

# Religious Beliefs and Conscientious Exemptions in a Liberal State

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## Conscientious Exemptions in a Liberal State

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JOHN ADENITIRE

### I. Introduction

This chapter, by engaging with the various contributions in this volume, sets forth a particular approach as to how a liberal state should deal with conscientious exemptions. This approach is here called the Liberal Model of Conscientious Exemptions. The Model has the following four defining propositions:

1. The liberal state should grant a general right to conscientious exemption.
2. The liberal state should refrain from passing moral judgement on the content of the beliefs which give rise to a claim for conscientious exemption.
3. The liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant a conscientious exemption.
4. The liberal state should grant conscientious exemptions to claimants who sincerely hold a conscientious objection which would not disproportionately impact the rights of others or the public interest.<sup>1</sup>

The Liberal Model is distinctively both liberal and interpretive. It is liberal because values which are constitutive of the liberal tradition, such as liberty, autonomy, and so on, mandate that a liberal state conforms to the Model. The Liberal Model does not claim to be acceptable to autocracies, theocracies or systems which always prioritise the general interest over individual well-being. Also, the Liberal Model is not compatible with all versions of liberalism. For example, it would reject the liberal perfectionism which is at the foundation of the approach proposed by Nehushtan and Coyle in chapter seven. As shall be explained in due course, the Liberal Model advocates for a version of liberalism – call it neutral pluralism – which requires the state not to paternalistically interfere with the moral responsibility which each person has to choose a conception of a good life. This results in the state having to endorse a state of affairs where individuals pursue plural and sometimes incompatible versions of a good life.

The Liberal Model is interpretative in the sense defended by Ronald Dworkin.<sup>2</sup> Its propositions need to fit with the legal doctrines which it has as its targets of inquiry.

<sup>1</sup>The Liberal Model was first defended in J Adenitire, 'The Irrelevance of Religion' (2017) 8 *Jurisprudence* 405. However, in that piece the first proposition of the Model, concerning the general right, had not yet been developed.

<sup>2</sup>R Dworkin, *Law's Empire* (Oxford, Hart Publishing, 1998). Although the Liberal Model is interpretive, it is not Dworkinian as Dworkin has explicitly rejected a right to conscientious exemption in R Dworkin, *Religion Without God* (Cambridge, MA, Harvard University Press, 2013) ch 3.

This chapter, for reasons of space constraints, largely leaves behind the fit aspect of the Liberal Model.<sup>3</sup> Instead, it focuses on showing that the propositions are morally attractive. If this is successful, the Model can lend its moral force to the legal practices which it has as its target and show them to be true propositions of law which deserve allegiance in a liberal democracy. To be sure, in line with Dworkinian interpretivism, the Liberal Model need not embrace all the aspects of the practice of conscientious exemptions. It can say that some of these practices are not sound. In this sense the Liberal Model is a critical model, however, and importantly, it is *legally* critical. The aspects of practice which it rejects as mistakes are rejected as legal mistakes: they are mistakes because they do not fit with the underlying moral principles which animate the core of the legal practice.

This chapter analyses each of the four defining propositions of the Liberal Model in turn by engaging with the various contributions in this volume. In part II it defends the proposition that a liberal state should grant a general right to conscientious exemption. Part II sets out the nature of the general right and outlines why it is morally attractive. Part III defends the proposition that a liberal state should not pass judgement on the content of beliefs which give rise to a conscientious objection. The chapter takes particular issue with the approaches proposed by Jones, and by Nehushtan and Coyle in this volume who seem to argue against this second proposition. Part IV defends the proposition that a liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether a conscientious exemption should be granted. The chapter takes issue with Corvino and with Moon who seem to argue that religious exemptions should be somewhat privileged. Issue is also taken with Nehushtan whose anti-religious stance is well known in the literature, although slightly tempered in his contribution with Coyle in this volume.<sup>4</sup> Part V defends the proposition that exemptions should be granted to sincere objectors whose objection will not disproportionately affect the right of others or the public interest. Part VI directly confronts the issue of objections to sexual orientation anti-discrimination laws and argues that, in general, such exemptions should not be granted given the dignitary harms they may inflict on members of sexual minorities. Particular issue is taken with Leigh, and with Chipeur and Clarke, who appear to argue in favour of exemptions from sexual orientation anti-discrimination laws.

## II. The Liberal State Should Grant a General Right to Conscientious Exemption

The first proposition of the Liberal Model says that liberal states should grant a general right to conscientious exemption. The general right is here understood as a legal right to conscientiously object to whatever obligation imposed by law, whether under statute, common law or otherwise, and to obtain from a court an exemption from the duty to comply with such obligation. The general right is to be contrasted with context-specific legal

<sup>3</sup>A detailed analysis of the fit of the Liberal Model with the practice of conscientious exemptions in US, Canadian and UK law is provided in chs 2–7 of J Adenitire, 'A General Legal Right to Conscientious Exemption: Beyond Religious Privilege' (PhD thesis, University of Cambridge, 2018).

<sup>4</sup>Y Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Oxford, Hart Publishing, 2015).

exemptions which are usually found in statutes in relation to a particular legal obligation. Famous context-specific exemptions include exemptions from the military draft or from the duty on doctors to perform abortions. The general right is termed 'general' because it can be invoked in any legal context and does not rely on the existence of context-specific legislative exemptions. The general right defended here is not an absolute right. A court may refuse to grant an exemption if doing so would disproportionately impact the rights of others or the public interest. So the general right to exemption is a *prima facie* or limited legal right. The general right empowers courts to consider the moral and pragmatic issues which legislatures often do when considering to enact context-specific legislative exemptions. After considering the moral and pragmatic issues at stake, courts may accept or decline to grant an exemption to a conscientious objector.

Not much exists in the academic literature to support or argue against the existence of the general right. To be sure, Raz had tentatively argued in its favour from a liberal perspective a few decades ago when he said:

Reflection on the nature of liberalism, it seems, may suggest that the very narrow definition of the liberal state given above should be widened to include the institution of a general legal right of conscientious objection, that is, a state is liberal only if it includes laws to the effect that no man shall be liable for breach of duty if his breach is committed because he thinks that it is morally wrong for him to obey the law on the ground that it is morally bad or wrong totally or in part.<sup>5</sup>

More recently, Nehushtan has also put forward theoretical arguments in favour of the recognition of this general right.<sup>6</sup> More will be said below as to the moral merits of the recognition of the general right. However, remember that the Liberal Model is an interpretive model which needs to fit with the practice of the jurisdictions under focus and which needs to morally justify these practices. So one needs to first mount an arguable case that the jurisdictions under analysis actually do recognise a general right to conscientious exemption before showing that such a right is morally attractive.

As indicated, this chapter will not attempt to show that the Liberal Model actually fits with the practice of conscientious exemption as that would require detailed doctrinal analysis which lack of space precludes. However, some of the contributors to this volume have already provided some evidence to suggest that the existence of a general right to conscientious exemption is actually not as implausible as it first sounds. Sure enough, no known jurisdiction has a constitutional or legislative provision clearly labelled as 'a general right to conscientious exemption'. Rather, in any given jurisdiction, several rules of law need to be conceptualised together to ground the general right.

In the US, for example, one of the grounds of the general right would be the constitutional rule recognised in *Sherbert*, abolished in *Smith* and then reinstated in statutory form in the Federal Religious Freedom Restoration Act (RFRA) and similar state-level legislation. The rule, already considered by several contributors to this volume,<sup>7</sup> is that government cannot substantially burden a person's free exercise of religion, unless in pursuance of a compelling state interest and unless government has taken the least restrictive means to

<sup>5</sup> J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979) 276.

<sup>6</sup> Y Nehushtan, 'The Case for a General Constitutional Right to Be Granted Conscientious Exemption' (2016) 5 *Oxford Journal of Law and Religion* 230.

<sup>7</sup> Chapter 11 in this volume considers it in part I and part III A. Chipeur and Clarke discuss it in ch 9 in this volume, text to n 49. Corvino discusses it in ch 2 in this volume, text to n 36.

achieve that compelling interest. This rule may be grouped together with the other rule under Title VII and similar state-level legislation, considered in detail by Vickers in part II A of chapter ten, which imposes an obligation on employers to accommodate requests from employees for changes to working conditions, short of undue hardship. Under both RFRA and Title VII (and their state counterparts) individuals may seek a conscientious exemption from a wide array of legal obligations. In line with the general right defended in this chapter, the right to exemption under RFRA and Title VII is limited and courts may decline to grant an exemption if, under Title VII, an exemption would impose more than a *de minimis* burden on an employer or, under RFRA, government can point to a compelling state interest and can show that no less restrictive ways, short of granting an exemption, are available to achieve that interest.

Much more could be said about the legal reasons to think that a general right already exists at least under US, Canadian and UK law scattered under several legal doctrines, statutory and constitutional principles which need to be conceptualised together. That discussion is however left for another venue.<sup>8</sup> Nevertheless, it is hoped that the brief discussion above gives a veneer of plausibility to the claim that the first proposition of the Liberal Model actually fits the practice of several liberal democracies. If this poorly substantiated claim is accepted, then it is necessary to show that the existence of a general right is morally justified.

## A. The Justification of the First Proposition<sup>9</sup>

None of the contributors to this volume argue against the grant of conscientious exemptions under any circumstances. Corvino, who argues against exemptions from anti-discrimination laws in the context of provision of commercial services, is happy to accept exemptions in other circumstances. Moon, who is unpersuaded about the case for exemptions for non-religious conscience, is happy to accept religious exemptions when they concern private matters. Nehushtan and Coyle, who are deeply sceptical of religious exemptions, accept that the state may grant religious exemptions based on non-unjustly intolerant views or non-morally repugnant beliefs. So it turns out that the consensus in this volume is that conscientious exemptions are sometimes warranted. On that basis, this chapter need not mount a defence against the view that exemptions should never be granted. Instead, it provides a positive case in favour of the general right to conscientious exemption. To do so, it asks what justifies granting conscientious exemptions generally and then builds on this to argue specifically in favour of the general right. A positive case is made for exemptions generally drawing on a plurality of values well established in a liberal democracy. After this a positive case is made for a general right on the basis of protecting minority moral views.

### *i. The Moral Case for Conscientious Exemptions Generally*

One of the arguments in favour of exemptions generally derives from the liberal commitment to what will here be called the duty of neutral pluralism of the state. This duty arises

<sup>8</sup> See n 3.

<sup>9</sup> This section draws extensively on J Adenitire, 'Conscientious Exemptions: From Toleration to Neutrality; From Neutrality to Respect' (2017) 6 *Oxford Journal of Law and Religion* 268, 15–16, 20–24.

in the face of the fact of moral pluralism. Moral pluralism is not just a factual statement of the obvious truth that different people hold different views about what moral values require. Rather, it should also be understood as a positive normative statement grounded on the value of individual moral responsibility. Call this ethical pluralism. This normative position holds that there are various ways to live a good life and that, by implication, there are various legitimate conceptions of what a good life is. A person may legitimately devote his life to religious contemplation or to the study of the intricacies of astrophysics. He may choose a life centred on family values or refuse to commit to a romantic relationship so as to focus on his career as an investment banker. No doubt there will be drawbacks in any of these conceptions of a good life. A life of religious contemplation as a monk, while benefitting from high spirituality, is incompatible with the joys of family life. Studying the intricacies of astrophysics, while contributing to knowledge, is unlikely to yield the pecuniary rewards of the life of an investment banker. However, the point of moral individual responsibility is that various incompatible conceptions of a good life each exhibit something worthwhile, even while exhibiting several drawbacks, and it is up to each individual to weight for himself what is more worthwhile for him. Importantly, given that it is the individual that will benefit or suffer the consequences of a conception of a good life, the choice of which conception to follow is his and not the state's.

Note that ethical pluralism is not to be equated with moral relativism or nihilism, respectively the views that there is no universal way to establish the moral worth of different conceptions of a good life or that different conceptions cannot be better or worse than each other because morality does not exist. Rather, the main thrust of this view is that different conceptions of a good life are objectively valuable in different ways and that the individual is the best judge of what is most valuable for him. The state should stay away from dictating what conception is more valuable. Note also that this view does not lead to undermining the legitimacy of state regulation of the interaction between different conceptions of a good life. While individuals are free to choose what lives to live, they cannot impose their choices on others (they too have the right to choose what life to live). The role of the state then, as guardian of the common good, is to ensure that different conceptions of a good life are compatible. The state can therefore limit acts that would undermine the common good and that would infringe others' right to choose which conception is for them.

Ethical pluralism then, if accepted, leads to accepting the imposition on the state of a duty of neutral pluralism: ie a limited duty of non-interference by the state in the individual moral responsibility to choose one conception of a good life over another. If this duty is accepted it may partially justify a right to conscientious exemption. In fact when the state imposes a general rule, that rule may create a barrier to an individual's chosen conception (eg the prohibition of drug possession may create a barrier to living according to the Rastafarian ceremonial use of cannabis). That may of course be another of the drawbacks of being committed to that conception and the individual may need to reconsider whether that way of life is really worth it with the burden which the state has imposed. However, in imposing a particular rule which creates a barrier to the pursuit of a particular way of life, the state may be portrayed as violating its duty of neutral pluralism: the state makes certain ways of life less accessible and thereby incentivises individuals to choose other conceptions of a good life (ie the more accessible ones). If the state is to remain neutral among competing ways of life it should therefore grant an exemption to alleviate the barrier it has created. Of course, the imposition of the particular rule may be justified by reference to vital public interests

or to the rights of others (eg combating drug-related criminality). So the granting of the exemption will depend on whether it would disproportionately undermine those interests and rights. This is, however, a reason to make the right to exemption non-absolute rather than rejecting the right altogether.

