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The Nature of Religious Coercion

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THE NATURE OF RELIGIOUS COERCION

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This article examines the nature of religious coercion. Direct religious coercion denotes situations where the government expressly applies sanctions to ensure conformity with religious goals. Indirect religious coercion describes situations where, although the state may not have intended to pressurize citizens to comply with some religious activity, it nonetheless takes advantage of social, psychological or peer pressure that has the same conformity-inducing effect. Indirect religious coercion is a real problem for those who dissent from majoritarian religious practices. But an open-ended inquiry into it can, as critics point out, be a highly unpredictable and subjective exercise. On balance, the article concludes that the concept does deserve recognition by the courts. The article develops a modified indirect coercion test to guide judges in First Amendment cases. A two-step test is expounded to streamline the inquiry, identify the key criteria and render the test more workable.

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“No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.”¹

“Let there be no coercion in religion”.²

INTRODUCTION

To ask “what is religious coercion?” is a demanding question, akin to asking, “what is religious freedom?” This is because religious coercion is the antithesis of religious freedom.³ Defining precisely what is “coercion” is an exercise that continues to tax philosophers.⁴ To take but one definition, “coercion occurs when one person threatens to visit some evil or unwanted consequence on another unless that other does or refrains from doing some act in accordance with the coercer’s demands.”⁵ Rather than laboriously work through the subject again from scratch,⁶ it will

* []. My thanks to Steven Smith, Greg Crespi and John Dawson for helpful comments on an earlier draft of this paper.

¹ Art. 18(2) International Covenant on Civil and Political Rights, Dec. 19 1966, Sen. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 175; Art. 1(2) United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73d plen. mtg., U.N. Doc. A/36/684 (Nov. 25, 1981).

² *The Qur’an*, Sura 2; Al-Baqara 256.

³ “The right to religious freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters of religion no one is forced to act in a manner contrary to his own beliefs.” VATICAN COUNCIL (2d: 1962-1965), *Declaration on Religious Freedom*, reprinted in THE DOCUMENTS OF VATICAN II 675, 678-79 (Walter M. Abbott, gen. ed., 1966)(1965).

⁴ See, e.g., NOMOS XIV: COERCION (J. Roland Pennock & John W. Chapman eds., 1972); Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969); ALAN S. ROSENBAUM, COERCION AND AUTONOMY: PHILOSOPHICAL FOUNDATIONS, ISSUES, AND PRACTICES (1986); ALAN WERTHEIMER, COERCION (1987); COERCION AND THE STATE (David A. Reidy & Walter J. Riker eds., 2008).

⁵ Burton M. Leiser, *On Coercion*, in COERCION AND THE STATE 31, 31 (David A. Reidy & Walter J. Riker eds., 2008).

⁶ Fortunately this has been done. For a most rigorous and lucid analysis of the core elements of coercion, see Peter Westen, ‘Freedom’ and ‘Coercion’—*Virtue Words and Vice Words*, DUKE L.J. 541, 559-569 (1985). After systematically refining and re-refining the term, “coercion” is

suffice for present purposes to posit an initial working definition of religious coercion as: the application of, or threat of, force by the coercer (A) to ensure someone, the coerced (B), engages in (or refrains from engaging in) a particular religious⁷ practice, observance, ceremony or ritual (x).

Notice in this definition, the identification of A, the perpetrator of the coercion, is left open. Definitions of religious coercion typically talk about compulsion, force or power exercised by the state or by others.⁸ There is no doubt that religious coercion may be exerted by non-state actors—employers, unions, churches, clubs, neighbors, parents, relatives, friends, angry mobs⁹—upon other citizens or groups of citizens. If one believes, as I do, that authentic faith must be free and voluntary,¹⁰ then it may seem myopic to focus upon government coercion in religious matters and not coercion by non-government actors. This is a fair criticism. My response, firstly, is that constitutional bills of rights typically have a “vertical” focus and are aimed curbing excesses of *government* power exercised towards citizens. Thus, some form of state action is required before the conduct at issue can be scrutinized as a constitutional violation. Secondly, the extent to which the state ought to intervene to protect one group of vulnerable citizens from religious pressure exercised by another such group is simply beyond the scope of this essay—save in one situation that I shall come to shortly. Conceivably, the state’s duty to protect the religious freedom of its citizens could require it in

finally defined by Westen, *id.* at 589, as: “a constraint or promise of a constraint, Y, that X₁, knowingly brings to bear on X in order that X choose to do something, Z₁, that X would not otherwise do and that X does not wish to be constrained to do—where X knows that X₁ is bringing or promising to bring Y to bear on him for that purpose, where Y renders X’s doing Z₁ more eligible to X than Z₁ would otherwise be, and where Y leaves X worse off either than he otherwise expects to be or than he ought to be for refusing to do X₁’s bidding.”

⁷ On what constitutes a “religious” versus a philosophical, patriotic or moral practice, *see infra* note 160 and accompanying text.

⁸ *See* the Vatican definition, *supra* note 3: “coercion on the part of individuals or of social groups and of any human power.”

⁹ H. J. McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335, 343 (1980).

¹⁰ *See e.g.*, VATICAN COUNCIL, *supra* note 3, at 689: “It is one of the major tenets of Catholic doctrine that man’s response to God in faith must be free. Therefore no one is to be forced to embrace the Christian faith against his own will. ... The act of faith is of its very nature a free act. Man ... cannot give his adherence to God revealing Himself unless the Father draw him to offer to God the reasonable and free submission of faith.”

some circumstances to intervene.¹¹ The obvious example is a law to prevent disturbance or interruption at places of worship.¹² The focus of this essay, however, is religious coercion exercised or authorized by the state.

In Part I, I outline the two conceptions of religious coercion, direct and indirect. In Parts II and III respectively, I examine the case against and for legal recognition of indirect religious coercion. Part IV contains an assessment of the pros and cons of adopting the indirect coercion approach and concludes in favor of the law recognizing the concept. Part V sets out a modified indirect coercion test. My goal here is to ensure the benefits of scrutinizing the practical social pressure that majoritarian religionists exert upon adherents of religious minorities are not dissipated by an unpredictable, open-ended inquiry. Accordingly, I propound a test that narrows the inquiry sufficiently to give it a greater degree of administrability and predictability. I conclude that indirect religious coercion is worth proscribing, provided a focused inquiry is followed.

I. TWO CONCEPTIONS OF RELIGIOUS COERCION

Leading cases on the meaning of the right of religious freedom from Canada, the United States and South Africa refer to two distinct conceptions of religious coercion, one narrow and one broad.¹³

¹¹ See further, REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 176-184 (2005).

¹² See e.g., the Ecclesiastical Courts Jurisdiction Act of 1960 s. 2 (Eng.); AHDAR & LEIGH, *id.* at 363.

¹³ See, e.g., respectively, R v. Big M Drug Mart Ltd., [1985] 18 D.L.R. (4th) 321, 353-354 (Can.); Lee v. Weisman, 505 U.S. 577 (1992). S v. Lawrence, 1997 S.A. (4) 1176, 1211 (S. Afr.). The Constitutional Court, in the leading South African case, *Lawrence*, briefly acknowledged the two types of coercion. Chaskalson P. commented that endorsement of a religion by the state may contravene the religious freedom guarantee in the Constitution where this “has the effect of coercing persons to observe the practices of a particular religion or of placing constraints on them in relation to the observance of their own different religion (*id.* at 1211).” He continued: “The coercion may be *direct or indirect*, but it must be established to give rise to an

First, there is “direct” or “legal” religious coercion. This denotes “overt”, “express”, “explicit” or “blatant” pressure exercised by the state upon individuals to engage in (or not engage in) matters religious. It is “legal” in nature as there is the express threat of a legal penalty, sanction, fine or the threat of withdrawal of a state benefit for non-compliance. It is “direct” because the government is intentionally and openly confronting the person with a choice of conforming to the religious activity in question or facing the adverse consequences imposed by the state. There are just two parties involved: the coercer (A) and the coerced (B)

The second type is “indirect” religious coercion where the state uses an intermediary or third party to achieve its object. Indirect religious coercion comprises less overt and more “subtle” kinds of social, peer or psychological pressure by private persons upon other private individuals to engage in (or not engage in) matters religious. There is, with this second form of religious coercion, no legal sanction imposed by the state for non-compliance. Furthermore, the choice to conform or not with the religious conduct is in a strict, formal sense, voluntary.

This situation appears at first glance to be an instance of purely private religious coercion and it is difficult to see how the state has coerced citizens to support or participate in religion. Nonetheless, the argument goes, the state may still be implicated where one can discern a causal link between the state and the ostensibly private exercise of coercion. While the state may not have directly applied pressure, it may have “orchestrated”¹⁴ or relied upon social pressure to ensure conformity to some religious matter. This is wrong, as “the government may no more use social

infringement of the freedom of religion (*id.*)” O’Regan J. stated that explicit state endorsement of one religion would not be permissible “because it would result in the indirect coercion that Black J adverted to in *Engel v. Vitale* (*id* at ¶123).” Sachs J. also alluded to the significance of coercion, “whether direct or indirect”, albeit in rejecting the proposition that coercion was necessary before a state endorsement of religion could be found to constitute an infringement of the Constitution (*id* at ¶179).

¹⁴ *Myers v. Loudon County Public Schools*, 418 F 3d 395, 406.

pressure to enforce orthodoxy than it may use more direct means.”¹⁵ Here there are three parties involved: the coercer (A), the intermediary (I) and the coerced person (B).

