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### "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation"

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*Les ateliers de l'éthique / The Ethics Forum*, vol. 6, n° 2, 2011, p. 155-175.

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DOI: 10.7202/1008036ar

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# BEYOND OBJECTIVE AND SUBJECTIVE: ASSESSING THE LEGITIMACY OF RELIGIOUS CLAIMS TO ACCOMMODATION

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## RÉSUMÉ

Il existe à l'heure actuelle dans le contexte juridique deux principales approches à l'évaluation de la légitimité des demandes d'accommodement pour des motifs religieux. La première, objective, affirme que ces demandes doivent pouvoir s'appuyer dans des faits concernant la religion en question. La seconde, subjective, s'appuie sur l'appréciation de la sincérité de la demande faite par le requérant. La première approche a l'avantage de rendre compte de la distinction entre les deux principes constitutionnels que sont, d'une part, la liberté de conscience, et de l'autre, la liberté de religion. Elle a l'inconvénient de tendre à ériger les tribunaux en « experts » sur des questions religieuses. L'approche subjective rend plus difficilement compte de la distinction entre les deux principes, et de plus risque de donner lieu à une prolifération de demandes. Pour atteindre une synthèse plausible de ces deux approches, il nous faut identifier les fondements normatifs justifiant l'intérêt que les démocraties libérales ont à reconnaître une telle catégorie d'accommodements. En prenant appui dans le célèbre argument de Kymlicka justifiant les droits de nations minoritaires, nous pouvons identifier un intérêt que ces types d'État ont à protéger les conditions permettant aux citoyens de manifester leur « agentivité culturelle », leur capacité à s'identifier en se les réappropriant et en les réinterprétant les normes, pratiques et rites issues de traditions religieuses.

## ABSTRACT

There are at present two ways in which to evaluate religiously-based claims to accommodation in the legal context. The first, objective approach holds that these claims should be grounded in « facts of the matter » about the religions in question. The second, subjective approach, is grounded in an appreciation by the courts of the sincerity of the claimant. The first approach has the advantage of accounting for the difference between two constitutional principles : freedom of conscience on the one hand, and freedom of religion on the other. It has the disadvantage of transforming courts into expert bodies on religious matters. The subjective approach has a harder time accounting for the distinction. It also risks giving rise to a proliferation of claims. A plausible synthesis between the two approaches requires that we uncover the normative grounds justifying the granting by liberal democracies of religious accommodation. An analogous argument to that put forward by Kymlicka in the case of minority nations identifies the interest that citizens have in being able to exercise their « cultural agency » : the creative reappropriation and reinterpretation of the rituals, practices and norms of religious traditions.

## INTRODUCTION

It has been said that toleration is a paradoxical, perhaps even a contradictory concept, and that the type of attitude it points toward should be discouraged rather than prescribed. To tolerate suggests that you are letting something slide that you disapprove of. If you disapprove of something that is actually morally wrong, then it seems that you are engaging in a form of moral cowardice not to condemn it. But if you disapprove of something that is actually morally permissible, then maybe what you should be doing is trying to overcome whatever foible makes you disapprove of it. You, rather than the person or group you are tolerating, are the problem. The cases in which actual toleration is required and appropriate seem vanishingly difficult to identify.<sup>1</sup>

Attending to the way in which we have attempted to institutionalize toleration in liberal-democratic legal regimes makes the issues clearer, even if it does not completely dissolve the perplexities. Laws and policies decided upon by democratic majorities and by their representatives and administrative regulations are adopted by public institutions because (one hopes) legislators and public officials feel like they will promote the common good. Yet there may be individuals and groups that feel that they must act in ways that the laws and regulation proscribe. The question that arises is whether there are some infractions of these laws and regulations that should not be sanctioned, indeed, if exemptions and exceptions ought to be built into the law itself. In some cases, the cost of enforcement may simply be too high. There are cases, however, where those who disobey do so for reasons that justify, or at least excuse, disobedience. Call these “toleration cases”. The “toleration cases” are ones in which though someone does something “wrong” (at least as the law defines rightness and wrongness), she does so for good reason, or at least for reasons that we would want upon reflection to endorse, sufficiently at least to warrant tolerating non-compliant behavior. They stand in a special position to the law. They do something that we would condemn without second thought in a person that did not occupy the specific position in the space of reasons that they do, which is such that the law imposes an excessive constraint upon them if it does not give some weight to the reasons that they have to act in a manner different from that prescribed by the law, given the specific position that they occupy. The set of “toleration cases” that seemed difficult to identify when looking at toleration in an abstract and individualistic way all of a sudden makes sense in an institutionally contextualized setting. These are the cases that would seem to call for “reasonable accommodation” on the part of public institutions.

Philosophers like Brian Barry have argued that our perplexity about toleration should survive into the legal institutional arena. As he has famously argued,<sup>2</sup> either a law mobilizes the coercive power of the state in the service of a very important goal, in which case it should be enforced even upon those who claim that it imposes a disproportionate burden upon them, or it does not, in which

case the unimportant goal that it does serve is not enough to justify recourse by the state to the use of coercion for anyone.

Barry's neat dilemma simplifies the issues at hand in at least two ways, however. First, it does not follow from the fact that some policy goal is important that no exemption should be granted. Many policies do not require full compliance in order to achieve their ends. Where the policy imposes burdens, and where there is therefore a risk of free-riding, "toleration cases" may provide a non-arbitrary way in which to select those limited sets of persons who will be allowed to exempt themselves from the law without giving rise to the race to the bottom that free-rider logics tend to set in motion.

Second, many laws that have tended to elicit requests for accommodation target self-regarding behaviour, to do for example with personal security and health. For example, the Hutterites of the Wilson Colony in rural Alberta requested an exemption from a law requiring of all inhabitants of that Canadian province that their drivers' licenses bear a photograph, in order to protect them against fraud and identity theft.<sup>3</sup> Arguably, exemptions to drug laws requested for religious reasons do not when they are granted impose costs upon others.<sup>4</sup> It is much harder to argue that state paternalism can brook no dissent than it is to argue that laws concerning other-regarding actions must be universally followed.