The argument above is essentially one that derives a non-absolute right to exemption from the state's duty of neutral pluralism. It is an argument calling for the state to respect ethical pluralism. But notice that there are other values at play here that reinforce this argument. The most obvious is perhaps the insistence that personal autonomy should be respected by the state. The idea of personal autonomy 'is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'<sup>10</sup> It is possible to argue that committing oneself to a particular way of life (eg one committed to a particular religion) is an expression of personal autonomy. The person that is committed to a particular religion will make a variety of choices which will have a myriad of implications for his life. A portion of those implications would have been different had he committed himself to another religion or to non-religion. By being allowed to be committed to any religion or non-religion the individual is thereby being allowed to lead a more autonomous life and to shape the course of his life. The state that values and respects personal autonomy will thereby allow the freedom for individuals to pursue whichever conception of the good life they identify with. Of course, as discussed multiple times, the state cannot permit all expressions of every way of life. Some will collide with fundamental public interests and/or the rights of others. However, the state's respect for personal autonomy leads to respecting various manifestations of different ways of life, although not of all.

Respect for personal autonomy does not directly lead to justifying the assertion of a right to be exempt from various legal duties. However, respect for autonomy leads to reinforcing the case for that right: if the state grants exemptions (perhaps on the basis of the state's duty of neutral pluralism sketched above) that promotes personal autonomy and that is virtuous. In fact, as stated, an exemption from a legal duty incompatible with a way of life diminishes the costs of accessing or continuing to identify with a particular way of life; it increases options for individuals. Personal autonomy is about, among other things, access to an adequate range of options.<sup>11</sup> By granting an exemption the state increases the range of conceptions of a good life which an individual may identify with and live according to. It thereby promotes personal autonomy.

Respect for personal autonomy reinforces the case for granting conscientious exemptions. However, respecting autonomy also usually involves, at least in the context of conscientious objection, respect for liberty of conscience. We may understand conscience as a person's faculty 'for searching for life's ethical basis and its ultimate meaning'.<sup>12</sup> Consequently, we may understand liberty of conscience as the liberty to live one's life according to the normative imperatives imposed by conscience. These normative imperatives may

<sup>10</sup> J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1988) 369.

<sup>11</sup> *ibid* 372. Raz says that 'The conditions of autonomy are complex and consist of three distinct components: appropriate mental abilities, an adequate range of options, and independence.'

<sup>12</sup> MC Nussbaum, 'Liberty of Conscience: The Attack on Equal Respect' (2007) 8 *Journal of Human Development* 337, 342.

originate from religious directives or from non-religious ones. Commitment to a particular way of life, whether religious or not, will normally include a judgement that that way of living is compatible and/or required by one's conscientious convictions. Otherwise the individual would find himself living in a pathological bipolar situation whereby he considers a way of life valuable but completely at odds with his convictions about what is right or wrong. No doubt such pathological cases exist. A professional killer may be committed to his way of life because of its luxurious rewards while fully appreciating its moral wrongness. However, in non-pathological cases, individuals subscribe to a particular conception of a good life, among other things, because they believe it to be right or morally required. This is usually the case for some religious believers. Individuals commit to living according to the edicts of a particular religion because they believe that living that way is required by God, the main source of their moral imperatives. It is their belief in a deity that leads them to commit to a particular way of life. In other words, it is liberty of conscience which influences the way they exercise their right to personal autonomy. It follows that when the state respects personal autonomy by granting an exemption, it normally also respects freedom of conscience.

When the state refuses to grant an exemption this may not only encroach on personal autonomy or freedom of conscience; it may occasion harm to the objector, ie undermine her well-being. Remember that when an exemption is denied the objector may be coerced to perform an act which she believes to be wrong. Being compelled to performing an act believed to be morally wrong goes against a person's conscience and that might undermine her well-being. In fact when an individual makes a claim of conscience she is normally so committed to her beliefs that acting against them 'would result in a loss of personal and moral integrity with consequences, such as profound guilt and remorse, which would have an adverse effect on the person's self-conception and self-respect'.<sup>13</sup> This, in turn, would affect the person's well-being. Of course the individual may refuse to yield to legal coercion and pay the consequences, eg be imprisoned for failing to perform her legal duties. However, succumbing to legal punishment rather than acting against one's conscience also undermines one's well-being. It follows that when the state grants a conscientious exemption it is usually also paying respect to an aspect of the objector's well-being.

## *ii. The Moral Case for a General Right to Conscientious Exemption*

If the arguments adduced so far are correct, then a non-absolute right to conscientious exemption is justified by reference to a cluster of moral values, including the demands of the state's duty of neutral pluralism (the duty being grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. No doubt other arguments could be made to show that other values are involved.<sup>14</sup> However, these suffice to temporarily ground the practice of granting conscientious exemptions in recognisable moral values. However, the Liberal Model cannot merely show that conscientious exemptions generally are justified

<sup>13</sup> J Adenitire, 'SAS v France: Fidelity to Law and Conscience' [2015] *European Human Rights Law Review* 78, 82.

<sup>14</sup> A further argument based on the state's ambition not to govern through coercion but mainly through the idea of fidelity to law was made in Adenitire, 'SAS v France' [2015].

by reference to compelling values. It also has to show that a general right to conscientious exemption is justified.

In order to provide a justification for a general right to exemption it is important to recall a feature of claims for conscientious exemptions already discussed in chapter eleven of this volume. There it was said that it should be expected that there will be an undefined number of legal obligations individuals may object to. Many are very familiar: objection to military service, to abortion, to be involved in officiating same-sex marriages, to providing emergency contraception. However, these familiar forms of conscientious objection do not exhaust all possible claims. It may be possible that legal obligations which are thought uncontroversial might actually contravene some deeply held beliefs. For example, as pointed out in that chapter, one might well be surprised by the Peculiar People's beliefs that parents have a religious duty not to allow their children (and themselves) to receive any medical treatment because that would otherwise contravene their interpretation of some passages in the Bible exhorting believers to pray for the sick.<sup>15</sup>

It cannot be expected of even the most diligent of legislatures to predict and cater for in specific legislative exemptions all instances in which a legal obligation may conflict with the beliefs of a conscientious objector. Of course it is open to legislatures to work in a reactive fashion whenever new instances of conscientious objections come to light. After the decision in *Smith*, for example, the Oregon legislature became aware of the need to exempt sacramental use of peyote from the prohibition of drug use and enacted a statutory exemption accordingly.<sup>16</sup> To the extent that the exemption was justified, the legislature ought to be applauded for its fast reaction to a genuine issue of conscience. Not all conscientious objectors, however, are as fortunate as the Oregon members of the Native American Church. Some minority groups are unlikely to be able to have sufficient social or political power to lobby for a discussion in the legislature about their conscientious beliefs to enable the legislature to deliberate properly about them. To be sure this is not always the case. Sikhs in England and Wales, while only constituting 0.8% of the population,<sup>17</sup> benefit from a generous statutory exemption from the obligation to wear safety headgear in the workplace and in other circumstances in favour of them wearing the turban.<sup>18</sup> Yet, as the example of the Peculiar People testify, unusual views that belong to a minority group are unlikely to be well known and therefore unlikely to be considered in the legislative process.

The case for a general right to conscientious exemption is therefore based on the inability of the legislature to predict all instances of conscientious objection and on the worry that minority views will be left behind in the political process when such minorities do not have enough political power to lobby the legislature for a context-specific exemption. The institution of a general right provides minority views with an alternative forum, ie a court of law, where they may be able to bring a claim and ask for exemptions from legal obligations which impinge on their consciences. To be sure, the existence of this alternative forum may not result in an exemption being granted. It may be that the exemption is not warranted because

<sup>15</sup> As illustrated in *R v Senior* [1899] 1 QB 283.

<sup>16</sup> The current statutory exemption is s 4(a) 2015 ORS 475.752.

<sup>17</sup> Office for National Statistics, 'The Percentage of the Population with No Religion Has Increased in England and Wales' (4 April 2013) available at [www.webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/sty-religion.html](http://www.webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/sty-religion.html).

<sup>18</sup> Employment Act 1989, s 11.

granting it would result in a disproportionate impact on the right of others (eg granting an exemption to the Peculiar People from the criminalisation of child neglect would endanger the lives of their children). It may also be that, even if the exemption is warranted, courts may fail to reach a proper outcome through poor legal reasoning.

Independently of whether an exemption is granted in this alternative forum, the general right to conscientious exemption guarantees that minority views have a right to equal treatment under the law. Indeed, earlier it was suggested that under US law the general right may be grounded in statutory provisions which protect religious freedom (RFRA) and which prohibit discriminatory treatment on the basis of beliefs (Title VII). Majority conscientious views that are well known (eg mainstream Christian views) usually have these legal rights considered in the legislative process and statutory exemptions are sometimes granted (eg the exemption for religious institutions in the Obamacare contraceptive mandate as discussed in *Hobby Lobby*). In a liberal democracy committed to the rule of law, these legal rights are not a prerogative of only majority conscientious views. Minority views are also entitled to these legal rights and, consequently, to a forum where these rights can be adequately considered by a state authority whenever they conflict with legal obligations. A general right to conscientious exemption makes this equal consideration of legal rights possible.

Finally, the general right is also justified by reference not only to legal rights but also to moral rights. We have seen that the general practice of conscientious exemptions is justified by reference to a cluster of moral values, including the demands of the state's duty of neutral pluralism (grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. There is no reason to think that these moral values are a prerogative of individuals holding well-known conscientious objections. The state ought to recognise these moral values even for less well-known conscientious views. The legal recognition of a general right to conscientious exemption enables the state to respect these values for minority and majority conscientious views alike.

### III. The Liberal State Should Refrain from Passing Moral Judgement on the Content of the Beliefs Which Give Rise to a Claim for Conscientious Exemption

The second proposition of the Liberal Model says that liberal states should refrain from passing moral judgement on the content of the beliefs which give rise to a claim for conscientious exemption. The core of the idea is that the state should not judge the reasonableness, merit, truth, attractiveness, etc of the beliefs of a conscientious objector. Consistent with the fourth proposition of the Liberal Model, a liberal state may only question whether the belief is sincerely held and should grant the exemption only if doing so would not disproportionately affect the rights of others or the public interest. This part of this chapter provides a moral justification for the proposition and rejects the challenges made to it in this volume by Jones and by Nehushtan and Coyle, who all want the state to take into consideration the quality of conscientious objectors' beliefs when deciding whether an exemption is to be granted. Jones wants the state to consider whether the beliefs of the objector are well-founded in her religion. Nehushtan and Coyle want the state to consider the moral merits of the beliefs at hand.

## A. The Justification for the Second Proposition of the Liberal Model

As discussed by Jones in this volume, the second proposition fits UK practice. He cites the well-established UK House of Lords decision of *Williamson*. In that case Lord Nicholls made clear that courts should not take into account whether an asserted belief that gives rise to a claim for conscientious exemption is well-founded in the claimant's religion (in that case the belief that the Bible mandated corporal punishment of children). Consistently with the second proposition, Lord Nicholls said:

[E]mplicitly, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. ... Each individual is at liberty to hold his own religious beliefs, however, irrational or inconsistent they may seem to some, however surprising.<sup>19</sup>

Jones is not convinced that there are principled arguments to support this aspect of the practice. He does think that this approach is pragmatically justified on the basis that:

The task could be very demanding in time and effort. It could also be difficult to execute with confidence, given that religious faiths are so internally diverse and that religious belief is not subject to ordinary rules of evidence or even logic. Due account would also have to be taken of heterodox as well as orthodox belief. Perhaps above all, it would frequently be difficult for a court to come up with decisions that escaped the sort of contention and controversy that it would not want to attract. So ... it may be reasonable that judges, or the society upon whose behalf they act, should take the view that, all things considered, the cake is not worth the candle.<sup>20</sup>

No issue is here taken with the pragmatic argument offered by Jones in support of the second proposition of the Liberal Model. However, this chapter rejects the view defended by Jones that 'If there is reason to abstain from screening beliefs for their well-foundedness, it is neither moral nor epistemic but pragmatic in nature'.<sup>21</sup> Indeed, the Liberal Model, being an interpretive model, has to show that the practice is morally justified. Therefore, the Model has to show that there are moral reasons, and not merely pragmatic ones, in favour of the second proposition. Consequently, this part scrutinises the objections to the moral arguments advanced by Jones before scrutinising the objections advanced by Nehushtan and Coyle.

## B. Against Ill-Foundedness

Jones advances two arguments against viewing the second proposition as morally justified. Let us examine the first. He says that religious and secular exemptions are usually justified because they are ethically salient, in the sense that they allow the exempted individual to

<sup>19</sup> *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, at 22.

<sup>20</sup> Chapter 3, text to n 3.

