*

If one citizen’s conscientious judgment is as valid as another’s, then there is no obvious unimpeachable way to adjudicate between them.75 In another age, and in homogenous societies, we might expect the vast majority of citizens to have a similar understanding of *synderesis*. The opportunities for disputes based on different applications of moral judgment (conscientia) would be still present—for the application of one’s grasp of the moral law to concrete circumstances can err. The inner voice can be ignored because of “the habitual inclination towards vice and the impetuousness of passion.”76 But clashes would be relatively few given a similar shared apprehension of the moral law (*synderesis*).

Now, however, many have abandoned a commitment to any kind of transcendent objective order, eschewed reliance upon an external moral law—*synderesis* has been forgotten, rejected or discarded. Others may hold to a *synderesis*, but not the *synderesis*.77 Liberal democracies are marked by moral and religious pluralism and citizens adhere to different worldviews. If conscience is the touchstone and our consciences are rooted in, or have developed from, completely different starting points, we should not be surprised that conflicts will be frequent.

My conscience tells me I cannot participate in same-sex weddings; your conscience tells you that you must follow your heart and marry your *object d’amour* or, as an employer, you must not allow your employees to discriminate against same-sex couples. Whose conscience is more likely to win the day?78 Sometimes the conflict will be between the government and the individual—as in the classic instance of a military draft law imposed upon

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74 Ibid.
76 Somme, “Indestructibility of *synderesis*”, at 408. The conscience can err in four ways: through insufficient experience; through insufficient skill in reasoning; through inattention; and through the perversion of reasoning: Budzsizewski, “Handling Issues of Conscience”, at 5-6.
77 There can, in the nature of things, be only one *synderesis* and thus to speak of a multiplicity of universal moral laws (plural) would be a contradiction in terms.
78 Leeman, *Political Church*, at 91.
a pacifist. Increasingly, however, the clash will be between non-state actors, each driven by conscience. Will the eventual victor in such disputes be the claimant whose conscience is more attuned to the prevailing ideologies of the day? Will it dependent upon the prevailing orthodoxy or worldview of those in positions of power and influence?

Reliance upon conscience as a stand-in for religion is fine (from the believers’ standpoint) where—in a former age—virtually everyone understood conscience (or at least synderesis) the same way. But, as Jonathan Leeman, insightfully notes

In a nation of believers and unbelievers, the unattached, unaccountable conscience will be employed to legitimize the freedom of various religions (institutionally defined) only as long as the conscience of a nation’s decision-makers value them. When a nation’s decision makers decide that the traditional (substantivist) institutional religions are a threat to liberty or equality or tolerance, they will banish them, first from the public square, then from the market place, and perhaps, in partial ways, from the home (“No, you may not indoctrinate your children”).

I have written elsewhere about a Wellington (or Canberra, Westminster or Washington/New York Times etc) Worldview. By this I mean the mindset of the vast majority of parliamentarians, bureaucrats, consultants, academics, educators, business leaders, company directors, news media editors, pundits and journalists, medical specialists and doctors, judges and lawyers, and so on. Secular liberal thought and values operate by way of subconscious absorption or osmosis. There subsists amongst the knowledge sector—or, less politely, “the chattering classes”—a “latent moral ideology.” The prevailing worldview held by the powers-that-be is, I maintain, increasingly incompatible with and unsympathetic to religious beliefs and conduct, especially conservative expressions of faith.

IV An Illustration: ‘Complicity-based’ Conscience Claims

79 Vischer, Conscience and the Common Good, at 2.
80 Leeman, Political Church, at 91 (italics added).
Conscience claims are not new. For instance, we have long grown use to medical professionals’ conscientious objection to participation in abortion: the state, through suitably crafted legislative exemptions, will usually make due allowance for this.\textsuperscript{83}

But more generally—and the military and medical fields aside—there have been a growing number of assertions of conscience by suppliers of everyday goods or services who, in good conscience, feel compelled not to supply these things. In the litigious US, we have a dreary litany of examples: the Christian flower shop owners or photographers who do not want to provide their wares to a same-sex couple’s wedding day celebration spring to mind.\textsuperscript{84} In Australia we have the recent \textit{Cobaw} case,\textsuperscript{85} but perhaps the best-known non-American example is the \textit{Ashers Baking}\textsuperscript{86} saga.