So Barry's attempt to convince us that the "paradox of toleration" survives into the legal institutional arena does not exempt us from trying to determine what the contours of the set of "toleration cases" are – those cases in which we rightly legislate against behaviour *x* or mandate behaviour *y*, and yet think that there are cases in which certain people ought to be exempted from the strictures of the law.

In Canada, Courts have been primary actors in the attempt to delineate the criteria that define this set of cases. This is both for the obvious reason that conflicts over accommodation are quickly brought before the Courts if settlements cannot be found by the agents themselves, but also for the more fundamental reason that the *Canadian Charter of Rights and Freedoms* requires of the Court that it achieve a balance between the legitimate interests of the State and the rights of individuals. Section 1 of the Charter, which precedes the enumeration of protected rights and liberties, states that these rights are subject to limitations that can be justified in the context of a just and democratic society. It has been left to the Court to determine how precisely to strike that balance in a principled and transparent way.

Courts engaged in determining whether religious believers should be exempted from laws that apply to members of the broader society are faced with dizzying complexities. In the Canadian constitutional context, they must determine

whether a law or policy (or even, in the context of the Quebec *Charter of Rights and Liberties*, the behaviour of private agents) constitutes an infringement of religious rights and liberties. What's more, they must determine whether the public policy aim in the context of which the infringement occurs is justifiable in the context of a free and democratic society. They must finally determine whether the limitation of right that the policy entails meets stringent proportionality tests. This battery of tests is known as the *Oakes Test*.<sup>5</sup>

Before the Court can determine whether a given law *justifiably* limits a constitutionally protected right, it must first determine whether there is a *prima facie* limitation. That is, it must first determine whether the individual rights claim that is being brought to bear to claim an exemption to a law is plausible on its face. This has proven to be particularly tricky in the case of religious rights and freedoms. What religious claims should be entertained for section 1 analysis, and which should be rejected out of hand?

Canadian constitutional theory and practice has veered between two ways of addressing this problem.<sup>6</sup> One, which I will call the objective test, takes it to be the case that there is a fact of the matter as to whether the claim being made by an individual is actually required by the religion that she professes. The second, which I will predictably call the subjective test, makes the claimant's sincere avowal of what his faith requires determinative of whether an accommodation should be considered. It makes a parallel epistemic claim to that made by the holders of the objective view, namely that Courts are in a position to make out the "sincerity" of the claimant's avowal.

The Canadian Supreme Court is at this point in time unsettled as to which of these two approaches should be adopted, a fact that bears witness to the considerable legal and philosophical issues at stake.<sup>7</sup> In a 2004 case that has spilled much scholarly ink, *Syndicat Northcrest v. Amselem*, the Court by the barest of majorities affirmed the subjective account.<sup>8</sup> But in a subsequent case to do with Jewish divorce, the Court seemed to lean toward an objective account, and allowed itself to make claims about what the religious obligations of a man who refused to grant his wife a Jewish divorce (a *get*) "really" were.<sup>9</sup> What makes matters more confusing for the Canadian constitutional scholar is that some of the Justices that wrote most eloquently in favour of the subjective approach in *Amselem* were now making arguments of an "objective" kind.

Though these cases are drawn from the Canadian constitutional context, I believe that the issues that they raise are of broader philosophical and constitutional interest, and apply to any constitutional regime that has read the guarantees of religious freedom as mandating certain forms of accommodation.

I have two principal purposes in this paper. First, I will spell out both the sub-

jective and objective approaches, and identify the problems and impasses to which they give rise. Second, I will propose an alternative approach that hopefully preserves the advantages of both approaches while avoiding their shortcomings, and that draws on an integrated philosophical justification that attempts to spell out grounds that a liberal democracy could point to in order to specify the value that it can, from within the confines of liberal theory, identify in religious belief and practice.

### THE OBJECTIVE APPROACH

The objective approach to determining whether a claim for religious accommodation has *prima facie* plausibility makes two claims. The first is that there is a religious “fact of the matter” against the background of which individual religious claims can be assessed. According to this view, a person may sincerely believe that her religion requires her to do x or not to do y, and yet be wrong. Let us call this the “fact of the matter” claim (or FOM for short).

The second claim is that Courts, aided by the panoply of tools that they have at their disposal (expert witnesses, “friend of the court” briefs, etc.), are in a position to make out the “objective” rightness or wrongness of the claim for accommodation. Let us call this the “epistemic authority” claim (or EA for short).

It is important for my purposes that these two component parts of the objective approach be clearly distinguished. It is in principle possible to hold FOM and not EA. That is, it is possible to think that there is a religious fact of the matter, but that courts are not in a position to ascertain it.

FOM has some virtues for Courts that have among their concerns that of avoiding the proliferation of accommodations. This concern might be justified on both pragmatic and principled grounds. Pragmatically, one can imagine a Court being sensitive both to the carrying capacity of the judicial system being rapidly outstripped by demands for accommodation were the perception to arise that they were too easily granted, and to broader efficiency concerns were laws to function on an *à la carte* basis. At the level of principle, it is at least plausible to claim on ethical grounds that those who make a claim to be exempted from a law that has been judged to be in the general interest have to bear a high threshold of justification, one which only a subset of those who might *feel* moved to ask for accommodation can actually satisfy. Let me call the concern that accommodation claims be limited the “anti-proliferation” requirement.