<sup>21</sup> Chapter 3, in part VII.

conform with an imperative which is important to his or her personal and moral integrity. He then contrasts religious belief with (non-religious) conscientious belief. The latter, he argues, is subjective in the sense that it is an individual's own conscience that is the authority of his or her moral beliefs and in the further sense that right conduct consists in compliance with the dictates of his or her own conscience. It is not so, Jones argues, for religious beliefs. First, religious beliefs are grounded in sources external to the believer such as sacred texts, religious teachings, the doctrines of an organised religion, the shared faith of a religious community, and so on. Second, Jones argues that 'by and large, religious belief and its imperatives are conceived, neither by religions themselves nor by their individual adherents, as exercises in individual self-legislation'.<sup>22</sup> Given this distinction between religious belief and non-religious conscientious beliefs, a principled argument cannot, in Jones' view, be grounded on freedom of conscience or freedom of religion. This is because religious beliefs are distinct from (non-religious) conscientious ones and because religion does not generally encompass subjective and self-legislated beliefs.

The problem with Jones' first argument is that it misconstrues the religious experience and, consequently, it misconstrues the scope of freedom of religion. First, the religious experience need not be sourced in an authority which is manifestly external to the person proclaiming it. Indeed, in the case of the Abrahamic religions, their alleged founders declared the new movements based on alleged private divine revelations: Moses claimed to have seen God's plan for the Israelites in a burning bush; Jesus declared himself the Son of God; Mohammed claimed that the Archangel Gabriel appeared to him dictating what would become the Quran. Jones is aware of this feature of religiosity when he claims that 'Individual inspiration can figure importantly in some faiths alongside shared external sources of belief' however he argues that 'for the most part the individuals who register legal claims with courts do so as "ordinary believers" rather than as self-professed prophets or visionaries claiming direct inspiration from God'.<sup>23</sup> However, this misses the point. No doubt most individuals' religiosity makes reference to external sources. Nevertheless, private revelation is a crucial element in the founding history of well-established religions and in the development of newer religions. Consider in this latter respect the origins of Mormonism in the 1820s which involved the claim that Joseph Smith was visited by angels several times and translated the Book of Mormon from golden plates revealed to him.<sup>24</sup> It would escape common understanding if these experiences of private revelation were not considered part of the religious experience and were therefore not covered by the scope of religious freedom. Jones' first argument therefore needs to be rejected because it leads to the idiosyncratic view that the founders of well-established religions and of newer religions were or are not engaged in religious practices and/or should not be protected by freedom of religion.

Consider now Jones' second argument. He considers whether the respect we generally owe to believers must extend routinely to enduring the costs of their error. He ponders whether it may be disrespectful to allow our assessment of an individual's belief to affect our

<sup>22</sup> Chapter 3, in part IV.

<sup>23</sup> *ibid.*

<sup>24</sup> Joseph Smith's own account of his private revelation is provided by the Church of Latter-Day Saints, 'The Testimony of the Prophet Joseph Smith' at [www.lds.org/scriptures/bofm/js?lang=eng](http://www.lds.org/scriptures/bofm/js?lang=eng).

treatment of that individual. He answers negatively and provides in support an analogy with cultural practices. He says:

Suppose I claim a practice is a constituent of my culture. Whether it is indeed a part of my culture is a matter for objective assessment. ... I cannot make a practice part of my culture merely by declaring it to be so. If, having investigated the matter, a court concludes that the practice does not belong to my ethnicity and for that reason dismisses my claim ... it is hard to accept that the court's judgement constitutes an intolerable act of disrespect merely because it conflicts with and overrides my own claim about my culture. But, if that is true, it is hard to see why it should not be equally true in the case of religion.<sup>25</sup>

The strategy of the argument does not work. It seeks to equate beliefs about cultural identity with religious beliefs. But that equation cannot be sustained. It is true that, as Jones says, individuals cannot make a practice part of their culture by declaratory fiat. This is because a culture is, as the widely quoted Edward Burnett Tylor puts it, 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society'.<sup>26</sup> If this is accepted, it follows that in order to identify a cultural practice or belief, one first needs to identify a particular society to which that practice or belief belongs to. And it is implausible that a society could be made up of a single individual. It follows that cultural beliefs cannot be created by declaratory fiat.

Not so, however, with religious beliefs. As already stated, the history of religion is full of individuals who founded a religion or modified an existing religious practice by simple declaratory fiat. There is no need to make reference to Jesus or Mohammed to validate this point. Take the case of *Blackburn*<sup>27</sup> considered at length by Frank Cranmer in part IV of chapter twelve. The beekeepers in that case, contrary to what their church asserted and practised (the church ran a website), believed that the Bible prohibited the use of electronic communication. Mr Blackburn's explanation for his view was that:

[H]e considered computers and television as a whole as forms of 'worldliness' which might seduce people away from 'righteousness'. ... He considered that people were obsessed by them, almost regarding them as 'idols'. ... He considers that modern media and in particular the 'screen' has 'blinded the minds of non-believers' and that people's time is so taken up with electronic communications that they no longer have time for religion in their lives.<sup>28</sup>

No doubt it is possible and indeed acceptable to tell the Blackburns that their beliefs about electronic communications are not in line with what is practised and preached by their church. But, given the theological explanation provided by Mr Blackburn, it would not be correct to argue that their beliefs are not worthy of the protection afforded to religious beliefs (including exemptions from online VAT filing) because they do not accord to what their church preaches on the subject. Doing so would be tantamount to enforcing theological orthodoxy – the very opposite of religious freedom. If there is anything that religious freedom should protect individuals from, is from being coerced to hold a particular religious belief, including the belief of a particular religious group.

<sup>25</sup> Chapter 3, in part IV.

<sup>26</sup> EB Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art, and Custom* (London, John Murray, 1873) 1.

<sup>27</sup> *Blackburn & Anor v Revenue & Customs* [2013] UKFTT 525.

<sup>28</sup> *ibid* at 13.

*i. Against Liberal Perfectionism*

Let us now turn to the challenge to the second proposition of the Liberal Model mounted by Nehushtan and Coyle in chapter seven. Their challenge is based on the premises that liberal states should subscribe to liberal perfectionism which holds that 'some ideals of human flourishing are sound whereas others are not; that the state is justified in favouring the former; and that there is no general moral principle that forbids the state from favouring sound values, even when these values are controversial, as long as these values are indeed sound.'<sup>29</sup> In the context of conscientious exemptions, this entails that, contrary to the second proposition of the Liberal Model, the quality of the belief of the objector is assessed to discover whether it is in line with the state's ideals of human flourishing and, if it is not, that constitutes a reason against granting an exemption. Hence, Nehushtan and Coyle differentiate between cases where the belief of the objector is in their view morally repugnant, eg objections to anti-discrimination legislation, and where it is merely misguided or irrational, eg objections to dress code policies and to life-terminating treatment. Exemptions are never to be granted to the former, whereas exemptions may sometimes be granted to the latter.

In making their case against the granting of exemptions to anti-discrimination legislation, Nehushtan and Coyle do not rely on a normative case grounded on liberal-perfectionism. Rather they rely on the descriptive claim that

by enacting equality laws the liberal state, through the legislature, has already expressed its view that discrimination against gay people does rely on illegitimate values. The state decided the limits of liberal tolerance by relying on content-based rather than content-neutral considerations. Equality laws set an underlying moral principle according to which less favourable treatment just because of a protected characteristic is basically indefensible.<sup>30</sup>

A normative argument will be advanced below against the appropriateness of a liberal perfectionist framework in the context of conscientious exemption. Here, however, it will be argued that the descriptive claim that anti-discrimination legislation is a means for the state to label as illegitimate the beliefs of those that object to anti-discriminatory legislation is false. Take in this regard the fact that the legislation to which Nehushtan and Coyle refer, ie the UK Equality Act 2010, explicitly exempts religious or belief-based organisations from the duty to comply with the prohibition of sexual orientation discrimination if the discrimination is mandated by the doctrine of the organisation or if complying with that duty would contravene the deeply held beliefs of a significant number of members of that organisation.<sup>31</sup> Notice then that the Equality Act, by explicitly allowing religious and non-religious organisations to discriminate on the grounds of sexual orientation on the basis of their doctrines or the beliefs of their members, cannot be held to be labelling as illegitimate those beliefs. They cannot be illegitimate if they are explicitly protected.

Nehushtan and Coyle are aware of this feature of the Equality Act but insist that although the statutory exemptions betray a form of favouritism towards religious organisations, this does not take away from their argument that equality laws express a content-based moral stance about the relative importance of the principle of equality. This is so, they argue,

<sup>29</sup> Chapter 7, text to n 3.

<sup>30</sup> Chapter 7, text to n 10.

<sup>31</sup> Equality Act 2010, Sch 23, para 2.

because ‘If the state perceived the religious discriminatory conscience as morally desirable, it would not have enacted equality laws to begin with.’<sup>32</sup> This is, however, a logically fallacious form of reasoning as it is a form of reasoning from ignorance. There may in fact be multiple reasons for the state to enact anti-discrimination laws, none of which may have anything to do with delegitimising ‘religious discriminatory conscience.’ Consistently with this, it should be noted that it is well established that UK anti-discrimination law, either in the form of direct or indirect discrimination, does not concern itself with the motive of the discriminatory treatment. As reaffirmed recently by the UKSC in *Essop*, there is no need to prove a hostile or malicious motive in direct discrimination; one only needs to prove that someone has been treated less favourably because of a protected characteristic.<sup>33</sup> Similarly, in indirect discrimination law, there is no need to provide an explanation of the reasons why a particular provision, criterion or practice puts one group at a disadvantage when compared with others. Furthermore, the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider.<sup>34</sup> Given these features of anti-discrimination legislation, it is implausible to hold that its aim is to delegitimise ‘religious discriminatory conscience.’ If it does not concern itself with mental states, either conscientious or not, it cannot be seeking to delegitimise them.

It seems then that the descriptive argument that anti-discrimination legislation proceeds on the basis of a liberal perfectionists account is mistaken, at least in the UK. The practice in the UK in this context therefore appears to conform to the second proposition of the Liberal Model. However, Nehushtan and Coyle, in part II of their chapter when discussing religious symbols and objections to abortions, do not rely on a descriptive claim but merely assume that liberal perfectionism is desirable. They do not provide in this volume a normative argument in favour of that assumption. However, in another venue, explicit reliance has been placed by Nehushtan on the liberal perfectionism defended by Joseph Raz.<sup>35</sup> This part therefore scrutinises Razian liberal perfectionism and scrutinises whether its arguments are persuasive in the context of conscientious exemptions.

Raz has forcefully argued that a liberal state should value autonomy highly and consequently should promote a range of valuable options for its citizens to pursue while discouraging the pursuit of immoral options. He argues:

No one would deny that autonomy should be used for the good. The question is, has autonomy any value *qua* autonomy when it is abused? Is the autonomous wrongdoer a morally better person than the non-autonomous wrongdoer? Our intuitions rebel against such a view. It is surely the other way round. The wrongdoing casts a darker shadow on its perpetrator if it is autonomously done by him. ... Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options.<sup>36</sup>

Consistent with being a liberal theory, Razian perfectionism is tempered by the fact that state coercion may only be utilised against immoral acts which harm others. Nevertheless, consistent with being a perfectionist theory, the state may use non-coercive means to

<sup>32</sup> Chapter 7, part II E.

<sup>33</sup> *Essop & Ors v Home Office* [2017] UKSC 27 at 17.

<sup>34</sup> *ibid* at 24 and 26.

<sup>35</sup> *Nehushtan* (n 4) ch 3.

<sup>36</sup> Raz, *Morality of Freedom* (1988) 380–81.

dissuade individuals from subscribing to immoral views even when those views are not acted upon.<sup>37</sup>

If Razian liberal perfectionism is applied to the context of conscientious exemptions, it follows, as Nehushtan and Coyle argue, that the state should take into consideration the moral quality of a belief of a conscientious objector when considering whether an exemption is to be granted. If the belief is immoral, that should provide the state with a weighty reason for discouraging it and, hence, a reason not to grant the exemption. Notice that Razian perfectionism does not collapse into the view that, consistent with the fourth proposition of the Liberal Model, a liberal state should refuse to grant exemptions if doing so would disproportionately affect the rights of others or the public interest. The fourth proposition is a specific form of the harm principle and is not perfectionist. Instead Razian perfectionism urges the state not to grant an exemption on the basis that it considers that the belief of the conscientious objector is immoral. In opposition to the second proposition of the Liberal Model, Razian perfectionism requires the state to assess and discourage immoral views of conscientious objectors even when granting an exemption based on an immoral view would not disproportionately impact on the rights of others or on the public interest.

How can the Liberal Model defend itself from Razian liberal perfectionism? It may show that that version of liberal perfectionism is not morally attractive. Or it may show that Razian perfectionism misfires against the Liberal Model. The latter path will be undertaken here. Consider that in part II of this chapter the moral justification for a right to conscientious exemption was based on a multiplicity of moral values. There it was argued that a non-absolute right to conscientious exemption is justified by reference to a cluster of moral values, including the demands of the state's duty of neutral pluralism (grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. The value of personal autonomy was only one part of the cluster of values invoked to justify the right. Indeed, it was argued that valuing personal autonomy does not lead to asserting a right to conscientious exemption. Rather, it was argued that respect for personal autonomy only leads to reinforcing the case for that right: if the state grants exemptions (perhaps on the basis of the state's duty of neutral pluralism) that promotes personal autonomy. By granting an exemption the state increases the range of conceptions of a good life which an individual may identify with and live according to. It thereby promotes personal autonomy.