My prime focus is not the situation where the government intentionally and actively co-opts private intermediaries as its agent to bring pressure to bear. This is non-contentious as a just another species of direct coercion, but it is not the phenomenon at issue. Rather, I am concerned with situations where this was not the original or principal objective but, nevertheless, the state becomes aware of the “collateral damage” its policy is *now* causing. It belatedly becomes aware that it has “structured an environment” where social pressure is having a coercive effect upon some citizens and having done so “the State cannot disclaim its responsibility for those resulting pressures.”¹⁶

Indirect religious coercion theory says the government cannot use an intermediary to bring about its goal or—and this is the crux—blithely *allow* the same result to occur having created a situation where the prospect of B being coerced to participate by (non-state) actors, I, is a real and foreseeable one. Having so structured the situation would be wrong to simply “let peer pressure take its natural and predictable course.”¹⁷ Plainly, the government cannot expressly say: engage in this religious activity *x* or suffer the penalty. Neither, according to the indirect religious coercion theory, should the state create or mandate a situation where B is confronted with a technical choice to not engage in a religious activity, but this choice is illusory due to the presence of social or peer pressure exerted by I.

The Canadian Supreme Court identified the contrasting notions of coercion in *Big M Drug Mart*:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by

¹⁵ *Lee v. Weisman*, 505 U.S. at 594.

¹⁶ *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 269 (1990) per Justice Marshall (Brennan J., concurring).

worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the *absence of coercion or constraint*. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.... Coercion includes not only such *blatant* forms of compulsion as *direct* commands to act or refrain from acting on pain of sanction, coercion includes *indirect* forms of control which determine or limit alternative courses of conduct available to others.¹⁸

In the Establishment Clause case law the distinction is firmly recognized, although, there has been a vigorous debate among the Supreme Court justices on the wisdom of extending the notion of religious coercion beyond direct legal coercion to include indirect forms of religious coercion.

To reiterate, this essay seeks to clarify these two different kinds of religious coercion and, in particular, to explore whether indirect religious coercion is a workable and helpful notion for legal purposes.

A. Direct Religious Coercion

A straightforward understanding of religious coercion is legal coercion—religious practice or observance enforced by the threat of legal sanction by the state. The Human Rights Committee in its authoritative General Comment No. 22 upon Article 18(2) of the International Covenant on Civil and Political Rights 1966 (“No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice”) take this approach to the meaning of coercion:

Article 18(2) bars coercions that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel

¹⁷ Justice Thomas in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 47 (2004).

believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant are similarly inconsistent with article 18(2).¹⁹

Justice Antonin Scalia, dissenting in *Lee v. Weisman*, has been a consistent advocate of the direct legal coercion approach: “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*”²⁰ *Lee* is one of the many cases where the conduct at issue was public prayer. The Supreme Court held that it was unconstitutional for a rabbi to offer non-sectarian, generically theistic, invocation and benediction prayers at Rhode Island, middle school and high school graduation ceremonies. The prayers were not rendered lawful by the fact that attendance at the graduation was voluntary in a legal sense.

Justice Clarence Thomas in the Pledge of Allegiance case, *Elk Grove*, strongly endorsed Justice Scalia’s strict definition. He argued that the broader notion of indirect, subtle coercion (to be discussed shortly) adopted in cases such as *Lee* “cannot be defended”²¹ and “has no basis in law or reason.”²² Justice O’Connor in *Elk Grove* pinpointed “compulsion...of the direct sort”²³ and instances where the government “*overtly coerce[s] a person*”²⁴, as the proper focus.

¹⁸ *Big M Drug Mart Ltd*, [1985] 18 D.L.R. at 353-354 per Dickson J. (italics added).

¹⁹ General Comment No. 22, ¶5. UN Doc. CCPR/C/21/Rev. 1/Add.4 (1993). See further PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN RIGHTS LAW AND PRACTICE 46-47 (2005); Peter Radan, *Chapter 1: International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights*, in LAW AND RELIGION: GOD STATE AND THE COMMON LAW 9-27 (Peter Radan, Denise Meyerson and Rosalind Croucher eds., 2005).

²⁰ *Lee v. Weisman*, 505 U.S. at 640 (emphasis in original).

²¹ *Elk Grove*, 542 U.S. at 45.

²² *Id.* at 49.

²³ *Id.* at 44.

²⁴ *Id.* (italics in original).

What are examples of direct coercion? Taxation to support a state church, compelling attendance at a state church and requiring a religious oath to obtain government office are historic instances.²⁵ The ICCPR mentions the deprivation of state educational or medical benefits for non-compliance as further examples.

A good contemporary example is a prison case, *Kerr v. Farrey*.²⁶ James Kerr, an inmate at a Wisconsin state minimum-security facility, was subject to significant penalties if he refused to attend religion-based narcotics rehabilitation meetings. Specifically, he would be classified to a higher security risk category and adverse notations on his prison record would be entered that could affect his eligibility for parole. The Seventh Circuit Court of Appeals held that the state had impermissibly coerced him to participate in a religious program.²⁷

B. Indirect Religious Coercion

A more subtle and broader understanding of coercion takes into account the psychological, social or peer pressure a person may experience if he or she does not comply. Whilst not under any legal penalty, the person may feel they have little real choice not to engage in the conduct expected.

In a long line of Establishment Clause cases, US judges have criticized state-approved practices that involve “subtle coercive pressures”²⁸ to engage in some religious practice. In *Engel v. Vitale*, a nondenominational voluntary prayer said by the class at the start of each school day at a New York public school was struck down as a violation of the Establishment Clause. The majority of the Supreme Court stated:

²⁵ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 559-660 (1989); *Lee v. Weisman*, 505 U.S. at 640-641.

²⁶ *Kerr v. Farrey*, 95 F. 3d 472 (7th Cir 1996).

²⁷ Compare *Raines v. Siegelman*, 2006 W.L. 691236 (MD Ala) where the court held that the evidence did not support the allegation that the inmate had been coerced into attending a faith-based substance abuse program due to the ability to choose a secular alternative.

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct* governmental compulsion and it is violated by the endorsement of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not.... When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure* upon religious minorities to conform to the prevailing officially approved religion is plain.²⁹

In *Lee v. Weisman*, the majority of the Supreme Court insisted that “public pressure, as well as peer pressure, . . . though subtle and indirect, can be as real as any overt compulsion.”³⁰

The court accompanied the expanded notion of coercion with an expanded (and similarly contested) meaning of “support” or “participation” in a religious activity. Conceivably, the objector to the prayer could sit or stand in silence during the invocation and thereby signify simply mere respect for, rather than participation or assent in, the prayer. But the court saw it otherwise: “What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.”³¹ The dissenter is coerced into *appearing* to subscribe to a religious activity he or she does not agree with.

Justice Scalia dissented forcefully on this point:

The Court’s notion that a student who *sits* in “respectful silence” during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely “our social conventions”... have not coarsened to the point that anyone who does not stand on his chair and

²⁸ *Lee v Weisman*, 505 U.S. at 588.

²⁹ *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (italics added).

³⁰ *Lee v. Weisman*, 505 U.S. at 593.

³¹ *Id.* at 593.

shout obscenities can reasonably be deemed to have assented to everything said in his presence.³²

Even a student who was standing would not be justified in believing that this action signified her own participation or approval. For Justice Scalia, standing “does not remotely establish a ‘participation’ (or an ‘appearance of participation’) in a religious exercise.”³³ Rather, it is, he contended, equally consistent with respect for the religious observances of others.

The Supreme Court in *Santa Fe Independent School District v. Doe* found similar indirect coercion at work in a Texas high school’s student-led prayer delivered before its home football game.³⁴ Again, while attendance at a football game was voluntary, and not as compelling an event as a one-off graduation ceremony, in a practical sense the court held it was not. For some pupils such as the direct participants—the football players, cheerleaders and band members—attendance was required. But even for the greater student body it would be unrealistic to say that they did “not feel immense social pressure to be involved in the extracurricular event that is American high school football”.³⁵ The prayer had “the improper effect of coercing those present to participate in an act of religious worship.”³⁶

In *Elk Grove*, the majority of the Ninth Circuit Court of Appeals drew upon *Lee* and *Santa Fe* in ruling that the elementary public school policy requiring teacher-led daily recitation of the Pledge of Allegiance was coercive.³⁷ Students were effectively coerced to participate in an exercise with religious content —given the Pledge uses the words “under God”—since not to do so would risk a backlash by their peers. Although the Supreme Court was not required to rule on the merits of the

³² *Id.* at 637.

³³ *Id.* at 638.

³⁴ 530 U.S. 309 (2000).

³⁵ *Id.* at 311.

³⁶ *Id.*

³⁷ *Newdow v. US Congress*, 328 F. 3d 466 (9th Cir 2003).