Indeed, FOM seems to rule out “frivolous” or “idiosyncratic” claims. If, as a Jew, I claim that my religion requires that I stay home from work to watch all of the World Cup matches, that claim can be ruled out of court because plainly there is no Biblical injunction to watch football. The claim I make as a Jew will have to point to a practice that has some kind of credential in Biblical texts and in the practice of the

Jewish people through history. And not just any claim will satisfy this requirement. Another advantage of FOM is that it makes sense of the fact that we distinguish, both in the Canadian constitutional tradition but more broadly philosophically between religious freedom and freedom of conscience. If (to anticipate) we adopt a subjective approach to the *prima facie* evaluation of religious claims to accommodation, then we elide that distinction, for there is nothing to distinguish an individual's claim that his religion dictates that he act in a way contrary to a law or regulation and an individual's claim that his individual moral conscience does so. (For my immediate purposes, it suffices for me to establish that the objective approach makes sense of a conceptual distinction that exists in law. I will later say something to speak to the philosophical importance of making the distinction). FOM requires that once it is established that the claimant is a member of a religion, it be established that the religion, considered as a relatively uncontroversial text or a readily identifiable set of rites and practices, actually does require that he act in the manner that he says it does. Call this the *perspicuity requirement*: all things equal, it speaks in favour of an approach to the problem we are considering that it affirms rather than elides a distinction written into constitutional law.

Note, however, a first disadvantage (for some) of FOM, one that follows from the perspicuity requirement, and from the fact that it drives a wedge between protection of freedom and protection of conscience. Though FOM seems to put bulwarks in place against proliferation, it does not similarly protect against what I would call opportunism. Opportunism occurs when a person asks for an accommodation that is due to him given FOM (he is a member of religion X, and religion X actually does require that he prescind from doing something that the law or a regulation to which he is subject requires), though the reason he makes the claim has nothing to do with the reasons that his religion mobilizes in order to justify the stricture. It might be laziness or lack of preparedness that leads me to invoking the holiday of *Simchat Torah* as a way of justifying not showing up to the exam, but FOM will grant me the exemption because, wanting to make the matter of the granting of exemptions as objective as possible, it will just want to see whether, first, I am a member of the religion I claim to be a member of (I am), and second, that the claim I am making have religious warrant (it does).

Anti-opportunism might seem a requirement just as important as anti-proliferation. There seems something morally galling about someone "taking advantage" of a legal regime granting accommodation to people to allow them to better observe their religious faith in order to fulfill an end having nothing to do with that purpose.

On the other hand, sincerity, or conformity of individual motivation to moral purpose, is not something we standardly require of people when they exercise other rights and entitlements. If parents claim parental leave and then hire a sit-

ter so that they can spend a lot of time doing things other than looking after their kids, we do not think that their leave should be taken away from them (even if we judge them morally quite severely for exercising their right in this manner). The right to vote is justified at least in part by the idea that all citizens are equally capable of judging the political merits of different candidates, and yet we would not think of taking the right to vote away from someone who avowed voting for the candidate which had the best haircut.

We abstain from making rights and entitlements conditional upon people making use of them for reasons that conform to the purpose for which they were enacted at least in part because we worry about licensing meddlesomeness of the part of public institutions such as Courts. Though we morally condemn those that make opportunistic use of accommodation regimes, we are equally morally worried about judges being able to act as Inquisitors standing in judgment of the seriousness of individuals' religious practice. I would therefore actually see the fact that FOM does not discourage opportunism as a cost of a desirable characteristic of public institutions in general and of Courts in particular, which I will refer to as the *anti-meddlesomeness requirement*. We don't want Courts determining whether someone has a right on the basis of their delving to too great a degree into people's lives to determine whether they are actually "good Jews" (or good Catholics, or good Muslims, and so on).

One undeniable shortcoming of FOM is that it tacitly represents religions as much more simple and monolithic than they actually are. Religions are not codes of ethics that clearly prohibit and prescribe behavior. That is so for at least two reasons, which I will refer to as "diversity of sources" and "diversity of interpretations".

By diversity of sources, I refer to two distinct phenomena. The first has to do with the diversity of written sources. A judge who determined for example that she would simply read the Pentateuch in order to determine what Jews' religious obligations are would be short-circuiting millennia of writings that have subtly but importantly different statuses in the Jewish religion – the Talmud, the Mishna, and almost countless Rabbinical commentaries. I am certain that the same can be said of other religions.

The second phenomenon that falls under the general heading of "diversity of sources" has to do with the fact that religion has to do not just with individual belief but also with communal practice and ritual. People worship in groups. What's more, for many religious persons, *practice is more important than belief*. That is, the question of whether the metaphysical claims made in the holy texts of their religions are true or not is far less important than is the requirement of remaining true to tradition, to taking part in a certain range of practices that bind the individual to community both synchronically and diachronically. And for re-

ligions that have spread across the globe, as have the world's major religions, practice will be inflected by non-religious, cultural considerations. To again use examples drawn from my own religion, the clothing worn by ultra-orthodox Ashkenazi Jews have less textual warrant than they do connection to traditions that grew up among practicing Jews in certain corners of the Pale of Settlement. But it would be a mistake to say that because Jews from Iraq do not dress in the same way, therefore no accommodation should be made for this way of dressing in circumstances in which it might come into conflict with some administrative requirement.

By “diversity of interpretation”, I mean something that is doubtless obvious, namely that religious texts have been through the centuries and in some cases millennia (in the case of “older” religions”) subject to a wide range of interpretations, some of which have become institutionalized (there are Orthodox, Conservative, Liberal and Reconstructionist synagogues, all of which are organized around different ways of interpreting the diversity of Jewish texts and practices; similarly there are Sunni, Shiite and Ismaeli Muslims, a dizzying range of Christian sects, and so on), others “infra-institutional” – they are the kinds of difference of interpretation that might divide believers who still think of themselves as members of the same religion.

Given diversity both of written and of “practice-based” sources and diversity of interpretations, it is probably a euphemism to conclude that interpreting the religious obligations of a claimant is more difficult than interpreting the Tax Code (which is not to say that that is easy!). This does not necessarily invalidate FOM (though maybe it does), but it places the hurdle that it has to face extremely high indeed.