In contrast to the cluster of values justification for the right to exemption of the Liberal Model, the Razian approach to conscientious exemptions is based entirely on the value of personal autonomy.<sup>38</sup> This is the reason why Razian perfectionism misfires against the Liberal Model: even if Raz is right that autonomy has no value when it is used in the pursuit of immoral options or views, the Liberal Model is able to point to other values which may be invoked when a conscientious objector holds immoral views. For example, an objector's well-being will be negatively affected when an exemption is denied, irrespective of whether the objection is motivated by immoral beliefs. A liberal state that values individual well-being will have a strong reason to promote the well-being of its subjects, irrespective of whether or not they hold morally acceptable views.

<sup>37</sup> *ibid* 418–19.

<sup>38</sup> This is consistent with the moral justification provided by Raz for a right to conscientious objection in Raz (n 5) ch 15.

The availability of other values to justify the right to conscientious exemption when the value of personal autonomy is unavailable allows the second proposition of the Liberal Model to be immune from the Razian liberal perfectionist challenge. There is however also a positive case in favour of the second proposition. This is the argument from futility.<sup>39</sup> This says that it is futile for the state to express a view on the merits of the content of the beliefs of the objector for two reasons. First, such moral judgement is unlikely to lead the objector to change his beliefs. Second, the moral judgement is totally unnecessary for the more important task of safeguarding the public interest or the rights of others which the acts of the objector may undermine.

The first futility argument is really about the difficulty of changing the convictions of objectors, especially, but not only, religious objectors. Judges and other state officials engaging in criticism of religious beliefs in a rational fashion are unlikely to be able to affect any meaningful change in the belief systems of the objector. This is because religious beliefs, but not only, are often held as a matter of faith. As Macklem argues:

[F]aith exists as a form of rival to reason. When we say that we believe in something as a matter of faith, or to put it the other way round, when we say that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that which can be established by reason, but not for that reason ... faith treats itself as a reason to believe, and to act in accordance with belief, without submitting to the conditions of reason.<sup>40</sup>

When it comes to beliefs which state officials think are wrong, it is futile to engage the objector in conversations about how his beliefs are misguided unless the state official is able to speak the same faith-based language of the objector.

Even if the belief is non-faith-based and is instead reason-based, it might be equally futile to engage the objector in conversations about the merits of his beliefs. This is mainly because, in the context of a liberal democracy with free speech, the objector is likely to have already been exposed to all sorts of arguments that contradict his beliefs. Take for example the claimant in *Exmoor* who objected to filing his VAT returns online based on the belief 'that internet usage puts more CO<sub>2</sub> in the atmosphere than aviation.'<sup>41</sup> Why would a state official expressing a competitive view to his (eg that farming of non-human animals is a more serious concern for climate change because it emits more CO<sub>2</sub> than all transportation combined) make any difference? If the objector has gone through the trouble of litigation to secure an exemption in order to accommodate his beliefs, that alone should give an indication of how deeply held and immovable those beliefs are. This is not to say that deeply held beliefs are not changeable. However, we may be sceptical that the lengthy process that is necessary to revise one's deeply held beliefs can be successfully affected by state disapproval.

Even if the above were wrong, the second limb of the futility argument might still be convincing. It says that the more urgent task for state officials is to determine whether granting an exemption will undermine vital public interests or the rights of others. The task of expressing negative moral judgements about the content of the objector's beliefs does not contribute to that urgent task and is therefore futile for the real task at hand.

<sup>39</sup> This was first advanced in Adenitire (n 9) 16–17.

<sup>40</sup> T Macklem, *Independence of Mind* (Oxford, Oxford University Press, 2008) 133–34.

<sup>41</sup> *Exmoor Coast Boat Cruises Ltd v Revenue & Customs* [2014] UKFTT 1103, at 27.

One may object to this second argument as Nehushtan has done. He says that expressing a view about the content of the objector's belief may make a practical difference to the outcome. He gives the example of a prospective non-white employee who seeks employment from an employer who, for religious reasons, holds that white people should not mix with non-whites and therefore refuses to employ the prospective non-white employee. Nehushtan assumes in this scenario that there is no serious problem of racism in the employment market and that the prospective employee immediately finds employment with another employer. Nehushtan argues that given that the employee will not have suffered any meaningful harm, except perhaps a slight offence having found alternative employment, it would not be possible to condemn the employer's behaviour unless the state takes into account the religiously motivated racist quality of his beliefs and denies the exemption on that basis.<sup>42</sup>

Nehushtan's example is not a good one against the second proposition because there is in fact a strong reason for prohibiting the act of the employer without having to judge the quality of his or her beliefs: the employer's refusal to employ the non-white prospective employee for the reason of his or her race causes dignitary harm to the prospective employee. Not only does the humiliation provide reasons for offence and may occasion psychological harm, most importantly it sends the signal that the non-white employee is a lesser member of society because they are a lesser human being: in short, legal permission of this discriminatory treatment amounts to classifying the non-white employee as a social outcast.<sup>43</sup> This alone is a sufficient reason for not allowing such acts; it is unnecessary to have to judge the content of the employer's beliefs. More will be said about how the notion of dignitary harm should be understood in part VI below.

#### IV. The Liberal State Should Neither Privilege Nor Disadvantage Religious Beliefs Over Non-Religious Ones When Considering Whether to Grant a Conscientious Exemption

The third proposition of the Liberal Model says that the liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant conscientious exemptions. Leigh, Chipeur and Clarke all agree in this volume with this proposition. Not much will be said about the positive case for the third proposition. This is because the clear implication of the positive argument made in part II of this chapter (the cluster of values argument) in favour of conscientious exemptions generally is that the case for exemptions is insensitive to the religious or non-religious nature of the belief of the objector. In fact, the state's duty of neutral pluralism is specifically against unequal treatment depending on the nature of the beliefs. Also, respect for autonomy, conscience and well-being are insensitive to the particular content of the beliefs of the objectors. Also, the case made in favour of the general right to conscientious exemption is insensitive to the religious or non-religious nature of the conscientious objection. It was argued that a general right to

<sup>42</sup> Nehushtan (n 4) 146–47.

<sup>43</sup> This is an argument borrowed from J Waldron, *The Harm in Hate Speech* (Cambridge, MA, Harvard University Press, 2014) ch 5.

conscientious exemption is based on providing an alternative forum, the judicial one, where minority moral views left behind in the political process may be able to bring a claim and ask for exemptions from legal obligations which impinge on their consciences. Of course, such minority moral views may or may not be religious.

Equality of treatment between religious and non-religious beliefs is also a clear implication of the second proposition of the Liberal Model. That proposition calls for the liberal state to be blind to the validity of the belief of the objector. It follows that the liberal state should also be blind to the validity of sectarian claims that religious beliefs are more or less deserving of accommodation than non-religious beliefs. The only criterion allowed, consistent with the fourth proposition, is that exemptions should not be granted if it would have a disproportionate impact on the public interest or on the rights of others. That criterion is neutral as to the religious or non-religious nature of the belief involved.

Given the clear neutralist implications of the arguments advanced so far, this part of the chapter therefore focuses on defending the third proposition from the attacks mounted by Corvino, Moon, and Nehushtan and Coyle in this volume. Corvino and Moon, especially the latter, seem sceptical of granting exemptions to non-religious objectors. Whereas, Nehushtan and Coyle would prefer granting exemptions to non-religious objectors over religious ones.

## A. Against Corvino

Corvino canvasses a number of arguments which would single out religion as specially or uniquely deserving exemptions. His final answer is that exemptions are warranted as a counter-balance to unjust discrimination in the framing of laws that bind all citizens. He says that given that it is unworkable to have a rule which countenances exemptions whenever a law is unfair, it is better to identify categories that are typical sites of unjust discrimination and then require heightened scrutiny with respect to those categories. He identifies religion as one such category and hence argues that exemptions for religious objectors are warranted in the circumstances where the interests of religious minorities have been discounted. It turns out, however, that Corvino does not see religion as uniquely special after all. Indeed, he explicitly says that there are other categories that are typical sites of unjust discrimination, such as disability and sexual orientation. He is, however, sceptical that there should be in general a right to exemption for secular citizens who have deep and meaningful moral commitments that conflict with the law. In this regards he argues that while non-believers can also have their perspectives unjustly discounted, they face this problem less commonly than believers do. Furthermore, he argues that:

[T]here are pragmatic difficulties with extending the argument of this section to secular concerns: The whole point of enumerating categories of heightened scrutiny – whether in antidiscrimination law or in constitutional interpretation – is that legislators and judges are unlikely to see their own prejudices. ‘Give heightened scrutiny to laws that unjustly overlook minorities’ is not a workable legal rule; ‘Give heightened scrutiny to laws that implicate race, religion, sexual orientation, and so on’ is.<sup>44</sup>

<sup>44</sup> Chapter 2, part V.

Corvino goes on to argue that while one ought to be sceptical of exemption claims for non-religious objectors in general, one can argue for non-religious exemptions in particular circumstances, for example in the context of the military draft.

It is however doubtful that Corvino's rationale for in effect arguing against the availability of the general right to conscientious exemption for non-religious objectors is convincing. Indeed, his argument that non-religious conscience is not a category to be given heightened scrutiny seems to be the result of a version of US parochialism. In this respect, remember the very brief discussion in part I on the general right to conscientious exemption in US law. There it was suggested that such a general right may be grounded, among others, in RFRA and in Title VII (and their state-level counterparts). Consistently with Corvino's views, these two pieces of legislation appear to confer exemptions only on the basis of a religious belief. A doctrinal argument could be advanced to show that this apparent privileging of religion in these statutes is in fact false because, consistent with the US Supreme Court ('USSC') decision in *Welsh*<sup>45</sup> (where a non-religious objector to military service was granted a statutory exemption on its face reserved only to religious believers), the legal definition of 'religion' in US law includes non-religious beliefs which function in the life of a conscientious objector as a religion.<sup>46</sup> But even if one took these statutes at their face value to the effect that a general right to conscientious exemption is reserved to religious believers alone, Corvino would not be correct to say that it is pragmatically best to reserve these exemptions to religious believers alone. This is because even under US domestic law several statutory exemptions use the category of religious and moral beliefs without much administrative difficulty. Micah Schwartzman illustrates the point:

[F]ederal and state legislation often goes beyond the category of religion to protect non-religious ethical and moral beliefs. For a recent example, the Affordable Care Act ... includes an exemption from its minimum coverage provision ... for ... nonprofit organization whose members 'share a common set of *ethical or religious beliefs* and share medical expenses among members in accordance with those beliefs'. Similar language is used in federal legislation prohibiting public officials from requiring health care providers to perform or assist with abortions or sterilizations when doing so would violate their 'religious beliefs or moral convictions'. The federal government is also barred from requiring employees to participate in the administration of the death penalty 'if such participation is contrary to the *moral or religious convictions* of the employee'. Numerous other federal and state statutes and regulations involving foreign aid, counseling services, vaccinations, pharmacies, organ donation, assisted suicide, and, of course, military service follow the same pattern of expressly protecting not only religious convictions but also ethical and moral beliefs, conscience, or some combination thereof.<sup>47</sup>

Furthermore, the use of 'conscience and religion' is a well-established category in international law and various domestic jurisdictions. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) reads 'Everyone shall have the right to freedom of thought, conscience and religion'. The United Nations Human Rights Committee, the body that monitors compliance with the ICCPR, has interpreted the article thus: 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any

<sup>45</sup> *Welsh v United States* (1970) 398 US 333.

<sup>46</sup> This argument is pursued in detail in Adenitire, 'A General Legal Right to Conscientious Exemption' (2018) ch 3.

<sup>47</sup> M Schwartzman, 'Religion as a Legal Proxy' (2014) 51 *San Diego Law Review* 1085, 1100–01.

religion or belief'.<sup>48</sup> In relation to conscientious exemptions in the military context it has stated that 'there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs [whether religious or non-religious]'.<sup>49</sup> The use of the category 'conscience and religion' is also present in Canada under section 2(a) of the Canadian Charter. As Moon recounts in part IV of chapter five, in *Maurice*, a Federal Canadian Court invoked this section to make available vegetarian meals to a prisoner who objected to eating non-vegetarian meals on the basis of non-religious beliefs.<sup>50</sup> The prison authorities had insisted that vegetarian meals were to be given only to religious vegetarians. The Court concluded that 'accommodating a vegetarian's conscientiously held beliefs imposes no greater burden on an institution than that already in place for the provision of religious diets'.<sup>51</sup>

Given these experiences that show that the category 'conscience and religion' is perfectly workable both in the US and elsewhere, Corvino's pragmatic argument that exemptions can be generally reserved for religious objectors alone should be received with high scepticism. However, Corvino is correct to say that for the most part it is religious believers that will make claims for exemptions. In Canada, leaving aside the 'seat-belt' cases discussed by Moon in part IV of his chapter, only five cases – *Roach*,<sup>52</sup> *Maurice*,<sup>53</sup> *Chainnigh*,<sup>54</sup> *McAteer*<sup>55</sup> and *Hughes*<sup>56</sup> – have been identified as involving a claim for exemption based on a non-religious belief relying on the Canadian Charter's protection of freedom of conscience. Of these, only *Maurice* successfully received the exemption he sought. It is however doubtful that the fact that it is religious believers that will make use more often of the general right to exemption is itself a good reason for excluding non-religious people from benefiting from the general right. The fact that injustice will be infrequent against non-religious objectors is not a good reason to eliminate the availability of a remedy against that injustice. If anything, the opposite is true. If the Canadian experience is to be believed, there will not be a huge administrative burden on courts to administer a general right to conscientious exemption for non-religious objectors. Consequently, given the little administrative cost for a gain in justice, it seems that there is a good reason to provide for a general right to exemption for non-religious objectors.

