

**The London School of Economics and Political  
Science**

**RELIGIOUS OBJECTIONS TO EQUALITY LAWS:  
RECONCILING RELIGIOUS FREEDOM WITH GAY  
RIGHTS**

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A thesis submitted to the Department of Law of the London School of  
Economics for the degree of Doctor of Philosophy, London, February 2014

## **Declaration**

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## **Abstract**

This thesis considers how the law should manage conflicts between religious freedom and the prohibition of sexual orientation discrimination. It starts from the basis that both these rights are valuable and worthy of protection, but that such disputes are often characterised by animosity. It contends that a proportionality analysis provides the best method for resolving these conflicts. In particular, it argues that proportionality is a conciliatory method of reasoning because it provides context-dependent and nuanced answers to these issues, providing scope for re-assessment in future cases, and because it accepts losing claims as in principle as worthy of protection. It is also argued that proportionality is advantageous because it inherently demands justification where rights are infringed.

The thesis takes a comparative approach, examining the law in England and Wales, Canada and the USA to demonstrate the clash of rights and to compare how these issues have been dealt with by courts and legislatures. It considers these issues with reference to four areas of law. The first assesses how far employees with discriminatory religious beliefs should be accommodated in the workplace, including whether they should have a right not to perform aspects of their work that are contrary to their beliefs and whether they should be permitted to share their discriminatory views at work. The second considers whether and when religious organisations should be permitted to discriminate in their employment decisions. The third examines how far religious organisations should be permitted to discriminate in providing services, such as charitable services or when hiring out premises, and the fourth whether religious individuals should be allowed to discriminate in the secular marketplace.

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## **Chapter 1: Introduction**

This thesis considers how conflicts between religious claims to be free to act in discriminatory ways and the right not to be subjected to sexual orientation discrimination should be addressed in law. It uses cases and issues that have arisen in three jurisdictions: the US, Canada and England,<sup>1</sup> to demonstrate the clash of rights that can result and to compare how these have been dealt with by courts and legislatures in order to propose a method of resolution for this conflict. These cases include the refusal of some religious organisations to hire out their premises for same-sex weddings, the refusal of some registrars or town clerks to perform marriages or give marriage licences to gay couples and the refusal of some faith-based social welfare organisations to employ gay people, among many others.

Such disputes raise important but difficult issues. They can cause a great deal of controversy, characterised in some contexts by bitterness and animosity, often accompanied by much public and media interest. American scholarship has long pointed to the problem of 'culture wars' with deep and stark divisions between social groups, whereby 'moral' issues become flashpoints for cultural and political disagreements.<sup>2</sup> In such a culture war, 'the goal is not to go on living with [the other side] but under a new arrangement. It is somehow to root them out, or subjugate them, so that one does not have to deal with what they stand for anymore.'<sup>3</sup> The question of gay rights, including non-discrimination laws, same-sex marriage and broader claims for social recognition, has become part of this culture war and indeed perhaps one of its most contested issues.<sup>4</sup> An interesting aspect of this

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<sup>1</sup> By England I mean the jurisdiction of England and Wales. The thesis does not refer to Scottish or Northern Irish law specifically, but the same law may apply to these jurisdictions. See *infra* at p30.

<sup>2</sup> Literature includes: J. Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991), *Before the Shooting Begins: Searching for Democracy in America's Culture War* (New York: Free Press, 1994); J. Hunter and A. Wolfe (eds), *Is there a Culture War? A Dialogue on Values and American Public Life* (Washington D.C: Brookings Institution Press, 2006); G. Layman, *The Great Divide: Religious and Cultural Conflict in American Party Politics* (New York: Columbia University Press, 2001); J. Nolan (ed.), *The American Culture Wars: Current Contests and Future Prospects* (Charlottesville: University Press of Virginia, 1996); J. Uecker and G. Lucke, 'Protestant Clergy and the Culture Wars: An Empirical Test of Hunter's Thesis' (2011) 50 *J Sci Study Relig* 692.

<sup>3</sup> C. Taylor, 'Living with Difference' in A. Allen and M. Regan (eds), *Debating Democracy's Discontent: Essays on American Politics, Law and Public Philosophy* (Oxford: Oxford University Press, 1998) 222.

<sup>4</sup> A. Wolfe, 'The Culture War that Never Came' in Hunter and Wolfe *supra* n. 2 (arguing that while the existence of a culture war is exaggerated on other issues, gay rights, and

conflict is that an issue may become highly contested, not necessarily because of its practical importance but because it is symbolically significant or because of fears that it signals the beginning of a slippery slope. While the culture war may only involve a small number of participants, even in the US,<sup>5</sup> and may be less evident in the other jurisdictions,<sup>6</sup> partly due to the lack of the 'religious right' as a powerful social and political force,<sup>7</sup> this analysis is still relevant. In all, disputes over gay rights or religious exemptions have sometimes become 'high stakes' issues and a matter of identity politics, where cases and issues can be used 'not simply, or even primarily, to settle ordinary individual disputes, but rather to pursue social and political causes'.<sup>8</sup>

We should be careful though not to overly simplify or misinterpret this controversy. Evidently, there is no straightforward religious/secular divide. There is no intrinsic reason why religious belief should necessarily be discriminatory towards gay people. There are many devoutly religious people who see no conflict between their religious beliefs and a belief that same-sex emotional/sexual relationships<sup>9</sup> are as morally worthy as heterosexual ones. Some organised religions' teachings do not argue there is any moral difference between the two, and indeed there are some such organisations particularly aimed at gay people, such as the Metropolitan Community Church.<sup>10</sup> Additionally, many religious individuals and organisations would not wish to discriminate in providing services to gay people for example, regardless of their beliefs or teaching on sexual morality and therefore do not seek exemptions from equality laws. The number of those who do wish to discriminate, that is to treat differently those who have a non-

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particularly same-sex marriage remain very controversial.) See also K. Hull, *Same-Sex Marriage: The Cultural Politics of Love and Law* (Cambridge: Cambridge University Press, 2006).

<sup>5</sup> M. Fiorina, *Culture War? The Myth of a Polarized America* (3<sup>rd</sup> ed, Boston: Longman, 2010).

<sup>6</sup> D. Rayside and C. Wilcox, 'The Difference that a Border Makes: The Political Intersection of Sexuality and Religion in Canada and the United States' in D. Rayside and C. Wilcox (eds), *Faith, Politics and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011).

<sup>7</sup> J. Malloy, 'Bush/Harper? Canadian and American Evangelical Politics Compared' (2009) 39 *American Review of Canadian Studies* 352; A. Walton et al, *Is there a 'Religious Right' Emerging in Britain?* (London: Theos, 2013).

<sup>8</sup> D. Hoover and K. Den Dulk, 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada' (2004) 25 *Int Polit Sci Rev* 9, 11.

<sup>9</sup> This phrasing is used in N. Bamforth, 'Legal Protection of Same-Sex Partnerships and Comparative Constitutional Law' in T. Ginsburg and R. Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011).

<sup>10</sup> See Metropolitan Community Church 'Who We Are', Available at: <http://mccchurch.org/overview/>. [Last Accessed 10 Feb 2014].



heterosexual sexual orientation from those with a heterosexual one,<sup>11</sup> may therefore be small and the number of those with discriminatory views also appears to be decreasing.<sup>12</sup> Even so, numerous conflicts have arisen and continue to arise and can arouse strong feelings.

From a political and social perspective this is therefore a controversial and difficult issue. It also poses problems from a legal perspective. Both freedom of religion, which may include the freedom to express and act on discriminatory beliefs, and freedom from discrimination are important rights in a liberal society. Therefore, as Stychin puts it, 'liberal democracies are faced with what appears to be an irreconcilable clash of two conflicting rights'.<sup>13</sup> In order to demonstrate this point, more will now be said about the legal protection of both rights in the jurisdictions in question and the underlying values on which such legal protection is based.

### **Freedom of Religion**

Freedom of religion is an important legal right in the three jurisdictions and is protected by constitutional or other law in all. In Canada, s.2 of the Charter of Fundamental Rights and Freedoms protects freedom of conscience and religion. S.15 of the Charter also prohibits discrimination on the grounds of religion and this includes a right of reasonable accommodation, unless this would cause undue hardship.<sup>14</sup> Employees may therefore be able to claim for example that their discriminatory beliefs and practices should be accommodated, perhaps by the rearrangement of duties.

In the UK, Article 9 of the European Convention on Human Rights (ECHR) protects freedom of religion. This gives an absolute right to freedom of 'thought, conscience and religion' and a limited right to 'manifest one's religion or beliefs'. Additionally, the Equality Act 2010 forbids direct and indirect discrimination in employment and the provision of services on the grounds of religion. Indirect discrimination concerns the situation where a 'provision, criterion or practice' places people who share a protected characteristic (such as a religious belief) at a disadvantage

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<sup>11</sup> Because I will use 'discriminatory' to refer to any difference in treatment, this should not always be seen as having a pejorative meaning.

<sup>12</sup> D. Hoover and K. Den Dulk *supra* n.8.

<sup>13</sup> C.F. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *OJLS* 729, 729.

<sup>14</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

compared to others, and the practice is not a proportionate means of achieving a legitimate aim. For example if an employer forbids employees from wearing head coverings this will disadvantage Muslim women more heavily than those who are not Muslim and the employer has the burden of demonstrating that this requirement is proportionate. While unlike Canada there is no right to reasonable accommodation per se, such an enquiry is likely to involve similar considerations as whether an employee's wish to wear a headscarf could be reasonably accommodated. It can therefore be argued that failure to accommodate discriminatory beliefs and practices constitutes indirect discrimination.<sup>15</sup> There are however differences between the two concepts: reasonable accommodation may place a greater demand on employers to modify their practices than indirect discrimination, since the emphasis is on accommodation. Furthermore, unlike reasonable accommodation, indirect discrimination is conceptually focused on ameliorating group disadvantage rather than protecting individual believers. Courts may therefore have difficulties in considering indirect discrimination cases involving religious beliefs that are not widely shared.<sup>16</sup>

In the US, the First Amendment protects the 'free exercise' of religion. The Religious Freedom Restoration Act (RFRA) also requires laws imposing a substantial burden on religious practices to be subject to strict scrutiny: that is that the state must demonstrate a compelling government interest and that the law is narrowly tailored to achieve this aim. Although in *City of Boerne v Flores*<sup>17</sup> the Supreme Court held that the RFRA was unconstitutional as far as it related to state law, since Congress had exceeded its authority under the Fourteenth Amendment to control state law, it still applies to federal action.<sup>18</sup> Additionally, 18 states have state RFRAs, providing equivalent protection to the federal RFRA to state laws, and some state constitutions provide similar protection. In employment, Title VII of the Civil Rights Act 1964 prohibits certain employers from discriminating on, inter alia, the basis of religion.<sup>19</sup> This includes a minimal right to reasonable accommodation.

Freedom of religion is therefore legally protected in each of the jurisdictions in question. In addition to the general legal and constitutional protections mentioned

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<sup>15</sup> E.g. *Islington London Borough Council v Ladele* [2010] 1 WLR 955.

<sup>16</sup> See *Mba v Merton LBC* [2014] 1 WLR 1501.

<sup>17</sup> 521 US 507 (1997).

<sup>18</sup> *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* 546 US 418 (2006).

<sup>19</sup> Codified at 42 U.S.C. § 2000e. It does not apply to religious organisations or to employers with fewer than 15 employees.

above, there are also numerous laws protecting religious freedom in specific contexts, such as the exemption in English law for Sikhs from wearing hard hats when working on construction sites.<sup>20</sup> This protection of religious freedom is not merely a matter of historical accident, but also rests on important principles. Although this is not the main focus of the thesis, in order to understand why conflicts between freedom of religion and non-discrimination rights pose hard questions, it is necessary to at least partly understand why freedom of religion is protected. Since my thesis only considers beliefs that are clearly religious in nature, I leave aside the questions of how non-religious beliefs should be treated and what counts as a religious belief.

There are firstly instrumental justifications for freedom of religion. It has for example been argued that failure to tolerate religious practices will lead to dissatisfaction and societal disorder.<sup>21</sup> While there may be some truth to this at various historical moments, it is not evidently true at present in the jurisdictions discussed here. As Rivers points out, those who are subject to religious oppression tend to be minorities who would not have sufficient power to challenge the state.<sup>22</sup> This merely pragmatic argument is contingent on particular circumstances and does not provide justification when they do not apply. Similarly, arguments that religion encourages 'civic virtue' fail because, as Ahdar and Leigh put it, 'there are religions and religions'.<sup>23</sup> While many religions may promote widely accepted virtues in some respects, it could hardly be said that all religions will do so at all times. Furthermore, such arguments could well lead to the co-option of religion for government purposes rather than religious freedom.

A still instrumental, but less contingent, potential justification is Mill's argument that religious liberty is more likely to lead to the discovery of truth than authoritarianism because it permits the pursuit of many competing lifestyles, and therefore allows others to assess the success of such ideas. While there may be some value in this idea, it fails to grasp the importance of freedom of religion for

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<sup>20</sup> Employment Act 1989 s.11.

<sup>21</sup> Locke for example put forward this argument in *A Letter Concerning Toleration*, reproduced in J. Horton and S. Mendus (eds) *John Locke: A Letter Concerning Toleration – In Focus* (London: Routledge, 1991).

<sup>22</sup> J. Rivers 'Justifying Freedom of Religion: Does Dignity Help?' in C. McCrudden (ed) *Understanding Human Dignity* (Oxford: Oxford University Press, 2013).

<sup>23</sup> R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2013).

individuals and groups who share particular beliefs, since it only focuses on the utilitarian benefits for society as a whole.

More important and persuasive is that religion may be of great importance to people's lives. Nussbaum argues that it has an important role, 'in people's search for the ultimate meaning of life; in consoling people for the deaths of loved ones and in helping them face their own mortality; in transmitting moral values; in giving people a sense of community and civic dignity [and] in giving them imaginative and emotional fulfillment'.<sup>24</sup> Perhaps because of these benefits, religion can have an 'identity-generative'<sup>25</sup> nature. It can be experienced not simply as an activity, but as central to a person's identity. Religion can 'form a core aspect of the individual's sense of self and purpose in the world.'<sup>26</sup> For some, religion is a *nomos*: 'a normative universe' providing its own source of 'law', which because of its mixture of a 'divinely ordained normative corpus, common ritual and strong interpersonal obligations' may be a 'potent' combination.<sup>27</sup> For this reason, interferences with religious practices may be experienced as intensely burdensome and disorientating.

Freedom of religion is also part of a broader value of autonomy, which is intrinsic to a liberal democracy. There is an important norm that all should be free to seek their own ultimate convictions without state interference and that they should be able to live in accordance with these convictions, where possible and where compatible with others' rights. This idea has been expressed by a number of writers who argue that seeking such convictions is a common and important human trait. Maclure and Taylor argue that, 'it is in choosing values, hierarchizing or reconciling them, and in clarifying the projects based on them that human beings manage to structure their existence, to exercise their judgment, and to conduct their life'.<sup>28</sup> Nussbaum similarly argues that there should be a 'special respect for

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<sup>24</sup> M. Nussbaum, 'A Plea for Difficulty' in S. Okin (ed), *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 106.

<sup>25</sup> D. Salmons, 'Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion' (1996) 62 *U Chi L Rev* 1243.

<sup>26</sup> C. Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brook L Rev* 61.

<sup>27</sup> R. Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative' (1983) 97 *Harv L Rev* 4, 14.

<sup>28</sup> J. Maclure and C. Taylor, *Secularism and Freedom of Conscience* (Cambridge, Mass: Harvard University Press, 2011) 11-12. See also *Planned Parenthood v Casey* 505 US 833,

the faculty in human beings with which they search for life's ultimate meaning.'<sup>29</sup> Plant uses Williams' ideas of 'ground projects' to argue that people have 'beliefs that give a sense of meaning and significance to their lives and that may indeed give them the best reasons they have for wanting to live at all.'<sup>30</sup> All such arguments have at the core a sense that the opportunity to develop and maintain such beliefs is valuable. This does not necessarily rest on a positive approval of the beliefs themselves. As Waldron argues, rights exist at a certain level of generality<sup>31</sup> which means that 'the right is not justified by the value of the particular choice I make, but rather by the value of being able to choose for myself in this particular aspect of life',<sup>32</sup>

Since religions typically lay down not only patterns of belief, but requirements to act in accordance with these beliefs, an interference with religious practices may affect the conscientious choices people have made. The next chapter will discuss in more detail whether it is sufficient to protect religious belief only, or whether conduct based on this belief must also be protected. It will be argued that, given the importance of this interest, while it would of course be impossible and highly undesirable to protect every religious practice, there should be consideration of whether it is possible to protect people's conscientious actions and, further, that these should be permitted unless the state has 'good reason' to intervene.<sup>33</sup>

Acting on the basis of beliefs is, as Feldblum points out, intrinsically part of being religious and is 'an essential way of bringing meaning to such beliefs'.<sup>34</sup> Perry perceives that banning religious practices 'causes serious human suffering: the emotional (psychological) suffering... that attends one's being legally forbidden to live a life of integrity... to live one's life in harmony with the yield of one's religious conscience.'<sup>35</sup> As Childress argues, the infringement of conscience that results from being required to act contrary to one's core ideals, 'result[s] not only in such unpleasant feelings as guilt and/or shame but also in a fundamental loss of

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851 (1992) ('At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.')

<sup>29</sup> M. Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008) 19.

<sup>30</sup> R. Plant, 'Religion, Identity and Freedom of Expression' (2011) 17 *Res Publica* 7.

<sup>31</sup> J. Waldron, 'A Right to do Wrong' (1981) 92 *Ethics* 21.