Establishment Clause violation, Justice Thomas agreed that if the Court's broad understanding of coercion in *Lee* was the ruling precedent, then the Pledge was unconstitutional.³⁸

In Canada, the courts have applied the indirect coercion test to invalidate religious-based activities in public school classrooms such as prayers and bible readings. The existence of a legal right for the child to be excused from the religious activity has been deemed inadequate in the face of the severe embarrassment or "stigmatization" pupils would incur when exercising their opt-out right. Peer pressure would operate to compel them to join in.³⁹

The leading decision is *Zylberberg v. Sudbury Board of Education*.⁴⁰ Ontario legislation provided that a public school "shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and repeating of the Lord's Prayer or other suitable prayers." The scheme provided for an exemption from participation if the parent so requested. If the child excused remained in the classroom during the exercise, he or she would not be required to participate in it. The majority of the Ontario Court of Appeal, by four to one, held that the legislation infringed s. 2(a) of the Canadian Charter of Rights and Freedoms and was thus of no effect. The Sudbury School Board argued that the right to claim an exemption negated any suggestion of compulsion on non-Christian pupils to participate in the religious exercises. In the court below, one judge found it "offend[ed] to logic and commonsense"⁴¹ to say that the necessity of requesting an exemption was in itself a form of compulsion or coercion:

³⁸ *Elk Grove*, 542 U.S. at 46. As we have seen, however, he believed that *Lee* was wrongly decided and the broader notion of coercion was unsustainable.

³⁹ See *Zylberberg v. Sudbury Board of Education*, [1988] 52 D.L.R. (4th) 577 (Can.); *Canadian Civil Liberties Assoc v. Ontario (Minister of Education)* [1990] 65 D.L.R. (4th) 1 (Can.); *Russow v. British Columbia (Attorney-General)*[1989] 62 D.L.R. (4th) 98 (Can.); MARGARET OGILIVE, *RELIGIOUS INSTITUTIONS AND THE LAW IN CANADA* 255-356 (2d ed. 2003).

⁴⁰ *Zylberberg*, [1988] 52 D.L.R. (4th) 577.

⁴¹ Anderson J., Ontario Divisional Court: [1986] 29 D.L.R. (4th) 709, 740.

It is tantamount to saying that a right to refuse is a compulsion to accept. Choice is of the essence of freedom and the decision as to what choice is appropriate is often difficult. The difficulty is part of the price of freedom.⁴²

At most, the Board contended, the need to obtain an exemption might be an “embarrassment” but it was not coercive in its effect.⁴³ The majority disagreed. First, the whole question of pressure and coercion must be looked at not from the viewpoint of the members of a majoritarian religious group, but from the standpoint of the dissenters, the members of a religious minority.⁴⁴ “The peer pressure and the class-room norms to which children are acutely sensitive, in our opinion, are real and persuasive and operate to compel members of religious minorities to conform with majority religious practices.”⁴⁵ Avoidance of stigmatization operated here to effectively compel the objecting pupils to conform:

the right to be excused from class, or to be exempted from participating, does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion.

... the excusal clause did not preclude a finding of coercion because pupils under peer pressure would be reluctant to call attention to their differences by taking advantage of it.⁴⁶

⁴²

Id.

⁴³

Zylberberg, [1988] 52 D.L.R. at 590.

⁴⁴

Id.

⁴⁵

Id. at 591.

⁴⁶

Id. at 592 and 595.

Religious freedom “in a broader sense” is infringed by the very act of the state compelling citizens to make a religious statement.⁴⁷ Under this approach, it is objectionable to be forced to declare one’s difference from or adherence to the majoritarian religious position.

In contrast, Lacourcière JA, in a lengthy dissenting opinion, could find no religious compulsion here. He did not deny that indirect religious compulsion could exist and could result in a restraint upon religious liberty.⁴⁸ But it did not exist here. The exemption mechanism was cast in “broad terms”⁴⁹ and the decision how best to accommodate a child excused from participation was made in consultation with the parents.⁵⁰ Children who remained in the classroom could and normally did stand with their peers during the exercises, but they were not required to bow their heads.⁵¹

He firmly rejected the majority’s view that being compelled to make a religious statement in itself constituted a violation of religious freedom:

the concept [of freedom of religion] cannot be so broad as to prohibit government Acts which compel the making of a religious choice. If “freedom” were so broadly conceived, it would demand a stance of state neutrality that us not justified and probably not possible to achieve...

to suggest that the requirement that a student make a choice is itself constitutionally invalid is, in my opinion, an untenable position. In my view, the government may not compel students to participate, but it is not prevented from creating a situation where a choice as to whether or not to participate must be made.... The state is under no duty to insulate children from cultural and religious differences. Thus, being compelled to choose whether or not to participate in religious exercises is not, in itself, constitutionally impermissible.⁵²

⁴⁷ *Id.* at 591. The majority at 595-596 quote approvingly Justice Brennan in *Abington School District v. Schempp*, 374 U.S. 203, 288 (1963) that “the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.”

⁴⁸ *Zylberberg*, [1988] 52 D.L.R. at 604 and 621.

⁴⁹ *Id.* at 604.

⁵⁰ *Id.* at 582.

⁵¹ *Id.*

⁵² *Id.* at 615-616.

For the minority, the evidence in this case pointed to a lack of compulsion. Students had been regularly excused from classroom activities for many different reasons, religious and non-religious.⁵³ Expert opinions of psychologists suggested no harm was caused to children required to seek an exemption insofar as moderate levels of pressure to conform and conflict were part of the normal developmental process in children as well as adults.⁵⁴

Finally, on what is religious activity the Canadian courts have given a broad meaning to that term. Religious coercion is not just pressure to engage in or refrain from engaging in some religious activity. It extends to engaging in or not engaging in some secular activity to vindicate the religious beliefs of others.

The Canadian Supreme Court in *Big M Drug Mart* said that a form of religious coercion is employed by the state when a citizen is required by the government to do or abstain from doing certain otherwise lawful, normal or harmless acts to preserve the religious feelings of others. It held that the Lord's Day Act "work[ed] a form of coercion"⁵⁵ to the extent it bound non-Christian shoppers to remember and observe the Christian holy day and prevented non-Christian retailers from selling their goods on that day:

the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action that is being decreed, but in my view compulsion is nevertheless what it amounts to.⁵⁶

⁵³ *Id.* at 619.

⁵⁴ *Id.* at 619-620.

⁵⁵ *Big M Drug Mart*, [1985] 18 D.L.R. at 354 per Dickson J.

⁵⁶ *Id.* at 364 per Dickson J.

II. THE CASE AGAINST INDIRECT RELIGIOUS COERCION

There appears to be no dissenters to the proposition that *direct* religious coercion is impermissible. But is indirect religious coercion the kind of coercion that courts should be concerned with? There are at least three distinct objections to the concept.

A. *Administratively Unworkable*

Some are adamant that the courts are ill equipped to delve into slippery questions of psychological coercion. The concept is yet another species of “constitutional Rorschach test”⁵⁷, another “weasel word”⁵⁸. Justice Scalia in *Lee v. Weisman* was at his caustic best in his denunciation of the notion. He accused the majority of wielding “the bulldozer of its social engineering” by “invent[ing] a boundless, and boundlessly manipulable, test of psychological coercion”⁵⁹. Reflecting upon the public nativity display cases which had come, to quote the words of another judge, to “requir[e] scrutiny more commonly associated with interior decorators than with the judiciary”⁶⁰, Justice Scalia continued: “But interior decorating is a rock-hard science compared to psychology

⁵⁷ Steven Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467 (1994). Gey here is applying this pejorative description to the much-maligned three-part *Lemon* test for Establishment Clause violations (*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

⁵⁸ L. Scott Smith, *Religion Interfacing with Law and Politics: Three Tired Ideas in the Jurisprudence of Religion*, 10 *Logos* 14, 21 (2007).

⁵⁹ *Lee v. Weisman*, 505 U.S. at 632. Smith, *id.* at 26 concurs: “[T]he notion of coercion is simply the term that judges and other citizens use to describe what happens whenever the state adopts religious and moral values with which they disagree. Constraints that are disliked are ‘coercive.’”

⁶⁰ Easterbrook J., dissenting, in *American Jewish Congress v. Chicago*, 827 F.2d 120,129 (1987); quoted in *Lee*, 505 U.S. at 636.

practiced by amateurs.”⁶¹ There was, in Justice Scalia’s view, no room for a kind of judicial “psycho-journey”⁶², adding:

I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of use who have made a career of reading the disciples of Blackstone rather than of Freud.⁶³

The majority had seen itself as engaging in a “delicate and fact-sensitive”⁶⁴ approach in its utilization of the concept of psychological coercion. But Justice Scalia doubted whether the court fully grasped the complexities and subtleties of this phenomenon. A few sporadic citations of articles from the psychological literature

cannot disguise the fact that the Court has gone beyond where judges know what they are doing. The Court’s argument that state officials have “coerced” students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.⁶⁵

B. Over-Inclusive Coverage and Secularizing Effect

The adoption of the concept of indirect religious coercion in anti-establishment cases has had adverse consequences for religious expression in the public square. An increasing number of traditional, historic public religious displays and ceremonies have been successfully challenged due to the courts’ acceptance of the argument that there is a subtle coercive effect upon those citizens who do not share that faith. In most Western nations the religious observances and rituals happen to

⁶¹ *Lee v. Weisman*, 505 U.S. at 636.

⁶² *Id.* at 643.

⁶³ *Id.* at 642.

⁶⁴ *Id.* at 597.

⁶⁵ *Id.* at 636.

be Christian ceremonies and displays, given the historic predominance of the Christian religion in the West.