<sup>48</sup> UNCHR, 'CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)' (1993) CCPR/C/21/Rev.1/Add.4.

<sup>49</sup> *ibid* 11. See also *Yoon and Choi v Republic of Korea* (2006) CCPR/C/88/D/1321-22/2004.

<sup>50</sup> *Maurice v Canada (Attorney General)* [2002] FCT 69.

<sup>51</sup> *ibid* at 13.

<sup>52</sup> *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (1994) 2 FCR 406. Roach, a committed republican anti-monarchist and non-Canadian citizen who was undergoing the process of naturalisation, sought to be exempted from affirming or swearing the citizenship oath which required swearing allegiance to the Queen.

<sup>53</sup> *Maurice* (n 50).

<sup>54</sup> *Giolla Chainnigh v Canada (Attorney General)* [2008] FC 69. This concerned anti-monarchists (including Roach himself) who objected to an oath of allegiance to the Queen.

<sup>55</sup> *McAteer v Canada (Attorney General)* [2014] CarswellOnt 10955. This also concerned anti-monarchists who objected to an oath of allegiance to the Queen.

<sup>56</sup> *R v Hughes* [2012] ABPC 250. The Alberta Provincial Court rejected a freedom of conscience claim against Calgary City's Responsible Pet Ownership Bylaw which prohibited the keeping of pet chickens on residential property. Hughes, being the founder of the advocacy group Canadian Liberated Urban Chicken Klub (CLUCK), testified that he kept urban hens and ate their eggs because of his philosophy regarding sustainable food choices which involved minimising the amount of consumption of non-self-grown food.

## B. Against Moon

Moon is deeply sceptical about granting exemptions to non-religious conscientious objectors. This results from his rationale about when exemptions are warranted for religious objectors. His first move is to argue that freedom of religion (under s 2(a) of the Canadian Charter) should not be understood as a form of liberty right which entitles the individual to be free from state encroachment in living according to her religious beliefs unless this is necessary to protect the rights and interests of others or the general welfare. Instead, he argues that freedom of religion is best understood as a form of equality right that rests on the recognition of the deep connection between the individual and his religious or cultural group and on a concern about the standing of such groups and their members in the larger society. Religious exemptions and other forms of accommodations for religious believers therefore rest, he argues, on seeking to avoid the marginalisation of religious groups and the exclusion and alienation of their members from the larger society.

Moon continues to argue that, on this basis, non-religious objectors do not seem to deserve conscientious exemptions because non-religious beliefs are seldom linked to the equal standing of groups in wider society. He concedes that it is possible to imagine individuals organising themselves around a particular secular purpose (he gives the example of a group dedicated to the use hallucinogenic drugs to obtain valuable insights). He argues, however that:

[A] group that is voluntarily formed around a particular issue does not play the same role in the life of the individual as a religious or cultural group that is characterised by a comprehensive world view, or form of life, that is transmitted through family and community. Such a group is not, in the same way, a source of identity or meaning for its members, and is not similarly vulnerable to discrimination and systemic exclusion. The state's rejection or regulation of the practices/beliefs of such a group is simply that – the rejection of a particular position or perspective.<sup>57</sup>

Accordingly, Moon argues that the few conscientious exemptions granted to non-religious objectors may be unjustified in principle and be explained by the simple fact that the beliefs and practices of the objectors (eg vegetarianism and pacifism) resemble well-known religious beliefs and practices which have traditionally benefited from exemptions.

Moon's attack against the third proposition of the Liberal Model rests on the twin view that religious freedom is best understood as a non-discrimination norm meant to protect religious groups and that non-religious groups are not systematically excluded from wider society on the basis of an unjustifiable discriminatory attitude. Both views are however unconvincing. Take the first view that religious freedom under s 2(a) of the Canadian Charter is not to be understood as a liberty norm but is better viewed as a non-discrimination norm intended to protect the standing of religious groups in society. If this was the case then we should expect the Canadian courts not to grant exemptions to individuals when their practices are not shared by their religious group. However, the Supreme Court of Canada has explicitly rejected that approach in the landmark case of *Amselem*.<sup>58</sup> As discussed by Jones in part II of chapter three, the case concerned whether religious freedom ought to protect the appellants' belief, not shared by their religious group, that Judaism required erecting

<sup>57</sup> Chapter 5, text to n 46.

<sup>58</sup> *Syndicat Northcrest v Amselem* (2004) 2 SCR 551.

a private succah on their balconies rather than use the communal succah offered by the Syndicat. The SCC, Iacobucci J delivering the majority judgment, held that the appellants' religious freedom had been unjustifiably infringed by the failure to accommodate them. The SCC explicitly rejected the contention made by the lower court in that case that, in line with the evidence from two Rabbis, Judaism does not require, contrary to the appellants' beliefs, an individual succah but permits communal succot.<sup>59</sup> Iacobucci J empathetically affirmed that 'claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.'<sup>60</sup>

The view that religious freedom is applicable also when a practice is not constitutive of a religious group is tied to the notion, developed by Iacobucci J in *Amselem*, that 'religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.'<sup>61</sup> It seems then that Moon is not right to argue that religious freedom is best understood as a non-discrimination norm intended to protect the standing of religious groups in society. This cannot be the case because the main focus of religion and religious freedom is a person's individual belief system, whether or not that belief system is shared by a larger group. Also in this regard, and crucially, as Cranmer briefly alludes to in chapter twelve, the SCC has yet to determine whether religious organisations, such as churches, schools and universities, can invoke freedom of religion. The current view is that individual members of such institutions can collectively invoke religious freedom but it remains an open question whether the institutions themselves can invoke religious freedom.<sup>62</sup> The current state of the law does not sit well with Moon's view: religious freedom under the Canadian Charter cannot be about the standing of religious groups in society if it is unclear whether religious freedom applies to institutions, such as churches or religious schools, whose main purpose is to lead and organise groups to follow certain religious doctrines.

The implication of rejecting Moon's view that exemptions are warranted to secure the standing of religious groups in society is that exemptions may be warranted whether or not they contribute to the standing of religious groups. Accordingly, in line with the third proposition of the Liberal Model, exemptions may be granted to religious or non-religious individuals. However, even if one accepted Moon's view that religious freedom is about the standing of groups in society, it is unclear why this rationale would not apply to non-religious groups as well. Moon argues that non-religious groups that coalesce around a particular secular purpose are not, in the same way as religious groups, a source of identity or meaning for their members, and are not similarly vulnerable to discrimination and systemic exclusion. This seems doubtful as atheist and agnostic members of secular humanist societies around the globe would attest. In the UK, for example, not only have members of the British Humanist Association (now Humanists UK) drawn meaning and identity from humanist values in social and political campaigns, they have also been vulnerable to

<sup>59</sup> *ibid* at 66.

<sup>60</sup> *ibid* at 43.

<sup>61</sup> *ibid* at 39.

<sup>62</sup> *Loyola High School v Quebec (Attorney General)* (2015) 1 SCR 613, at 33; *Law Society of British Columbia v Trinity Western University* [2018] SCC 32 (SCC), at 61.

discrimination and systemic exclusion. For example, the Northern Ireland High Court has recently accepted that the failure to recognise legally valid humanist weddings in Northern Ireland unlawfully discriminates against humanists in breach of Article 14 ECHR read in conjunction with Article 9.<sup>63</sup> This discriminatory state of affairs continues in England and Wales where it is still not possible to have any form of legally recognised humanist wedding.

Furthermore, certain Canadian provinces (but not all) have explicitly accepted that individuals may be targeted for discriminatory treatment on the grounds of their non-religious conscientious beliefs. For example, section 1 of the Ontario Human Rights Code,<sup>64</sup> an anti-discrimination statute, prohibits discrimination on the basis of creed. Prior to the non-legally binding guidance issued by the Ontario Human Rights Commission (OHRC) in 2015, it was not clear whether creed covered only religious beliefs. However, following a period of public consultation and redrafting of the guidance, the current guidance makes clear that the Code does not only protect religious beliefs when it says that 'Creed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life.'<sup>65</sup> No cases have arisen under the Ontario Code to authoritatively settle in law what non-religious beliefs qualify for protection. Nevertheless, Moon's factual claim that non-religious groups are not similarly vulnerable to discrimination and systemic exclusion seems to be undermined by the recognition by an anti-discrimination body (ie the OHRC) that non-religious belief systems also need to be protected from discrimination. Of course, in the UK, this has long been recognised given that the Equality Act 2010 (and some of its predecessors) protects religious and non-religious philosophical beliefs (such as the moral responsibility to avoid climate change<sup>66</sup>) from discriminatory treatment.

In conclusion, Moon's attack against the third proposition of the Liberal Model needs to be rejected on the basis that religious freedom under the Canadian Charter is not best understood as an anti-discrimination norm meant to protect the standing of religious groups in society. The scope of religious freedom is better understood as encompassing a liberty right which protects the deep moral commitments of individuals to live according to their beliefs unless there are good reasons for the state to interfere. Given that individuals can also have deep moral commitments which are non-religious, it is unfair not to protect those non-religious commitments. Also, contra Moon, non-religious groups and their members can also be the target of systemic exclusion or discrimination and, consequently, they too need to be protected in order to uphold their equal standing in society.

## C. Against Nehushtan and Coyle<sup>67</sup>

Nehushtan and Coyle, in chapter seven, state that there are good reasons for disadvantaging religious objectors over non-religious ones in the context of conscientious exemptions.

<sup>63</sup> *Smyth, Re Judicial Review* [2017] NIQB 55. A similar conclusion was reached by the United States Court of Appeal for the Seventh Circuit in *Center for Inquiry, Inc v Marion Circuit Court Clerk* (2014) 758 F3d.

<sup>64</sup> RSO 1990, Chapter H 19.

<sup>65</sup> Ontario Human Rights Commission, 'Policy on Preventing Discrimination Based on Creed' (2015) at [www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20based%20on%20creed\\_accessible\\_0.pdf](http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20based%20on%20creed_accessible_0.pdf).

<sup>66</sup> *Grainger plc v Nicholson* [2009] ICR 360.

<sup>67</sup> A significant portion of the following discussion relies heavily on Adenitire, 'The Irrelevance of Religion' (2017) 411–13.

The statement is grounded in their liberal perfectionism, already criticised in part III of this chapter, and in the view, not defended in this volume, that:

While every comprehensive theory or ideology is intolerant by its nature, religion is uniquely and unjustly intolerant, and in a way that poses unique challenges to the tolerant-liberal state. If this is true ... religious symbols may not be allowed to be displayed in certain places ... even when the symbol itself does not directly convey illegitimate, unjustly intolerant values, and even if the person wearing the symbol does not intend to convey unjustly intolerant views ... This is so because religion is inherently and unjustly intolerant and because the liberal state should not support or endorse, directly or indirectly, intolerant ideologies or sets of beliefs.<sup>68</sup>

The authors reference Nehushtan's monograph, *Intolerant Religion in a Tolerant-Liberal Democracy*,<sup>69</sup> to provide support for the view that religion is inherently and unjustly intolerant. It is however doubtful that the arguments provided in Nehushtan's monograph can sustain this view. His main argument is an empirical one, though he does adduce some theoretical explanations to sustain the empirical arguments. Some of these theoretical arguments for the intolerant nature of religion are that religious groups tend to keep a distinct community and thereby exclude others; religions claim that their world-view is the absolute truth and thereby persecute heretics; the divine nature of religious commands stifles the possibility of criticism and prompts the religious person not to tolerate non-compliance.<sup>70</sup> No issue will be taken here against Nehushtan's theoretical arguments. He himself admits that his theoretical arguments 'might appear too sketchy. Indeed, some of the following assertions and generalisations rely on the assumption that these generalisations are, by definition, mostly true or generally accurate.'<sup>71</sup>

Given that these theoretical arguments cannot by themselves show that religion is inherently (or conceptually) intolerant, Nehushtan's main arrow is his empirical argument. He relies on a number of sociological/psychological studies which he interprets as proving his point. He cites various studies spanning over a considerable number of years the constant conclusions of which are best described, he says, by a review undertaken by Hunsberger and Jackson.<sup>72</sup> But on closer analysis this review does not in fact prove that, as a matter of conceptual necessity, religious people are unjustly intolerant. Rather, it proves that certain religious attitudes are more prone to lead to certain kinds of prejudice towards certain groups than others. Indeed, some religious attitudes actually lead to less prejudice towards certain groups, such as homosexuals and some racial groups.