This brings us to the second claim made by proponents of an objective approach to assessing the *prima facie* warrant of religious claims. That claim was that of the epistemic authority of the Court to determine facts of the matter about whether a person making a claim for accommodation is actually doing so on the basis of an accurate representation of his religious obligations. Now, EA would be plausible were facts of matter about religious obligation easy to ascertain. But as we have just seen, they are not.

Now, EA might still be vindicated if it turned out that, fortunately, Courts in countries like Canada were *very good* at interpreting religious doctrine, interpretation and practice. But there is no reason to think that this is so. The training that judges receive and the experience that they accumulate before they are named to the bench rarely if ever qualify them for that particular task.

A defender of EA might however point to the fact that judges are aware of their

own shortcomings in this regard. This is the reason that they enlist help in order to make their decisions. They receive “friend of the court” briefs and lawyers on both sides of a legal conflict solicit expert witness testimony, most notably.

The problem with this kind of epistemic prosthesis is that they often reflect rather than overcome debates and conflicts of interpretation. In *Amsalem* (a case that opposed a religious Jew to his landlord over the issue of whether, as the landlord argued, his religious obligation was satisfied by the construction of a communal *souccah* for all the Jewish inhabitants of the condominium complex in which he lived, or whether, as the claimant argued, his religions required that each Jewish family be able to construct their own on their own balcony (which was opposed by the landlord for aesthetic reasons as well as for reasons of safety)), lower Courts found in favour of the landlord largely on the basis of the testimony of rabbis who claimed that the laxer practice was sufficient to honor religious obligations. The Supreme Court, which found in favor of the claimant by a 5-4 margin, affirmed the subjective approach to determining the *prima facie* plausibility of Amsalem’s claim, but in so doing consulted, and decided to give preference to, a rabbi who claimed that as far as religious obligations such as the construction of *souccah* is concerned, it is important that the individual believer be given as much latitude as possible in order to allow him to “take joy” in the fulfillment of his religious obligation.<sup>10</sup>

In choosing to privilege the testimony of one expert witness rather than another, the Court was in effect reclaiming for itself the epistemic authority that it claimed to be backing away from by calling on expert witnesses in the first place. But it is difficult to see how they could have done otherwise: religious experts are not like ballistics experts. They are themselves subject to the interpretive difficulties wrought by the plurality of sources and interpretation. What’s more, in the case of the rabbis heard by different levels of courts in the *Amsalem* case, these experts are (unlike ballistics experts, at least one would hope) parties to the debates and disputes of interpretation that expert testimony is purportedly being sought out to overcome.<sup>11</sup>

The obstacles that lie in the way if a court being able to claim epistemic authority are considerable. But there are moral obstacles as well. To appreciate these, consider that one response to the problems just canvassed might be to say that though there are considerable obstacles to determining the fact of the matter about an individual’s religious obligations, the matter cannot be left undecided when demands for accommodation are put forward. Someone has to determine whether the accommodation will, or will not be granted. Why not entrust that task to the Courts?

We might resist entrusting the Courts with this task for at least two reasons. First, if courts are asked to adjudicate between rival interpretations of religious text and practice, they are in effect being asked to violate the obligation of neutrality

which it particularly important that Courts cleave to in religious matters. Neutrality requires that the state not affirm any particular religion. Now, in granting accommodations on religious grounds, the Court is not violating that requirement because it is not saying anything about the relative value of different religions, but rather weighing against one another the importance of a law or regulation that has *prima facie* justification relative to the common good, and the importance of a religious obligation that has importance for the claimant.

But in claiming, (say), that Orthodox Judaism is a “better” interpretation than Liberal Judaism, the Court, and therefore the State, is departing from that stricture. It is now saying that the claims of one religious group are more credible as interpretations of the religion in question than are those of another, and that in virtue of that fact demands for accommodation that flow from it will be granted, whereas those that flow from the other will be denied. If we believe that neutrality is particularly important in the State’s treatment of religion, then we have reason to believe that Courts should not be involved in the business of determining religious facts of the matter.

Second, demands for accommodation often (though not always – religious Christian groups have in majority Christian countries asked to be exempted from strictures that prohibit religious symbols in public spaces and institutions) emanate from religious minorities. Sometimes, these religious minorities are ones that perceive themselves as having been oppressed by the State of which the Court is the emblematic embodiment. Minority status tends to breed suspicion and fear of institutions that are thought of as “speaking for” the religious or cultural majority. This tendency is exacerbated when a history of oppression compounds minority status. Thus, there is a concern that decisions made by judges who are not members of the religious minority in question, and who sit on a Bench that is seen as representing the majority, faces a legitimacy deficit in making judgments about the facts of the matter about a minority religion, either directly, or via the indirect route of legitimating one religious expert rather than another.

In sum, the objective approach has advantages and disadvantages. By disciplining accommodations through the demand that they be “objectively” verifiable, it satisfies the “anti-proliferation” requirement. By making sense of a distinction written into the *Charter* between conscience and religion, it satisfies the perspicuity requirement. I argued that though it runs the risk of inviting opportunism, it in so doing avoids the even worse pitfall of meddlesomeness.

On the other hand, it implicitly suggests that determining facts of the matter about religion is much easier than it actually is. What’s more, it is grounded in a view about the epistemic authority of the Court that is both epistemically and morally suspect, even when the competence of the Court is enhanced by expert witnesses and the like.

The opposed approach, the subjective approach, looks at the question of the establishment of the *prima facie* plausibility of a claim for religious accommodation from an opposite tack. It claims that a claim has *prima facie* warrant if it is made sincerely by the claimant. In order for a claim to accommodation to be deemed worthy of consideration, it must be the case that the claimant truly believes that it is essential to his ability to worship and to experience his spirituality. It is to this approach that I now turn.