The plaintiff, Gareth Lee, a homosexual activist, ordered a cake from a Belfast bakery.\textsuperscript{87} The icing on Mr Lee’s cake would have the words “Support Gay Marriage”, the logo of QueerSpace (a LGBT lobby organization) and a colour picture of the \textit{Sesame Street} TV show characters, Ernie and Bert. After initially (and reluctantly) accepting the order on the day, Mrs Karen McArthur, a director of the family firm, phoned back Lee telling him the bakery could no longer fulfill his order. To do so would violate the owner’s, the Macarthur family’s, religious beliefs. McArthur apologized and arranged for a refund. Lee was upset and the culmination of his grievance was a successful complaint to the Equality Commission. The County Court held that the defendant bakery had contravened the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment Order 1998. Ashers Baking’s

\begin{footnotes}
\item[83] For NZ, see s 46 of the Contraception, Sterilisation, and Abortion Act 1967. For Australia see: Criminal Law Consolidation Act 1935 (SA), s 82A(5); Abortion Law Reform Act 2008 (Vic), s 8; Criminal Code Act 1924 (Tas), s 164(7); Health Act 1911 (WA), s 334(2); Health Act 1993 (ACT), s 84; Medical Services Act (NT), s 116.
\item[84] See eg \textit{Elane Photography LLC v Willock}, 309 P 3d 53 (N M 2013)(photographer had no right to refuse, on religious grounds, to photograph a same-sex wedding); \textit{State of Washington v Arlene’s Flowers}, 389 P 3d 543 (Wash 2017)(florist unlawfully discriminated against a same-sex couple when the shop refused couple’s flower order for their wedding).
\item[85] \textit{Christian Youth Camps v Cobaw Community Health Service Ltd} [2014] VSCA 75 (16 April 2014). The Brethren-owned company that ran a youth camp at Philip Island unlawfully discriminated in refusing a booking from a gay youth organization. For discussion see Ahdar, “Companies as Religious Liberty Claimants”, at 17-20.
\item[86] [2015] NICty 2.
\item[87] A sampling of the voluminous commentary includes those that condemned the case, eg, “Icing on the cake” (Editorial), \textit{Daily Telegraph}, 20 May 2015; Melanie McDonagh, “The ‘gay cake’ case highlights new intolerance developing in Ireland”, \textit{Spectator}, 20 May 2014; and those who supported the decision, eg, Joshua Rozenberg, “The ‘gay cake’ ruling is a victory for equality in Northern Ireland”, \textit{Guardian}, 20 May 2015; Mary Hassan, “Finally: A Victory for the LGBT Community in Northern Ireland”, \textit{Huffington Post}, 19 May 2015: \url{http://www.huffingtonpost.co.uk/mary-hassan/gay-rights-northern-ireland_b_7313366.html}.
\end{footnotes}
conduct in refusing the cake order constituted unlawful direct discrimination on the basis of the customer’s sexual orientation. The defendants’ pleas that their religious beliefs provided them with a defence were rejected. They contended that to accept the order would have forced them to violate their conscience by endorsing a cultural phenomenon (same-sex marriage) that they did not, based on their sincere religious convictions, agree with.\textsuperscript{88} It was to no avail. The Court of Appeal in Belfast agreed and the case is set down to be heard in the Supreme Court.\textsuperscript{89}

Some American scholars are worried at what they discern to be this entire new breed of exemption claims, which they call “complicity-based conscience claims”—requests to be exempt from having to be complicit in others’ immoral activities, or from having to facilitate them. Professors Nejaime and Siegel explain:

Complicity claims are faith claims about how to live in community with others who do not share the claimant’s beliefs and whose lawful conduct the person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third party harms.\textsuperscript{90}

It is hard to find much in the way of direct adverse material or economic consequences to the other (third) party arising from the granting of legal exemptions: few would-be consumers would be denied the goods or services, or be forced to incur considerable time and cost to secure them elsewhere. Certainly, Mr Lee had many other bakeries in Belfast to ice his cake. Absent some sort of local monopoly, or the objecting provider being a remote rural area, there are nearly always other providers available to service the needs of the consumers rebuffed.