Hunsberger and Jackson's review (and the studies it is based on) proceeds on the basis of four attitudes to religion, namely the intrinsic orientation, the extrinsic orientation, the quest orientation and religious fundamentalism. Hunsberger and Jackson explain these four categorisations as follows:

An intrinsic orientation was considered to be more mature, stemming from an internalized, committed, and sincere faith. The extrinsic orientation was associated with religious immaturity, involving an externalized, consensual, utilitarian orientation to religion ... the quest orientation

<sup>68</sup> Chapter 7, text to n 35.

<sup>69</sup> Nehushtan (n 4).

<sup>70</sup> *ibid* 97–101; 108–12; 114–17.

<sup>71</sup> *ibid* 96.

<sup>72</sup> B Hunsberger and LM Jackson, 'Religion, Meaning, and Prejudice' (2005) 61 *Journal of Social Issues* 807.

involves a questioning, doubting, open, and flexible approach to religious issues ... religious fundamentalism (RF) focuses on closed-mindedness, the certainty that one's religious beliefs are correct, and the belief that one has access to absolute truth<sup>73</sup>

On the basis of these categorisations the review concludes that:

Our review of studies published since 1990 clearly supports the idea that the target of prejudice is important when considering prejudice-religious orientation relationships ... The Intrinsic scale was consistently *negatively* related to self-reported racial/ethnic intolerance (4 of 4 studies), but it was *positively* related to intolerance of gay men and lesbians (7/9 studies) and possibly to authoritarianism and to intolerance of Communists and religious outgroups, though there are few relevant studies. The extrinsic orientation was sometimes positively related to racial/ethnic (3/4) and gay/lesbian (4/8) intolerance. Quest showed a weak tendency to be associated with tolerance for racial groups (2/5); a much stronger effect appeared for gay/lesbian persons as targets (7/9). Finally, [religious fundamentalism] was consistently related to increased prejudice against gay/lesbian persons, women, Communists, and religious outgroups, as well as authoritarianism (39/39 findings in total), but its relationship with racial/ethnic intolerance is less clear-cut (5 positive relationships, 6 nonsignificant findings).<sup>74</sup>

Rather than proving Nehushtan's claim that religious beliefs necessarily lead to intolerance/prejudice, the review actually proves that certain religious attitudes may lead to certain kinds of intolerance/prejudice. The review does not however tell us how many religious people hold what religious attitudes. If the vast majority of religious individuals held the religious fundamentalism attitude then Nehushtan's claim would hold true as a quick generalisation (while still falling below the conceptual claim he makes). However, if it is shown that a vast majority of religious individuals actually hold the quest religious attitude then perfectionist liberal states, in their endeavour to combat prejudice and intolerance, would do well to promote religion. Arguably, the latter is not a conclusion which Nehushtan would be happy to reach.

Nehushtan's anti-religion approach may be more generally criticised for trying to prove a conceptual claim, one that should hold true independently of space and time, by relying on empirical evidence of limited scope. He himself admits that the empirical studies he relies on are very limited in scope. He says that 'most if not all of the reliable empirical findings and conclusions are limited not only in terms of the target group (mostly Christians) and geographic area (mostly North America) but also the relevant era (late twentieth Century)'.<sup>75</sup> There is a significant difference between claiming, as he does, that 'religion is inherently intolerant'<sup>76</sup> and claiming, as the more accurate picture might suggest, that there are meaningful links between prejudice and certain religious attitudes which exist in late twentieth Century North American Christian communities.

Furthermore, and importantly, not all claims for religious exemptions are based on prejudice. The Christian B&B owners in the case of *Bull v Hall*<sup>77</sup> who refused to provide a double bedroom to same-sex couples were arguably prejudiced against homosexuals and

<sup>73</sup> *ibid* 809.

<sup>74</sup> *ibid* 812. Nehushtan cites this passage at Nehushtan (n 4) 88.

<sup>75</sup> Nehushtan (n 4) 92.

<sup>76</sup> *ibid* 200.

<sup>77</sup> *Bull v Hall* [2013] UKSC 73.

their act of refusing a bedroom was arguably an unjustly intolerant one. However, not the same can be said about a Sikh man claiming an exemption from the legal duty to wear motorcycle helmets in order to be able to wear the Sikh turban. Nehushtan and Coyle in this volume acknowledge the fact that a claim for exemption by a religious objector may not be based on unjustly intolerant views but merely on morally misguided or irrational beliefs. While they insist that the inherently intolerant nature of religion is a good reason not to exempt individuals from legal obligations that forbid them from wearing religious symbols, they eventually concede that such exemptions may nevertheless be granted on the condition that anti-religious symbols are also allowed. They state that:

Religious symbols may be allowed in the public sphere and the workplace after all if anti-religious symbols are accorded the same status and protection. Thus, whether one is or is not convinced by the soundness of the link between the intolerant nature of religion and the need to exclude religious symbols from the public sphere is of less importance. The more important point is that of the equal treatment that should be granted to both religious and anti-religious symbols and sentiments.<sup>78</sup>

It is a welcome development for Nehushtan to have softened in this volume (together with Coyle) his earlier claim that ‘Religious claims ... for exemptions may not be tolerated or accepted even when they do not directly rely on [unjustly] intolerant values ... This is so because religion is inherently intolerant and because the liberal state should not support or endorse, directly or indirectly, intolerant ideologies or sets of beliefs.’<sup>79</sup> It is doubtful that the added proviso that anti-religious symbols should also be displayed along religious ones is entirely compatible with the third proposition of the Liberal Model given that that proposition calls for equal treatment of religious and non-religious beliefs; not simply religious and anti-religious beliefs. Nevertheless, given that there is no compelling evidence for the view that religion is inherently intolerant, Nehushtan and Coyle should be taken to have failed to provide even a *prima facie* case in favour of disadvantaging religious conscientious objectors over non-religious ones.

## V. The Liberal State Should Grant Conscientious Exemptions to Claimants Who are Sincere and if the Exemptions would not Disproportionately Impact the Rights of Others or the Public Interest

The final proposition of the Liberal Model says that the liberal state should grant conscientious exemptions to claimants who are sincere and only if the exemptions would not disproportionately impact the rights of others or the public interest. Much of the analysis in this part will be reserved to providing criteria as to how the right to exemption should be balanced against countervailing considerations. Some of these considerations will then be applied in part VI in the context of cases in which the general right to conscientious

<sup>78</sup> Chapter 7, text to n 38.

<sup>79</sup> Nehushtan (n 4) 200.

exemption conflicts with the principle of non-discrimination on the ground of sexual orientation. It will be argued that, in general, exemptions from anti-discrimination laws should not be granted given that granting them would result in LGB people being classed as second-class citizens. It is argued that this approach does not in turn label as second-class citizens individuals who are refused exemptions given the myriad of protections granted by liberal states for individuals to make known and live out their opposition to homosexuality. Particular issue is taken with Leigh, and with Chipeur and Clarke who argue in favour of exemptions from sexual orientation anti-discrimination laws in this volume.

## A. The Two Pillars of the Fourth Proposition

The fourth proposition has two pillars. The first is that only sincere conscientious objectors should benefit from the right to exemption. Much has already been said about this requirement in part III of chapter eleven of this volume. It may be recalled that it was there argued that assessing the sincerity of a person, whether or not a conscientious objector, is a job that courts are well accustomed to. To this it should be added that the sincerity test ought not, for the reasons explored in part III of this chapter, turn into a judicial enquiry into the validity, truth, reasonableness, etc of the beliefs of the objectors. Rather the focus should be on whether the belief is sincerely held.

Some have claimed that it would be more difficult for judges to assess the sincerity of secular beliefs without reference, as in religious practices, to comprehensive belief systems which have a communal dimension.<sup>80</sup> However, the UK and Canadian experience seem to invalidate this claim. In none of the five Canadian non-religious conscientious exemption claims was the sincerity of the claimants an issue. In the UK, two<sup>81</sup> cases only on non-religious conscientious exemptions have been identified, ie *Pattison*<sup>82</sup> and *Exmoor*. Only in *Exmoor* was sincerity an issue. That issue was resolved, as in any other case, on the basis of evidence in front of the tribunal. In that case the objector did not want to file his VAT returns online based on his belief that electronic communications greatly contributes to climate change. There was however evidence that he was not being totally sincere. He in fact did occasionally use the internet when economically expedient despite his strong disinclinations in that regard.<sup>83</sup> It seems then that the non-religiosity of a claim for conscientious exemption does not raise particular sincerity problems which courts cannot deal with.

<sup>80</sup> KA Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (Cambridge, Cambridge University Press, 2015) 307.

<sup>81</sup> This is only in the context of the general right to conscientious exemption. Other cases on non-religious conscience exist but they concern particular statutory exemptions.

<sup>82</sup> *R (on the application of Pattison) v Social Security and Child Support Commissioners* [2004] EWHC 2370. The applicant objected to employment in the private sector 'on the ground that private enterprise is not democratically accountable for the way the worker feels and consequentially is under no obligation to sustain the employment of those who generate profit. Nor is it disposed to concede the employers a stake in the assets that accrue from their individual efforts' (para 2). The High Court held that the applicant's right to freedom of conscience under Art 9 ECHR was not even engaged because the Art 9 did not allow the applicant to object to obligations attached to a benefit which he was not obliged to seek. This reasoning would now be incompatible with the ECtHR's reasoning in *Eweida v United Kingdom* [2013] IRLR 231.

<sup>83</sup> *Exmoor* (n 41) at 81–82.

Just as in the case of religious objections, courts do not need to look at what the objector's community believes in order to determine the sincerity of the particular objector. In fact, that query is altogether unhelpful because a person, even if religious, is not required to hold the same beliefs as his or her religious or moral community. This is because that would require the court to investigate whether a person adheres to a particular religious orthodoxy. As examined in part III of this chapter, courts cannot assess the validity, including the orthodoxy, of a particular religious belief.

The second pillar of the fourth proposition is that conscientious exemptions should not be granted if doing so would disproportionately impact the rights of others or the public interest. This can be formulated in the following way:

Refusing to grant a conscientious exemption will be disproportionate unless:

- (a) the refusal pursues an objective having substantial moral weight (countervailing reason stage);
- (b) the refusal is suitable for the achievement of that legitimate objective (suitability stage);
- (c) the refusal is the most practicable way to achieve that objective (necessity stage); and
- (d) the overall reasons supporting a refusal outweigh the reasons to grant an exemption (balancing stage).<sup>84</sup>

In essence, the second pillar of the fourth proposition requires a proportionality analysis. The core of this analysis is balancing the reasons in favour of granting an exemption against the reasons against granting it. The proportionality analysis is nothing other than structured moral reasoning which is highly sensitive to facts and context.

## B. What Factors Should Influence the Proportionality Analysis?

No robust attempt is made here to provide a full defence of the use of proportionality analysis against its most assiduous critics. Proportionality as a method of legal reasoning in human rights law generally has been criticised by various theorists for, among other things, being irrational, too formal, being incapable of providing actual guidance to adjudicators employing it, and undermining democratic legislative decisions about rights.<sup>85</sup> A response ought to be given to critics of proportionality/balancing reasoning within the context of conscientious exemptions, such as Kathleen Brady, who claims that it gives rise to 'manipulation, unprincipled or arbitrary decision making, and inconsistent and potentially discriminatory

<sup>84</sup>This is a way to make specific to the context of conscientious exemptions the more general proportionality test. This says that: '1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right? 2. Are the means in service of the objective rationally connected (suitable) to the objective? 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?' See G Huscroft, BW Miller and G Webber, 'Introduction', *Proportionality and the Rule of Law* (Cambridge, Cambridge University Press, 2014) 2.

<sup>85</sup>The literature on this is vast. Various critiques are set out by different authors in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012). See also G Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009); Huscroft, Miller and Webber, *Proportionality* (2014).

application.<sup>86</sup> The response is not to say that proportionality analysis can give rise to unequivocal legal outcomes in all situations. The adequate response is that the Liberal Model can point out factors which adjudicators should weight more heavily when considering whether a particular exemption should be given under the general right to conscientious exemption. This part catalogues them while analysing each stage of the proportionality analysis.

### C. The Countervailing Reasons Stage

The first stage of the proportionality analysis requires identifying reasons which may militate against granting an exemption. Those reasons will be provided by analysing the rationale for the existence of the legal duty which is being objected to. No doubts several countervailing reasons will exist in reference to one particular legal duty. In accordance with the fourth proposition, permissible countervailing reasons will be of two kinds only: guaranteeing the rights of others; or the public interest. Other kinds of reasons are not consistent with the Liberal Model. In particular, paternalistic reasons and reasons motivated by an adverse moral judgement about the way of life of the objector are not permissible.

Consider the case of *Pack* where members of the Holiness Church of God in Jesus Name sought to be exempt from the tort of public nuisance so that they could handle poisonous serpents and consume poisonous substances in accordance with their beliefs that doing so was a biblical injunction. The Tennessee Supreme Court explicitly rejected the possibility of allowing the practice between members only on the basis that ‘the state has a right to protect a person from himself and to demand that he protect his own life.’<sup>87</sup> This is a clear case of a countervailing paternalistic reason incompatible with the Liberal Model’s insistence that given that it is the individual that will benefit or suffer the consequences of a particular way of life, the choice of which life to follow is theirs and not the state’s.

In *Pack*, at least two alternative permissible countervailing reasons were available. The first, and weightier reason, was to protect the right to personal safety of the children of the members of the Church who, as the court recorded, were ‘roaming about unattended’ during services with poisonous snake-handling.<sup>88</sup> The second, perhaps less weighty, reason was to safeguard the public interest in reducing or preventing the costs (if any) that would be incurred by public healthcare in dealing with cases of poisoned members or other individuals attending the services.