Public displays that are not directly and legally coercive are, nonetheless, constitutionally suspect under an indirect religious coercion approach because they are said to send an alienating and exclusionary signal to citizens who do not share that religion. In *Big M Drug Mart* the Supreme Court stated that the Lord's Day Act was "inimical... to the dignity of all non-Christians."⁶⁶

the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians.... The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their difference with, and alienation from, the dominant religious culture.⁶⁷

In *Freitag v. Penetanguishene (Town)*⁶⁸ the Ontario Court of Appeal held that the practice of saying the Lord's Prayer at the opening of town council meetings was invalid. Non-Christian residents who attended the council meetings were not forced to stand and say the prayer, but there was pressure upon them to do so. The appellant, Mr Henry Freitag, although he did not himself stand and pray, deposed he felt "great pressure" to do so and felt "intimidated by and uncomfortable" with the practice.⁶⁹ Echoing the words in *Big M Drug Mart*, the court stated the prayer was a "subtle and constant reminder"⁷⁰ of the appellant's difference from the majority. He was "clearly stigmatized by his decision not to stand and recite the Lord's Prayer, so that the fact that he is not prohibited from

⁶⁶ *Big M Drug Mart*, [1985] 18 D.L.R. at 354.

⁶⁷ *Id.*

⁶⁸ *Freitag v. Penetanguishene (Town)*, (1999) 47 O.R. (3d) 301 (Can.).

⁶⁹ *Id.* at 309.

⁷⁰ *Id.* at 313.

making that choice does not save the town’s practice from infringing his Charter right.”⁷¹ The court was in no doubt that adults as well as children could be victims of indirect religious coercion:

Clearly the nature and potential effect of the coercion are much different for an adult who wishes to attend Town Council meetings than for children who are in the school environment all year with friends and teachers, and are subject to the pressures that those important relationships engender.⁷²

But the greater vulnerability of children did not mean adults could be coerced with impunity. Just as children were entitled to be free from coercion to conform to majority religious practices, so adults were “entitled to attend public local council meetings and to enjoy the same freedom.”⁷³

By contrast, in *Allen v. Renfrew (County)*, a “non-denominational and broadly inclusive prayer” (invoking “Almighty God”) recited at the commencement each Renfrew County Council monthly meeting was upheld by the Ontario Superior Court.⁷⁴ Hackman J could not accept that the prayer was “a coercive effort to compel religious observance.”⁷⁵ This inclusive prayer was different from the “specifically Christian prayer”⁷⁶ (the Lord’s Prayer) in *Freitag*. Notwithstanding the “mental anguish”⁷⁷ experience by the applicant, Mr Robert Allen, who described himself as a Secular Humanist, the prayer was “not in substance a religious observance, coercive or otherwise” and the

⁷¹

Id.

⁷²

Id. at 312.

⁷³

Id. Mr Freitag unsuccessfully sought to overturn the Speaker’s Prayer said daily at the opening of the Legislative Assembly of Ontario. The practice was held by the Ontario Court of Appeal to be protected by parliamentary privilege: Ontario (Speaker of the Legislative Assembly) v. Ontario [2001] 201 D.L.R. (4th) 698 (Can.).

⁷⁴

Allen v. Renfrew (County), (2004) 69 O.R. (3d) 742, ¶19 (Can.).

⁷⁵

Id.

⁷⁶

Id.

⁷⁷

Id. at ¶24.

mere reference to God was not enough in its effect “to interfere in any material way with [Mr Allen’s] religious beliefs.”⁷⁸

One more case highlights the unpredictable nature of the indirect coercion test. The recitation of a prayer at city council meetings of Ville de Laval was held by the Québec Human Rights Tribunal to be in violation of the complainant, Danielle Payette’s, an atheist, right of religious freedom.⁷⁹ The complainant testified to feeling “very uncomfortable and uneasy”⁸⁰ when she remained seated whilst the other attendees rose to say the prayer and make the sign of the cross. She testified she felt “humiliated” at one meeting where she raised the issue of the prayer and was booed and shouted at.⁸¹ The Tribunal stated that she was “compelled to either abide by the beliefs of the majority or be singled out”.⁸² There was clear stigmatization occurring here and the prayer “impos[ed] a religious atmosphere and tone that produce[d] a form of coercion contrary to the spirit of the Charter.”⁸³

The alienating and exclusionary signal may encourage some dissenters to conform to majoritarian religious practices. But the real objection is surely not that some citizens are coerced to conform. More often than not the dissenter stands his ground.⁸⁴ Henry Freitag was not coerced into saying the prayer although he felt pressure to. Robert Allen and Danielle Payette similarly did not

⁷⁸ *Id.* at ¶27. The Court added that even of the prayer was in violation of s. 2(a) of the Charter it could be saved as a justified limitation under s 1: *Id.* at [29].

⁷⁹ Québec (Commission des droi de la personne et des droits de la jeunesse) v. Laval (Ville), 2006 Can. L.I.I. 33156 (QCTDP)-2006-09-22 (Can.).

⁸⁰ *Id.* at ¶17.

⁸¹ *Id.* at ¶23. At this meeting one man shouted at her: “Go sit down, you damn crazy woman.” Another started screaming: “It’s because of people like you that the World Trade Center came down” (*Id.* at ¶22).

⁸² *Id.* at ¶190.

⁸³ *Id.* at ¶210. The case was brought under the Charter of Human Rights and Freedoms (Québec) not the Federal Charter. The religious freedom guarantees in the two Charters do not differ significantly.

⁸⁴ Indeed it may be patronizing to assume most meekly succumb. One commentator, criticizing the courts treatment of indirect coercion, charges that the courts’ implicit assessment of the complainants “rests upon the patronizing assumption that whatever oppositional view they hold is so fragile and weakly supported that a brief prayer is sufficient to overwhelm their volition

succumb. It is in the nature of things that some will be more courageous than others. Furthermore, coercion is not always successful, but that does not mean that A has not exercised coercion. *Pace* those who argue coercion must be successful,⁸⁵ I agree with Peter Westen that it need not: “To coerce a person is to subject him to coercive constraint, regardless of whether the constraint achieves its purpose.”⁸⁶ At the very least once can charge A with an *attempt* to coerce.⁸⁷

Arguably, the real concern behind the alienating-signal objection is not so much that some may be coerced but that the state is not acting neutrally or even-handedly in singling out certain religious communities for special treatment. Christopher Eisgruber and Lawrence Sager contend that the real objection to public school prayer rituals and the like is their social meaning. Implicit is a blunt message: “the real members of this community (the school community, and by extension the larger community serviced by the school or school district) are practicing Christians of a certain sort; others dwell among us but lack the status of full membership.”⁸⁸ These practices “create a class of outsiders and disparage those relegated to that status.”⁸⁹ A constitutional wrong is committed even if students can avoid the ritual and are not directly coerced to participate.

C. *The De Minimis Principle and the Standard for Judging Coercion*

Critics of the indirect coercion approach argue that allegations of exclusion, embarrassment, stigma or alienation are properly caught by the *de minimis non curat lex* principle (the law does not concern itself with trifles).

and induce in them a response contrary to their own belief.” L. Scott Smith, *From Typology to Synthesis: Recasting the Jurisprudence of Religion*, 34 CAP. U. L. REV. 51, 70 (2005).

⁸⁵ See Bayles, *A Concept of Coercion*, in NOMOS XIV: COERCION, *supra* note 4, 16 at 19; McCloskey, *supra* note 9, at 344.

⁸⁶ Westen, *supra* note 6, at 562.

⁸⁷ McCloskey, *supra* note 9, at 344.

⁸⁸ RELIGIOUS FREEDOM AND THE CONSTITUTION 163 (2007).

Some critics would say that the outer limit of coercion was reached, if not breached, when the majority of the Ninth Circuit Court of Appeals in *Elk Grove* held the Pledge of Allegiance to be coercive. Even though the school pupil was not obliged to recite the pledge, she was compelled to watch and listen to the ritual: “the mere presence in the classroom everyday as peers recite the statement ‘one nation under God’ ha[d] a coercive effect.”⁹⁰ The policy “impermissibly coerces a religious act.”⁹¹ Judge Fernandez, dissenting, believed it was “obvious” that the tendency of the Pledge’s “under God” phrase to establish religion in the United States or to interfere with the free exercise (or non-exercise) of religion was *de minimis*.⁹² There was no coercion of anyone’s religious liberty “except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.”⁹³

Admittedly it is no response to say glibly an aggrieved citizen should simply be less sensitive, have a thicker skin, be made of sterner stuff. In *Lee* the majority rejected the argument that the embarrassment and the intrusion suffered by the pupils was of a *de minimis* character.⁹⁴ As Reid J, dissenting in the lower court in *Zylberberg*, observed:

It may be that a control or limitation indirectly imposed is not readily appreciated by those who are not affected by it. It may be difficult for members of a majoritarian religious group, as am I, to appreciate the feelings of members of what, in our society, are minority religions. It may be difficult for religious people

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Id.

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Newdow v. US Congress, 328 F. 3d 466, 488 (9th Cir 2003).

⁹¹

Id. at 487.

⁹²

Id. at 493.

⁹³

Id. at 492.