Accordingly, critics turned their attention to the emergence of “dignitary harms”: an accommodation granted by the state to the claimants, they contend, sends an adverse social signal, one with the power to stigmatize\textsuperscript{91} those who engage in the conduct in question (abortion, same-sex marriage, etc). Furthermore, accommodation of the complicity-based kind further fuels the fires of the culture wars and “provide[s] an avenue to extend, rather than settle, conflict about social norms in democratic contest.”\textsuperscript{92} One can almost hear the sigh: we

\textsuperscript{88} In Karen McArthur’s words ([2015] NICty at [17]): “I knew that using our skills and creativity to produce a cake supporting gay marriage—which we consider to be contrary to God’s word—was something which would be on my conscience. If we provided that cake in these terms, I would feel that I was betraying my faith and failing to live in accordance with what God expects of me…”

\textsuperscript{89} McHugh, “Supreme Court to consider judgment in Ashers gay marriage cake case”, Irish Times, 10 May 2017.

\textsuperscript{90} Douglas Nejaime and Reva B Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics” (2015) 124 Yale LJ 2516 at 2519.

\textsuperscript{91} Ibid at 2522, 2577, 2581.

\textsuperscript{92} Ibid at 2520.
(progressive, enlightened, liberal citizens) have finally triumphed when it comes to LGBT rights, reproductive rights, and so on. But the conflict is stubbornly kept alive when the state is willing to grant exemptions to recalcitrant citizens who refuse to move with the times. Thus, for example, Nejaime and Siegel lament: “The network of conscience exemptions that the anti-abortion movement seeks to enact functions like other laws pressed by the movement: it impedes access to abortion.”93 Well, that might not be the prime aim of the claimants pressing their conscientious objection—they simply want to be excused—but they would be more than pleased with this broad societal “side-effect”.

Here is my point. The dignitary harm notion is, I believe, an overly broad and fuzzy conception of what constitutes harm to others. When we move away from direct, tangible harms to diffuse, indirect, psychological ones, the potential to severely shrink the scope for protection of conscience is clear.94 It confuses what is at the heart of the accommodation by the state: an exemption from facilitating certain conduct engaged in by third parties—not a governmental statement about the third parties’ character, integrity, or moral worth.95 Surely, one can decline to participate in an activity that one finds directly contrary to one’s conscience without this meaning that you personally view the third parties as “sinners”, or as persons possessing less dignity. Can one still hate the sin and not the sinner?96

Professor Douglas Laycock has, in my view, written a devastating critique of the entire complicity claim thesis.97 First, talk of dignitary harms is really another way of saying that denied customers will be offended.98 Offence per se is never a sufficient ground to suppress conduct or free speech under American constitutional law.99 Outside the US, the recognition of

93 Ibid at 2555.
96 As the godfather of modern law and religion scholarship, Harold J Berman, noted: “It is a cardinal principle of the Western religious tradition (both in its Christian and Judaic aspects)) to ‘hate the sin and love the sinner’”: Berman, Faith and Order: The Reconciliation of Law and Religion (Atlanta: Scholars Press, 1993) ch 1 at 16. See further Helen Alvaré, “A ‘Bare…Purpose to Harm’?” in W Cole Durham Jr and Donlu Thayer (eds), Religion and Equality (London: Routledge, 2016) ch 10 at 260-161.
99 Laycock, “Religious Liberty for Politically Active Minority Groups”, at 376-77.
a right not to be offended has some currency but, in my view, this is yet another instance where its merits are seriously wanting.

Next, the talk of dignitary harm is seriously one-sided. It ignores the hurt suffered by suppliers whose consciences tell them not to carry through with this proposed action. “Those seeking exemption,” Laycock explains patiently, “believe that they are being asked to defy God’s will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates.”