<sup>32</sup> J. Quong, 'The Rights of Unreasonable Citizens' (2004) 12 *J Polit Philos* 314, 330 referring to Waldron *ibid*.

<sup>33</sup> M. Perry, *The Political Morality Of Liberal Democracy* (Cambridge: Cambridge University Press, 2010) 71.

<sup>34</sup> Feldblum *supra* n. 26 at 104.

<sup>35</sup> *Supra* n. 33 at 70-1.

integrity, wholeness, and harmony in the self.’<sup>36</sup> Perry argues that the state is under an obligation to try and prevent this harm in some cases because each person has inherent dignity and should be treated in accordance with this. He argues that causing unnecessary severe emotional suffering infringes a person’s dignity and therefore ‘we have conclusive reason to do what we can, all things considered, to prevent human beings from doing things that... cause [others] *unwarranted* suffering.’<sup>37</sup> Since preventing a person from acting in accordance with their religious belief would, he maintains, cause them suffering, there is a prima facie reason to seek to avoid this.

Freedom of religion therefore protects autonomy, a sense of identity and important relationships, as well as being part of freedom of conscience.<sup>38</sup> Discriminatory beliefs, which, as stated above, include any belief that same-sex emotional/sexual relationships are not as morally worthy as opposite sex ones, may form part of a matrix of beliefs and practices which constitute a person’s ground project and are therefore prima facie worthy of protection. It should be clear from what has been said above that these arguments do not depend on the merit of any particular religious belief or on any sympathy for it, but on a more general benefit of being able to live in accordance with one’s deeply felt convictions.

However, because this justification is based on the idea of ultimate convictions, in making a claim for protection there is a minimum obligation to demonstrate how such discriminatory views are part of broader conscientious beliefs, although this should not be taken to impose too great a burden. While it is possible that a non-religious justification could amount to a conscientious claim, in the vast majority of cases which have reached the courts in the relevant jurisdictions, a clear religious motivation is present, or at least there has been a mixture of religious and non-religious motivations.<sup>39</sup> For this reason, only religious objections to equality claims will be considered.

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<sup>36</sup> J. Childress ‘Appeals to Conscience’ (1979) 89 *Ethics* 315.

<sup>37</sup> *Supra* n. 33 at 19 (emphasis added).

<sup>38</sup> Reasons for the protection of collective religious freedom are considered in more detail in Chapter 5.

<sup>39</sup> E.g. *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT), [2008] EWCA Civ 167 (CA). McClintock was a magistrate on the family panel who did not want to place children with gay adoptive couples. Although he was a Christian, the reasons he gave were factually based, in that he did not believe that this was in the best interests of the child. This was not accepted as a ‘belief’. This conclusion is criticised in A. Hambler, ‘A No-Win Situation for Public Officials with Faith Convictions’ (2010) 12 *Ecc LJ* 3.

The question arises, though, as to whether there should be some substantive limit as to what beliefs should be protected. In *R(Williamson) v Secretary of State for Education and Employment*,<sup>40</sup> for example, it was held that in order to be protected under Article 9 ECHR, a belief, or at least a manifestation of that belief,<sup>41</sup> must be, among other things, 'worthy of respect in a democratic society' and 'compatible with human dignity'. Limiting the scope of this right though is potentially problematic. As Rix LJ argued in the Court of Appeal judgment in *Williamson*, 'religion is a controversial subject... It is in part to guard against such controversy that the Convention guarantees religious freedom'.<sup>42</sup> Furthermore, it will be argued in Chapter 3 that there are benefits in interpreting rights broadly, thus meaning that attention is focused on justification for the infringement, rather than the preliminary question of the breadth of the right. In particular, the requirement to 'respect' these beliefs may be too high a bar. Religious beliefs may well be unpopular, perceived as odd or even dangerous, and not worthy of respect in the sense of positive approval, but should still be tolerated as part of a diverse society. As Lord Walker remarked in *Williamson*, 'the state should not show liberal tolerance only to tolerant liberals'.<sup>43</sup>

The tests discussed in *Williamson* originated in the context of interpreting the very different question of what counted as 'philosophical convictions' for the purpose of Protocol 1 Article 2 ECHR, which requires states to respect the rights of parents in ensuring that education and teaching is in conformity with their convictions. In contrast, Article 9 case-law disclaims a role for assessing the respectability of religious beliefs. For example, in *Manoussakis v Greece* the ECtHR held that 'the right of freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs... are legitimate.'<sup>44</sup>

Nevertheless, as Taylor argues, we should be able to reject some demands in a 'quick way', which 'cuts off all conversation from the start' rather than considers

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<sup>40</sup> [2005] 2 AC 246.

<sup>41</sup> Whether these restrictions applied only to manifestations of beliefs, rather than beliefs themselves, was not made clear, although *Islington London Borough Council v Ladele* [2010] 1 WLR 955 appears to suggest that it applies to beliefs per se.

<sup>42</sup> *R (Williamson) v Secretary of State for Education and Employment* [2003] QB 1300.

<sup>43</sup> *Supra* n. 40 at 268.

<sup>44</sup> (1995) 23 EHRR 387 at para 47.

whether a right can be protected in practice.<sup>45</sup> As he argues, calls to kill Salman Rushdie because of his authorship of *The Satanic Verses*, for example, have to be outlawed as incitement to murder. Although I have argued that the criterion of 'worthy of respect in a democratic society' is too restrictive, the requirement that a belief should be compatible with human dignity is more justifiable. Since the fundamental purpose of protecting rights, including freedom of religion, is to protect human dignity, they should not be used to undermine this purpose.

Of course though, deciding what dignity means or requires is extremely contentious.<sup>46</sup> Even here, care should be taken to ensure that the right is not too narrowly defined or that references to dignity are not used as a way of 'imposing a normative or ethical value onto individual behaviour or choice'.<sup>47</sup> As far as this relates to discriminatory beliefs, the requirement that a belief should be compatible with human dignity does not mean that individuals owe each other an obligation of equal respect, which the state owes to individuals, but entails merely an idea of 'personhood': that they must act as if all are worthy of inherent dignity simply because they are human. An individual is free to act in partisan ways. However, neither the state nor individuals could act in accordance with beliefs that a person should be subject to violence, or excluded from society merely because of their opinions, because this fundamentally ignores their basic rights.

A further requirement I will adopt, which is not discussed in *Williamson*, but which is connected to the requirement of being compatible with human dignity is, as Taylor argues, that the belief must be compatible with reasonable co-existence in society with those who share different views. This is a demand of reciprocity. Otherwise the group claims a right to exist for itself, even though others oppose it, but refuses to accept that others should have this right. General acceptance of this idea is required for a liberal democracy to function and thus there is a need for limited containment of some views. However, this is not a requirement that groups must think that a state of coexistence is *desirable*. Sala gives the example of Jehovah's Witnesses who would, ideally, like everyone to be Jehovah's Witnesses, but since this is not the case, live peacefully in co-existence with others, although

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<sup>45</sup> Supra n.3 at 219.

<sup>46</sup> See e.g. C. McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655.

<sup>47</sup> See the discussion of *S v Jordan* 6 SA 642 (CC) (2002) in E. Cameron 'Moral Citizenship and Constitutional Protection' in C. McCrudden (ed), *Understanding Human Dignity*, (Oxford: Oxford University Press, 2013).



they seek to convert those around them.<sup>48</sup> This is acceptable. All that is excluded is the refusal to accept the situation of coexistence that *does* exist, given freedom of conscience and religion.

These two principles, of compatibility with human dignity and acceptance of a state of reasonable coexistence, will exclude calls to violence as well as some hate speech and discrimination.<sup>49</sup> However, the claim to discriminate may be limited. It may be a claim to protect personal conscience, rather than a claim as to how all society should act. The reasoning behind it may be not that 'gay people should never receive this service because they, or their behaviour, should not be tolerated in any right-thinking society', but rather, 'I cannot in good conscience provide it, given that my beliefs place this obligation on me, although I understand others have different views'. As the English courts have suggested, such a claim is consistent with co-existence and with accepting that gay people are worthy of inherent dignity.<sup>50</sup>

This section has concluded that freedom of religion is an important moral and legal right, and that this is recognised by the legal systems of all three jurisdictions. However, quite clearly, it may conflict with other rights and with the state's interests. This difficulty, and the attitude which the state should take to these dilemmas was well expressed by Sachs J in the South African Constitutional Court, and has since been quoted elsewhere.<sup>51</sup> He stated that:

'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not... Believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'<sup>52</sup>

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<sup>48</sup> R. Sala, 'The Place of Unreasonable People Beyond Rawls' (2013) 12 *European J of Political Theory* 253.

<sup>49</sup> See *infra* at p71-3 for further discussion. There may of course be pragmatic reasons not to prohibit hate speech.

<sup>50</sup> E.g. *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 at paras 18-19 and *Bull and Bull v Hall and Preddy* [2012] 1 WLR 2514, 2528.

<sup>51</sup> E.g. *Ladele* *supra* n.15, *Williamson* *supra* n.40.

<sup>52</sup> *Christian Education South Africa v Minister of Education* [2000] ZACC 11 at para 35.

## Non-Discrimination

One of the rights which freedom of religion may conflict with is that of non-discrimination, by which as stated above, I mean any differential treatment on the grounds of sexual orientation, outside the sphere of personal relationships. This too is an important right, again both theoretically and legally. Within all three states, sexual orientation discrimination is at least partially prohibited, and the trend is towards greater protection.

Challenges to sexual orientation discrimination began with challenges to laws prohibiting 'sodomy'. Decriminalisation took place in 1967 in England and Wales, in Scotland in 1980, in 1982 in Northern Ireland,<sup>53</sup> and 1969 in Canada. In contrast, although many US states overturned such laws much earlier, and such bans were in any case rarely enforced, it was not until 2003 in *Lawrence v Texas*<sup>54</sup> that the US Supreme Court ruled that prohibiting 'sodomy' violated the Due Process Clause of the Fourteenth Amendment, and even then there were three dissents. One of the dissenters, Scalia J argued that:

'Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.'<sup>55</sup>

In an earlier case, *Bowers v Hardwick*,<sup>56</sup> decided as recently as 1986, the Supreme Court had upheld the prohibition. In doing so, Burger CJ stated that, 'condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards' and quoted Blackstone who described 'sodomy' as "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named".<sup>57</sup> It was a prominent example of a legal failure to recognise even basic interests in privacy and non-discrimination. Although such laws were rarely

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<sup>53</sup> Decriminalisation in Northern Ireland though only took place following a decision of the ECtHR in *Dudgeon v UK* [1981] 4 EHRR 149 that a criminal prohibition was a violation of Article 8 ECHR.

<sup>54</sup> 539 US 558 (2003).

<sup>55</sup> *Ibid.* at 604.

<sup>56</sup> 478 US 186 (1986).

<sup>57</sup> *Ibid.* at 197.

enforced, *Bowers v Hardwick* served as justification for discriminatory treatment, for example, to deny custody of children to gay parents.<sup>58</sup>

Calls to prohibit discrimination in contexts such as employment have followed decriminalisation, and each of the jurisdictions has accepted this at different points and to different extents. In Canada, the Supreme Court held in *Egan v Canada*<sup>59</sup> in 1995 that sexual orientation discrimination was a prohibited ground of discrimination under s.15 of the Charter, which grants every individual the right to equal protection and equal benefit of the law. It further held in 1998 in *Vriend v Alberta*<sup>60</sup> that each province or territory's Human Rights Act must prohibit sexual orientation discrimination by private actors. There was therefore a violation of the Charter as Vriend had no cause of action to challenge his dismissal due to his sexual orientation, from a private religious college.

In Britain, protection against sexual orientation discrimination in employment was introduced by the Employment Equality (Sexual Orientation) Regulations 2003, as a result of an EU directive.<sup>61</sup> The Regulations were later incorporated into the Equality Act 2010, which also prohibits discrimination in the provision of services and similar contexts. Such statutory protection lies alongside that given by Article 14 ECHR which requires states not to discriminate when another right protected by the Convention is engaged, and Art 8, the right to respect for private and family life. The ECtHR held in *Lustig-Prean v UK*<sup>62</sup> that it was a violation of the Convention for army personnel to be discharged because of their homosexuality. It has since extended such reasoning to hold that 'very weighty reasons'<sup>63</sup> are required to justify sexual orientation discrimination.

In contrast to the other two jurisdictions though, in the US the protection given against sexual orientation discrimination at the federal level is extremely limited. A bill known as the Employment Non-Discrimination Act, which would give protection in private employment, although with blanket exemptions for religious

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<sup>58</sup> W. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, Mass: Harvard University Press, 1999).

<sup>59</sup> [1995] 2 SCR 513.

<sup>60</sup> [1998] 1 SCR 493.

<sup>61</sup> Council Directive 2000/78/EC of 27 November establishing a General Framework for Equal Treatment in Employment and Occupation.

<sup>62</sup> (2000) 29 ECHR 548.

<sup>63</sup> E.g, *L and V v Austria* (2003) 36 EHRR 55.

organisations and small businesses, has not yet gained the necessary support to be passed, despite being introduced in every Congress apart from one since 1994. However, the Supreme Court is moving towards greater protection against sexual orientation discrimination. Although it has not accepted that it is a 'suspect ground' of discrimination, in 2013 it held that the Defense of Marriage Act,<sup>64</sup> which prohibited the recognition of same-sex marriages by the federal government, was unconstitutional.<sup>65</sup> Furthermore, since the District of Columbia prohibited discrimination in employment and 'public accommodations' in 1973, a growing number of states have prohibited such discrimination. Currently 21 states, plus the District of Columbia, and many local laws, applying to cities and counties, prohibit such discrimination in employment and 'public accommodations'. In addition of course, many private employers require employees not to discriminate against fellow employees or customers.

In addition to non-discrimination rights, more recently, there have calls for marriage, or at least other legal forms of partnership, to be available to same-sex couples. It currently only exists in 17 states plus the District of Columbia in the US,<sup>66</sup> although further states have forms of civil partnership falling short of marriage, does not exist in Northern Ireland and comes into force in March 2014 in England and Wales and a date yet to be set in Scotland,<sup>67</sup> although it has existed in Canada since 2003.<sup>68</sup>

As with freedom of religion, the prohibition of discrimination, including sexual orientation discrimination, rests on important considerations. Most obviously, discrimination can deprive a person of tangible goods, such as particular employment, thus leading to economic disadvantage, and through that social disadvantage. This though is only a partial explanation and cannot explain why this right may be violated where there is no tangible loss caused apart from mild

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<sup>64</sup> 1 USC §7 and 28 USC §1738C.

<sup>65</sup> See *United States v Windsor* and *Hollingsworth v Perry* 570 US 12 (2013).

<sup>66</sup> Illinois' law granting same-sex marriage does not come into effect until June 2014. In addition, a District Court struck down the prohibition on same-sex marriage in Utah in *Kitchen v Herbert* 2013 WL 6697874 (D. Utah) but the order permitting same-sex marriage was stayed by the Supreme Court pending the state's appeal (Order in Pending Case 13A687, 6<sup>th</sup> Jan 2014).

<sup>67</sup> Civil partnerships have though existed throughout the UK though since 2004.

<sup>68</sup> In *Halpern v Canada* [2003] 65 OR(3d) 161 Ontario courts held that same-sex marriage was a requirement of the Charter, which was followed by decisions in other jurisdictions: *Hendricks v Quebec* [2002] RJQ 2506; *Barbeau v British Columbia* 2003 BCCA 251. It was legalised throughout the jurisdiction by the Civil Marriage Act S.C. 2005, c.33.

inconvenience, since a person has acquired the service from someone else. There is evidently a moral difference between being told 'we don't make wedding cakes' and 'we won't make a wedding cake for *you*', even if the practical result is the same.

The importance of the non-discrimination right is not necessarily recognised by all writers on the conflict between sexual orientation discrimination and freedom of religion. For example, in his discussion of whether there should be exemptions for those who refuse on religious grounds to provide services relating to same-sex marriage, Laycock considers discrimination to involve a practical loss and 'the insult of being refused service.'<sup>69</sup> Since he argues that insult is not a recognised interest under US law, he sees it as an easy decision to protect discriminatory refusals of service related to same-sex marriage because there is little to weigh against the infringement of freedom of religion. This though is not an adequate explanation of what is at stake. A person may of course *feel* insulted in such a situation but this suggests that only hurt pride is affected.

Rather, such discrimination undermines a person's sense of self worth and inclusion and denies them equal respect. This is partly because of its cumulative nature. Discriminatory beliefs are often widely shared. Repeated discrimination causes harm which 'occasional idiosyncratic prejudice'<sup>70</sup> does not, even if this is entirely arbitrary and unjustified. If a person is denied a job because the owner of the company dislikes people with large earlobes<sup>71</sup> they of course suffer harm, but this is likely to be an isolated occurrence. However, repeated discrimination leads to a sense of exclusion:<sup>72</sup> a person cannot feel that they are an 'equal citizen'<sup>73</sup> where they fear constant discrimination in performing everyday tasks, in seeking access to benefits or services given by the state or in access to social activities. Widespread discrimination may also have a stigmatic effect: if a person is discriminated against, it may lead others to believe that this is acceptable and to assume that there is a reason why a certain group is stigmatised.<sup>74</sup> Discrimination

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<sup>69</sup> D. Laycock, 'Afterword', in D. Laycock et al. (eds), *Same-Sex Marriage and Religious Liberty*, (Lanham: Rowman & Littlefield, 2008) 197.

<sup>70</sup> A. Koppelman, 'Justice for Large Earlobes! A Comment on Richard Arneson's "What is Wrongful Discrimination?"' (2006) 43 *San Diego L Rev* 809.

<sup>71</sup> *Ibid.*

<sup>72</sup> The exclusion may be literal e.g. from some organisations or places.