### THE SUBJECTIVE APPROACH

The subjective approach seeks to establish the sincerity of claimants.<sup>12</sup> It requires that they truly believe that they are religiously obligated to do x whereas the law requires that they do y. Being defined in explicit opposition to the objective approach, it has a very large and permissive conception of what counts as a plausible religious claim. Each individual is, as it were, his own religious arbiter, the individual best able to determine religious right from wrong. Let's call this attitude toward the individual religious conscience of each believer the "sincerity" condition.

It is very important to note that the subjective approach incorporates its own claim to epistemic authority (EA2). The court that invokes the subjective approach is not claiming to be expert in determining religious truth and falsity. Rather, it is claiming to have privileged access to the sincerity of the claimant.

Whereas the bugbear of the objective approach seems to have been the danger of proliferation, the worry of the proponent of the subjective approach seems to be opportunism. What the approach most seems to want to avoid is people making opportunistic use of religious prescriptions, claiming that they are entitled to an accommodation even where nothing in their biography suggests that they have ever acted beforehand on the basis of the values that the religion mandates. And so, it claims to be able to "read the hearts" of claimants in order to rule opportunists out.

What are the advantages of the subjective approach? Some of them can simply be read as ways of addressing the flaws inherent in the objective approach. Thus, while the objective approach sets itself the epistemically daunting task of establishing religious "facts of the matter" despite the diversity of sources, practices and interpretations, the subjective approach is premised upon the ability of Courts to do something that they have been doing since time immemorial, which is to establish the credibility of claimants, in the present context that they really believe what they claim to believe. While the risk of meddlesomeness and judicial overreach is obviously still present (one can well imagine courts overreaching by claiming to know better than claimants what is truly in their hearts), the task is not one for which Courts seem by their very nature unsuited to carry out. Both the determination of sincerity, and the Courts' status as appropriate insti-

tutional mechanisms through which to establish sincerity, seem easier to establish than the corresponding tasks that the objective approach has to accomplish, those of establishing religious facts of the matter, and of trying to use the essentially juridical expertise of judges in order to adjudicate religious conflicts.

Another potential advantage that I would claim for the subjective approach is that of recognizing the agency of believers. I say “potential” here because the realization of this potential would require lessening the emphasis placed on the inward dimension of *sincerity*, and playing up a broader conception of *agency*. The subjective conception with its emphasis on sincerity would seem to stress the relation of the believer to his own mental content. He must bear the appropriate propositional attitude to it, namely *belief*. But one could imagine a subjective approach that emphasized not (non-neutrally) belief but rather agency, the fact that whether through fully articulated belief to which sincerity or insincerity can be ascribed, religious experience is never passive. The subjective approach recognizes that religion is not just something that *happens* to people, but rather something that people *do*. Even in cases where, (as we will see below), it is inappropriate to reduce religiosity to a question of individual belief and conviction, religious belonging and practice is something that profoundly inflects and informs people’s (sometimes inchoate and taken-for-granted) experience of the world, of their relations with others, and of their perception of their obligations. It is a mistake to put forward the simplistic dichotomy according to which believers are either fully procedurally autonomous agents whose belief is entirely driven by conscience, or mindless automatons who merely await the deliverances of some higher authority. Religion can inform the agency of individuals rather than short-circuiting that agency. Religion matters to believers, and that mattering is something that cannot be accounted for according to a view of the faithful as merely determined in their actions by outside authoritative sources.

But the disadvantages of the subjective approach are considerable as well. Chief among them is in my view the central claim of the subjective approach, which is that the only bar that a claim for religious accommodation has to pass is that of individual sincerity, a claim that is premised upon the further claim that religion is ultimately about individual conviction and conscience.

There are as far as I can see at least three problems with this set of interlocked claims. First, as has already been mentioned, by reducing religion to a matter of *belief*, the approach gives us no way to account for the distinction that is present in our constitutional tradition and in that of many others, which is that freedom of conscience and freedom of religion are protective of different things. Invoking a vaguely Dworkinian idea that in interpreting constitutional texts we should try to make the law “the best that it could be”, we should avoid interpre-

tations of Charters that make them redundant, that provide in effect two constitutional protections where one would have sufficed.<sup>13</sup>

Second, as Avigail Eisenberg has pointed out, there is something implausible about the subjective interpretation taken on its own terms. Indeed, to use one of Eisenberg's own examples, were a Jew to claim that his sincerely held view about what his religion required of him is that he ingest peyote for ceremonial purposes, the subjective view if taken literally would only be able to establish sincerity, and would have to abstain from the argument that on no plausible interpretation of Jewish law, custom or practice is that an even remotely plausible claim. In fact, in order to avoid absurdities of this kind, the subjective approach must at least tacitly incorporate an objective dimension setting the bounds of plausible sincerely held convictions about the requirements of this or that religion.<sup>14</sup>

Third, there are not only narrow legal, but also more broadly philosophical reasons to want to hold on to the conscience/religion distinction. The subjective conception in collapsing religious belief onto conscientious conviction tacitly reduces all religion to what we might call a "Protestant" conception of religion, which privileges the moment of belief over that of practice and deference to tradition. Now clearly, some religions clearly do prioritize conviction in this manner – that was a central theological motivation behind the Protestant Reformation, and it is in some measure what distinguishes orthodox from liberal denominations of Judaism. But many strands of contemporary religion do not place the individual conscience of the believer on such a pedestal, and on the contrary emphasizes the epistemic humility of the believer in subordinating his individual conscience to authority, be it the authority of tradition, of text, or of religious leaders. The subjective conception tacitly or explicitly downplays such forms of religiosity, and in so doing it violates the neutralist strictures that public institutions such as Courts ought to cleave to in adjudicating religious claims to accommodation.<sup>15</sup>