Consider also the case of *Lukumi Babalu Aye*.<sup>89</sup> The case involved the effective prohibition by the city of Hialeah of the practice of animal sacrifice by individuals of the Santeria religion. The USSC found that the prohibition of Santeria ceremonial animal sacrifice was motivated by legislative animus against the religion and was therefore unconstitutional under the Free Exercise Clause. Similar religious practices of killing animals without stunning them, such as Kosher or Halal, were explicitly exempted by the city’s ordinances. Furthermore, various city officials expressed similar views to the one that ‘Santeria was a sin, “foolishness,”

<sup>86</sup> Brady, *The Distinctiveness of Religion in American Law* (2015) 195.

<sup>87</sup> *State ex rel Swann v Pack* (1975) 527 SW2d 99 at 113–14.

<sup>88</sup> *ibid* at 113.

<sup>89</sup> *Church of Lukumi Babalu Aye, Inc v Hialeah* (1992) 508 US 520.

“an abomination to the Lord,” and the worship of “demons”.<sup>90</sup> Such rationale, ie legislative animus against a particular religion, is incompatible with the second proposition of the Liberal Model which prohibits the state from passing moral judgement on the content of conscientious objectors’ beliefs. Such rationale would therefore also be impermissible at the countervailing reasons stage of the proportionality analysis.

*Lukumi* is also useful to reflect on another constraint of the Liberal Model: if no valid countervailing reasons can be identified for a legal obligation which is being objected to, the optimal result is not to grant an exemption but is instead to dispense with the obligation altogether. In *Lukumi*, exempting the members of the Santeria religion from the legal obligation which was specifically enacted to target them would have made the obligation meaningless. There are no good reasons why such meaningless and discriminatory legislation should remain on the statute book. Compatibly with the Liberal Model, the USSC voided the entire legislation rather than holding that it was unconstitutional as applied to the church members.<sup>91</sup>

#### D. The Suitability and Necessity Stage

In considering the suitability stage the relevant question is whether the granting of an exemption would undermine the countervailing reasons that were identified in the first stage. The rationale here is to ensure that the countervailing reason is in fact having a role to play in the decision whether or not to grant the exemption and is not being used as a façade. Consider the countervailing reason in *Hobby Lobby* for an exemption from the contraceptive mandate. This was identified by the majority opinion as providing to women cost-free access to contraception.<sup>92</sup> In principle, granting the exemption would not have undermined the countervailing reason. This was because the USSC had argued that the exemption already provided to religious non-profit organisations could be extended to for-profit objecting employers such as Hobby Lobby. Under that accommodation arrangement, Hobby Lobby would self-certify that it objected to providing the coverage. Upon receipt of the certification, Hobby Lobby’s insurers would then be required to provide the contraceptive coverage.<sup>93</sup> Accordingly, despite granting the exemption, women would still continue to have cost-free access to contraception. Admittedly, however, as already discussed in part III of chapter eleven in this volume, it was not clear that this accommodation would have been possible given that, as other religious employers have done, Hobby Lobby may also have objected to self-certifying its conscientious objection to its insurer.

*Hobby Lobby* is also a useful case to illustrate the necessity stage of the proportionality analysis. In the necessity stage a court asks whether the refusal of the exemption is the most practicable way to achieve the countervailing reason. In *Hobby Lobby* the USSC was able to identify a suitable and practicable alternative: extending to the for-profit the exemption

<sup>90</sup> *ibid* at 541.

<sup>91</sup> *ibid* at 547. This section should not be taken to mean that animal sacrifice or indeed the killing of animals for religious or non-religious purposes, including for food, is morally justifiable. The opposite is the case. However, that would require a detailed argument not relevant to the present volume.

<sup>92</sup> *Burwell v Hobby Lobby Stores, Inc* (2014) 134 S Ct 2751, at 39–40.

<sup>93</sup> *ibid* at 40–45.

which religious non-profit already benefitted from. In essence, unless refusing the exemption is necessary to pursue the countervailing reason, the duty-bearer would have acted disproportionately. This step encourages the duty-bearer to canvass a range of options in which it may achieve its own countervailing reason while allowing the right-bearer to enjoy the exemption. It may well be that imposing an alternative obligation may be sufficient to alleviate the concerns raised by the countervailing reason. The classic example here is in the military context. A countervailing reason for refusing to exempt Quakers and pacifists from compulsory military conscription would be the unfairness to non-objectors in being required to serve their country at great cost to their lives and families. This unfairness may be significantly alleviated if exempt objectors are required, as a condition for their exemption, to perform civilian service. The necessity stage therefore requires the institution to think creatively about what other measures, short of a refusal, may alleviate the concerns raised by a countervailing reason.

### E. The Balancing Stage

The balancing stage requires a decision on whether the overall reasons supporting a refusal outweigh the reasons to grant an exemption. This is a context- and fact-specific enquiry. However, a few general factors can be taken into account. First, if granting an exemption would run counter to a well-reasoned finding by a democratic institution, then that is in itself a strong but not dispositive reason for an exemption not to be granted. Consider the claim for exemption as it arose in *Williamson*.<sup>94</sup> In that case Christian parents objected to the statutory ban of corporal punishment of school pupils on the basis that such punishment was mandated by their religious beliefs. The UK House of Lords rejected the view that the statutory ban impermissibly breached the parents' Article 9 right. In reaching that conclusion, the Court, when undertaking the proportionality analysis, took into consideration the fact that courts owe deference to the legislature on morally and socially sensitive issues such as the permissibility of corporal punishment of minors. Lord Nicholls, delivering the Court's main opinion, stated:

Parliament was entitled to take this course [ie enact the statutory ban] because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament. The legislature is to be accorded a considerable degree of latitude in deciding which course should be selected as the best course in the interests of school children as a whole. The subject has been investigated and considered by several committees ... The issue was fully debated in Parliament. ... the proportionality of a statutory measure is to be judged objectively and not by the quality of the reasons advanced in support of the measure in the course of parliamentary debate. But it can just be noted that the desirability or otherwise of overriding parental choice was a matter mentioned in the course of debate in both Houses of Parliament.<sup>95</sup>

In a liberal democracy, respect for democratic institutions is part and parcel of the public interest. If granting an exemption would run counter to a well-reasoned finding by a democratic institution, then that is in itself a strong reason for an exemption not to be granted.

<sup>94</sup> *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

<sup>95</sup> *ibid* at 51.

However, it cannot be a dispositive reason. In a liberal democracy committed to individual well-being individuals have legal rights which they can enforce against wider public interests, even when those interests have been crystallised in democratic legislation. It would not conform to the liberal commitment to individual well-being if deference to the legislative process was a conclusive factor rather than a weighty factor when courts are considering whether an exemption is warranted.

Second, the nature of the person requested to grant an exemption ought to weigh heavily in the moral equation. The ability of a small family-run business to grant an exemption from the duty to work on weekends to a Sabbatarian will substantially differ from the ability of a governmental department or a publicly traded company. The more costly granting an exemption would be for the person asked to grant the exemption, the less weighty would be the case for granting an exemption.

Finally, even if it is the state itself that is being asked to grant an exemption, all things being equal, an exemption should not be granted if doing so would result in discriminatory treatment of protected groups, such as racial minorities and homosexuals. This is especially important in the contemporary flurry of litigation on whether providers of commercial goods and services, such as florists, hoteliers and bakers, can refuse their services on the ground of sexual orientation.<sup>96</sup> The next section is entirely dedicated to that issue.

## VI. Balancing the Right to Conscientious Exemption and the Right to Non-Discrimination: Beyond Ongoing Culture Wars

### A. Against Leigh: Sexual Orientation Non-Discrimination as a Human Rights Norm

Leigh (chapter six), Chipeur and Clarke (chapter nine) argue in this volume in favour of granting conscientious exemptions from sexual orientation anti-discrimination norms. The core of Leigh's argument in this respect is that freedom of conscience should take priority over non-discrimination because the former is a human right whereas the latter is not, at least under the ECHR. On the view that human rights should trump other policy considerations, a claim for exemption grounded in the human right to freedom of conscience (under Article 9 ECHR) would automatically trump the policy consideration that individuals should not be discriminated against by private service providers on ground of their sexual orientation.

It is however doubtful that Leigh's insistence on what he calls the 'reversibility test' is based on an accurate portrayal of the legal status of non-discrimination norms. Leigh claims that 'There is no general Convention right to be protected against discrimination by private

<sup>96</sup> *Elane Photography, LLC v Willock* (2013) 309 P 3d 53 (Photographer); *Bull v Hall* (n 77) (B&B hoteliers); *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Com'n* (2018) 584 U S \_\_\_\_ 1 (USSC) (Bakery); *Lee v Ashers Baking Company Ltd & Ors* (Northern Ireland) [2018] UKSC 49 (Bakery).

persons in the provision of goods and services.<sup>97</sup> There is however some scope to argue that this statement is not an accurate portrayal of ECHR law. Leigh is correct to note that the Convention, under Article 14, does not protect individuals from discrimination by private persons in the provision of goods or services. However, his dismissal of the potential applicability of Protocol 12 to the Convention is too quick. Article 1(1) of that Protocol provides:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Leigh states that 'Protocol 12 (which the UK has not signed in any event) is wider [than Article 14] but still stops short of requiring states to prohibit discrimination by private parties.'<sup>98</sup> He cites as authority for this proposition paragraph 25 of the Explanatory Report to that Protocol.<sup>99</sup> It is true that in that paragraph the Report seems to support Leigh's assessment when it says 'On the one hand, Article 1 protects against discrimination by public authorities. The article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons'. However, the Report goes on to consider countervailing suggestions and concludes that there might be good reasons to interpret Article 1 of the Protocol to cover prohibitions of discrimination by private persons in certain circumstances. Consequently, in paragraph 25, the Report says 'On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination'. Crucially, the Report finds that the imposition of this positive obligation to protect individuals from discrimination would most likely arise in the context of private providers of goods and services. It says, at paragraph 28, that:

[A]ny positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc).

It seems then that the Explanatory Report to Protocol 12 undermines Leigh's assessment that there is no Convention right to be protected against discrimination by private persons in the provision of goods and services. Indeed, it seems to support the very opposite view. Importantly, this duty would prohibit discrimination on the ground of sexual orientation by private providers of goods and services. While sexual orientation is not mentioned as a prohibited ground of discrimination in Article 1 of Protocol 12, the Explanatory Report suggests that this 'was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive'.<sup>100</sup> There is force to this suggestion as sexual orientation is not mentioned under Article 14 either yet the ECtHR has held that sexual

<sup>97</sup> Chapter 6, text to n 86.

<sup>98</sup> *ibid.*

<sup>99</sup> *Explanatory Report to the Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 2000), at 25.

<sup>100</sup> *ibid.* at 20.

orientation ‘is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as”.’<sup>101</sup>

Two qualifications need to be made to the view that the Convention recognises a right to be free from sexual orientation discrimination by private providers of goods and services. The first is that this view is best supported by the Explanatory Report to Protocol 12 and not by ECtHR case law. The Report does not have the status of law even though it is highly persuasive. The ECtHR has relied on the Report in a number of cases for the proposition that the meaning of ‘discrimination’ under Protocol 12 is identical to that under Article 14.<sup>102</sup> Nevertheless, the Court has yet to decide a case on the specific issue of sexual orientation discrimination by private providers of goods and services. If it does, only then will we be provided with the most authoritative confirmation that the Convention does recognise a right to be free from sexual orientation discrimination by private providers of goods and services.

The second qualification is that, as Leigh correctly notes, the UK is not a signatory to Protocol 12. This is however irrelevant for the purposes of Leigh’s reversibility test. As stated, the core of Leigh’s argument is that freedom of conscience should take priority over non-discrimination by private service providers on the ground of sexual orientation because the former is a human right under the Convention whereas the latter is not. However, Leigh’s argument is undermined if, as argued, there is indeed a Convention right to be free from sexual orientation discrimination by private providers of goods and services under Protocol 12. Irrespective of whether or not the UK is party to the Protocol, it seems to follow that the UK legislation prohibiting providers of commercial services from discriminating on the basis of sexual orientation guarantees a Convention right. Accordingly, even under Leigh’s reversibility test, there is a genuine clash of human rights norms and the right to conscientious exemption cannot automatically take precedence.

## B. Against Chipeur and Clarke: Dignitary Harm and Social Standing

Chipeur and Clarke also support the notion that the right to conscientious exemption should prevail over sexual orientation non-discrimination on the basis that there appears to be only a conflict between a fundamental right (conscience and religion) and a ‘vague aspiration’ (sexual orientation non-discrimination).<sup>103</sup> Again, this unfortunately mischaracterises the legal status of the prohibition of sexual orientation discrimination as a human rights norm. In any event, Chipeur and Clarke are prepared to consider the fact that when an identifiable person is being refused a commercial service on the grounds of sexual orientation, that may constitute a dignitary harm. However, they mischaracterise the nature of dignitary harm as one involving offence to feelings. Consequently, they argue that ‘we are on dangerous

<sup>101</sup> *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 47, at 28.