<sup>73</sup> K. Karst, 'The Supreme Court 1976 Term- Foreword: Equal Citizenship Under the Fourteenth Amendment' (1977) 91 *Harv L Rev* 1.

<sup>74</sup> K. Karst, 'Private Discrimination and Public Responsibility: *Patterson* in Context' [1989] *Sup Court Rev* 1.

is thus mutually reinforcing: the more pervasive it is, the more 'natural' it may seem and thus the more likely it is to continue to occur. The stigma of discrimination may also be internalised, leading to low self-esteem and higher rates of mental illness.<sup>75</sup> Sexual orientation discrimination may also lead to other pressures because, in an effort to avoid discrimination or social ostracism, a non-heterosexual orientation may be hidden in contexts such as work. Maintaining this may lead to 'significant stress and disengagement'.<sup>76</sup> The non-discrimination principle therefore 'presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who "belongs"'.<sup>77</sup> It is part of a broader principle that the state has an obligation to treat all its citizens with 'equal concern and respect'.<sup>78</sup>

As private actors control much of the economic and social opportunities in society and make up a great deal of public life,<sup>79</sup> this obligation means that the state must not only refrain from acting in discriminatory ways itself but also prevent private actors from acting in discriminatory ways in many contexts too. As Dworkin puts it, 'a political and economic system that allows prejudice to destroy some people's lives does not treat all members of the community with equal concern'.<sup>80</sup> To permit private discrimination in public and social life where there is pervasive discrimination demonstrates either an impermissible lack of interest in the welfare of its citizens or, probably more likely, that the discriminatory views are tacitly, or perhaps even explicitly, agreed with. After all, it is through the state's choice not to prohibit it that such discrimination may legally continue.<sup>81</sup>

Epstein, though, argues from a libertarian perspective that, while the state should not discriminate, anti-discrimination law should not apply to non-state actors.<sup>82</sup> He contends that there is a right of self-ownership which should mean that people are

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<sup>75</sup> See e.g. M. Hatzenbuehler, 'How Does Sexual Minority Stigma "Get Under the Skin"? A Psychological Mediation Framework' [2009] *Psychol Bull* 135.

<sup>76</sup> N. Buddel, 'Queering the Workplace' (2011) 23 *Journal of Gay & Lesbian Social Services* 131, 136.

<sup>77</sup> Karst supra n. 74 at 6.

<sup>78</sup> R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977). This principle also partly explains why freedom of religion must be protected.

<sup>79</sup> Karst argues that 'respected participation in the community's life implies access to all those activities and places, whether managed directly by government or not, that are normally open to the public at large.' Supra n. 74 at 35.

<sup>80</sup> R. Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 *Iowa L Rev* 1, 36-7.

<sup>81</sup> S. Gardblum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Mich L Rev* 387.

<sup>82</sup> R. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass: Harvard University Press, 1992).

free to contract their labour with whoever they choose and at whatever price. He also argues that market forces will ameliorate invidious discrimination, although leaving some rationally-based discrimination,<sup>83</sup> if it is allowed to function unhindered by, for example, minimum wage laws. However, in this argument, he does not account for the effects of stigma and stereotyping, which lead to the continuation of discrimination even where this is not economically rational. Discrimination laws also have a cultural effect, meaning that they help to change attitudes.<sup>84</sup> Legally prohibiting employment discrimination does reduce discrimination against gay people.<sup>85</sup> For these reasons, although they are far from a perfect mechanism, the law has an important role to play in ending discrimination. Indeed, all three jurisdictions recognise that prohibiting private discrimination is necessary in order to combat discrimination and that the state is required to prohibit it in some circumstances.<sup>86</sup>

In the three jurisdictions under discussion here, discrimination is usually addressed by the prohibition of discrimination on specific grounds, where discrimination is particularly prevalent.<sup>87</sup> It can easily be demonstrated that sexual orientation should be one of these grounds. Gay people have certainly been subject to appalling historical disadvantage in the three jurisdictions.<sup>88</sup> This history is important because it can continue to have psychological effects, leading to fear of discrimination or ill treatment, which can in turn affect behaviour.<sup>89</sup> Furthermore,

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<sup>83</sup> See *ibid.* at 269-74, arguing that there are biological and other factors which mean women and men will choose to specialise in different jobs.

<sup>84</sup> Indeed Epstein recognises this at 302-6, but argues that it makes the government intervention inherent in non-discrimination laws even more problematic.

<sup>85</sup> L. Barron et al, 'The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment' (2013) 19 *Psychology, Public Policy, and Law* 191.

<sup>86</sup> Cases prohibiting discrimination between private parties include *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 in the UK and *Shelley v Kraemer* 334 US 1 (1948) in the US. In Canada in *Retail Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* (1985) 33 DLR (4th) 174 it was held that the Charter could not be asserted against a private party, although the common law will be developed consistently with 'Charter values', as in *Ontario (Human Rights Commission) v Brockie* (2002) 22 DLR (4th) 174. An individual can also claim that the state has breached the Charter by not prohibiting discrimination: *Vriend v Alberta*. See Ahdar and Leigh, *supra* n.23 at 185-192.

<sup>87</sup> The Equality Act 2010 has a list of 'protected characteristics' (s.4). The US uses concepts of suspect and quasi-suspect grounds to distinguish between different kinds of discrimination and Canada lists various grounds as part of its equality right in the Charter of Fundamental Rights and Freedoms s.15, although these are not comprehensive.

<sup>88</sup> Eskridge *supra* n. 14.

<sup>89</sup> G. Ellison and B. Gunstone, *Sexual Orientation Explored: A Study of Identity, Attraction, Behaviour and Attitudes in 2009* (Manchester: Equality and Human Rights Commission, 2009) (Finding that fear of discrimination affects choice of career).

although there has clearly been an overall trend towards greater protection against discrimination, some of this history is very recent, as demonstrated above.

Moreover in fairly recent studies, high levels of discrimination are still reported in all three jurisdictions. In the US, a large meta-analysis found that 55% of gay people reported suffering verbal harassment and 41% discrimination.<sup>90</sup> In England and Wales, according to one study, 51% of gay men, 61% of lesbians and 25% of bisexual people felt that they had experienced disadvantage as a result of their sexual orientation.<sup>91</sup> In Canada in one study, 44% of gay men and lesbians and 41% of bisexuals reported some form of workplace discrimination in the previous five years.<sup>92</sup> Even more serious is the existence of violent hate crime against gay people.<sup>93</sup> Given this evidence, there is still a demonstrable need for the prohibition of discrimination.

Such a prohibition though is not sufficient to challenge ingrained attitudes. There may therefore be a claim for more: to challenge the 'cultural heterosexism' in society: the process whereby heterosexuality is the norm and other sexualities are marginalised,<sup>94</sup> by 'a heterosexual assumption'<sup>95</sup> that leads to the invisibility of gay people. Such policies do not fall strictly under the right to non-discrimination but are part of a broader public policy. They may include efforts to challenge the heterosexual norm in education and in other training, and for workplaces to promote inclusivity.<sup>96</sup> These types of policies may pose greater conflicts for those who have discriminatory views than the mere obligation not to discriminate because they may suggest positive approval of gay people and relationships, rather than a merely negative requirement not to discriminate. Thus when a School Board in British Columbia decided not to approve three books which portrayed same-sex parenting positively, this led to serious disputes, with claims on the one side about

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<sup>90</sup> S. Katz-Wise and J. Hyde, 'Victimization Experiences of Lesbian, Gay, and Bisexual Individuals: A Meta Analysis' (2012) 49 *J Sex Res* 142.

<sup>91</sup> Equality and Human Rights Commission, *Beyond Tolerance: Making Sexual Orientation A Public Matter* (Manchester: Equality and Human Rights Commission, 2009).

<sup>92</sup> Buddel *supra* n.76.

<sup>93</sup> See e.g. G. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample* (2009) 24 *J Interpers Violence* 54. The report by Ellison and Gunstone (*supra* n. 89) found that 19% of gay men in the study reported being physically assaulted on the grounds of their sexual orientation.

<sup>94</sup> J. Schacter, '*Romer v. Evans*: Democracy's Domain' (1997) 50 *Vanderbilt Law Rev* 411.

<sup>95</sup> G. Herek 'Confronting Sexual Stigma and Prejudice: Theory and Practice' (2007) 4 *J Soc Issues* 905.

<sup>96</sup> E.g. *Paterson v Hewlett-Packard* 358 F.3d (9<sup>th</sup> Cir., 2004).



the use of schools to 'indoctrinate children' against parents' wishes and on the other the need of state schools 'to mirror the diversity of the community and teach tolerance and understanding of difference'.<sup>97</sup> Eventually, the Canadian Supreme Court quashed the decision to refuse to approve the books.<sup>98</sup> These types of disputes mirrored arguments in England about the repeal of 'Section 28' that had forbidden local authorities to promote homosexuality or to 'promote the acceptability of homosexuality as a pretended family relationship' in schools. It was finally repealed in 2003, following an earlier attempt which was defeated in the House of Lords in 2001.<sup>99</sup>

This section has established that non-discrimination, in particular on the grounds of sexual orientation is a vital right. However, just as there are limits to the value of freedom of religion, there are limits to how far non-discrimination can be applied. As Koppelman puts it:

'The antidiscrimination project represents a claim of enormous moral power: the demand that society recognize the human worth of all its members, that no person arbitrarily be despised or devalued. Yet as soon as we begin to try to carry it out, we find ourselves in collision with other moral considerations, equally powerful, that demand that the project be a limited one.'<sup>100</sup>

### **Conflict of Rights**

So far it has been demonstrated that conflicts between religious freedom and the prohibition of sexual orientation discrimination are not merely likely but also potentially serious because both rights are important and worthy of protection, in both a moral and legal sense. This means that a choice must therefore be made about which right to protect, at the cost of infringing another important right. It is this difficulty which is at the heart of the thesis. As Minow puts it, 'always granting exemptions subverts the civil rights norms. Never granting them disparages

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<sup>97</sup> D. Collins, 'Culture, Religion and Curriculum: Lessons From the 'Three Books' Controversy in Surrey, BC' (2006) 50 *Can Geogr-Geogr Can* 342; *Chamberlain v Surrey School District No. 36* (2002) 221 DLR (4<sup>th</sup>) 156 at para 3.

<sup>98</sup> *Ibid.*

<sup>99</sup> Similar disputes continue to arise though. See N. Morris, 'The Return of Section 28: Schools and Academies Practising Homophobic Policy that was Outlawed Under Tony Blair', *The Independent* 20 Aug 2013. <http://www.independent.co.uk/news/uk/politics/the-return-of-section-28-schools-and-academies-practising-homophobic-policy-that-was-outlawed-under-tony-blair-8775249.html> [Last Accessed 10 Feb 2014].

<sup>100</sup> A. Koppelman, *Antidiscrimination Law And Social Equality* (New Haven: Yale University Press, 1996) 10.

religious beliefs and coerces religious believers.’<sup>101</sup> The choice is made paradoxically both harder, in the sense that a straightforward binary answer is unlikely to be sufficient, and easier, in the sense that there is some way to avoid stalemate situations, by the fact that the claims may not be of identical strength in particular situations. Any method of resolving this conflict must be sufficiently nuanced to appreciate these points and should also accept that, given that both these rights are valuable, it should seek to protect both as far as possible, rather than protecting one entirely at the expense of the other.

Because these rights are both important, and because co-existence in society between people who have very different views on this matter is required, it will be argued that the method used to resolve this conflict should promote respect, although of a very limited kind. To be clear, this is not an argument that gay people should respect, in the sense of approve of, those who they may see as seeking to undo hard fought and precarious rights, or alternatively that religious people must approve of those who they think are behaving in fundamentally immoral ways. Rather, as Darwall argues, it suggests that there are two different kinds of respect, which he calls moral recognition respect and appraisal respect. It is the former which is of use here. Having moral recognition respect for something means that the ‘inappropriate consideration or weighing of that fact or feature would result in behavior that is morally wrong’.<sup>102</sup> Thus when considering whether discrimination should be prohibited, whether and how this affects religious freedom should be taken into account. Similarly if a religious organisation wishes to discriminate in providing a service, there must be consideration of how this affects those discriminated against. Appraisal respect, or a ‘positive appraisal of a person or his character-related features’,<sup>103</sup> is not needed.

### **Thesis Perspective**

This thesis argues that an approach based on proportionality is the best way to resolve the conflict between non-discrimination and freedom of religion, taking into account the considerations raised so far. Proportionality requires that any interference with the right under examination must have a legitimate aim and a rational connection between the aim and the action taken. The policy must be the

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<sup>101</sup> M. Minow, ‘Should Religious Groups Be Exempt from Civil Rights Laws?’ (2007) 48 *BCL Rev* 780, 827.

<sup>102</sup> S. Darwall, ‘Two Kinds of Respect’ (1977) 88 *Ethics* 36, 41.

<sup>103</sup> *Ibid.* at 46.

least restrictive means of achieving the aim and it must be proportionate overall. Under proportionality, rights do not operate in an all or nothing way, but can apply to different extents, with the purpose being to optimise the rights to the greatest extent possible. Proportionality therefore balances the relevant interests, rather than imposing a categorical rule. It will be argued that such an approach has two main benefits in this context.

The first is that it is fact specific and nuanced. As both claims are legitimate, it is not appropriate for one automatically to win over the other. The proportionality test is not about whether a right generally is more important than another. It only leads to a judgment for a particular fact situation. It will be demonstrated that this therefore draws attention to the actual dispute in issue and recognises that the rights may not have equal value in a particular case.

Proportionality can also 'fractionate' conflicts because of this fact-specific nature. If conflicts over a large issue, here say the role and position of religion in society, can be broken down into smaller issues, progress is more likely.<sup>104</sup> This may help to reduce the 'culture wars' problem where every dispute, on a perhaps minor and probably narrow issue, is taken as standing for a more fundamental disagreement about the nature of society. More intangible benefits of proportionality, such that it is a conciliatory form of reasoning, will also be demonstrated.

It will be argued that proportionality's other major benefit is that it necessarily requires justification when rights are restricted. This is evidently important practically in ensuring that rights are not unnecessarily restricted, but is also important less tangibly in that it treats each party in a dispute as *worthy* of justification: as people who can be expected to accept the process of justification, even though they disagree with the result.

In order to make these arguments, this thesis uses a doctrinal methodology and a comparative approach, examining, as earlier indicated, the law in the USA, Canada and England to illustrate the conflict of rights. A comparative approach is used because the legal problem in a basic sense, that of whether and how to reconcile the conflicting rights, has arisen in all three places. In each the problem has been litigated, leading to a significant amount of case-law, in addition to often detailed

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<sup>104</sup> M. Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (Lawrence, Kansas: University Press of Kansas, 1990).

legislation. Indeed, some of the same situations have arisen in the different jurisdictions, such as the claim of some Catholic adoption agencies not to place children with gay couples or the demand of some owners of bed and breakfast accommodation to be permitted not to allow gay couples to stay, although evidently the broader social and legal context in which these disputes have arisen is not identical.

Although the situations and legal problems that have arisen are similar, these jurisdictions' legal tests and methods of analysis, and in particular their use of proportionality, varies. This will be explained in greater detail in Chapter 3 but in summary, proportionality is becoming a widely used test in English law, although this is a fairly recent introduction. In Canada, proportionality is an established and major concept in its human rights and discrimination law. In contrast, the US tends to use either categorical tests or tiered standards of review (strict scrutiny, intermediate scrutiny, rational basis), based on the type of interest at stake. It does not generally use proportionality, although I will consider whether these tests or their variations in fact implicitly use it. Importantly though, since the US Supreme Court's judgment in *Employment Division v Smith*<sup>105</sup> in 1990, strict scrutiny, which requires a compelling government interest to be shown where a right is infringed, only applies to religious freedom claims where a law or action deliberately targets a religious practice and does not apply where there is 'a neutral rule of general applicability'. The current constitutional protection of freedom of religion is therefore narrow, although the Religious Freedom Restoration Act or similar state laws may give greater protection. There are therefore a number of contrasts which can be made between these legal tests, and the overall protection they provide of both rights, and proportionality thereby highlighting the advantages and disadvantages of both.

In addition to different uses of proportionality, there are other factors relating to particular aspects of Canada and the USA's legal culture which make these jurisdictions of interest. Canada has a self-perception as an 'inclusive-accommodative'<sup>106</sup> culture, seeing itself as upholding tolerance, pluralism and

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<sup>105</sup> 494 US 872 (1990).

<sup>106</sup> B. MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages' (2006) 69 *Sask L Rev* 351.

multiculturalism in its rights' analysis.<sup>107</sup> Interestingly too, whilst its courts in particular have been active in reducing legal discrimination against gay people<sup>108</sup> they have also sought to protect religious people, particularly those from minority religions, in maintaining their way of life.<sup>109</sup>

In the US, religious liberty has a long history and is given high priority as part of its constitutional order, although this does not necessarily always translate into greater protection for religious rights. However, religious organisations have a great deal of autonomy, particularly in the field of employment, meaning that employees of such organisations may have only very limited anti-discrimination rights. Although the different approaches between protection for individuals and for organisations are not necessarily inconsistent, these cases will be re-examined under a proportionality analysis. Unlike Canada or England, there is also a constitutional separation of church and state, which may raise particular issues. More general legal-cultural differences also create contrasts, for example 'cause lawyering'<sup>110</sup> as a strategic method of legal and cultural change has been used in the US to a greater extent and for a longer period than the other jurisdictions, leading to a significant number of cases.