While it illegitimately privileges certain forms of religiosity over others, the subjective conception also ignores what is morally distinctive about claims of conscience, and about the specific reasons that it makes sense to protect the capacity of citizens to make claims of conscience. When one thinks of the paradigm cases of conscientious refusal or objection – pacifists who refuse to go to war, health-care professionals who refuse to perform euthanasia in those jurisdictions in which it has been decriminalized,<sup>16</sup> and the like – what we see are people who have strong moral objections to certain state policies. The best interpretation of the protection of freedom of conscience in my view is that (paradoxical as it may sound), while we want citizens to obey the law, we also want them to be able to think autonomously about the moral claims that the law makes. We don't want citizens who are slavish in the face of the law. We want them when they obey to

do so because they have considered and affirmed the legitimacy of what the law requires of them. Now the *cost* of this might be that in exercising their capacity to think independently of the law's requirements, citizens will come to conclusions radically opposed to those of legislatures and tribunals. They will determine that wars ought not to be fought, whatever the practical and ethical stakes, because nothing can justify one in deliberately taking another human life. They will reach the conclusion that health-care professionals ought under no circumstances be involved in the termination of life, no matter how grim it has become. Now my intention is not to *endorse* either of these two stances, but rather to emphasize the importance for democracies to possess citizens who feel that they can follow their moral reasoning where it goes (within limits) even when this places them in conflict with what the law requires, and to protect them within well-circumscribed limits in their exercise of that capacity.<sup>17</sup>

The subjective conception elides the distinction between the kinds of claims that are made by would-be conscientious objectors, and those that are made by claimants for religious accommodation. Though they may sometimes be extensionally equivalent (the vegetarian and the Buddhist may both be asking for an exemption from meat-based diets, say in institutional contexts that otherwise impose it, and from which claimants cannot exit at will, like the army or prison), the religious claimant and the moral claimant are making claims that are substantively quite different. The moral claimant says that he cannot do *x* because he believes it to be *wrong*, full stop, whereas the religious claimant is claiming that *x* is unacceptable given his religious commitments, or one might perhaps better say his religious identity. Now, as we have seen above, there may be some religions and denominations that have already as it were placed an emphasis on individual conscience as opposed to identification with a tradition and community of believers, it is difficult to claim even in their case that claims of religious accommodation are necessarily reducible to claims of individual conscience. For a subjective claim for religious accommodation can be to the effect that the believer sincerely believes that his religion requires of him that he abstain from *x*, rather than that morality requires of him that he abstain to *x*. The further step that would need to be taken in order to argue for the equivalence, not just extensionally but intensionally, which is that religion is reducible to morality, would be extremely difficult to establish, to say the least.

So the subjective approach alleviates the objective's approach's considerable epistemic burden, but it comes at the cost of representing religion tendentiously, and of not allowing us to account for the distinctive importance of constitutional protections of freedom of conscience.

Is there a way of combining the strengths of these two approaches into a hybrid approach that would avoid the pitfalls of both? It is to this question that I now turn.

## A SYNTHESIS?

I would like in this last section to propose an approach that attempts to avoid the pitfalls associated with the approaches that have just been mooted, while retaining their advantages. I want to begin by taking a step back from the detail of juridical debates to do with religious accommodation to ask a more basic, philosophical question: what reasons might a liberal democracy have to ascribe value to religious practice sufficient to ground claims for religious accommodation (as well as other claims that religious groups might make, such as subsidies and tax-exempt status, and limited autonomy over certain areas of communal life)?

As an example of the kind of argument that I am after, consider Will Kymlicka's well-known argument in favor of self-determination rights for minority nations that have been involuntarily incorporated into larger political entities. Regardless of the benefits that individuals may draw from being members of a national group, Kymlicka claims that a liberal need see value in national affiliation only to the extent that it provides him with an important ingredient of individual agency. To wit, it provides them with a "context of choice" within which to exercise their individual capacity for choice.<sup>18</sup> Can we come up with a structurally similar argument to Kymlicka's in the case of religious belonging, one that provides liberals with reasons to value it, irrespective of the particular grounds that members of a religious group might profess for their membership?

I believe that we can. To begin to make some headway, I would like to take my bearings from a recent paper of Samuel Scheffler's on the moral importance of tradition. By the term "tradition", Scheffler intends to denote a set of quite different kinds of things that bear family resemblances to one another rather than falling under a unique set of necessary and sufficient conditions. Among the features that the members of this set possess, Scheffler lists "beliefs, customs, teachings, values, practices and procedures that is transmitted from generation to generation".<sup>19</sup> Though traditions are not all *religious* traditions, on this account, all religions seem to me to be traditions. Indeed, the very etymology of the term "religion" points to its function in "linking together" people and generations in precisely the manner that traditions, broadly understood, do.

On Scheffler's account, traditions perform an important function in "anchoring" individual identity in time. He claims that it is an important condition of individuals coming to feel that they are possessed of a stable identity that they be able to make themselves at home against the backdrop of the identity-threatening flux of space, and most clearly, of time. By linking individuals to something that possesses a meaningful stability across time, a tradition "plays a role in relation to time that is analogous to the role that a home plays in relation to space".<sup>20</sup>

If Scheffler is right about the importance of tradition to one's sense of enduring, stable identity, then, to the extent that we accept what I take to be a fairly uncontroversial premise, it is also important to individual *agency*. That premise is the following: we cannot be agents (as opposed to wantons who, according to Harry Frankfurt's famous characterization, act on the basis of the strongest occurrent desire<sup>21</sup>) if we do not have a relatively stable sense of self. The vindication of this premise is given by much current work in the theory of action, that has sought to complete the belief-desire model of agency by observing that our agency is expressed through temporally extended plans or projects that incorporate and account for our myriad individual actions.<sup>22</sup>

If this account is plausible, it follows that we cannot be agents if we do not possess a temporally extended sense of self. If Scheffler is right about tradition, it follows that traditions are important not only to stabilize our identities against the identity-threatening backdrop of the flux of time, but also to our ability to be agents rather than merely wantons. And if I am right in claiming that religions are (among other things) traditions as defined by Scheffler, it follows that religions are among the various ways in which individual agency is sustained. It provides a temporally extended context against the backdrop of which agents come to see themselves as possessed of a temporally extended self.