Third, framing of the conscience claim as a complicity one does not illuminate, nor “do[ ] any analytical work.” Opponents of complicity claims are ostensibly concerned with the material and dignitary harm to potential consumers. If this is so—I have my doubts—then the nature of the practice causing the harm is irrelevant, as is the motivation of the objector, viz, whether she says it would make her “complicit in your (the customer’s) sin” or “I would be sinning myself.”

By calling it a complicity claim I think Nejaim and Siegel mean to subtly downgrade the conscience claim. To say that the objector does not wish to participate or be complicit in the wrongdoing of another seems to imply that the harm to the claimant is more removed or indirect than any immediate and direct personal toll upon his or her conscience. But in no way should it obscure the fact that the objector believes her or she—not just the other person—is doing something that is deeply wrong. The McArthurs, the owners of Ashers Bakery, felt they would be doing something quite wrong. Laycock deftly alters the facts of Hobby Lobby to make this point. Recall that there, the Greens, the owners of the craft stores, objected to contracting and paying for employees’ contraceptive coverage that included prepaid abortifacients.

If the Greens provided a prepaid heroin benefit to their employees, or a prepaid prostitution benefit, would they be doing wrong just by offering it, tempting their employees to use it? Or would they merely be complicit in the wrongdoing of those employees who chose to take advantage of the benefit? It is not a line worth drawing, and characterizing it one way or the other does not change the moral stakes.

Precisely.

100 Ibid at 378. See also De Girolami, “Free Exercise By Moonlight”, at 142 and Walsh, “Same-Sex Marriage”, at 127.
101 Laycock, “Religious Liberty for Politically Active Minority Groups”, at 382.
102 Ibid.
103 Ibid at 383.
There is a strange and unwarranted type of zero-sum game mentality here: if the state grants these claimants an exemption, it must somehow detract from the would-be customers’ rights and cast aspersions upon their conduct. If such an artificial interpretation of harm were to be accepted, it would eradicate a great many conscience-based claims for exemption.

More worryingly, there is also a vaguely totalitarian air to the dignitary harm theory, whose implementation would see the state brook no dissent from newly-established legal norms. It seems to say: not only must citizens tolerate their fellow citizen’s conduct, they must go along with and facilitate it—and if they refrain from doing so, the state will not hear of it. The liberal democratic state begins to take on a totalitarian character to the extent it is “not satisfied with passive obedience; it demands full co-operation from the cradle to the grave.”

As Nejaime and Siegel soberly caution in the final sentence of their 75-page (!) article:

[T]he claim for accommodation is not simply an act of withdrawal. Instead, in advancing complicity-based claims for exemption, mobilized groups and individuals may seek to enforce traditional norms against those who do not share their beliefs. Accommodation of these claims may undermine, rather than advance, pluralistic values.

Nothing, it seems, must stand in the way of what is described tendentiously as “pluralistic values.” Here at last we get to what is, I suggest, at the heart of their objection: exemptions for conscience—at least for moral or religious conservatives—keep the culture battle alive.

V Concluding Thoughts

Sole reliance and the complete re-framing of religious freedom claims as freedom of conscience claims is unwise. Although the right to liberty of conscience appears to do the same work, it simply does not. In certain respects, it is narrower than the right to religious freedom. Placing all one’s faith eggs in the conscience basket is risky.

If I am correct then it seems we are back to the right of religious freedom again—albeit supplemented by the right of conscience. We are back to the task of justifying again why we should protect religious liberty. I think Michael Stokes Paulsen is right: “[r]espect for religious

106 “Complicity Wars”, at 2591 (emphasis in original).
freedom has faded as appreciation of the fundamental importance of religion to human flourishing has waned.\textsuperscript{107}

Perhaps we will need to say the right of religious freedom is valuable as an independent right, not just because the right protects the very core of an individual’s identity, it fosters personal autonomy, it respects human dignity or it offers the resources to oppose tyranny—although it does all those. No, we may have to grasp the nettle and make the case that religious freedom is good because religion is good.\textsuperscript{108} There, the battle has just begun.