Whilst the jurisdictions therefore have similar basic understandings of the two rights, the differences between them create an opportunity to explore different legal tests and methods of analysis as they relate to this context. A comparative approach can demonstrate how proportionality can be used in jurisdictions with different legal cultures and demonstrate its benefits across such jurisdictions. This thesis does not aim to provide a comprehensive description of the law in each jurisdiction, but rather selects cases to give examples of situations that have arisen, to demonstrate the general approach of each jurisdiction and to contrast different approaches for the resolution of these issues. These jurisdictions are therefore

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<sup>107</sup> Stychin, *supra* n.13 at 743-4; R. Moon, 'Introduction' in R. Moon (ed), *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 1998).

<sup>108</sup> B. Cossman, 'Lesbians, Gay Men and the Canadian Charter of Rights and Freedoms' (2002) 40 *Osgoode LJ* 223.

<sup>109</sup> E.g. *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, although see M.H. Ogilvie, 'And Then There was One: Freedom of Religion in Canada – the Incredible Shrinking Concept' (2008) 10 *Ecc LJ* 197.

<sup>110</sup> D. NeJaime, 'Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation' (2009) 32 *Harv JL & Gender* 303.

used, 'with a view towards constructing general theory, using various legal sources as examples to help to refine, and to clarify, the analytics of a general problem.'<sup>111</sup>

I have referred to the three jurisdictions as England, Canada and the USA. By England, as I have already indicated, I mean the jurisdiction of England and Wales, although much law, such as the Equality Act 2010, applies to Scotland as well. The particular situation relating to Northern Ireland will not be discussed, although in some cases, such as when discussing case-law on the ECHR, the law will be applicable throughout the UK. I will therefore refer to Britain or to the UK rather than to England where this is appropriate. Secondly, both Canada and the US are federal systems and therefore the relevant law is somewhat complex, although state law of course is subject to federal law. This does not though pose problems of scope for the thesis because I am not intending to provide a full outline of the law. However, as the purpose of the thesis is to examine situations where there is a clash of rights, it will only rarely address the situation in those US states that do not prohibit sexual orientation discrimination.

In making its argument, this thesis will refer to two main fields of scholarship. The first relates to proportionality, including its nature, use and benefits or disadvantages. While this literature is large and detailed, it does not specifically focus on the situation under discussion here. The second relates to the conflict between religious freedom and non-discrimination rights or discusses religious freedom more generally. While this literature contains some reference to proportionality as a method of resolving these disputes,<sup>112</sup> or an analysis of proportionality as it has been used in particular circumstances,<sup>113</sup> none makes it, or the specific benefits the method of analysis brings, its focus, although there are

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<sup>111</sup> V. Jackson, 'Comparative Constitutional Law: Methodologies' in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

<sup>112</sup> E.g. A. Afridi and J. Warmington, *Managing Competing Equality Claims* (London: Equality and Diversity Forum, 2010); Ahdar and Leigh supra n.23; I. Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Ox J Law & Religion* 109; J. Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010); Stychin supra n.13.

<sup>113</sup> E.g. A. Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 *ILJ* 305; I. Leigh, 'Homophobic Speech, Equality Denial and Religious Expression' in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2009); L. Vickers *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008).

more general arguments for balancing approaches.<sup>114</sup>

As stated above, this thesis considers an important theoretical and practical problem. It draws on a broad comparative understanding of these conflicts and how they are addressed in law to develop a theoretical framework for consideration of these issues and gives a detailed analysis of how proportionality could be used in numerous cases and situations across different jurisdictions. In doing so it provides a workable and advantageous solution to this problem. It therefore makes a substantial and original contribution to the literature.

The structure of the work is as follows. The thesis first provides a theoretical discussion of methods for resolving this conflict and then examines particular issues that have arisen in the three jurisdictions and how proportionality has successfully resolved them, or could have done so. To explain this in more detail, Chapter 2 discusses various tests that have been suggested or used for deciding when religious freedom should be protected, since it evidently cannot be an absolute right, but will conclude that none of these is appropriate. Chapter 3 is the theoretical heart of the thesis and explains the nature of the proportionality test, its advantages in this context and proposes it as a method of resolving these issues. Chapters 4-7 are case study chapters. Chapter 4 looks at the situation of employees in secular organisations who claim that they face conflicts between their religious beliefs and part of their work, or claim a right to express discriminatory views in a work related context. Chapter 5 discusses whether religious organisations, including faith-based social service organisations, can require that their employees are not gay or in same-sex relationships. Chapter 6 considers the issue of whether religious organisations, including social service organisations and providers of rented premises, can refuse to provide services to gay people. Chapter 7 discusses the same issue with regard to religious individuals, particularly relating to services relating to same-sex marriage and the provision of housing and other accommodation.

## **Conclusion**

Full agreement over conflicts between sexual orientation discrimination and

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<sup>114</sup> E.g. Feldblum *supra* n.26; A. Fielding, 'When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada' (2008) 13 *Appeal* 28; A. Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 *Brook L Rev* 125.

freedom of religion is extremely unlikely and there is no widely accepted moral answer to this question. Since neither side is likely to completely withdraw its demands and therefore disputes and cases are likely to continue to arise, these conflicts have to be resolved by the law. This thesis argues that both freedom of religion, which can include the right to express and act on discriminatory beliefs, and non-discrimination are important rights. The aim is therefore to find a way for the law to protect both sides' rights as fully as possible, bearing in mind the impact on the other, ideally in a way which does not exacerbate existing tensions. This thesis will argue that reliance on the principle of proportionality is a suitable way of adjudicating the balance between freedom of religion and non-discrimination given these considerations.



## **Chapter 2: Potential Strategies for Resolving Conflicts Between Religious and Other Claims**

Clearly there can be no absolute right to follow the dictates of one's religious conscience since this would strongly conflict with the rights of others. Various 'limiting strategies'<sup>1</sup> have been suggested or used as ways of restricting freedom of religion and thereby ensuring that it does not encroach too heavily on other rights. Four approaches will be outlined in this chapter, three of which rest on a dichotomy between different forms of religious expression. All draw categorical distinctions, rather than balance the various interests. It will be demonstrated that while they may highlight factors that should be taken into account, none of these approaches is sufficient by itself, and that a more nuanced account is needed.

The problem of determining how to decide conflicts between freedom of religion and other rights or the public interest, is a not a new one, although the specific context relating to conflicts between this right and sexual orientation discrimination is. This chapter therefore takes a step back from the specific question addressed by this thesis, and considers more generally what criteria should be used to decide when religious claims should be protected. Since the US has the longest constitutional protection of freedom of religion in the three jurisdictions discussed, and a concomitant history of disputes over what this constitutional protection requires, much of the discussion will use case-law drawn from this jurisdiction. This chapter will consider tests based on distinctions between conduct and belief, public and private, core and non-core religious activities, as well as the current test in US constitutional law that requires justification for infringing religious practices only where a law is not neutral or generally applicable.

### **Conduct/Belief**

The first possible test distinguishes between conduct and belief and provides that while freedom of belief is protected, no special protection should be given to conduct motivated by that belief. Such an analysis would therefore permit people to hold discriminatory views but would not protect conduct based on this. This understanding of religious freedom has deep historical roots. It is for example

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<sup>1</sup> R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, 2<sup>nd</sup> ed, (Oxford: Oxford University Press, 2013).

crucial to Thomas Jefferson's understanding of the First Amendment and has proved to be extremely influential in its interpretation.<sup>2</sup> Jefferson argued that:

'Religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship: that the legislative powers of the government reach actions only, and not opinions.'<sup>3</sup>

Hamilton outlines how this distinction was central to the US Supreme Court's understanding of religious freedom in the nineteenth and first half of the twentieth centuries.<sup>4</sup> The distinction is particularly noticeable in the first case on the free exercise clause<sup>5</sup> decided by the US Supreme Court, *Reynolds v US*.<sup>6</sup> The Church of Latter Day Saints (Mormons) claimed there was a religious obligation for male members of the church to practice polygamy. Following a prosecution of one eminent member of the church, Reynolds, for bigamy, he claimed the law was a violation of his free exercise of religion. His argument failed. In its decision, the Supreme Court made a distinction between the 'legislative power over mere opinion' and 'actions which were in violation of social duties or subversive of good order'.<sup>7</sup> It held that 'laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'<sup>8</sup> Since the case involved religious conduct and did not in theory affect the right to religious belief, it received no protection.

The result itself is unsurprising. Polygamy was an extremely shocking practice by the standards of the time, considered to be particularly barbaric and, through its challenge to monogamy and to established Christian morality, perceived as capable of undermining the very basis of society.<sup>9</sup> Even now, with a far greater acceptance of different forms of relationships beyond heterosexual monogamous marriage, protecting the interests of women (since polygamy seems usually to mean

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<sup>2</sup> A clear distinction between belief and action can also be seen in the approach taken in Art 9 ECHR which gives absolute protection to religious belief and only limited protection to the manifestation of this belief.

<sup>3</sup> T. Jefferson, 'Letter to the Danbury Baptists' available from Library of Congress website: <http://www.loc.gov/loc/lcib/9806/danpre.html> [Last Accessed 10 Feb 2014].

<sup>4</sup> M. Hamilton, 'The Belief/ Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence' (1993) 54 *Ohio St LJ* 713.

<sup>5</sup> The First Amendment states 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

<sup>6</sup> 98 US 145 (1879).

<sup>7</sup> *Ibid.* at 164.

<sup>8</sup> *Ibid.* at 166.

<sup>9</sup> S.B. Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: North Carolina Press, 2012).

polygyny) appears to be sufficient justification for its prohibition.<sup>10</sup> The major importance of *Reynolds* though in terms of precedent is in its strictness of the division between belief and practices and the refusal to protect the latter. Since it is held that a government could clearly intervene if for example a religion claimed it had a duty to perform human sacrifices, it is held that there can be no exemptions from laws regulating religious practice. Any form of balancing the importance of the act to the religion against the importance of the government interest is not considered.

Mormonism was a new and startlingly different religion, and it led to real fear of the challenge Utah could pose to the federal government, if Mormons were permitted to control the state's government.<sup>11</sup> Even so, the campaign against it is noteworthy. Following *Reynolds*, much greater infringements of rights were upheld on the basis that they did not affect religious belief, but only conduct. The Edmunds Act of 1887<sup>12</sup> denied the right to vote to any person who refused to state that they did not practise polygamy and were not married to a polygamist. A later act<sup>13</sup> extended the meaning of polygamy to cover cohabitation and:

'Disincorporated the LDS Church, transferred all its property to the government, and dissolved the company that had funded and overseen all Mormon emigration to Utah... Witnesses had to attend trials without benefit of subpoena. Federal officials could prosecute adultery whether or not a spouse filed a complaint. Wives could be called to testify against their husbands.'<sup>14</sup>

The denial of the right to vote was challenged but upheld in *Murphy v Ramsey*.<sup>15</sup> This decision again rested on the conduct/belief distinction. It was held to be constitutional as the law explicitly stated that no person could be denied the vote

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<sup>10</sup> This issue was reconsidered by the Canadian Supreme Court in *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588, which decided that a prohibition was not a violation of the Charter. For opposing opinions on whether a prohibition would survive current US constitutional review see R. Vazquez, 'The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace?' (2001) 5 *NYU J Legis & Pub Pol'y* 225 and K. Berberick, 'Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause' (2007) 44 *Willamette L Rev* 105. For nuanced accounts of polygamy from the perspective of women who practiced it see A. Campbell, 'Bountiful's Plural Marriages' (2010) *Int JLC* 343 and 'Bountiful Voices' (2009) 47 *Osgoode Hall LJ* 183.

<sup>11</sup> Gordon supra n. 9.

<sup>12</sup> Act of Mar 22, 1882, ch. 47, § 8, 22 Stat. 30 (1882).

<sup>13</sup> Edmunds-Tucker Act of Mar 3, 1887, ch. 397, §§ 13, 17, 24 Stat. 635, 637, 638 (1887).

<sup>14</sup> E. Harmer-Dionne, 'Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction' (1998) 50 *Stan L Rev* 1295, 1327. See also W. Eskridge, 'A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law' (1997) 106 *Yale LJ* 2411.

<sup>15</sup> 114 US 15 (1885).

because of his opinion of polygamy but only because of a refusal to disclaim particular conduct. Similar cases held that the free exercise clause only protected against attempts 'to control 'the mental operations of persons'.<sup>16</sup> Eventually, faced with such pressure, the Mormons retracted their belief in religiously obligated polygamy, although there remain breakaway fundamentalist sects that still believe and practise it.

The action/belief distinction continued to be applied into the twentieth century. In *Minersville School District v Gobitis*,<sup>17</sup> decided in 1940, two Jehovah's Witness children refused to take a pledge of allegiance to the US flag as required in their public school, as they considered the pledge to be a form of idolatry and therefore contrary to their religious beliefs. The children were expelled for refusing to do so and challenged this as a violation of their free exercise rights. The Supreme Court however considered this to be a case about conduct, where the children were seeking an exception from a law that their school board had considered necessary to maintain national unity and cohesion. This aim was considered to be of fundamental importance by the Court, who also held it should be deferential in assessing whether or not a flag salute contributed to this aim. It therefore held there need be no exemption.

*Reynolds* and *Gobitis* demonstrate the distinction's lack of protection. It allows states to prohibit religious conduct for little or no reason, even 'for no reason other than the legislature's religious preference.'<sup>18</sup> The challenge the *Gobitis* children really posed to the interests of national security was extremely minimal, but they were still required to break a basic tenet of their religion. Such protection as the distinction grants is therefore fundamentally underinclusive. It is particularly problematic because a state is likely to use its power to act against unpopular minority groups, thus encouraging further discrimination. Both the Mormons and the Jehovah's Witnesses were a group that faced heavy social discrimination and indeed after *Gobitis* there was mob violence against the latter, which the authorities did not prevent.<sup>19</sup>

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<sup>16</sup> *Davis v Beason* 133 US 333, 342 (1890).

<sup>17</sup> 310 US 586 (1940).

<sup>18</sup> T. McCoy, 'A Coherent Methodology For First Amendment Speech and Religion Clause Cases' (1995) 48 *Vand. L Rev* 1335, 1345.

<sup>19</sup> M. Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008) 211-2.

The kind of protection the belief/conduct distinction brings is in protection against mind control and against deliberate attempts to ensure internal conformity to religious orthodoxy. This is certainly a valuable right<sup>20</sup> but it is not sufficient. As was said in the previous chapter, acting on the basis of beliefs is the natural result of having them. The distinction is compatible with a great deal of unjustified, repressive government action.

Evidently a test based on such a distinction can be oppressive to individuals. It also fails to protect religious pluralism in society. This is partly because, as *Reynolds* demonstrates, coercion of religious practices can change belief. Faced with extreme state pressure, the Mormons renounced their belief in religiously mandated polygamy. This though is potentially problematic. As Harmer Dionne puts it, there is a 'marked philosophical difference between theological developments that result from organic evolution and those that result from massive persecution and forced cessation of social customs and marital practices.'<sup>21</sup> Similarly, while it could be argued that a religious organisation could maintain a teaching that homosexuality was immoral *and* be required to abide by anti-discrimination norms, by for example being required to employ gay people as clergy, in practice maintaining such an internally inconsistent teaching would be subject to considerable pressure. In explaining this idea Harmer-Dionne makes reference to the idea of cognitive dissonance: it is psychologically difficult to maintain a situation where belief and action diverge, leading to pressure to change one or the other. A prohibition on permitting discrimination in practice may well change the underlying belief in its necessity.<sup>22</sup> Even though the distinction theoretically protects freedom of belief and merely affects the manifestation of beliefs, this distinction is less clear in practice.

A comparison of *Gobitis* with a case based on almost identical facts and decided only three years later demonstrates a further problem. In *West Virginia v Barnette*,<sup>23</sup> Jehovah's Witnesses challenged the West Virginia's School Board

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<sup>20</sup> As Smith states, 'Victims of the Inquisition might have been profoundly grateful for something like an effective right or freedom to believe or disbelieve, free from legal investigations and sanctions': S. Smith, 'Religious Freedom and its Enemies, or Why the *Smith* Decision May Be a Greater Loss Now Than it Was Then' (2011) 32 *Cardozo L Rev* 2033, 2036.

<sup>21</sup> *Supra* n. 14 at 1139.

<sup>22</sup> C. Harper and B. Le Beau, 'The Social Adaptation of Marginal Religious Movements in America' (1993) 54 *Sociology of Religion* 171. However, the process is complex and some pressure may actually strengthen religious belief.

<sup>23</sup> 319 US 624 (1943).

resolution making flag salutes compulsory in public schools. In contrast to *Gobitis*, refusing to perform flag salutes was considered to be a matter of belief or speech, rather than conduct. The challenge was successful, and *Gobitis* was overruled. The Court's decision is a ringing endorsement of free speech and opinion. It held that, 'the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind'<sup>24</sup> and that 'compulsory unification of opinion achieves only the unanimity of the graveyard... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.'<sup>25</sup> The issue in *Barnette* has therefore been transformed from one concerning an exemption from conduct, which has the aim of promoting national security, to one of religious belief. The burden on the right therefore appeared far more serious, and the relevance of the government interest correspondingly less. This is important because it demonstrates that 'the Court has wide latitude within the paradigm ... to identify the religious interest at issue as either belief or conduct.'<sup>26</sup> When the distinction is crucial, the arbitrariness of the enquiry is worrying.

This arbitrariness is partly because the distinction is too blunt, holding that belief and action are fully distinct concepts and furthermore that the protection of belief is always absolute. This is potentially misleading. Some beliefs may be considered incompatible with certain employment for example, even if the person claims they will not affect their behaviour and there is no proof that they have in the past. Greenawalt gives an example of a woman nominated for the head of the Environmental Protection Agency who believes that the Book of Revelation reveals that the world will end in twenty years, but who says this will have no effect on her job performance.<sup>27</sup> It would be entirely appropriate for the Senate to take this into account. Indeed in *Hollon v Pierce*<sup>28</sup> a public school bus supervisor was held to have been constitutionally dismissed after he co-wrote 'a religious tract expressing threats, violence and retribution, and specifically referring to the burning of schools and the death of school children',<sup>29</sup> although he was found to be

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<sup>24</sup> *Ibid.* at 633.