⁹⁴

Lee v. Weisman, 505 U.S. at 594.

to appreciate the feelings of agnostics and atheists. Yet nevertheless those feelings exist.⁹⁵

There is an interesting discussion of this point in the South African Constitutional Court case, *Lawrence*. Sachs J. explained that the functional impact of a law endorsing a religion may be “marginal” and “its symbolic effect muted”⁹⁶ but the message it sends ought not to be disregarded out of hand. There is a need, he contended, to be most wary in applying the *de minimis* maxim to these situations. The *de minimis* principle:

should be used with extreme caution when it comes to deciding such sensitive and not easily measurable questions as freedom of conscience, religion and belief. One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny and hold beliefs considered bizarre by ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the State is.⁹⁷

In principle, as Sachs J puts it, it should not matter how slight the offence is,⁹⁸ but, in practice, there must be some limit. In *Edwards Books*, the Canadian Supreme Court stated that the Charter guarantee of religious freedom did “not require the legislature to eliminate every miniscule state-imposed cost associated with the practice of religion” and that burdens—whether direct or indirect,

⁹⁵ *Zylberberg*, [1986] 29 D.L.R. (4th) 709, 729: quoted by the majority of the Court of Appeal in *Zylberberg*, [1988] 52 D.L.R. at 590 and also by the Ontario Court of Appeal in *Freitag*, (1999) 47 O.R. at 313.

⁹⁶ *S. v Lawrence*, 1997 S.A. at 1233.

⁹⁷ *S v Lawrence*, 1997 S.A. at 1234.

⁹⁸ See also Justice O’Connor in *Elk Grove*, 542 U.S. at 36-37: “There are no *de minimis* violations of the Constitution— no constitutional harms so slight that courts are obliged to ignore them.”

intentional or unintentional, foreseeable or unforeseeable—upon religion that were “trivial or insubstantial” did not attract constitutional protection.⁹⁹

This issue highlights a recurrent question in discussions of coercion in the law in general: what is the standard by which the response of the coerced person is to be judged? Is it the actual person B’s susceptibility to the religious pressure or is it the average or reasonable person in B’s position?¹⁰⁰ It is, as Wertheimer comments on standards for assessing coercion in law generally, “not clear which approach is preferable”¹⁰¹—a subjective or individualized test versus an objective or standardized one. In the religious context, there might be a case for leaning in favour of a subjective approach based on the individual’s actual response. Judicial support exists for this approach. As noted earlier, the majority of the Court of Appeal in *Zylberberg* held that the question of whether there is religious pressure or compulsion must be assessed from the standpoint of the member of the religious minority.¹⁰² Similarly, in *Freitag* the court evaluated and accepted the direct evidence of the actual complainant, Mr Freitag, regarding *his* feelings of intimidation and stigmatization and its effect of *his* decision not to run for council office.¹⁰³

Of course, subjective protestations of coercion that do not square with the objective likelihood of such may not be given much credence. This perhaps explains *Chaudhuri*.¹⁰⁴ The Court of Appeals for the Sixth Circuit refused to find there had been indirect coercion where Dr Philip Chaudhuri, a professor of mechanical engineering and a Hindu, challenged the practice of prayers at Tennessee State University functions, including graduations. “By no stretch of the imagination” was the professor coerced to attend the functions, given that attendance by faculty was not mandatory,

⁹⁹ R v. Edwards Books & Art Ltd [1986] 35 D.L.R. (4th) 1, 34-35 (Can.). See also Wilson J in Jones v. R [1986] 31 D.L.R. (4th) 560, 578 (Can.).

¹⁰⁰ Matthew Peterson, *The Supreme Court’s Coercion Test: Insufficient Constitutional Protection for America’s Religious Minorities*, 11 CORNELL J. OF L. & PUB. POLICY 245, 266 (2001).

¹⁰¹ WERTHEIMER, *supra* note 4, at 273.

¹⁰² *Zylberberg*, [1988] 52 D.L.R. at 590.

¹⁰³ *Freitag*, (1999) 47 O.R. at 312.

attendance was not monitored and no faculty member had been penalized for non-attendance.¹⁰⁵ Compared to *Lee*, continued the Court, “[w]e may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are.”¹⁰⁶

Those subjected to religious pressure are almost invariably dissenters from, or non-members of, the majoritarian religion. If the reasonable average person in that situation—neither especially courageous nor timid—would not succumb to pressure and conform, that might simply reflect the fact that this person is a member of that faith already or has been socialized by the dominant religion to acquiesce to or feel indifference toward such things.

III. THE REJOINDER

A. More “Realistic”

Defenders of indirect religious coercion argue that it addresses the practical reality of situation.

It might be that philosophers are unanimous that the coerced person *does* have a choice and the response is voluntary.¹⁰⁷ “To say a person has been ‘coerced’ into doing something presupposes an act of will on his part.”¹⁰⁸ “A person being coerced has a choice between acquiescence or resistance to the coercer’s demands, even though the unpleasant consequences of failure to acquiesce might be highly probable or even a dead certainty.”¹⁰⁹

¹⁰⁴ Chaudhuri v. Tennessee State University, 130 F 3d 232 (6th Cir 1997).

¹⁰⁵ *Id.* at 239.

¹⁰⁶ *Id.*

¹⁰⁷ Bayles, *supra* note 88, at 18; McCloskey, *supra* note 9, at 336; Leiser, *supra* note 5, at 33; Michael R. Rhodes, *The Nature of Coercion*, 34 J. VALUE INQUIRY 369, 370 (2000).

¹⁰⁸ Westen, *supra* note 6, at 565.

¹⁰⁹ Leiser, *supra* note 5, at 33.

Now there are situations where philosophers agree it is correct to say a person is forced to do something against his will and the action is involuntary, namely, where the force is an overwhelming external physical force upon which one has no control (a hurricane) or an overpowering natural person (a deranged madman who clasps the hand of the person holding a gun, forcing her to pull the trigger).¹¹⁰ These instances of true involuntary action or acts against one's will—it might be better to dub these “compulsion”¹¹¹—are rare and not the kind of situation we are addressing here. The sorts of coercion we are concerned with are where the person acts and is not acted upon, they reluctantly choose to do something they would prefer not to:

The coerced person acts. He does what he does as a result of coercion. He may not like what he does and may much prefer to act in other ways; and he may do what he does only because he is coerced. Nonetheless, he, the coerced person does what he does; he chooses to do it.¹¹²

Even if, according to the refined strictures of philosophy, the person does exercise choice and the conduct is technically voluntary, and not against her will, this does not dispose of the matter so far as the law is concerned. The courts have said there may be effective compulsion of citizens even if there is no overwhelming or irresistible pressure to contend with. The “real alternatives” open to the complainant must, it is contended, be addressed.¹¹³ In *Lee v. Weisman*, the middle school graduation prayer case, the majority commented:

Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise *in any real sense* of the term “voluntary”... The prayer exercises in this case are especially improper because the State has *in every practical sense* compelled attendance

¹¹⁰ See Bayles, *supra* note 88, at 18; McCloskey, *supra* note 9, at 336.

¹¹¹ Leiser, *supra* note 5, at 33. Bayles, *supra* note 88, at 18, calls this type “occurrent” coercion to distinguish it from “dispositional” coercion, the latter denoting the choice between unpalatable alternatives.

¹¹² McCloskey, *supra* note 9, at 336.

and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had *no real alternative* to avoid....¹¹⁴

Recognition of the reality of subtle or indirect coercion in religious matters is said to avoid the “formalism” of the direct religious coercion approach.¹¹⁵ “To say”, said the Court in *Lee*, “a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”¹¹⁶ Steven Gey describes the individious choice confronting school pupils such as “Jane” Newdow and Deborah Weisman¹¹⁷ this way:

He or she may silently accept the government-sanctioned religious exercise, thereby suppressing deep disagreement with the exercise and misleading the rest of society about the dissenter’s true views. Alternatively, the dissenter may make an overt gesture of dissent, which will be perceived by virtually everyone as inappropriate, rude, inflammatory, and probably sacrilegious, thereby increasing the dissenter’s feelings of ostracism and the psychological pressure to conform.¹¹⁸

¹¹³ *Lee v. Weisman*, 505 U.S. at 588.

¹¹⁴ *Id.* at 598 and 595(italics added).

¹¹⁵ *Lee v. Weisman*, 505 U.S. at 595; *Santa Fe*, 530 U.S. at 311.

¹¹⁶ *Lee v Weisman*, 505 U.S. at 595. And perhaps even adult citizens such as licensed Texas lawyer, Thomas Van Orden, who regularly pass by the six-foot-high red granite Ten Commandments monument erected on the lawn of the state capitol: *Van Orden v. Perry*, 545 U.S. 677(2005).

¹¹⁷ Or, at least their fathers. Daniel Weisman, “acting for himself and his daughter”, objected to any prayers at fourteen-year-old Deborah’s middle school graduation: *Lee v Weisman*, 505 U.S. at 581. The Rev Dr Michael Newdow, an atheist and ordained minister of the Universal Life Church, objected to his five-year-old daughter’s exposure at kindergarten to the Pledge of Allegiance. The (unnamed) daughter herself, was, according to her mother (*Elk Grove*, 542 U.S. at 9), a Christian who did not object to saying the Pledge. The Supreme Court held that as he was the non-custodial parent, he lacked standing to sue on her behalf.

¹¹⁸ Gey, *supra* note 57, at 503-504.

There is reluctance by some philosophers to say that social pressure or public opinion may coerce.¹¹⁹ Coercion is “an interpersonal phenomenon”¹²⁰ that requires both coercer and coerced to be “persons”—either natural or juridical (such as corporations, churches or the government). Natural forces such as impending storms or lightning might compel people to act in a certain way but, as noted above, they cannot sensibly be said to engage in coercion.¹²¹ The amorphous thing called “social pressure” seems equally suspect as the coercive agent. One reply would be to say that the intermediary is that collectively of natural persons we call society: it is real humans exercising the pressure to comply. Another would be that we are not talking about indiscriminate and diffuse social pressure in general, but a particular, localized, discrete instance of it (such as a school or council meeting). But even if there is a clear distinction between coercion (personal) and social pressure (impersonal, diffuse, indeterminate, lacking design or conscious direction to achieve certain intended ends) there is, as the drawers of the distinction concede, the exceptional situation where social pressure “may be exploited... to achieve certain intended ends of conformity.”¹²² This is the very situation presented by the indirect religious coercion cases. The state is taking advantage of social or peer pressure to attain its goal.¹²³

B. Under-Inclusive Coverage

¹¹⁹ See, e.g., McCloskey, *supra* note 9, at 339.