Two other points need to be made to extend Scheffler's account in a manner that allows us to answer that I set for myself at the outset of this section. First, though Scheffler claims that traditions can be constituted by any subset of the set of properties that he claims traditions to be constituted by, he clearly believes that there are at least some properties that are necessary constituents of traditions. First, most trivially, traditions are temporally extended. They are beliefs, practices, rituals, institutions, etc., that people inherit from the past and pass on to the future. Second, they are intersubjective and collective. They are, in Scheffler's words, "public, collective enterprises".<sup>23</sup> This means, first of all, that it is difficult if not impossible to imagine a solipsistic tradition. Traditions seem to be the sorts of things that link people together. Second, they are, again to use Scheffler's terms, *enterprises*, that is that they link people together in practices (rather than for example merely in beliefs). The collective nature of a tradition is constituted by the fact that they bring together people whose behavior and belief is not merely convergent, but rather who do things together.

If all of this is true, then it follows that religions are part of a smaller set than might have originally been thought by referring to the list of properties of traditions that Scheffler introduced in order to provide a general definition of traditions. Traditions are paradigmatically collective enterprises, as, I take it, are religions.

I will make a second point by introducing a distinction. All religions provide their members with what might be termed “authoritative scripts”. That is, they identify certain texts, obligations, beliefs, rites and practices as constitutive of what the tradition is. Now some religions are “closed”, both in the sense that they do not allow religions to evolve by accretion and syncretism, and in the sense that the interpretation of these texts, practices, and so on are the preserve of an authoritative epistemic elite. Ordinary members of closed religious traditions receive these traditions as commands more than they receive invitations to participate in the reappropriation and reinterpretation of authoritative scripts.

Some religious traditions are “open”, in the sense that either they do not foreclose the evolution of religious traditions through accretion or syncretism, and/or they allow or openly encourage members of tradition to exercise agency within the tradition by interpreting and reappropriating for themselves the authoritative scripts that have been bequeathed to them, in order to adapt and give meaning to these scripts in the context of their circumstances.

With this characterization of religious tradition in hand, I am now in a position to offer an answer to the question I posed to open this section of the paper: what can a liberal find of value in religious tradition, that might be sufficient to ground state accommodation of religion, in the form, among other things, of legal exceptions and exemptions? The answer would seem to be this: regardless of what people *think* (for example that they are doing the will of God), religions (and other forms of organized tradition) can matter to liberals because they contribute both a condition and a site for individual agency. They provide a condition in that they are among the ways in which humans achieve the agency-enhancing temporal stability of their identities. And, at least in their “open” variants, they allow agents to exercise what might be termed “cultural agency”, namely the creative participation in the interpretation and reappropriation, and supplementation of partially open, authoritative scripts.

Clearly, a liberal theory will find more value in open than in closed religious traditions, because such traditions sustain and encourage rather than inhibiting an important form of agency. Such traditions recognize the interest that people have in interpreting and reappropriating for themselves the authoritative scripts that they inherit from the past in order to make them meaningful in the light of present experience and circumstance.

How does this account allow us to split the difference between the subjective and objective approaches to accommodation that were discussed above? My claim is that by digging deeper than either account does into the moral and philosophical grounds that warrant liberals ascribing value to religious traditions, they allow us to see the kernel of truth in both accounts, while hopefully avoiding the pitfalls that would arise from seeing either one as a sufficient, stand-alone account.

Remember that I am guided in these reflections by what I have called above the “perspicuity requirement”, which claims that to the extent that constitutional documents and common philosophical and legal usage distinguish between freedom of religion and freedom of conscience, we must find ways to distinguish the moral considerations that underpin them, rather than running them together. Freedom of conscience is underpinned by the view that within limits (the delineation of which is at present a pressing moral and philosophical task), people should not be forced to act against their moral beliefs. A justification of this limit upon the State is presumably that in a liberal democracy, it is desirable that citizens be encouraged to be morally inquisitive and critical, rather than morally deferent and incurious.

Religious freedom, as distinct from freedom of conscience, matters for different reasons from a liberal standpoint. The account of toleration and accommodation that emerges from this account ensures that the practice of religious accommodation allow the liberal democratic state to realize these reasons.

By integrating aspects of the objective account described and critiqued above, the account that naturally flows from the argument just sketched satisfies the perspicuity requirement. Indeed, like the objective account, the account defended here, (which, for lack of a better word, I will go on to term the “hybrid” account), my account requires for a claim made on religious grounds that it be connected to what I have here called an authoritative script. There is a range of texts, practices, rites, and so on, that are at least partially constitutive of a religion, and a claim has to be made at least partly by reference to these (partly, and not completely, because as I have mentioned above some religious traditions evolve by accretion and syncretism).

The hybrid view therefore endorses a version of FOM. There is a fact of the matter about the texts, rites, practices, beliefs, and so on, that are constitutive of a religious tradition. But it lessens the epistemic burden placed upon courts by requiring of them not that they be able to ascertain who is right and who is wrong in their interpretation of a religious tradition, but rather, more modestly, that they be able to ascertain that these interpretations, the rightness and wrongness of which they do not seek to establish, are actually interpretations of a religious tradition. The form of EA embodied in the hybrid account, though not completely free from possible controversy, does not require of courts that they take sides in religious conflicts as regularly as the objective account would. Presumably, determining what scripts are authoritative for a given religious tradition will not involve courts in as much controversy as would the requirement that they determine which side is right in the interpretation of these scripts.