<sup>25</sup> *Ibid.* at 641-2.

<sup>26</sup> Hamilton *supra* n. 4 at 724.

<sup>27</sup> K. Greenawalt, *Religion and the Constitution Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2006) 44.

<sup>28</sup> 257 Cal App 2d 468 (1967).

<sup>29</sup> *Ibid.* at 479.

psychiatrically stable and there was no evidence he was going to take such action. It may be arguable too that particular beliefs relating to equality and non-discrimination may be relevant to particular employment, for example as a minister in a gay-affirming Christian church.

The likely response to this argument is that while freedom of belief is an absolute right, there is no right to a particular job while holding a particular belief. However, the response needs to be more complex than this. It would presumably be regarded as an interference with freedom of belief, and not the more limited right to religious conduct, if all Muslims, for example, were prohibited from holding senior positions in government employment. Certainly in the US case of *Torcaso v Watkins*<sup>30</sup> it was held that a requirement that candidates for public office declare a belief in the existence of God was an interference with freedom of belief.<sup>31</sup> Either then, the meaning of 'belief' is extremely narrow, and would not cover even broad discriminatory exclusions, or more complex decisions about the relevance of religious beliefs to employment are made in considering whether there is a violation of religious freedom. Therefore there cannot be a simple division between conduct and belief in this context.

A further argument against such a test is that the distinction between action and belief is discriminatory because it embodies a particular kind of Protestant belief. Hamilton argues that it comes from the distinction between faith and works made by St Paul, which was emphasised by reformation theologians who considered faith, and not works, to be crucial to religious salvation.<sup>32</sup> Indeed the approach of the US Supreme Court in the nineteenth century has been known as 'Republican Protestantism'.<sup>33</sup> This distinction has therefore been subject to criticism from other religious traditions; the Catholic theologian John Courtney Murray for example criticised the distinction as 'an irredeemable piece of sectarian dogmatism'.<sup>34</sup>

Merely because a distinction has religious roots does not automatically make it

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<sup>30</sup> 367 US 488 (1961).

<sup>31</sup> Although the ECtHR held a similar law was an interference with the *manifestation* of belief in *Buscarini v San Marino* (2000) 30 EHRR 208.

<sup>32</sup> Hamilton *supra* n.4. Berger also notes the connection between Protestant thought and an emphasis on belief rather than practice. See B. Berger, 'Law's Religion' in R. Moon (ed), *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 284.

<sup>33</sup> P. Hammond, D. Machacek and E. Mazur, *Religion on Trial: How Supreme Courts Trends Threaten Freedom of Conscience in America* (Walnut Creek, CA: Altamira Press, 2004).

<sup>34</sup> J.C. Murray, 'Law or Prepossessions' (1949) 14 *Law and Contemp Probs* 23, 30.

suspect and indeed it is probably impossible to separate the influence of Protestant thought from Western thought more generally, particularly when referring to concepts of religious freedom and in countries where Protestantism has been the dominant religious tradition.<sup>35</sup> However, it is still problematic because it is easier for those religious traditions that privilege an internal and wholly private relationship with the divine above religious conduct to maintain this distinction between belief and action in favour of protecting the former but not the latter.

Nevertheless, this discriminatory aspect can be overstated. Given that almost all religions require some kind of external practice<sup>36</sup> the problem is more one of under-inclusivity rather than discrimination. Conduct is the normal result of belief. This approach does though have difficulty in comprehending religions which are *essentially* performative, that is that the religion centrally consists of performing certain actions, rather than in individualistic reflection, since it assumes that belief is inevitably more important than conduct. Stahl argues peyote religions, particularly the Native American Church, are an example of such performative religions.<sup>37</sup> Peyote religions revolve around a sacred ceremony involving the use of peyote, a mild hallucinogen, but its importance goes beyond this as peyote is also considered an 'incarnation of God'.<sup>38</sup> Prohibiting peyote then is, he argues, akin to prohibiting the religion. Performative religions are also common in a different sense. Sociological research draws attention to the concept of 'lived religion', where what is important is religious tradition and custom, which may be engaged in for no more reflective reason than habit, but which is still internally seen as fundamentally religious.<sup>39</sup>

The above discussion has demonstrated the failure of the distinction in providing a mechanism for deciding cases where religious freedom conflicts with other rights or the public interest. This is not to say that the distinction is not of some use, but it fails as a full test of whether religious claims should be protected or not. It does not take account of the importance of religious freedom discussed in the previous chapter, since it holds that, unless there is an attempt at 'mind control', interference with the right of freedom of religion on the basis of another right or a social

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<sup>35</sup> With the important exception of Quebec.

<sup>36</sup> As Hamilton accepts *supra* n.4.

<sup>37</sup> R. Stahl, 'Carving Up Free Exercise: Dissociation and "Religion" in Supreme Court Jurisprudence' (2002) 5 *Rhetoric & Public Affairs* 439.

<sup>38</sup> *Ibid.* at 449.

<sup>39</sup> W. F. Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2007).



interest will always be justified. Furthermore the distinction is dominated by Protestant concepts and subject to manipulability. These latter two disadvantages may be acceptable if it is only a factor to be taken into account, but are problematic when this is the entire basis on which a decision is made.

The next distinction suggested will be between private and public spheres, a division which often goes alongside the action/belief distinction. While the protection only of religious belief is no longer considered appropriate in US law, the private/public distinction continues to have great relevance in this jurisdiction, as will be demonstrated.

### **Public/Private**

The distinction between public and private is a fundamental one in modern society. It is therefore unsurprising that it has been suggested that there should be a clear dividing line on this basis when it comes to the protection of religious claims. Under this interpretation of religious freedom, society is divided into separate spheres of authority. Religion is confined to the private sphere, but in return the state undertakes not to interfere in its domain, apart from in narrowly defined situations of abuse.

Collins argues that:

‘For the American Civil Liberties Union and the Canadian Civil Liberties Association a clear and inviolable boundary separates the secular public sphere of government and politics (including state schools), from the private sphere of conscientious belief and religious organizations (including parochial schools)... religion is thoroughly privatized so as to preserve both the liberty of individuals... and the independence of the state from religion.’<sup>40</sup>

Such a division permits religious organisations and individuals to apply their own rules, including discriminatory rules, within the private sphere, subject only to minimal protection for individual rights, but no religious exemptions are made outside this. It has particular resonance in the US context since it fits into an understanding of a strict separation of church and state. Even though neither Canada nor the UK shares the same conception of this separation, the division between the two spheres is still an element within public and legal thought in these jurisdictions.

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<sup>40</sup> D. Collins, ‘Culture, Religion and Curriculum: Lessons From the ‘Three Books’ Controversy in Surrey, BC’ (2006) 50 *Can Geogr-Geogr Can* 342, 344.

The question of whether it is acceptable for citizens, legislators and officials to use religious beliefs in supporting and discussing political opinions is one which has given rise to a great deal of debate<sup>41</sup> but will not be discussed here. This section instead focuses on whether it should be permissible to live out religious beliefs in public life and the extent to which religion should be left unrestricted in the private sphere, to see whether this creates an appropriate division. In the context under discussion in this thesis, such a distinction would mean that religious individuals or organisations would not be able to discriminate in the public sphere, but that discrimination would be permitted in all cases in the private sphere.

Reference to the distinction between public and private can be seen in Burger CJ's declaration in *Lemon v Kurtzman*,<sup>42</sup> the seminal case on the Establishment Clause of the First Amendment, that 'the constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.'<sup>43</sup> It has also been relevant to ECHR case law, which has been adopted by English courts. In *Pichon and Sajous v France*<sup>44</sup> for example, the ECtHR held that pharmacists were not protected by Article 9 when they refused to sell contraceptives because they could manifest their beliefs outside the 'professional sphere'.

The first question the distinction begs is in deciding what is 'public' and 'private'. The line between the two is highly contested. Collins argues that, 'in discussions of religious liberty and freedom of conscience, the term 'private' is typically equated with the interests of individuals, families, and religious institutions, while 'public' is usually synonymous with governmental authority.'<sup>45</sup> His reference to the 'interests of individuals' is potentially confusing though since it only refers to a person acting in an entirely individual capacity. More importantly, his description of public is incomplete as 'public' is often used to mean not only the state but also anything that is not 'private', including the commercial sector and non-religious employment.

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<sup>41</sup> See e.g. R. Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000); C. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002); K. Greenawalt, *Private Consciences and Public Reasons* (Oxford: Oxford University Press, 1995).

<sup>42</sup> 403 US 602 (1971).

<sup>43</sup> *Ibid.* at 625.

<sup>44</sup> App No. 49853/99 (2<sup>nd</sup> Oct 2001).

<sup>45</sup> Collins *supra* n. 40 at 344.

In the same way, though, as the distinction between action and belief can be contested and different constructions of the distinction be the ground on which such decisions are fought, so can the distinction between public and private be subject to the same analysis. In the Canadian case of *Chamberlain v Surrey School District No. 36*,<sup>46</sup> as discussed in the previous chapter, a School Board decided not to approve three books for kindergarten children that presented gay parenting favourably, having taken into account the religious objections of some parents. These parents claimed the school would otherwise interfere with the private matter of teaching children about controversial moral issues. The opposing claim was made by a teacher, Chamberlain, who argued that the private matter of religious beliefs should not be allowed to influence decision-making in public schools, especially given that the British Columbia School Act stated that schools must be on 'strictly secular and non-sectarian principles.'<sup>47</sup> The Canadian courts favoured the latter interpretation of the public/private division, although the exact meaning of public and private differed with each court decision.<sup>48</sup> The public/private distinction is therefore open to the same criticism of manipulability and vagueness as the action/belief distinction.

Even if an appropriate distinction between public and private can be made, a sharp distinction between the two, with its required privatisation of religious practice, gives rise to more fundamental problems. Firstly, the private sphere is very small in the modern regulatory welfare state, particularly when employment is taken into account. Even those unusual religions that seek to distance themselves from wider society, such as the Hutterites or Amish, will interact with the public sphere at some point,<sup>49</sup> and thus will be subject to state control. For the vast majority of religious adherents, there is much greater interaction and conflicts can arise far more frequently.

Most importantly, once again as with the action/belief divide, the public/private distinction imposes a particular notion of religion which is at odds with the understanding many religious believers have of their religious obligations. As Stychin puts it, for many, 'in its essence, religion demands manifestation in the

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<sup>46</sup> [2002] 4 SCR 710.

<sup>47</sup> School Act R.S.B.C. 1996, c. 412.

<sup>48</sup> Collins supra n.40.

<sup>49</sup> E.g. *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; *United States v Lee* 455 US 252 (1982).

public sphere and to require otherwise is to undermine its core. For those of faith, to demand privatization is in practice to require exit from the public sphere.<sup>50</sup> For many religious believers it may be nonsensical to attempt to divide religious experience into a privately religious and publicly non-religious identity in such a way. Religious beliefs are 'interwoven'<sup>51</sup> into their lives. The public nature of religion is simply inherent in much of the idea of what religion is. As Cochran argues, 'religion inclines toward a total account of life, organizing, explaining and justifying all action. Therefore religions often generate elaborate systems of belief, institution and ritual applicable to all areas of life.'<sup>52</sup> Of course, this is not necessarily so for all believers and some may willingly and unproblematically divide their lives into such spheres. However, forcing a person to so divide her life can lead to the 'emotional (psychological) suffering...that attends one's being legally forbidden to live a life of integrity'.<sup>53</sup> It may appear to her false and hypocritical and to trivialise her religious belief.<sup>54</sup> Of course, in some cases this will clearly be necessary to prevent a greater harm, but this is not necessarily so.

Such a person is therefore required to accept an ordering of the world which they do not accept,<sup>55</sup> with no justification or consideration of whether this is necessary to preserve other rights or the public interest. Furthermore, this division is not required for those who do not have such beliefs. Lupu therefore argues forthrightly that 'separationism is a matter of secular privilege' and amounts to the 'hegemony of secular ideology in the public square'.<sup>56</sup>

A further argument against a strict distinction is that it is discriminatory between different religions in a similar way to the distinction between action and belief. It is arguable that adherents of some religions, particularly what is called in US terms Mainline Protestantism, are better able to separate their identities between public and private than other religious groups because, as explained, it holds private religious belief to be of central religious importance. Belief, by itself, is intensely

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<sup>50</sup> C.F. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *OJLS* 729, 734.

<sup>51</sup> L. Underkuffler-Freund, 'The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory' (1995) 36 *Wm & Mary L Rev* 837, 843.

<sup>52</sup> C. Cochran, *Religion in Public and Private Life* (New York: Routledge, 1990) 65.

<sup>53</sup> M. Perry, *The Political Morality of Liberal Democracy* (Cambridge: Cambridge University Press, 2010) 71.

<sup>54</sup> E.g. S. Carter, *The Culture of Disbelief* (New York: Basic Books, 1993); R. Trigg, *Religion in Public Life: Must Faith be Privatized?* (Oxford: Oxford University Press 2007).

<sup>55</sup> R. Plant, 'Religion, Identity and Freedom of Expression' (2011) 17 *Res Publica* 7, 17.

<sup>56</sup> I. Lupu, 'The Lingering Death of Separationism' (1994) 62 *Geo Wash L Rev* 230.

private and therefore religions which privilege belief above action are likely to have few problems with keeping religion as a private matter. However, as discussed before, to a greater or lesser extent, there are communal and social aspects to almost all religions. Religion is rarely *solely* private and internal as religions typically lay down rules of public behaviour.<sup>57</sup> Again the problem is more one of underinclusivity than discrimination.

So far this discussion has focused on religion and the public sphere. The flip side of this distinction is the extent of religion's authority in the private sphere, in particular, given our context, to what extent there should be protection against discrimination in these circumstances. Horwitz, drawing on the approach of the nineteenth century Dutch neo-Calvinist writer Kuyper, argues for an approach of 'sphere sovereignty'.<sup>58</sup> Kuyper argued that various non-state institutions, including churches, should largely be given autonomy within their own sphere, with the state responsible for ensuring the institutions do not encroach on each other's sphere and for protecting against abuses of power. Such an argument has also been historically present within British thought too, notably within the writing of the British pluralists.<sup>59</sup> Such an argument would therefore permit discrimination within the private sphere. Evidently there needs to be *some* human rights protection: violent or sexual abuse for example does not become any more acceptable because it takes place in a religious setting and indeed the vulnerability of victims may make it more serious. However, laws, even those relating to human rights, protect a huge variety of state and societal interests of varying seriousness and it could be argued that the state should not intervene outside a very limited core of rights. This is because 'the church's affairs are not the state's affairs' and more fundamentally because 'it simply has no jurisdiction to entertain these concerns.'<sup>60</sup>

This idea though is extremely problematic. Of course there is a difference between church and state affairs. However, in most cases, disputes are not directly between the state and a religious institution but between a religious institution and an

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<sup>57</sup> R. McCrea, *European Law, Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010) 110-3.

<sup>58</sup> P. Horwitz, 'First Amendment Institutions: Of Sovereignty and Spheres' (2009) 44 *Harv CR-CL L Rev* 79.

<sup>59</sup> See J.N. Figgis, *Churches in the Modern State* (London: Longmans, Green and Co, 1913).

<sup>60</sup> Horwitz *supra* n.58 at 121.

individual who has sought the state's protection in some way.<sup>61</sup> It is unclear why the church should always win such disputes. As Baer argues, rather than enhancing religious freedom, it can merely be a 'tool to shield [religious] elites from accountability'.<sup>62</sup> The failure of the Catholic Church, and indeed other religious organisations, in dealing with child abuse, acts as a potent reminder that such organisations can act in particularly abhorrent ways.<sup>63</sup>

While it is usually considered obvious that there can be no protection of a direct claim to abuse children for religious reasons, since that would fall within the limited core of rights protected,<sup>64</sup> there have been some successful US claims resisting government intervention because of fears of interference in private matters.<sup>65</sup> In *Gibson v Brewer*<sup>66</sup> a priest allegedly abused a child. When his parents reported this to the diocese, it failed to take any action, and they then sued the priest and the diocese. The Minnesota Supreme Court struck out all claims relating to the diocese which did not rest on the intentional infliction of harm. It ruled that the parents could not sue for negligent supervision of the priest because it 'could not adjudicate the reasonableness of a church's supervision of a cleric' as 'this would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision'.<sup>67</sup> Similarly the parents could not bring a claim for negligent hiring as the 'ordination of a priest is a "quintessentially religious" matter'.<sup>68</sup> In general terms this is true: it would be a great interference with the right of freedom of religion to force a particular leader on a religious institution.<sup>69</sup> However, it does not demonstrate why a church should not be liable for the harm perpetrated by the priest they have chosen in the same manner as other employers. This approach therefore raises great issues over the safeguarding of children, even if actual abuse is prohibited.

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<sup>61</sup> R. Schragger and M. Schwartzman, 'Against Religious Institutionalism' (2013) 99 *Va L Rev* 917.

<sup>62</sup> S. Baer, 'Privatizing Religion. Legal Groupism, No-Go-Areas, and the Public-Private-Ideology in Human Rights Politics' (2013) 20 *Constellations* 68, 70.

<sup>63</sup> M. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2005).

<sup>64</sup> Although see *R(Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246; *Khan v United Kingdom* Application No. 11579/85 (7 Jul 1986).

<sup>65</sup> See Hamilton *supra* n.63.

<sup>66</sup> 952 S.W.2d 239 (Mo. 1997).