¹²⁰ See Bayles, *supra* note 88, at 19; Rhodes, *supra* note 107, at 372; Westen, *supra* note 6, at 560; Leiser, *supra* note 5, at 33.

¹²¹ *Id.*

¹²² McCloskey, *supra* note 9, at 339.

¹²³ Or, social pressure being used in “an instrumentalized fashion” by the state: ROSENBAUM, *supra* note 4, at 38.

Critics of direct religious coercion test contend that it is too narrow and disturbingly under-inclusive in its coverage.¹²⁴ Gey argues:

[T]he narrow definition of coercion imposes almost no limit whatsoever on government-sponsored religious activity. Adopting this version of the coercion standard would rob the Establishment Clause of almost all its power. . . .

Justice Scalia's "legal coercion" standard is unpalatable even to many advocates of coercion theory, for the obvious reason that the "legal coercion" standard in effect would convert the government into a subsidiary of the majority's religious faith, which would seriously inhibit the religious liberty of everyone else in society.¹²⁵

Gey points to a case like *Doe v. Duncanville Independent School District*¹²⁶ and I agree that it is a troubling example of what social pressure can do.

Duncanville is described in its official city government website as "A warm community of friends."¹²⁷ The following events suggest that this self-description may not have always been so. Jane Doe was a twelve-year-old girl who made the girls' basketball team at Reed Junior High, Duncanville, Texas. The coach of the team regularly began or ended a game with a team recitation of the Lord's Prayer. Even though Doe was "uncomfortable with these prayers", she joined in "out of a desire not to create dissension."¹²⁸ Doe's father, upon learning his daughter did not like participating in these prayers, took the matter up with the school authorities—but to no avail. Thereafter, Doe was required to stand apart from the team during subsequent prayers.

The record shows that her fellow students asked, "Aren't you a Christian?" and one spectator stood up after a game and yelled, "Well, why isn't she praying? Isn't she a Christian?" Additionally, Doe's history teacher called her "a little

¹²⁴ See Peterson, *supra* note 100.

¹²⁵ Gey, *supra* note 57, at 493 and 533.

¹²⁶ 994 F. 2d 160 (5th Cir 1993).

¹²⁷ See http://www.ci.duncanville.tx.us/fast_facts.shtm (accessed 16 January 2009).

¹²⁸ *Duncanville*, 994 F. 2d at 161.

atheist” during one class lecture.¹²⁹

The Fifth Circuit Court of Appeals held the basketball prayers as unconstitutional, largely based on the fact that the coach, a school official, chose and led the prayer.¹³⁰ Had, as Gey hypothesized, the school required the coach to *not* participate in the prayers and permitted the students to decide whether to pray voluntarily, it is likely that the student body would have voted to continue the practice. Would the outcome have been any different?

In fact an event similar to the hypothetical Gey postulated did occur subsequently. As we have seen, in *Santa Fe* the Supreme Court held that a student-led, student-initiated, Christian invocation said over the public address system by a student prior to football games at Santa Fe High School, a public school in southern Texas, was in violation of the Establishment Clause. The interposition of a two-step student election process—whereby, first, students voted on whether to have an invocation and, secondly, who should deliver it—as a “circuit breaker” mechanism¹³¹ did not eradicate the coercive element of the final message and thus did not immunize the practice from constitutional challenge. In addition, it was still government and not private speech.

IV. AN ASSESSMENT

There is, I suggest, considerable merit in the indirect religious coercion approach, in that it does take account of the social and psychological pressures that may practically force a person to comply with some religious activity. As the Court in *Lee v. Weisman* noted,¹³² and subsequent studies continue to affirm, research in psychology does support the everyday intuition that peer and social

¹²⁹ *Id.* at 162-163.

¹³⁰ *Id.* at 164.

¹³¹ *Santa Fe*, 530 U.S. at 310.

¹³² *Lee v. Weisman*, 505 U.S. at 593-594.

influence has a demonstrable conformity-inducing effect upon both adolescents and adults.¹³³ Yet, the notion is not without difficulties, both conceptual and practical. Broadly speaking, are the “benefits” of adopting an indirect religious coercion approach outweighed by the “costs”?

First, in terms of the “costs”, the indirect religious coercion approach calls for subjective and imprecise evaluations of intangible phenomena—peer and social pressure, alienation, stigmatization, ostracism. But clearly some judges believe they are capable of undertaking such an evaluation. Many areas of the law have long called for the courts to engage in subjective and imprecise assessments. For instance, determining the quantum of compensatory damages for loss of reputation is difficult. The determination of whether a merger will result in a substantial lessening of competition in a market is likewise a challenging exercise. Granted that religious coercion is a “manipulable” label, as Justice Scalia dubbed it.¹³⁴ But it is certainly not the only one to be found in the law. “Unconscionable conduct” in contract law and “exclusionary, monopolizing” conduct in antitrust law are just two examples.

Secondly, a finding of indirect religious coercion is somewhat unpredictable. There is the oft-heard accusation that it is simply a matter of “I know it when I see it.”¹³⁵ But is *ex ante* certainty as important a virtue here as it is in commercial law? Is religious freedom law perhaps more like family law where, arguably, *ex ante* certainty is less important? Flexibility and individualized justice are paramount in family and child law and thus amorphous standards such as the “best interests” test are acceptable.

¹³³ For recent studies see, e.g., Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCH. 1531 (2007); Vidas Griskevicius et al, *Going along versus going alone: When fundamental motives facilitate (non) conformity*, 91 J. PERSONALITY & SOCIAL PSYCH. 281 (2006); Leslie M. Janes & James M. Olson, *Jeer Pressure: The Behavioral Effects of Observing Ridicule of Others* (2006) 26 PERSONALITY & SOC. PYSCH. BULL. 474.

¹³⁴ *Lee v. Weisman*, 505 U.S. at 632.

¹³⁵ Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(referring to the difficulty of defining “hard-core pornography”). See further Paul Gerwitz, *On ‘I Know it When I See it’*, 105 YALE L.J. 1023 (1996).

A third “cost” is that indirect religious coercion has the potential to expunge religious symbolism from the public square. Its potency as an anti-establishment weapon has been amply demonstrated in many jurisdictions. As Canada shows—a nation with only a Free Exercise Clause—indirect coercion may do much of the work an anti-establishment guarantee does.¹³⁶ I have placed this third cost in quotation marks, since whether the extirpation of religious displays in the public sphere, and the removal of voluntary religious exercises in state institutions such as schools, is a highly contentious matter. It depends on one’s political and religious outlook. I must be numbered among those defending “mild”, “weak”, “non-coercive”(!) establishments.¹³⁷ I have thus provocatively listed this as another cost.

Fourthly, is not some indirect religious coercion—subtle social or peer pressures to conform, grudging compliance to avert embarrassment or stigma—simply a fact of life in modern pluralistic democracies? Is some offence to at least some persons not an inevitable by-product of contemporary social life, where an increasing range of diverse cultures and religions live cheek-by-jowl in cramped urban confines? Justice O’Connor in *Elk Grove* observed:

Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.... That is not to say that government could *overtly* coerce a person to participate in an act of ceremonial deism...

The compulsion of which Justice Jackson [in *Barnette* (1943)] was concerned, however, was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.¹³⁸

¹³⁶ See M. H. Ogilvie, *Between Liberté and Egalité: Religion and the State in Canada*, in LAW AND RELIGION 134-167 (Peter Radan, Denise Meyerson and Rosalind Croucher eds., 2005).

¹³⁷ See [].

¹³⁸ *Elk Grove*, 542 U.S. at 44.

Similarly, in *Zylberberg*, Lacourière JA insisted: “The state is under no duty to insulate children from cultural and religious differences.” “Thus”, he continued, “being compelled to choose whether or not to participate in religious exercises is not, in itself, constitutionally impermissible.”¹³⁹

Fifthly, and paradoxically, does history not show that religious pressure and testing may produce beneficial effects for adherents of minority faiths by reinforcing their religious convictions? Although it may seem unpleasant,¹⁴⁰ the testing of one’s religious commitments through peer or social pressure may bolster that faith. An observation by Lacourière JA in *Zylberberg* captures this thought: “We as a contemporary multicultural Canadian society are trying to encourage minority children to be proud of their ethnic heritage and assert their respective religious or ethnic identities.”¹⁴¹

Finally, and sixthly, why should there be a sort of “religious dissenter’s veto” akin to the so-called “heckler’s veto”? The majority in *Lee v. Weisman* was not unaware of these points:

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But ... the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause.¹⁴²

Clearly, reasonable people can disagree on what constitutes “too high an exaction”. Chief Justice Rehnquist in *Elk Grove* decried the notion that the court should affirm a sort of religious version of the heckler’s veto. Mr Newdow might sincerely disagree with the “under

¹³⁹ *Zylberberg*, [1988] 52 D.L.R. at 616.