<sup>102</sup> *Pilav v Bosnia and Herzegovina* [2016] ECHR 498, at 40. *Zornić v Bosnia and Herzegovina* [2014] ECHR 773, at 27. *Savez Crkava Riječ Života and Others v Croatia* (2012) 54 EHRR 36, paras 104–05 and 107 (here the ECtHR relied on the report to determine the scope of the protection from discrimination rather than on the meaning of ‘discrimination’). *Sejdić and Finci v Bosnia and Herzegovina* [2009] ECHR 2122, at 55.

<sup>103</sup> Chapter 9, text to n 91.

territory when the State enters into the business of attempting to protect feelings.<sup>104</sup> There is some good reason for this mischaracterisation. Leading advocates of the notion of ‘dignitary harm’ in the context of conscientious exemptions refer to the hurt feelings of gay customers being denied a commercial service. Nejaime and Segal say in this respect:

[T]he bakery owner who turns away a same-sex couple treats that particular couple as sinners. ... the individualized condemnation in the bakery are actions that address third parties as sinners in ways that can stigmatize and demean. In some situations, social meaning is explicitly communicated during the religiously based refusal of service. Consider the operation of complicity-based conscience claims in the context of same-sex marriage. A bakery customer, for instance, reported being told, ‘[we] don’t do same sex weddings because [we] are Christians and being gay is an abomination.’<sup>105</sup>

It is unfortunate that Nejaime and Segal interpret dignitary harm to consist only in the offence and humiliation occasioned by LGB persons being called sinners. If dignitary harm merely equated to being offended and humiliated then Chipeur and Clarke would be right to be sceptical about the state getting involved in preventing it. After all, offence and humiliation are a daily occurrence in other contexts (eg family life and friendship) and the state does not generally intervene. The notion of dignitary harm should be instead understood as the harm occasioned to members of a section of the political community when their equal social standing is undermined and when they are prevented from enjoying legal entitlements on an equal footing as members of other social groups.<sup>106</sup> The problem with the law allowing LGB customers being turned away from providers of commercial services is not that offence and humiliation is caused (although that is of course also problematic). It is that the law that permits such state of affairs signals that LGB people do not have the same social standing as non-LGB people and that they do not enjoy the same basic legal entitlements on an equal footing: in sum, they are labelled as social outcasts by the law itself. This legal injustice is compounded by the fact that LGB people have traditionally also been targeted by discriminatory laws (eg criminalisation of homosexuality) and, even today, continue to be the target of unjust discriminatory treatment by the law and law-makers, which signals their status as second-class citizens.

For example, the US Department of Justice has argued in *Zarda* that the prohibition of sex discrimination in employment in Title VII should not be interpreted to cover sexual orientation, with the consequence that it would not be unlawful for a gay person to be fired by their employer under that legislation on grounds of their sexual orientation alone. The Second Circuit Court of Appeal did not accept that submission and held that the prohibition of sex discrimination does include sexual orientation discrimination.<sup>107</sup> Similarly, in *Masterpiece*, the US Department of Justice argued that while there is a compelling state interest in combatting race discrimination, there is no compelling interest in combatting sexual orientation discrimination. The USSC did not determine that issue as it disposed

<sup>104</sup> Chapter 9, text to n 92.

<sup>105</sup> D Nejaime and R Siegel, ‘Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics’ (2015) 124 *Yale Law Journal* 2516, 2576.

<sup>106</sup> This is an argument borrowed from Waldron, *Hate Speech* (2014) ch 5.

<sup>107</sup> *Zarda v Altitude Express, Inc* (2018) 883 F3d 100. The submission was the focus of the amicus brief submitted to the Court by the Department of Justice.

of the case on the basis that there had been unconstitutional animus towards the baker's religious beliefs by the judicial bodies that heard his case.<sup>108</sup> To this should be added that in 25 US states sexual orientation discrimination in employment is not unlawful.<sup>109</sup>

The argument advanced here is that the notion of dignitary harm as expressed both by Nejaime and Segal and by Chipeur and Clarke in this volume is understated. The notion is not to be equated with offence and humiliation occasioned by the expression that homosexual behaviour is sinful or immoral. Rather, it is to be construed as a form of social harm which undermines the social standing of members of a section of the political community and which takes away equal basic entitlements. Allowing the law to permit this form of social outcasting reinforces the view that LGB members of the political community are, at best, second class citizens. On the uncontroversial view that the state has a duty to promote the well-being of its subjects, it follows that the state has also a duty to protect individuals against the dignitary harms occasioned by refusing equal access to commercial services on the grounds of sexual orientation. Accordingly, exemptions from sexual-orientation anti-discrimination norms should not be granted to the service-providers.

A possible objection to this argument is that while there are dignitary harms, understood in the manner put forward above, occasioned to gay people turned away from commercial services, refusing to exempt objecting service-providers also imposes dignitary harms on them. Ryan Anderson, who accepts that there are grave social harms if exemptions from anti-discrimination laws are granted to service-providers (only in the context of race rather than sexual orientation discrimination), consequently complains:

[A] Supreme Court ruling against Phillips [ie the baker in *Masterpiece*] would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. The Court's refusal to grant First Amendment protections to Phillips would teach that his reasonable convictions and associated conduct are so gravely unjust that they cannot be tolerated in a pluralistic society.<sup>110</sup>

Let Anderson's charge be rephrased thus: even if we accept that the law labels LGB persons as social outcasts by permitting that they be denied basic commercial services, would the law not also label as social outcasts service-providers by forcing them to provide a service which they object to in good conscience? It is doubtful that this charge has much force to it. This is because, in a liberal society committed to defending a pluralism of beliefs, the social standing of those that oppose homosexuality is protected by liberal law in various ways: such individuals may not be denied commercial services or be fired from their jobs on the basis of their religious or moral beliefs about homosexuality (religion and belief is a standard protected characteristic in anti-discrimination legislation);<sup>111</sup> they may associate in secular groups and churches whose constitutive beliefs include condemning homosexuality and that

<sup>108</sup> *Masterpiece Cakeshop* (n 96). The submission was made in the amicus brief submitted to the USSC at pp 31–33.

<sup>109</sup> The states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.

<sup>110</sup> RT Anderson, 'Disagreement Is Not Always Discrimination: On *Masterpiece Cakeshop* and the Analogy to Interracial Marriage' (2018) 16 *The Georgetown Journal of Law & Public Policy* 123, 126.

<sup>111</sup> For application in a UK context see *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* [2015] ET 3300656/2014, unreported. The UK Employment Tribunal held that an employee was unlawfully dismissed when she responded to her colleague's queries on the issue by sharing her view that homosexuality is a sin.

exclude LGB people from their members;<sup>112</sup> short of incitement to violence, harassment, intimidation and disrupting public order, they may publicly condemn homosexuality.<sup>113</sup> In sum, liberal law, through all of these protections, guarantees their equal social standing in a liberal society. Hence, safeguarding LGB people from the dignitary harm they would suffer if the law allowed them to be turned away by providers of commercial services is a legitimate balancing of conflicting rights: this is because the social standing of both those that oppose and those that support homosexuality is protected by liberal law.

### C. The No Religious Rites Principle and Conscientious Exemptions for Wedding Photographers

If the arguments advanced so far are accepted, it follows that conscientious exemptions should not be granted to commercial service-providers from sexual orientation anti-discrimination norms on the basis that doing so causes dignitary harms (a social harm rather than offence to feelings) to LGB persons. This section, however, acknowledges that there is a principle based on freedom of conscience and religion which would exonerate a limited class of service-providers, ie objecting wedding photographers such as in *Elane Photography* (who refused to photograph a commitment ceremony between lesbians),<sup>114</sup> from providing the requested service. The principle is the No Religious Rites Principle. It says that a person may not be compelled by the state to participate in rites which have a significant religious or moral character. The principle can be extracted from the case of *Galloway*. There city residents claimed that the town's practice of opening town board meetings with sectarian prayers violated the First Amendment's Establishment Clause. The USSC rejected the claim justifying the constitutionality of the practice on the grounds that, although it retained a religious significance, it had become a traditional practice which had survived the test of time.<sup>115</sup>

However, fundamental for the Court's reasoning was the fact that attendance at the prayer session was not compulsory for individuals that objected to it. Justice Kennedy, writing for the Court, said: 'It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise'. He continued by stating that the outcome of the case 'would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.'<sup>116</sup>

<sup>112</sup>The USSC held that the Boy Scouts could exclude homosexuals from its membership in *Boy Scouts of America v Dale* (2000) 530 US 640.

<sup>113</sup>That seems to be the view endorsed by Justice Kennedy in *Obergefell* when he said: '[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered'. See *Obergefell v Hodges* (2015) 135 SCt 2584 (USSC) 2607.

<sup>114</sup>*Elane Photography* (n 96).

<sup>115</sup>*Town of Greece, NY v Galloway* (2013) 134 S Ct 1811.

<sup>116</sup>*ibid* 1825–26.

Assume for the moment that the No Religious Rites Principle is valid (some objections to it are considered below). If so, it would seem to exonerate the photographer in *Elane Photography* from being compelled to provide her service to a same-sex marriage in so far as it would entail her being compelled to be physically present at the wedding ceremony to which she objects on religious or moral grounds. The principle would be inapplicable to other service-providers (such as bakers or printers) to the extent that their presence at the ceremony is not needed to fulfil their services.

The UK government has suggested that no exemptions should be granted to wedding photographers. The UK Equality Act 2010 contains a statutory exemption granted to individuals and organisations from participating in same-sex marriages. The exemption is worded thus:

(1) A person does not contravene section 29 [ie the prohibition of sexual orientation discrimination] only because the person – ...

(b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage ...

for the reason that the marriage is the marriage of a same sex couple.<sup>117</sup>

The non-legally binding explanatory notes drafted by the government that proposed the legislation suggest that this applies mainly to people who would be directly involved in officiating the religious component of the ceremony (priests and organists) but would not exempt a commercial photographer. The notes state:

A commercial photographer is asked to photograph a wedding of a same sex couple. It would be unlawful sexual orientation discrimination for her to refuse because she does not approve of marriage of same sex couples. This is because her role is not part of the religious marriage service.<sup>118</sup>

It is doubtful that this guidance has adequate legal backing. This is because it fails to recognise the importance for freedom of religion of the principle of freedom from religion, in particular the freedom not to be coerced to participate in a religious ceremony. The negative aspect of religious freedom has been recognised by the ECtHR which has stated that Article 9 covers the ‘the freedom not to adhere to a religion and the freedom not to practice it’.<sup>119</sup> The practice of religion does not only consist in officiating a religious rite; in the wording of Article 9, it also consists ‘in worship, teaching, practice and observance’. Physically being present at a religious ceremony can reasonably be construed as taking part in the ceremony.

One may construe the No Religious Rites Principle in either a broad or a narrow way. The narrow way would protect the photographer (or other person) from attending only those parts of the same-sex marriage ceremony which are religious in nature. This seems to be the preferred construction of the explanatory notes which agree that an organist may be exempt:

An organist who usually plays at wedding services at a church does not wish to play at a wedding service of a same sex couple. This would be lawful because he is involved in the religious act of worship i.e. the religious ritual of the wedding service. This is the case whether he is a volunteer or employed by the church.

<sup>117</sup> Equality Act 2010, Part 6A, Sch 3.

<sup>118</sup> Explanatory notes to Marriage (Same Sex Couples) Act 2013, p 8.

<sup>119</sup> *Alexandridis v Greece*, App no 19516/06 (ECtHR, 21 February 2008), at 32.

However, this insistence on only the religious ritual of the wedding service misses a crucial aspect of the principle. Remember that the principle says that a person may not be compelled by the state to participate in rites which have a significant religious or *moral* character. Focusing on the religious parts only would disregard the moral objections of the objector in favour of the religious ones. This would entail that photographers who have a moral rather than a religious objection to same-sex marriage would not be exempt. However, this would not be compatible with the third proposition of the Liberal Model, which states that the liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant a conscientious exemption. Accordingly, the No Religious Rites Principle should be interpreted in a broad way to include all religious and non-religious parts of a same-sex ceremony to the extent that the photographer would be compelled to take part in a religiously or morally significant event to which she objects.

## VII. Conclusion

This chapter has defended the Liberal Model of Conscientious Exemptions as a morally attractive template for how liberal states should deal with claims for conscientious exemptions. The chapter has defended the propositions of the Liberal Model from several attacks from several of the contributors to this volume. It has argued in favour of a general right to conscientious exemption on the basis of providing an alternative forum, the judicial one, for minority moral views often overlooked in the political process. It has advocated state neutrality on the content of the beliefs of conscientious objectors. Arguments to the contrary advanced by Jones and by Nehushtan and Coyle were found unpersuasive. The chapter has also advocated for equal treatment between religious and non-religious conscientious objectors. It rejected claims for preferential treatment for religious objectors advanced by Corvino and by Moon. It equally rejected claims for preferential treatment for non-religious objectors advanced by Nehushtan and Coyle. The chapter then analysed the application of proportionality analysis when the right to exemption conflicts with the rights of others or with the public interest. It was argued that in the current controversies that pitch the right to conscientious exemption of commercial service providers against sexual orientation non-discrimination norms, the latter should generally prevail. It was acknowledged, however, that objecting service-providers who would be required to physically attend an event to which they object (eg a same-sex wedding) should be exempt.