<sup>67</sup> *Ibid.* At 247. Although see for a different conclusion on this point *John Doe 169 v Brandon* (MN Ct. App., May 28, 2013).

<sup>68</sup> *Supra* n.66 at 247.

<sup>69</sup> See *Kedroff v Saint Nicholas Cathedral* (1952) 344 US 94.

The issues of employment discrimination in religious organisations will be considered in more detail in Chapter 5. For the time being, it will be noted that an absolute right to dismiss religious employees at will cannot take into account opposing rights and interests, such as non-discrimination or the protection of children. Thus in the US case of *Hosanna Tabor v EEOC*,<sup>70</sup> which will be discussed at greater length in Chapter 5, it was held that a ‘called teacher’ at a Lutheran school could not bring a retaliation claim after she was dismissed for raising a claim for disability discrimination, even though such discrimination was officially condemned by the religion. This was due to concern over state interference with the relationship between a religion and its ministers. Since then, in *Weiter v Kurtz*<sup>71</sup> it has been held that a bookkeeper/receptionist at a Catholic church was prevented by the First Amendment from pursuing claims arising from her dismissal for telling parishioners that a priest who was awaiting trial for child abuse charges was being housed by the parish and to keep their children away from him. Since the case would involve analysis of the Archdiocese’s administrative decisions regarding the treatment of priests accused of child abuse, it was held that the case could not be brought. It is highly questionable whether such a categorical rule really draws an appropriate balance between the protection of children and religious autonomy.

Even in cases where the motives are benign, excluding the private sphere from scrutiny is still unwarranted. In *Yoder v Wisconsin*,<sup>72</sup> Amish parents wanted to remove their children from the last two legally required years of education since they believed it affected their ability to transmit their religion and distinctive way of life. The Supreme Court held the Amish were entitled to an exemption. Formally the case did not rest on a private/public distinction but rather on a strict scrutiny test, asking whether there was a compelling government interest in the policy. However, the private/public distinction is crucial to the case. The opposing interests considered are entirely public ones: the likelihood of the Amish to find employment, so they will not pose a drain on state resources, rather than ‘private’ issues such as the interests of the children. Even if the case was correctly decided (it is certainly arguable that it failed to give enough weight to the interests of children who wished to leave the Amish community, as many do), most would balk at the idea that parents had unlimited power over their children. If the Amish

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<sup>70</sup> 565 US \_\_ (2012).

<sup>71</sup> No. 2011-CA-001058-MR (KY App., Dec. 14, 2012).

<sup>72</sup> 406 US 205 (1972).

had wanted to exclude their children from more than two years of public education, should this have been automatically permissible?

The most worrying exclusion of scrutiny of religious claims because of the division of public and private is the exclusion from child neglect laws for those who refuse medical care for their children, relying only on 'faith healing'. No fewer than 26 US states have exemptions for felonious child neglect, manslaughter, murder or other offences if parents fail to seek medical care for their children because of their religious beliefs,<sup>73</sup> although there are no such exemptions in Canada and the UK. Such religious practices have led to children's deaths which were easily preventable. The public/private distinction approach may then prevent an adult from wearing a religious headscarf in state employment, but permit such treatment of children. This cannot be justifiable.

A more fundamental argument can also be made that the very distinction legitimates oppression, since by its nature when something is designated as private, it is no longer a state responsibility but an individual one, and therefore does not require any state action.<sup>74</sup> This argument is particularly associated with feminist theories,<sup>75</sup> as in the famous slogan that 'the personal is the political,' but is also an argument within critical legal theory<sup>76</sup> and queer theory.<sup>77</sup> Cobb for example, writing from a queer theory perspective, draws attention to the overemphasis given in British political and legal debates to potential discrimination against gay people in bed and breakfast accommodation, when it is intra-familial discrimination which is pervasive and most harmful, particularly to gay teenagers.<sup>78</sup> The particular harm lies in the fact that since this is viewed as a private problem, and not something that is capable of public or legal interference, it is rendered invisible or unproblematic.

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<sup>73</sup> Hamilton *supra* n. 63 Ch 2.

<sup>74</sup> R. Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stan L Rev* 1, 19.

<sup>75</sup> E.g. C. MacKinnon, *Toward a Feminist Theory of the State* (Harvard: Harvard University Press, 1989).

<sup>76</sup> E.g. R. Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *U Pa L Rev* 1429.

<sup>77</sup> E.g. D. Richardson, 'Locating Sexualities: From Here to Normality' (2004) 7 *Sexualities* 391.

<sup>78</sup> N. Cobb, "'Couple's Break Like Fawlty Towers": Dangerous Representations of Lesbian and Gay Oppression in an Era of 'Progressive' Law Reform' (2009) 18 *Social & Legal Studies* 333.



This is not to say that there is no distinction between public and private or that such a distinction is irrelevant. Despite Cobb's criticism, discrimination by a parent against a legally adult child because she is gay is different from discrimination against gay people in state employment. Partly this is because of the effect of any state action. It seems unlikely that the law could promote parental love or family reunification, but it can ensure that discrimination in employment is met with a legal monetary remedy.

In conclusion, the distinction between public and private is probably fundamental to contemporary Western society, even if what falls into each category is not objectively ascertainable.<sup>79</sup> To try to abandon such a distinction is therefore probably impossible even it were desirable. Even those who have criticised this distinction for hiding oppression or making oppressive practices appear natural accept that some distinction is appropriate.<sup>80</sup> As with the belief/conduct distinction, it certainly has some value as a potential factor to be taken into account in deciding claims. However, it fails as a full test. This is partly because of its vagueness and potential manipulability, but mainly because such a test would lead to tolerating oppression in the private sphere, while simultaneously underprotecting religious claims in the public sphere.

### **Core/Periphery**

The third dichotomy that is sometimes proposed as a solution to the issue of how far to protect religious freedom is to distinguish between core religious activities, such as religious worship, and peripheral activities, such as demonstrations of public belief, whereby only core activities are protected. This argument can be seen in Buxton LJ's judgment in the Court of Appeal in *R(Williamson) v Secretary of State for Education and Employment*.<sup>81</sup> The case involved parents and teachers at private Christian schools who claimed that corporal punishment was integral to their religious doctrines on the upbringing of children and that this therefore should be permitted at the schools which their children attended. Buxton LJ held that Article 9 only protected 'worship, proselytism and possibly... mandated religious "practice"' which was a 'clear, uniform and agreed requirement of the religion in

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<sup>79</sup> A. Freeman and E. Mensch, 'The Public-Private Distinction in American Law and Life' (1987) 36 *Buff L Rev* 237.

<sup>80</sup> Gavison *supra* n. 74 at 19.

<sup>81</sup> [2003] QB 1300.

question'.<sup>82</sup> Since the law prohibiting corporal punishment in schools only affected a peripheral rather than core right, he held that there was no interference with the parents' rights. Similarly in *Ladele v Islington LBC*,<sup>83</sup> a case that will be discussed in detail in Chapter 4, it was held that when a registrar refused to perform civil partnerships because it conflicted with her Christian view of marriage, this did not affect her 'core' beliefs and she could not be accommodated in her refusal to perform them. Although this distinction was not the only reason for the decision, it was certainly an important factor in the Court of Appeal's judgment.

The distinction between core and non-core beliefs was also important in the recent English decision of *Mba v London Borough of Merton*,<sup>84</sup> where a care worker unsuccessfully argued that her employer should have given her an exemption from working on Sundays because of her religious beliefs. The Employment Tribunal stated that, 'her belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith'. The Employment Appeal Tribunal upheld this decision,<sup>85</sup> although this was subsequently overturned by the Court of Appeal, because it argued that a consideration of how many Christians refused to work on Sundays was relevant to the question of how deeply the 'provision, criterion or practice' of requiring Sunday working affected Christians as a group.

Ahdar and Leigh argue that the distinction is inappropriate because it is extremely difficult to define the core beliefs of, for example, Christianity and this would in any case be a theological question.<sup>86</sup> However, some of this criticism is misplaced and their (predictably difficult) attempt to define the core of Christianity is not required, since the distinction is actually about religious *practices*. A minor change to a Christian liturgy may be at the periphery of a religious belief, but at the core of a religious practice since it involves religious worship. Core then is really taken as a synonym for private religious belief and worship, which is assumed to be at the centre of all religions, as opposed to the 'non-core' of public manifestations of these beliefs. If this is accepted though, the distinction then produces the same problems as the public/private distinction. A typical 'core' religious practice such as the

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<sup>82</sup> *Ibid.* at 1315.

<sup>83</sup> [2010] 1 WLR 955.

<sup>84</sup> [2013] ICR 658 (EAT); [2013] EWCA Civ 1562 (CA).

<sup>85</sup> Although it described the reasoning as 'inelegant'.

<sup>86</sup> *Supra* n.1 at 168-9.

protection of minor aspects of religious worship may be less important to an individual than a typically 'non-core' claim, such as proselytisation.

Alternatively, if it were the case that a real attempt was made to understand what the core of religious activity was for each person, this would pose difficult questions of proof, not least because it may not be clear even to that person what the core of her religion is. This may be because a person's religious practices and beliefs may flow seamlessly from her religious understanding. Expert evidence is therefore likely to be demanded to provide more evidence on this point. The problem with this is that religious belief is often personal, in other words dependent on a person's own understanding of religious doctrines and authorities. Religious belief may vary vastly between people even within the same religious tradition. A person who deviates from the mainstream, for entirely sincere religious reasons, may therefore not be protected. As well as being likely to involve 'deeply theological questions, where courts have little expertise'<sup>87</sup> it could also impose religious orthodoxy, which is contrary to the purpose of religious freedom. In contrast to concerns raised elsewhere in this chapter, this may pose most problems for members of a majority religion because judges may feel more capable of adjudicating what is or is not a core belief for beliefs of which they have a cultural awareness. It may also pose major problems for religions with more amorphous beliefs, where identifying any 'core' practices will be difficult.

This is not to say that there are not differences between different kinds of religious activities. Intuitively, there is a difference between a sermon condemning abortion and an employee wearing a badge at work with a picture of an aborted foetus, even if the latter is a manifestation of her religious beliefs.<sup>88</sup> Similarly, discrimination appears more acceptable in the context of permitting access to religious sacraments than it does to a charitable service provided by a religion, such as a food bank, which, while motivated by religious beliefs, is not per se a religious activity. As with the other tests considered so far, this is a relevant factor which should be taken into account. However, by itself it is too inflexible. An absolute division between core and peripheral beliefs should be rejected because of the difficulty in making such a distinction when religious beliefs can vary so

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<sup>87</sup> Ahdar and Leigh supra n.1 at 169.

<sup>88</sup> *Wilson v U.S. West Communications* 58 F.3d 1337 (1995).

considerably between individuals, and also because some 'peripheral' practices may be extremely important to an individual.

### **Neutral Laws of General Applicability**

The final test to be considered is the current constitutional approach taken in the US after the Supreme Court's decision in *Employment Division v Smith*.<sup>89</sup> Smith took part in a Native American religious ceremony which involved the use of peyote, a banned substance under Oregon law. He was dismissed from his employment as a drug and alcohol counsellor as a result and was then denied unemployment benefit as he was considered to have been dismissed because of work-related misconduct. He claimed this decision was a violation of his free exercise rights. Since the Supreme Court considered that it was impossible to separate the question of whether he should be denied unemployment benefit from Oregon's prohibition of peyote for religious activities, the issue became whether Smith could demand an exemption from the law prohibiting its use because of his religious beliefs.

The majority of the Court held that a law would only be subject to strict scrutiny if it was not 'neutral' or 'generally applicable'. This reversed the position established in *Sherbert v Verner*<sup>90</sup> that strict scrutiny was required whenever a law substantially burdened the free exercise of religion.<sup>91</sup> The decision was highly controversial. The political opposition to it was such that it led to the Religious Freedom Restoration Act,<sup>92</sup> which sought to reinstate the compelling state interest test, but which was later held to be partly unconstitutional.

The main problem with such an approach is that it permits interference with religious practices 'no matter how serious the interference, no matter how trivial the state's nonreligious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion.'<sup>93</sup> It provides no justification to those affected by the interference with religious practices other than that the religion was not deliberately targeted, which may be of little comfort. It is indifferent to the fact that the law imposes a harsher

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<sup>89</sup> 494 US 872 (1990).

<sup>90</sup> 374 US 398 (1963).

<sup>91</sup> This was though judged much less stringently than in other areas such as free speech.

<sup>92</sup> 42 U.S.C. §2000bb.

<sup>93</sup> McCoy supra n.18 at 1346.

burden on people such as Smith than on someone who uses peyote for merely recreational reasons.

It could be argued that the demands of equality require that Smith should be treated the same as others and cannot have any 'special' rights because of his religious beliefs. This though is a cramped understanding of equality. Even formal equality only mandates the treating of like cases alike, which is not necessarily the same as treating everyone the same. There is a strong argument that Smith is not in a relevantly similar position to recreational drug users because the presumed anti-social effects of such drug use are less likely to occur in the tightly controlled circumstances of the Native American Church, and because the centrality of peyote to his religion means that it places a much greater burden on him to refrain than it would on others.

Indeed the demands of equality may actually *require* an exemption. The ECtHR held in *Thlimmenos v Greece* that 'the right not to be discriminated against... is violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'<sup>94</sup> Similarly, Alexy argues that the right to equality includes a norm that: 'If there is an adequate reason for requiring differential treatment, then differential treatment is required'.<sup>95</sup> *Thlimmenos* involved a Jehovah's Witness who was prevented from becoming an accountant because of a criminal conviction resulting from his refusal to wear military uniform due to his religiously based pacifist views. The ECtHR held that the failure to treat this conviction as having no bearing on his suitability to be an accountant was a violation of his Art 9 rights, taken with Art 14, the right to non-discrimination. This is a good example of where a normally appropriate rule imposes an unjustifiable burden on a religious belief. *Smith* imposes formal equality at the expense of substantive equality. As Laycock argues, it means that 'a soldier who believes he must cover his head before an omnipresent God is constitutionally indistinguishable from a soldier who wants to wear a Budweiser gimme cap'<sup>96</sup> leading to, as he vividly puts it, 'the equality of universal suppression'.<sup>97</sup>

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<sup>94</sup> (2001) 31 EHRR 15.

<sup>95</sup> R. Alexy, *A Theory of Constitutional Rights*, tr J. Rivers, (Oxford: Oxford University Press, 2002) 272.

<sup>96</sup> D. Laycock, 'The Remnants of Free Exercise' [1990] *Sup Ct Rev* 1, 11.

<sup>97</sup> D. Laycock, 'The Religious Exemption Debate' (2009) 11 *Rutgers J L & Religion* 139, 173.

Scalia J's answer to this problem is that the proper course is to seek a legislative exemption. This is of course a possibility which should not be forgotten, but it is not sufficiently protective by itself.<sup>98</sup> The purpose of having legally enforceable constitutional rights is that individuals are not reliant on the will of the legislature to protect them. Small, unpopular or new religions will find it more difficult to gain legislative exemptions, either through deliberate discrimination or, perhaps more likely, through ignorance of or indifference to them. Gaining an exemption through legislative means can potentially require far greater resources, both financial and in terms of political access, than bringing a court case. In any case, it cannot be raised as a defence to state action. This discriminatory effect is even recognized by Scalia J but who holds that this is an 'unavoidable consequence of democratic government'.<sup>99</sup> In essence his conclusion is that 'minorities will always do worse in a democracy and there is nothing to be done about this.'<sup>100</sup> This seems both unfeeling and problematic from a fundamental rights perspective.

An inability to challenge restrictions unless it can be demonstrated that they are not generally applicable is also discriminatory for another reason. Those who have minority beliefs are likely to face more clashes because the majority, probably unthinkingly, creates structures to suit them.<sup>101</sup> For example, in all three jurisdictions, while a Christian employee is likely to have Christmas day off since this is a public holiday, and therefore no clash between their religious obligation and their employment obligations arises, this is not so for a Jewish employee who wishes to have time off for Yom Kippur. They will be unable to challenge a generally applicable rule that everyone has to work on that day.

The approach in *Smith* only leaves a small category of acts open to challenge: those where there is a discriminatory motive. This is unlikely to include many challenges to non-discrimination rights since these will normally clearly be driven by a desire to protect the rights of others, rather than to discriminate against those with particular religious views. However, the principle was found to be violated in a

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<sup>98</sup> After the Supreme Court's decision, Oregonian law was changed in order to grant an exemption for religious use for peyote, but it seems unlikely that this legislative change would have happened without the publicity the court case brought.

<sup>99</sup> At 890.

<sup>100</sup> Nussbaum *supra* n.19 at 119.

<sup>101</sup> *Ibid.*

different context in *Church of the Lukumi Babalu Aye v City of Hialeah*.<sup>102</sup> In this case, members of the Santeria religion, which requires certain ritualistic animal sacrifices, challenged a city ordinance which prohibited the killing of animals in a 'ritual or ceremony not for the primary purpose of food consumption'. The Supreme Court held the law was unconstitutional as it was clear that it was designed only to prevent these particular killings. This case raises a number of issues. Firstly, it demonstrates the limited nature of the exception. This should be an easy case under the *Smith* test, but the claim had been rejected by both the District Court and Court of Appeals. There was considerable evidence that Hialeah was not motivated by concerns about animal cruelty, but rather by opposition to the Santeria religion. This can even be seen in the terms of the ordinance, which makes reference to a 'ritual' but then, presumably in an effort to exclude kosher butchering, adds 'not for the primary purpose of food consumption'.