¹⁴⁰ “Peer pressure, unpleasant as it may be, is not coercion”: Justice Thomas in *Elk Grove*, 542 U.S. at 49.

¹⁴¹ *Zylberberg*, [1988] 52 D.L.R. at 619.

¹⁴² *Lee v. Weisman*, 505 U.S. at 597-598.

God” part of the Pledge, but that did not give him “a veto power” over the “democratic choices made by public bodies” that willing participants should participate in a daily patriotic recitation.¹⁴³ This case perhaps points to an unarticulated factor at work here.¹⁴⁴ Religious activities that seem to lack little claim to governmental support might be invalidated even if a small amount of indirect coercion is present. By contrast, if there seems to be a good reason for the government practice (for example, engendering community solidarity and patriotism by saying a pledge) A greater amount of pressure is allowed and the “exaction” is not “too high”.

On balance I believe that a case can be made for adoption of the indirect religious coercion approach. As with so many issues, it is not an all-or-nothing choice. There is more to consider than the stark alternatives of rejecting the concept entirely or accepting an open-ended version of it.

V. A MODIFIED INDIRECT RELIGIOUS COERCION TEST

Instead of an open-ended test of indirect religious coercion, I propose a modified or truncated two-stage test of indirect religious coercion.¹⁴⁵ The object is to capture the benefits of taking into account the practical social pressure that majoritarian religionists exert upon adherents of religious minorities and other dissenters, whilst streamlining the inquiry to give it a greater measure of administrability and predictability.

¹⁴³ 124 S. Ct. 2301, 2320 (2004).

¹⁴⁴ I am grateful to Steve Smith for this insight.

¹⁴⁵ For other tests, *see, e.g.*, *Child Evangelism Fellowship of Maryland, Inc v. Montgomery County Public Schools*, 373 F. 3d 589, 598 (4th Cir 2004)(first, the context and, second, the character of the assertedly coercive activity, are factors to be take into account).

The first step is to restrict the availability of the test. Because coercion is open-textured, greater certainty can only be achieved by more fully specifying its variable terms.¹⁴⁶ One could limit the pool of potential claims by focusing on the type and nature of the complainant (B), the perpetrator (A), the factual setting, the coercion and so on. The plaintiff should have the burden of showing he or she is in the protected class, that the preconditions to a viable claim have been met.

Having refined the situations where a claimant can plead indirect religious coercion, the second stage comprises a mixture of burdens of proof and presumptions, whereby the defendant has the opportunity to show that the practice is legitimate in the circumstances.

A. Stage One: The Preconditions

There are three preconditions to a successful claim that the complainant must satisfy: there must be government conduct not private action, there must be indirect coercion and the coercion must be religious in nature.

I have limited these prerequisites to three. One could extend the requirements further to stipulate the nature of the context or factual situation in which the coercion must occur or the nature of the victim of the indirect coercive pressure. I have rejected these additional conditions. Regarding the factual context, there seems no valid reason why we should restrict the availability of a claim to, for example, closely regulated environments such as schools or prisons. Indirect coercion pressure may occur outside these environments at places such as town meetings. Secondly, there is no convincing reason why the coerced person B should be limited to those especially vulnerable to peer pressure such as children. Constitutional protection may be availed of by adults too, although the assessment of the susceptibility to

¹⁴⁶ Westen, *supra* note 6, at 690.

pressure will take into account the age and maturity of the complainant.¹⁴⁷ I turn now to the three prerequisites.

I. Government Action

First, the complainant must show that the state has acted.¹⁴⁸ This in turn raises the question of a causal nexus. As Cynthia Ward rightly comments: “The problem of setting limits to indirect coercion is really one of connecting the state’s behavior to the feared harm in a way that justifies barring the state from a challenged religious activity.”¹⁴⁹ Usually this causation exercise will be straightforward. In *Freitag* the court was in no doubt that the act of the mayor of Penetanguishene in inviting members of the council to rise with him and recite the Lord’s Prayer was “government conduct” subject to the Charter. The mayor was not acting in his personal capacity but pursuant to his delegated authority under the Municipal Act and the “action [wa]s government conduct by a government official in a government meeting.”¹⁵⁰ Sometimes, however, the matter is contested.

In *Lee v. Weisman* the court disagreed on whether there was state action. Justice Scalia, for the minority, remarked he found it “difficult to fathom” how the state was involved and how the rabbi who delivered the graduation prayers could be said to be “a mouthpiece of

¹⁴⁷ See, e.g., *Mellen v. Bunting*, 327 F.3d 355 (2003) where the Fourth Circuit Court of Appeals held a daily supper prayer at the Virginia Military Institute, a state-operated military college, violated the religious freedom of the two plaintiffs, adult cadets. The “technical ‘voluntariness’” of the prayer did not immunize it and it “exact[ed] an unconstitutional toll on the consciences of religious objectors (*id.* at 372)”. See further Elizabeth Halligan, *Coercing Adults? The Fourth Circuit and the Acceptability of Religious Expression in Government Settings*, 57 S. CAROLINA L. REV. 923 (2006).

¹⁴⁸ *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir 1996).

¹⁴⁹ Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1649 (2006).

¹⁵⁰ *Freitag*, 47 O.R. (3d) at 306.

the school officials”¹⁵¹ when the school did not draft or screen the prayers. The majority, however, was clear that this was a “state-sponsored” and “state-directed” religious activity.¹⁵² A state official, the public school principal, determined that a prayer should be said and “this was a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.”¹⁵³ The principal chose the rabbi and issued guidelines on an inclusive prayer suitable for this occasion and this sufficed to connect the state to the impugned conduct.

Attempts to insulate the government from challenge and sever or “short-circuit” the link between it and the impugned conduct are possible. But, if the *Santa Fe* case is anything to go by, these efforts will be scrutinized stringently. As noted earlier, the attempted “circuit breaker mechanism” failed. The school held a two-fold election where students voted whether to have a pre-game prayer and, if so, who the speaker would be. The school district argued this case was distinguishable from *Lee*: that there was no impermissible *government* coercion since the pre-game messages were the product of student choice; they were *private* not public speech. The majority disagreed: “Although it is true that the ultimate choice of student speaker is ‘attributable to the students’... the District’s decision to hold the constitutionally problematic election is clearly ‘a choice attributable to the State’”.¹⁵⁴ The majority held that to empower the student body majority (via an election) “with the authority to subject students of minority [religious] views to constitutionally improper messages”¹⁵⁵ (namely, prayers) was

¹⁵¹ *Lee v. Weisman*, 505 U.S. 577 at 640.

¹⁵² *Id.* at 586.

¹⁵³ *Id.* at 587.

¹⁵⁴ *Santa Fe*, 530 U.S. at 311.

¹⁵⁵ *Id.* at 316.

impermissible. “The award of that power alone regardless of the students’ ultimate use of it is not acceptable.”¹⁵⁶

2. *Indirect Coercion*

The coerced person B must establish that indirect religious coercion was exercised. The claimant must show he or she was confronted with a state-created choice between a religious activity *x* and a non-religious one and the presence of peer or social pressure by private citizens operates to ensure option *x* is the only realistic or practical choice. To fulfill the causation requirement, the negative social sanction must either be intended by the state or be a “reasonably foreseeable consequence”¹⁵⁷ of requiring the persons coerced to make the choice set before them.

3. *Religious Activity*

The object of the government coercion must be “religious” and not secular.¹⁵⁸ Again this may or may not be straightforward. Is a public elementary school that directs its pupils to take home—along with a host of other materials and flyers—a flyer inviting parents to give permission to their child to attend a school Christian club coercing its students’ participation in a religious activity?¹⁵⁹

¹⁵⁶ *Id.* The minority disagreed strongly on this issue: see Chief Justice Rehnquist’s opinion, *id.* at 321-324.

¹⁵⁷ I adopt the approach of Ward, *supra* note 149, at 1653-54, 1660.

¹⁵⁸ *Kerr .v Farrey*, 95 F 3d at 479. *See also* Ward, *supra* note 149, at 1655-59.

¹⁵⁹ The answer of the majority of the Fourth Circuit Court of Appeals was ‘no’: *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F. 3d 589 (4th Cir 2004). *See further*, Rebecca Hardberger, *Coercion, Misperception and Excessive Entanglement*

The recitation of the Pledge of Allegiance by children in US public schools might, due to the presence of the words “under God”, be characterized as a religious exercise, akin to the saying of a prayer. The majority of the Supreme Court in *Elk Grove* rejected this argument: “Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.”¹⁶⁰ Similarly, the Fourth Circuit Court of Appeals, whilst conceding that it would be demeaning to religious people to say that the phrase “under God” lacked religious significance, nonetheless, the words did not alter the nature of the Pledge as a patriotic exercise.¹⁶¹

By contrast, in *Kerr v. Farrey*, an example of direct religious coercion discussed above, one of the issues was whether the substance-abuse rehabilitation program the inmate was coerced to attend, Narcotics Anonymous, was a religious one. The Seventh Circuit Court of Appeals concluded that AA-style, twelve-step program was religious. The steps—“We turn our lives over to the care of God as we understood Him; “We admitted to God, to ourselves, and to another human being the exact nature of our wrongs” and so on¹⁶²—were clearly “based on the monotheistic idea of a single God or Supreme being.”¹⁶³ The District Court was incorrect in holding that the concept of God could include the non-religious idea of individual will power and hence the program was not inevitably a religious one. The meetings the inmate

with Religion: A Reexamination of Child Evangelism Fellowship of Maryland, Inc. v Montgomery County Public Schools (2006) 39 UC DAVIS L. REV. 1941.