The hybrid account also shares much with the subjective account mooted above. Stated in very general terms, the account takes agency seriously by recognizing

the importance of traditions in sustaining individual agency, and thus provides grounds that liberals, given their emphasis on individual agency, to support accommodations for religious persons. As opposed to a purely subjective account that would presumably require of members of religious minorities that they justify their claims to exemptions as if they were claims of conscience rather than tradition-based claims, however, this account does not privilege what I have above called “Protestant” conceptions of religion. Rather, it takes seriously the possibility that some traditions provide benefit to individuals not by being a form of belief, but rather by being a form of practice.

What’s more, the hybrid account would allow us to make distinctions between traditions that seem sensible from a liberal point of view. It would most notably recognize that while all religious traditions have importance for individuals in that they contribute to the temporal stabilization of individual identity, they do not all contribute equally to the promotion of individual agency. Closed religious traditions might not provide grounds for exemption that are as strong as do open traditions. (I hasten to add that it does not follow from a religious tradition being “open” that it is internally organized along liberal, democratic lines. Many religious traditions that view themselves as “orthodox” are nonetheless sites of quite creative cultural agency, and are often rife with internal debate).

A liberal account grounded in the arguments presented here would thus enjoin judges to consider claims for accommodation made by members of religious traditions, to the extent that they are grounded in recognizable interpretations of these traditions, and particularly when they are put forward by members of “open” religious traditions, that is by traditions that, though they need not themselves be organized democratically or in accordance with liberal norms, nonetheless provide a space for individuals to engage in cultural agency.

I want to make two final notes in closing. First, it should be clear throughout that the test I am imagining here in very broad lines establishes a first bar that claims to religious accommodation must pass, at least within the context of the kind of logic that Canadian Charter jurisprudence embodies. Indeed, Section 1 of the Canadian Constitution allows the Court to set aside a *prima facie* reasonable claim to accommodation if a pressing objective of general interest can be shown in a manner compatible with the values of a free and democratic society to warrant the limitation of the protection of a right. Clearly, on my account, those claimants who have satisfied the *prima facie* plausibility test still have a significant hurdle to clear. So while I have shown that liberals have reason to give claims grounded in religious tradition some *prima facie* weight, it does not follow that once recognized, such claims should be viewed

Second, and relatedly, I think that it nonetheless makes a difference for a claimant whether he be told that, though his claim has met a *prima facie* burden of proof,

it has to be set aside because of pressing social needs, or whether, on the contrary, he be told that his claim has no merit, even independently of this broader consideration. It is important that we calibrate this first hurdle just right so that it provides vindication just to those claimants that we think merit it given our best understanding of the values underpinning freedom of conscience and of religion, even if it turns out that that vindication is only *prima facie*.

## NOTES

- <sup>1</sup> For a recent collection of historical and conceptual inquiries into toleration, see Melissa Williams and Jeremy Waldron (eds.), *Toleration and its Limits*, The NYU Press, 2008.
- <sup>2</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Oxford: Oxford University Press, 2001.
- <sup>3</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567
- <sup>4</sup> See for example the Canadian case *R. v. Malmö Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74
- <sup>5</sup> I have sought to articulate the logical structure of the Oakes test in greater detail in Daniel Weinstock, “Philosophical Reflections on the Oakes Test”, in L. B. Tremblay et G. C. N. Webber (Eds.), *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* Montréal: Éditions Thémis.
- <sup>6</sup> These have been well chronicled in Dia Dabby, *Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law*, M.A. Thesis, Faculté de Droit de l’Université de Montréal, January 2010.
- <sup>7</sup> For some important discussions of some of these issues, see *inter alia*, Richard Moon, “Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms”, in *Brandeis Law Journal*, 41 (3), 2003; Benjamin L. Berger, “The Limits of Belief”: Freedom of Religion, Secularism, and the Liberal State”, in *Canadian Journal of Law and Society*, 17 (1), 2002; and Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond”, in *University of Toronto Faculty Law Review*, 54 (1), 1996.
- <sup>8</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47
- <sup>9</sup> *Bruker c. Marcovitz*, [2007] 3 R.C.S. 607, 2007 CSC 54
- <sup>10</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at 75.
- <sup>11</sup> For some interesting thoughts about the place of religious experts in adjudicating religious disagreements before the Courts, see Lori Beaman, “The Courts and the Definition of Religion”, in *Defining Religion: Investigating the Boundaries between the Sacred and the Secular*, edited by Arthur L. Greil and David G. Bromley, Oxford: Elsevier, 2002.
- <sup>12</sup> For a strong defense of this approach, see Jocelyn Maclure and Charles Taylor, *Laïcité et liberté de conscience*, Montréal: Boréal, 2010.
- <sup>13</sup> This interpretive notion is of course drawn from Ronald Dworkin, *Law’s Empire*, Oxford : Oxford University Press, 1986.
- <sup>14</sup> Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*, Oxford: Oxford University Press.
- <sup>15</sup> Cf Benjamin Berger, “Law’s Religion: Rendering Culture”, in *Osgoode Hall Law Journal*, 45 (2) 2007.
- <sup>16</sup> See Mark R. Wicclair, *Conscientious Objection in Health-Care*, Cambridge : Cambridge University Press, 2011.
- <sup>17</sup> Cf Kimberley Brownlee, *Demands of Conscience*, forthcoming from Oxford University Press.
- <sup>18</sup> Will Kymlicka, *Multicultural Citizenship*, Oxford : Oxford University Press, 1995.
- <sup>19</sup> Samuel Scheffler, « The Normativity of Tradition », in *Equality and Tradition. Questions of Value in Moral and Political Theory*, Oxford : Oxford University Press, 2010, p. 290.
- <sup>20</sup> *Ibid.*, p. 301. Cf. G.A. Cohen, « Rescuing Conservatism :
- <sup>21</sup> Harry Frankfurt, « Freedom of the Will and the Concept of a Person », in *The Journal of Philosophy*, 72 (1975).
- <sup>22</sup> See for example Michael Bratman, *Intentions, Plans, and Practical Reason*, Cambridge : Cambridge University Press, 1999.
- <sup>23</sup> Scheffler, p. 301.