However, if the law had been more skilfully drafted, it would probably have been considered constitutional. If it had been based on the disposal of animal waste for example, it may have been permissible without any consideration of the necessity of the law or the burden it placed on Santerians in living out their religion. In many situations it would be fairly easy to create a generally applicable law which would pass constitutional scrutiny. It has been said that 'a tax on wearing yarmulkes is a tax on Jews':<sup>103</sup> such blatant discrimination is therefore prohibited. However, it would be perfectly possible to have a rule forbidding any head coverings in federal employment. Although this would have a much more severe effect on Jewish men and Muslim women than others, this differential burden would not even be recognised and the need for such a rule would not be assessed. This is hardly a new problem, as the nineteenth century British case of *Kruse v Johnson*<sup>104</sup> demonstrates. Byelaws prohibited singing in a public place within 50 yards of a dwelling house if asked to stop by a policeman or a resident. Whilst these laws were ostensibly aimed at noise pollution, they were in fact aimed at preventing the Salvation Army from holding outdoor services. Despite this being an important part of their religious practice, the laws were upheld without difficulty. The approach in *Smith* makes discrimination the only important factor in considering constitutionality.

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<sup>102</sup> 508 US 520 (1993).

<sup>103</sup> *Bray v Alexandria Women's Health Clinic* 506 US 263, 270 (1993).

<sup>104</sup> [1898] 2 QB 91.

However, the actual effect on a religion may be the same whether the law is directed at it or if it is merely caught by a general rule.

The Court's judgment in *Smith* appears to be driven by a fear of anarchy to which, it is assumed, balancing will inevitably lead, notwithstanding that a balancing approach had been used for the past thirty years. Scalia J argued that 'it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice' and thus 'it would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church'.<sup>105</sup> This seems to rest on a perplexing lack of faith in the ability of federal judges and a tenuous conclusion that religions would prefer not to have a judge decide the relative religious importance of church weddings and throwing rice at weddings, to being permitted to challenge a law forbidding church weddings at all. Balancing tests may require some intrusion into religious matters, but this may be a fair trade off in return for greater religious protection. These problems and the benefits of balancing tests will be discussed in the next chapter.

An underlying feature of the approach in *Smith*, taken with subsequent developments in US law, is the reasserted distinction of the public/private distinction. *Smith* means the ability to challenge laws in the public domain is very limited, with an apparent aim of protecting private religion, since it does not lead to state assessment of religious belief. In doing so, though, it forces religion to be privatised when this may be quite contrary to the religion's precepts: a much larger interference with religious belief. This ironically thus undermines the very thing that Scalia J is so anxious to protect. Indeed in an earlier case he had criticised the rest of the court for treating religion like 'some purely personal avocation that can be indulged entirely in secret, like pornography.'<sup>106</sup>

Although *Smith* denies protection in the public sphere, in the private sphere religions have much greater rights under US law, including rights to discriminate. In *EEOC v Hosanna Tabor*,<sup>107</sup> a case about whether a religious minister has any protection from discrimination law, *Smith* was simply held to be irrelevant. Although some had argued that employment discrimination laws were neutral and

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<sup>105</sup> Supra n.93 at 887.

<sup>106</sup> *Lee v Weisman* 505 US 577, 645 (1992).

<sup>107</sup> Supra n.73.



general laws which should be applied to religious organisations under *Smith*,<sup>108</sup> this approach was firmly rejected. The Court held that *Smith* involved ‘government regulation of only outward physical acts’, whereas *Hosanna Tabor* involved ‘interference with an internal church decision that affects the faith and mission of the church itself.’<sup>109</sup> This then is a reinvention of the public/private distinction, with all the problems this entails.

The most incomprehensible part of the rule emanating from *Smith* is that the Court held that claims can be brought to protect ‘hybrid rights’. The exact meaning of a hybrid right is unclear, but the idea is that free exercise combined with another right can give rise to a claim against a generally applicable law. In *Smith* Scalia J stated that cases that had been previously considered to purely involve free exercise claims were actually hybrid rights cases. Thus when discussing *Yoder v Wisconsin*, Scalia J asserted that the case was not simply about free exercise, but also the rights of parents to control their children’s education and thus gave rise to a hybrid right. A cynical explanation for the introduction of such a concept is that it was necessary to explain away previous cases where a violation of free exercise had been found. Even if this is not so, it is a very unclear concept.

That a right taken with another right can lead to a violation is not in itself an incoherent idea. Under the ECHR for example it is possible that there is no violation of a substantive right by itself, but there is a violation of that right taken with Article 14, the right to non-discrimination, as long as the claim falls within the ‘ambit’ of the right. However, non-discrimination rights are different from other rights as they can only be measured relationally, that is with regard to how others are treated. While a member state may have discretion in whether to grant a benefit or not, and therefore there is no violation of the substantive article, it does not have the right to grant the benefit unequally. Therefore adding together the two rights can lead to a violation.

However, the problem with this idea of hybrid rights is that another right could almost always be considered to be implicated in the right of freedom of religion, particularly freedom of speech. This is a very broad principle in US law and the concept of expressive speech has for example been considered to include non-

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<sup>108</sup> C.M. Corbin, ‘Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law’ (2007) 75 *Fordham L Rev* 1965.

<sup>109</sup> *Supra* n.70 at 15.

obscene commercial nude dancing.<sup>110</sup> Almost all religious practices must have some message, even if this is simply to identify a person as a member of a religion. If school pupils are protected in wearing black armbands to protest against the Vietnam War,<sup>111</sup> then it seems difficult to see why wearing a hijab, for example, could not be considered expressive speech. Smith's claim could also be reinvented as a free speech claim, indeed possibly political speech, and thus deserving of the highest degree of protection as it could be argued that the peyote ceremony was an expressive reassertion of a Native American way of life, in contrast to the discrimination and forced assimilation and Christianisation Smith had faced in his childhood.<sup>112</sup> Claims to discriminate could potentially also be re-invented as speech claims<sup>113</sup> and indeed will presumably always involve some kind of speech. Given then that cases can always be considered hybrid rights, the distinction is arbitrary. More fundamentally, it is simply unclear why two small infringements of different rights should add up to a violation when a great infringement of one does not. For these reasons, even if the generally applicable law rule is accepted, the hybrid rights idea cannot be.

In conclusion then, the approach in *Smith* too fails as a test. Whilst it is of course extremely problematic if a religion is deliberately targeted, this does not mean that a restriction is only problematic in this situation. Such an approach cannot protect religious freedom sufficiently, since it permits many invasions of religious rights without consideration as to whether this is justified.

### **Conclusion**

This chapter has concluded that none of the tests expressed here are suitable for deciding when religious claims should be protected above other rights, such as non-discrimination, because they are variously under or over protective, do not take equality concerns seriously or give too much power to religious elites. Nevertheless some of the insights they bring may be relevant in pointing out differences in the circumstances and types of religious claims: that a case involves the private rather than public sphere for example. Scalia J in *Smith* was convinced that balancing approaches were doomed to turn into anarchy with everyone asserting a right to be free of laws with which they disagreed. It is to the question

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<sup>110</sup> *Barnes v Glen Theater Inc.* 501 US 560 (1991).

<sup>111</sup> *Tinker v Des Moines Independent Community School District* 393 US 503 (1969).

<sup>112</sup> See Nussbaum *supra* n.19 at 149-150.

<sup>113</sup> See *Elane Photography v Willock* 309 P.3d 553 (N.M., 2013) discussed in Chapter 7.

of balancing, and to a particular type of balancing test, proportionality, that this thesis now turns, suggesting that his fears are unfounded.

## **Chapter 3: Proportionality**

The previous chapter concluded that none of the tests outlined so far was adequate to adjudicate the complexities of claims involving conflicts between freedom of religion and other rights, in particular the right of non-discrimination. This chapter suggests a different method: proportionality. Proportionality lays out a process for deciding cases as well as setting a standard of review. This chapter will first describe in some detail the different parts of the test and then will consider its advantages in the context of resolving conflicts between freedom of religion and non-discrimination. Throughout this section the problems described in the Introduction should be borne in mind: the difficulty of legislating and deciding cases in situations of social divergence. The chapter will end with a short description of whether and how proportionality is used in the Canadian, English and US legal systems in order to place the discussion of cases in later chapters in context. It will be argued that, in contrast to the disadvantages of the previous approaches discussed, proportionality provides a coherent method for resolving these disputes.

### **Proportionality: An Analysis**

Proportionality as a method of controlling government action originated in nineteenth century Prussian administrative law.<sup>1</sup> Despite no explicit mention of it in the German Basic Law, proportionality became an important part of German constitutional law after World War II. Its use has since spread to many countries, possibly becoming a 'post-war paradigm' of rights analysis.<sup>2</sup> It can take a number of forms, but all contain the same essential elements. The test as set out by Alexy, referring to German law is:<sup>3</sup>

1. Suitability – the aim must be capable of achieving the end desired.
2. Necessity – are there any less restrictive but equally effective means of achieving this aim?
3. Proportionality in the narrow sense, involving a balancing exercise.

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<sup>1</sup> A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) Ch 7.

<sup>2</sup> L. Weinrib, 'Postwar Paradigm and American Exceptionalism' in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

<sup>3</sup> R. Alexy, *A Theory of Constitutional Rights*, tr. J. Rivers (Oxford: Oxford University Press, 2002).

Although as Brady notes, ‘the application of the proportionality test has not always been uniform,’<sup>4</sup> all these elements are present in the British case law. Thus a measure will be considered to be proportionate if:

1. The legislative objective is sufficiently important to justify limiting a fundamental right.
2. The measures designed to meet the legislative objective are rationally connected to it.
3. The means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>5</sup>

To this has been added an overall consideration of whether the measure is proportionate, balancing the rights of the individual against the needs of society.<sup>6</sup> The Canadian test is slightly different.<sup>7</sup> The test as laid down by the Supreme Court in *R v Oakes*<sup>8</sup> is:

1. There must be a substantial aim of ‘sufficient importance to warrant overriding a constitutionally protected right... an objective [must] relate to concerns which are pressing and substantial’.
2. There must be a rational connection between the aim and the restriction of the right.
3. The means must be carefully designed to achieve the aim and should impair the right or freedom as little as possible.
4. Proportionality itself – does the objective justify the restrictions on the right?

Greater weight appears to be placed on the first step of legitimate aim than in the German test. In its German incarnation, questions as to the appropriate balance between the rights and interests are left to the end of the process.<sup>9</sup> This allows the question of how ‘substantial’ the objective is to be considered in conjunction with

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<sup>4</sup> A. Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012).

<sup>5</sup> *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

<sup>6</sup> *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

<sup>7</sup> D. Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *U Toronto LJ* 383.

<sup>8</sup> [1986] 1 SCR 103.

<sup>9</sup> Barak *supra* n. 1 at 281.

the extent of the interference. In contrast, the *Oakes* test states that an objective must always be 'pressing and substantial.' It is far from clear why this should necessarily always be so. The interference may be minimal or unimportant.<sup>10</sup> Indeed in later cases there seems to be relaxation of the standard, with an appreciation that the standard will vary according to the particular case. Trakman argues that in practice, the "sufficiently important objective" test has played a limited role... The majority of the Supreme Court of Canada found that the government's objective was sufficiently important in 97 per cent of the instances in which *Charter* violations were considered under section 1'.<sup>11</sup> Despite the terms of the test, the difference seems to be 'merely semantic'.<sup>12</sup>

The Canadian minimal impairment test is, though, set at a high level. This is where most cases have failed, rather than at the balancing stage, as is the case in Germany.<sup>13</sup> The question is whether this difference is advantageous. Under the *Oakes* test, the minimal impairment test includes some of the balancing considerations dealt with under the proportionality test in the other. It has been criticised as 'evolv[ing] into a repository for under-articulated normative choices that should properly be explained under the proportional effects branch'.<sup>14</sup>

Davidov points to *Eldridge v British Columbia*<sup>15</sup> as an example of where the courts have used balancing considerations under cover of the minimal impairment test.<sup>16</sup> The case concerned the failure of the government to provide sign-language interpreters in hospitals, thus negatively affecting deaf patients' ability to access medical care. Whether this failure was justified by the, relatively small, cost to the government is a question of balancing. The Court, though, treated it as a question of minimal impairment. They held that the objective of 'controlling health care expenditures' could be protected even if sign-language interpreters were provided. This ducks the important point that it was not protected to the same extent: it

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<sup>10</sup> P. Blache, 'The Criteria of Justification under *Oakes*: Too Much Severity Generated Through Formalism' (1991) 20 *Man LJ* 437.

<sup>11</sup> L. Trakman et al., '*R. v Oakes* 1986-1997 Back to the Drawing Board' (1998) 36 *Osgoode Hall LJ* 83, 95.

<sup>12</sup> Grimm supra n. 7 at 389.

<sup>13</sup> Trakman supra n.11.

<sup>14</sup> Ibid. at 102.

<sup>15</sup> [1997] 3 SCR 624.

<sup>16</sup> G. Davidov, 'Separating Minimal Impairment from Balancing: A Comment on *R v Sharpe (B.C.C.A)*' (2000) 5 *Rev Const Stud* 195.

evidently cost more to provide the interpreters than not. The real question is whether this cost is a sufficient reason to deny providing interpreters.

As discussed later in this chapter, the distinctive part of the necessity test is that it examines whether there are less restrictive means for achieving the aim to the *same extent*. It is not about weighing up the pros and cons of different policies. Often there are policies which would achieve the aim less well, but which create a lesser infringement of a right. Which one is chosen is a matter for the original decision-maker (although of course all policies must also be proportionate in the strict sense). It is therefore beneficial to separate the no less restrictive means test from the balancing test.

These differences between the ways proportionality is applied should not be overstated. Despite the minor variations between the tests, they all contain the same essential elements. For the purpose of this thesis the following components will be used:

1. Legitimate aim
2. Rational connection
3. Necessity
4. Balancing

### Interference<sup>17</sup>

The elements of the tests will be considered further below. However, the preliminary question in applying any test which considers whether the interference with a right is justified, is evidently whether there is an interference at all. A test of interference is closely linked to the test used to decide whether there is a violation of a right. If it is extremely difficult to justify any interference with a right, an interference will only be found in rare cases. Interference is then the most important hurdle that claimants will have to clear if they are to be successful. As Mathews and Stone Sweet put it, 'a stingy approach to the limitation of rights goes

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<sup>17</sup> This section draws on my earlier article, 'Article 9 at a Crossroads: Interference Before and After *Eweida*' (2013) 13 *HRLR* 580.

hand in hand with a stingy approach of the scope of rights.’<sup>18</sup> Under a proportionality test though, the mere fact of finding an interference certainly does not guarantee a claim’s success. There can therefore be ‘definitional generosity’ in considering the ambit of a right.<sup>19</sup> Importantly also, the degree of justification required by proportionality depends on the degree of interference. Since a minor interference will not require significant justification, interference can be defined broadly.

Even so, the issue of when interference with a right begins is complex. This is particularly true regarding freedom of religion, but is also relevant to non-discrimination rights. With regard to religious rights, since society contains a multitude of religious and moral beliefs and practices, people will constantly be faced with practices with which they disagree and will in a myriad of ways be constrained from creating their ideal society. Not all of this should constitute an interference with rights. In considering this issue, this section will draw on Greenawalt’s analysis which draws distinctions between religiously compelled and religiously motivated acts, and between tests which require compliance with religious precepts to be legally impossible and those that merely make religious compliance more difficult.<sup>20</sup> It should be remembered that the current discussion is only about whether there is an interference with a right and does not consider the question of justification.

It could be argued that there must be a religiously required act which is legally forbidden for there to be an interference. The ECtHR has sometimes taken this approach. In *Cha’are Shalom Ve Tsedek v France*<sup>21</sup> for example there was held to be no interference with religious rights where compliance with religious beliefs was not *impossible*. The applicant organisation was one of Ultra-Orthodox Jews who required meat certified as ‘glatt’ and not merely kosher. They were denied a licence to ritually slaughter animals on the grounds that there was a licensed slaughterer in the area, albeit one that only produced kosher meat. The ECtHR held there was no interference since glatt meat could be imported from Belgium.

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<sup>18</sup> J. Mathews and A. Stone Sweet, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ (2011) 60 *Emory LJ* 797, 868-9.

<sup>19</sup> S. Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *ICON* 468, 480.

<sup>20</sup> K. Greenawalt, *Religion and the Constitution Vol. 1* (Princeton: Princeton University Press, 2002).

<sup>21</sup> 9 BHRC 27 (2000).



Adherence to this test would mean there was no interference in cases like *Lyng v Northwest Indian Cemetery Protective Association*.<sup>22</sup> In this case the government wished to build a road and conduct logging on a sacred Native American site which would, as the Court noted, 'have devastating effects on traditional Indian practises'. This though would not be enough. They would still be able to practice their faith. It would not be outlawed in any way, simply practically difficult. There was no coercion.

Even in situations where a government more directly requires or prohibits certain behaviour, this test may not be met. In *Bowen v Roy*,<sup>23</sup> a Native American man believed that the maintenance of a social security number for his daughter 'robbed her of her spirit', but he could not receive social security benefits, including Medicaid, for her without it. This too did not involve an impossibility – he was under no obligation to claim those benefits, although they were in practice extremely important. Similarly, in the Canadian case of *Alberta v Hutterian Brethren of Wilson Colony*,<sup>24</sup> some Hutterites objected on religious grounds to being photographed. A new requirement that driving licences needed photographs was therefore a violation of their beliefs. But, again, even though not having a driving licence would make their rural farming existence very difficult, this would not be sufficient. An impossibility test would therefore permit severe burdens on belief, without requiring any justification to be given.