¹⁶⁰ *Elk Grove*, 542 U.S. at 31 per Chief Justice Rehnquist. See also Justice O’Connor, *id.* at 44: “Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.” By contrast, Justice Thomas, *id.* at 48, maintained that even if the Pledge was not a prayer, it still entailed “an affirmation that God exists” and presented a “constitutional problem” since “the government cannot require a person to ‘declare his belief in God.’”

¹⁶¹ *Myers v. Loudon County Public Schools*, 418 F 3d at 407-408.

¹⁶² The twelve steps are quoted in full, *id.* at 474.

¹⁶³ *Id.* at 480.

Kerr attended were “permeated with explicit religious content”¹⁶⁴ such as prayers invoking the Lord. This was not a case like Pledge of Allegiance where the only religious note struck was a couple of words “or other incidental references.”¹⁶⁵

B. Stage Two: The Rebuttable Presumption

Once the claimant has satisfied the court that he or she is within the protected class and that the three preconditions are met—there is state action that coerced B into a religious activity—a prima facie case is established. I propose that upon fulfilment of the prerequisites, a rebuttable presumption¹⁶⁶ arise that indirect religious coercion was exercised in violation of the religious freedom of the complainant.

The defendant coercer, A, has the opportunity to escape constitutional infringement. The onus is upon the to show either: (a) that the effect upon the claimant is *de minimis*, or, failing that, (b) that the defendant has taken all feasible steps to avert the subtle coercive pressure upon the claimant. If the defendant can do neither then the practice is prima facie in violation of the relevant provision safeguarding the right of religious freedom.

¹⁶⁴

Id.

¹⁶⁵

Id.

¹⁶⁶

The presumption against religious coercion derives from the presumption against coercion generally. “Although coercion is not always wrong (quite obviously: one coerces the small child not to run across the highway, or the murderer to drop his weapon) there is a presumption against it... What can be concluded at the moral level is that we have a *prima facie* obligation not to employ coercion”: Virginia Held, *Coercion and Coercive Offers*, in NOMOS XIV: COERCION, *supra* note 4, at 61-62. See also Robert Paul Wolff, *Is Coercion ‘Ethically Neutral’?*, in NOMOS XIV: COERCION, *supra* note 4, 144 at 145-146: “But why seek to eliminate, or at least minimize coercion if it is *not* intrinsically evil?... Presumably because coercion is *not* morally neutral (as persuasion is) but morally evil, and hence requires justification.... The real reason [coercion is intrinsically evil] is quite simply that coercion is degrading. To coerce a man rather than persuade him is to treat him as a thing governed by causes rather than as a person guided by reason.”

The de minimis defence is not an easy one for defendants to satisfy for the reasons discussed above. It is all too easy to dismiss the response of members of minority religions, atheists and other dissenters from the majoritarian faith. The test is individualized and subjective. It is not how a reasonable person would feel and whether that person would succumb to the pressure of the situation and choose religious conformity. It is how the actual complainant, typically a member of a religious minority, would respond. There is an objective gloss here though. Where, however, the actual complainant B's reaction is idiosyncratic and is one that no reasonable person clothed with B's attributes of age, religion and so on, would take, the claim ought to be given little or no weight. If an adult atheist or Buddhist at a university graduation ceremony felt alienated and stigmatized by a theistic prayer and felt compelled to join in, his claim may not be accorded much weight where the evidence showed there was ample opportunity to exit the venue without embarrassment. Take *Tanford v. Brand*.¹⁶⁷ The Seventh Circuit Court of Appeals found there was no constitutional violation. The complainants, a law school professor and two law students and an undergraduate student, were free to stay and listen to the invocation and benediction at the Indiana University graduation ceremony (an impersonal gathering of some 30,000 people) or, as many staff and students chose to do, to not attend the morning ceremony which included the prayer but the afternoon one (which did not have a prayer) or to seamlessly exit the morning ceremony to avoid listening to the prayers. The advancement of religion concluded the Court—and I would equally add, the prospect of any real coercive effect—was “de minimis at best.”¹⁶⁸

If the de minimis defence fails, the defendant may still point to the fact it has taken all feasible steps to avert coercive pressure. Obviously an excusal or exemption mechanism is required. But, as the cases make abundantly clear, that may not be sufficient. The opt-out

¹⁶⁷ 104 F. 3d 982 (1997).

¹⁶⁸ *Id.* at 986.

mechanism must be designed so that the embarrassment or stigma is negligible, if not non-existent. The fact that careful consultation with the affected persons has taken place regarding measures to minimize embarrassment¹⁶⁹ would assist the defendant in this respect. Of course, there may be no compromise possible and, from the coerced person's viewpoint, nothing short of cessation of the activity may suffice. But the duty to eliminate coercion is not absolute and under my formulation the steps taken to offset any coercive pressure must be all those which are "feasible".

CONCLUSION

Coercion is a "vice word" and an open-textured concept.¹⁷⁰ While most judge coercion to be bad,¹⁷¹ coercion can be a purely descriptive and morally neutral term that describes the situation where the pressure exercised by A has in fact left B in a worse position than she otherwise desired to be. It can also be a normative or prescriptive term denoting the situation where the pressure by A has left B in a worse position than she *ought* to be.¹⁷² It is too easy, as Westen points out, to conflate the descriptive and normative.¹⁷³ In religious freedom law this tends to happen: religious coercion has occurred therefore a constitutional violation has

¹⁶⁹ In *Zylberberg*, [1988] 52 D.L.R. at 582, it appears that the school board did consult with parents of dissenting students to devise how best to accommodate the pupils excused from participation, but this did not prevent the majority from finding the practice unconstitutional.

¹⁷⁰ Westen, *supra* note 6, at 543, 547

¹⁷¹ See the scholars cited in note 166 *supra*. Not everyone agrees. See, e.g., Westen, *supra* note 6, at 548; McCloskey, *supra* note 9, at 349; "In fact, it is unprofitable to speak in the abstract about the evilness or otherwise of coercion. Society cannot exist, let alone function well, without the use of coercion at many levels, institutional and personal. It is an essential tool for social life." Samuel Dubois Cook, *Coercion and Social Change*, in NOMOS XIV: COERCION, *supra* note 4, 107 at 126: "Coercion of the human will is intrinsically neither good nor evil."

¹⁷² Westen, *supra* note 6, at 590.

¹⁷³ *Id.* at 544-548, 590-593.

transpired. Yet, “[w]hether an institution exercised coercive force is a matter empirically ascertainable and logically distinct from whether its exercise of coercive force is morally defensible.”¹⁷⁴ The danger of conflating the descriptive and prescriptive is that, having conducted the factual exercise of identifying the exercise of religious coercion, we neglect the further and distinct task of determining whether this *particular* instance is justifiable in *these* circumstances.¹⁷⁵ My proposal starts with the presumption that religious coercion is bad, but does not rest there, for it allows the coercer to make a case that this instance is nonetheless justified.

To recap, there are two broad concepts of religious coercion, one narrow and the other broad. Direct religious coercion, the express and direct imposition by the state of penalties for failure to comply with some religious exercise is wrong. It clearly violates religious freedom. It is the second, broader concept that is controversial. Indirect religious coercion denotes situations where the state makes use of subtle social or peer pressures from private persons to achieve conformity to some religious objective. The state creates or orchestrates a situation where the person has a theoretical choice to decline to engage in a particular religious activity, but the social and psychological constraints make compliance well nigh certain.

I have argued that the indirect religious coercion theory is a useful addition to the religious freedom jurisprudence. It addresses some of the very real and complex dynamics of religious and group behavior. Nonetheless, it is, like many things in life and human society, a subtle and complex phenomenon that does not easily translate into a workable legal doctrine. Rather than jettison the concept entirely, as some are wont to do, I have put forward a modified indirect coercion test in an attempt to focus the analysis, identify the key criteria and make the test more manageable and transparent.

¹⁷⁴ David A. Reidy and Walter J. Riker, *Introduction*, in *COERCION AND THE STATE*, *supra* note 4, at 6-7.

In stage one the complainant must satisfy three conditions before his or her claim of violation of religious freedom may proceed. First, there must be government and not private action. Secondly, there must, obviously enough, be indirect coercion exercised. The claimant must be confronted with a state-mandated choice to conform or not to conform to a particular religious activity and the prevailing social or peer pressures must render the religious option that only practical or real one. Thirdly, the activity must be a religious and not a secular one.

If these preconditions are met, a rebuttable presumption arises that indirect coercion was exercised in breach of the claimant's religious liberty. The second stage enables the coercer to rebut the presumption. First, the state may endeavor to show that the infringement was a de minimis breach: the coercive effect is so attenuated and mild that no religious dissenter or person with the same attributes to the claimant's would succumb to the pressure and join in the religious practice. If that fails, the defendant may show that it has taken all feasible steps to avert coercive pressure and ensure the claimant's choice was really voluntary.

"The multitude", said Tocqueville, "require no laws to coerce those who do think like them: public disapprobation is enough".¹⁷⁶ Social and peer pressure to effect religious conformity is real and is deleterious. We can ignore it but the challenge is to construct a workable law to sensibly regulate its most egregious and conscience-impeding forms.

¹⁷⁵ Westen, *supra* note 6, at 593.

¹⁷⁶ ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 261 (Everyman's Library ed., 1994)(1835).