The question of whether it remains strictly possible to comply with religious beliefs has also been considered relevant to whether an interference can be found in employment since an employee could resign and thus avoid the conflict. The ECtHR has found this issue surprisingly difficult. To take one example, in *Pichon and Sajous v France*<sup>25</sup> the Court held that requiring the applicant pharmacists to sell contraceptive pills did not interfere with their right to freedom of religion and thus their application was dismissed as manifestly ill founded. However, the Court's reasoning was essentially a balancing process: women were entitled to access contraception with ease, the applicants were acting in the public sphere and they could manifest their beliefs in other ways. All of this is true and relevant, but as to whether the infringement of belief was justified, and not to the prior question of

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<sup>22</sup> 108 S.Ct. 1319 (1988).

<sup>23</sup> 476 US 693 (1986).

<sup>24</sup> [2009] 2 SCR 567.

<sup>25</sup> Application No. 49853/99 (2 Oct 2001). See also *Kalaç v Turkey* (1997) 27 EHRR 552.

whether the right was infringed, which should have been answered affirmatively. The alternatives available to the pharmacists were to perform an act they were resolutely opposed to, or to resign. If resignation was always sufficient to protect rights then there should be no concern with dress codes, working hours or religious holidays, or perhaps even with religious harassment taking place within employment.

The British courts have in the past accepted and even extended the ECHR's reasoning. In *R(Begum) v Denbigh High School Governors*<sup>26</sup> the majority of the House of Lords accepted that there was no interference where a pupil was not permitted to attend her school wearing a jilbab, because there were other schools she could have attended. Lord Bingham referred to *Cha'are Shalom Ve Tsedek* in his judgment and held that 'there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established'<sup>27</sup> Lord Hoffmann also held that since she chose the school knowing its uniform policies and she could have attended another school, there was no interference with her beliefs. As Lord Nicholls pointed out though, such an approach 'under-estimate[s] the disruption this would be likely to cause to her education' and places the school under no duty to 'explain and justify its decision'.<sup>28</sup> More recently though the ECHR has appeared to change its approach. It held there was a violation in *Eweida v UK*, which concerned an employee who was prevented from wear a cross at work as a symbol of her Christian faith.<sup>29</sup> The consequences of this decision have not yet been fully considered by domestic courts. These issues regarding religious freedom within employment will be discussed in more detail in the next chapter.

Although the clearest examples of a religious practice being made legally impossible are cases where a religion has ceremonies involving illegal drugs, such as the use of peyote in some Native American religions or cannabis in Rastafarianism, the test at its strictest also requires a religious compulsion. Such cases may fail since a judge could conclude that, while such ceremonies are an important part of the religion, there is no strict obligation to perform them. Not all

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<sup>26</sup> [2007] 1 AC 100.

<sup>27</sup> *Ibid.* at 113-4.

<sup>28</sup> *Ibid.* at 119.

<sup>29</sup> *Eweida and others v UK* (2013) 57 EHRR 8.

religions have definite rules or doctrines, and some firmly reject hierarchy.<sup>30</sup> However, there may still be practices which are clearly part of the religion, even where there is no textual or other authority to which an adherent can point. A focus on religious obligation misses these practices.

Furthermore, defining what is religiously motivated rather than religiously required is difficult.<sup>31</sup> A compulsion requirement creates an impulse to 'dutyfy' every aspect of religion. This may be quite artificial. Laycock puts this as follows: 'it assumes that the exercise of religion consists only of obeying the rules... all the affirmative communal and spiritual aspects of religion are assumed away... for many believers the attempt to distinguish what is required from what grows organically out of the religious experience is an utterly alien question, perhaps nonsensical.'<sup>32</sup> It is probable that some religious practices are put in terms of duty because this is more likely to be accepted by a court.<sup>33</sup>

Even if there were a clear distinction between compulsion and motivation, religious duties may be less important to a believer than religiously motivated conduct. For example, most Christian denominations do not think it is a religious requirement to attend Bible study groups, but for some it may be an important part of their religious practice. It would be a nonsense to say that a law which made studying a sacred text with others a criminal offence did not interfere with their freedom of religion. It is therefore sufficient for an act to be religiously motivated.

However, to say that any act motivated by a sincere religious conviction, however indirect, is protected by the right is by itself too generous. It would include facts such as those arising in *Rushton v Nebraska Public Power District*.<sup>34</sup> Two employees of a nuclear power station refused drug testing, not because they were religiously opposed to it, but because the company's drug policy statement stated that alcoholism was a disease that could be treated. Contrary to this, they believed that alcoholism was not a disease but a sin. They therefore did not wish to affirm the policy. Including such a case would place weighty burdens on employers and the

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<sup>30</sup> See e.g. D. O'Brien, 'Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism' (2002) 18 *J L & Religion* 219.

<sup>31</sup> D. Laycock, 'The Remnants of Free Exercise' [1990] *Sup Ct Rev* 1.

<sup>32</sup> *Ibid.* at 24.

<sup>33</sup> W.F. Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

<sup>34</sup> 653 F.Supp. 1510 (D.Neb., 1987).

state in assessing these claims. It may encourage frivolous or spurious claims. Although the importance of the practice would be assessed at the balancing stage, and therefore cases involving indirect unimportant interferences would be extremely unlikely to be ultimately successful, there is still benefit in excluding some cases via a threshold test.

An intermediate requirement is therefore appropriate. I will consider there to be an interference if an act is motivated by a sincere religious conviction, provided that there is an close connection between the act and the belief and there is more than a *de minimis* burden. *Eweida v British Airways* is difficult in this respect.<sup>35</sup> Although Eweida wanted to wear a cross visible to others at work as a symbol of her Christian faith, she did not claim this was a strict religious obligation. However, it seemed to form part of a commitment to publicly demonstrating her faith and so this should be included. A case on the other side of the line is that of some Quakers refusing to fill in the 2011 British census form. They objected because the processing of the data was to be done by Lockheed Martin, a company that also manufactures military equipment, and it therefore conflicted with their pacifist views.<sup>36</sup> In this case the obligation to complete the census is too remote from the religious belief in pacifism.

What Lupu calls ‘atmospheric burdens’<sup>37</sup> should also not be included. Living in a society that does not generally share your beliefs may make living according to their precepts more difficult, but this does not mean that the failure to change society to conform to your beliefs constitutes an interference with rights. Merely being aware that people have different views on a matter does not interfere with a right even if this causes offence. Therefore the mere existence of same-sex marriage cannot be a violation of religious rights. Similarly it cannot be a violation of equality rights, without more, for there to be public and private disapproval of

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<sup>35</sup> [2010] ICR 890. The case was taken to the ECtHR in *Eweida v UK* supra n.29.

<sup>36</sup> ‘Pacifists and the Census Form’, *The Guardian*, 30 Jan 2012  
<http://www.guardian.co.uk/uk/2012/jan/30/pacifists-and-the-census-form> [Last Accessed 10 Feb 2014].

<sup>37</sup> I. Lupu, ‘Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion’ (1989) 102 *Harv L Rev* 933.

homosexuality or same-sex marriage. In the same way, mere exposure, without more, to religion or to anti-religious views is not an interference.<sup>38</sup>

Finally, although there should not be a strict rule preventing claims from being successful in employment, in truly voluntary situations, though, there can be no interference with freedom of religion. For example, if a person joins a university Christian Union, they cannot then complain that the society does not respect their atheist views by praying before each meeting. In this example the free choice to join and leave the society adequately protects freedom of religion. As *Pichon and Sajous* illustrates though, most employment cannot be said to be truly voluntary, especially if circumstances change after an employee begins employment. However, in some circumstances, even in employment, there should not be considered to be an interference. For example, if a person willingly takes on a job when she is aware its whole nature conflicts with her conscience, for example the job is to provide Sunday cover or to work in an abortion clinic, she probably cannot accept it and subsequently claim an interference.

Regarding the right not to be discriminated against, this evidently includes straightforward discrimination. For example, if a benefit is given to heterosexual couples but not to homosexual couples then there is an interference with the right. This right is also interfered with if a gay person does not receive the same treatment, even though she ultimately receives the same benefit. For example if a gay couple applies for a marriage licence and an employee refuses to grant it because of her beliefs but refers the application to a colleague, the couple's right has still been infringed even if the licence is granted without delay.<sup>39</sup> The couple has not received equal treatment since they have not had the opportunity to have the licence granted by any available employee, as a heterosexual couple would have had. In addition to prohibiting discrimination by the state itself, as discussed in the Introduction, the right also requires the state to provide legal protection against some kinds of discrimination by private actors.<sup>40</sup>

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<sup>38</sup> Other country-specific constitutional rules may be relevant though – exposure to religious teachings in state schools may not violate the right to religious freedom but may well violate rules about the separation of church and state.

<sup>39</sup> Although of course not necessarily violated. These issues are discussed in more detail in the next chapter.

<sup>40</sup> See e.g. *Vriend v Alberta* [1998] 1 SCR 493.

In the same way as atmospheric burdens against religion are not sufficient, mere disapproval of homosexuality is though not sufficient to constitute an interference with rights. It is not an interference to receive social disapprobation, although of course this may lead to sincere and understandable hurt. This does not mean that harassment or hate speech that is so pervasive that it prevents people from being able to live freely could not be an interference.<sup>41</sup>

However, in addition to protecting against interferences with the right per se, governments may also, as discussed in the next section, sometimes legitimately act to promote social harmony and tolerance, even if discriminatory attitudes have not reached the level of an interference. As mentioned in the Introduction, there may be a desire to lessen cultural heterosexism and to promote equality as a matter of public policy. The state may seek to do this by such mechanisms as the Public Sector Equality Duty in British law.<sup>42</sup> This requires public authorities to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.

### Legitimate Aim

Returning then to the proportionality test proper, the first question is whether the right has been infringed for a legitimate aim. This is a moral question which relies for answers on the constitutional or legal morality of a state and more generally on the morality inherent in a liberal democratic society. Some legitimate aims can be found explicitly in the constitution or other law granting the right. Others are implicit. Thus under the ECHR, the right to manifest a religion or belief may be restricted on the basis of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. In Canada, rights granted by the Charter may be subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In contrast, US constitutional rights are usually expressed in absolute terms.

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<sup>41</sup> In *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30, a campaign of intimidation against Jehovah's Witnesses, which the authorities did very little to prevent, was held to be a violation of Art 9. There would have been an interference with Art 8 (right to respect for private and family life) if this had been aimed at gay people.

<sup>42</sup> Equality Act 2010 s.149.

In many of the cases discussed in this thesis, finding a legitimate aim will be straightforward since the aim will be to protect a right or at least an interest of another party, whether this is non-discrimination or the right to manifest religious beliefs. In some cases though, the aim will be not to directly protect a right, but for example, to promote equality or tolerance more generally. This can potentially still be a legitimate aim since the aim is to better protect rights or to create a more harmonious society.<sup>43</sup> Tolerance, in the sense of putting up with behaviour or expression thought wrong or immoral, is an essential part of a liberal democratic society. This does not mean that it would be legitimate to require everyone to be 'inclusive' and 'non-judgemental'.<sup>44</sup>

That there must be limits to this being a legitimate aim becomes clearer when it is considered that promoting tolerance is closely linked to preventing offence. In a pluralistic multicultural society perhaps one of the few certainties is that almost any act could be potentially offensive to somebody. Permitting offence to be a legitimate reason for restricting rights is thus problematic.<sup>45</sup> Nevertheless there may be good reason, partly in order to promote social harmony, to allow restrictions of some kinds of offensive acts (although of course any restriction would still have to pass the other elements of the proportionality test).

*Hammond v DPP*<sup>46</sup> raises these issues starkly. An elderly street preacher carried a sign saying 'Stop Immorality, Stop Homosexuality, Stop Lesbianism' and 'Jesus is Lord'. He attracted a very hostile crowd and was arrested. He was subsequently found guilty of displaying a sign which is 'threatening, abusive or insulting' within the sight of a person 'likely to be caused harassment, alarm or distress' under s.5 of the Public Order Act 1986. The Divisional Court rejected his appeal, holding that the restriction of Hammond's Art 10 rights was necessary for the prevention of disorder or crime because the police feared an outbreak of violence, given that a group of 30 to 40 people 'arguing and shouting' had gathered around him. While his arrest was on public order grounds, the terms of the offence focused on whether the sign was 'insulting'.<sup>47</sup> Although the Act required that the sign be

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<sup>43</sup> Barak, *supra* n. 1, Ch 9.

<sup>44</sup> F. Furedi, *On Tolerance: A Defence of Moral Independence* (London: Continuum, 2011) 7.

<sup>45</sup> See S. Tsakyrakis *supra* n.19.

<sup>46</sup> [2004] EWHC 69 (Admin).

<sup>47</sup> The law has subsequently been amended by the Crime and Courts Act 2013 s.57(2) to remove 'insulting' so it would now have to be demonstrated that the sign was 'threatening or abusive'.

‘within the sight of a person likely to be caused harassment, alarm or distress’ and it was a defence that the conduct was ‘reasonable’, such a focus on insult is still unsatisfactory.

While the sign was offensive, this in itself should not be enough for it to be prohibited. As Weinstein puts it, ‘building a tolerant society, particularly about matters as essential to one’s identity as sexual orientation, is a laudable societal goal. But... promoting tolerance is insufficient grounds for suppressing public discourse critical of homosexuality’.<sup>48</sup> In an often quoted statement<sup>49</sup> the ECtHR has stated that the right of freedom of expression includes the right to express ideas which ‘shock, disturb or offend’.<sup>50</sup> While the fear of public disorder is important to the case, the magistrates’ statement that there was a ‘need to show tolerance to all sections of society’ is extremely questionable in this context, even leaving aside the moral paralysis that would result if this maxim were to be taken seriously. It is unclear why individuals, as opposed to the state, must necessarily demonstrate such tolerance or why insult should necessarily be prohibited.

However, this does not mean that all hate speech should be permissible or that some ‘public discourse critical of homosexuality’ should not be suppressed. There is potentially a legitimate state interest in this area. The difficulty of course is deciding where to draw the line. The concept of offence does not provide adequate guidance, because it is subjective and variable. Waldron instead argues for an approach which focuses on the idea of dignity, rather than offensiveness. By dignity he means ‘upholding against attack a shared sense of the basic elements of each person’s status, dignity and reputation as a citizen or member of society in good standing.’<sup>51</sup> This is similar, although perhaps broader, to the ‘personhood’ argument put forward in the Introduction.<sup>52</sup> In doing so, Waldron prefers a change in terminology from hate speech, which he argues focuses too much on the subjective emotion of the speaker, to the idea of group libel. He argues this better

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<sup>48</sup> J. Weinstein, ‘Extreme Speech, Public Order, and Democracy: Lessons from The Masses’ in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).

<sup>49</sup> Although perhaps often not complied with. See e.g. G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 16 *OJLS* 705.

<sup>50</sup> *Handyside v UK* (1976) 1 EHRR 737.

<sup>51</sup> J. Waldron, *The Harm in Hate Speech* (Cambridge, Mass: Harvard University Press, 2012) 47.

<sup>52</sup> See *supra* at p15-17.



encompasses the type of harm that should be prohibited, by focusing on fundamental obligations to individuals, rather than focusing on offence.

An example of where it would be legitimate to prohibit such speech is in *Vejdeland v Sweden*.<sup>53</sup> In that case, four men were convicted under hate speech legislation for placing leaflets in a school. The leaflets called homosexuality a 'deviant sexual proclivity' which had a 'morally destructive effect on the substance of society', stated that homosexuals were responsible for the spread of HIV and AIDS and that 'homosexual lobby organisations' played down paedophilia and wanted to legalise it. This is evidently extremely offensive, particularly bearing in mind its unauthorised distribution in a non-public place and its intended teenage audience. It also undermined the dignity of gay people in a way in which *Hammond* does not. Differing opinions on whether or not something is immoral, even something as important as sexuality, do not intrinsically deny dignity in the way that the abusive statements do in *Vejdeland*.

Preserving the legitimacy of acting in a potentially offensive way protects both sides in this context to some degree. As the ECtHR said in *Dudgeon v UK*,<sup>54</sup> 'although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.'<sup>55</sup> Similarly, preventing all religiously based discussion or teaching opposed to homosexuality or legal rights for gay people in order to prevent offence would not be legitimate. As was held in relation to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 in *Re Christian Institute*,<sup>56</sup> it is important to consider that such speech may involve the manifestation of a religious belief. The Court there held that there had been a failure to consider the danger that 'explanations of sincerely held doctrinal beliefs'<sup>57</sup> could breach the Regulations as they stood at the time.

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<sup>53</sup> Application no. 1813/07 (9th Feb 2012).

<sup>54</sup> (1982) 4 EHRR 149.

<sup>55</sup> *Ibid.* at 167.

<sup>56</sup> [2008] IRLR 36.

<sup>57</sup> *Ibid.* at para 40, quoting from the House of Lords and House of Commons Joint Committee on Human Rights Sixth Report of Session 2006-07 on Legislative Scrutiny: Sexual Orientation Regulations.

While preventing mere offence is not a legitimate aim and the right of non-discrimination does not include a right not to be confronted with criticism, it should be noted that there may be other legitimate aims in some situations involving offensive speech or actions. Employers for example may have legitimate interests in controlling the actions of their employees at work in order to maintain efficiency or to promote their own ethos, and thus there may be a legitimate aim in prohibiting some conduct or expression at work on this basis.

In addition to protecting the right to manifest religious beliefs, the requirement of a legitimate aim also gives some protection against discrimination. 'A law whose only purpose is to discriminate is not for a proper purpose'.<sup>58</sup> This is particularly clear if the discrimination is constitutionally prohibited, but applies beyond this. An important word in the sentence quoted is *only*. A law providing for affirmative action for marginalised ethnic minorities in jobs where they are under-represented, discriminates on the basis of race, but is not designed for the purpose of discrimination. Its purposes are social inclusion, ameliorating historic injustices and so on. That a law's purpose is only to discriminate can be implicit in its terms. *Romer v Evans*<sup>59</sup> is such an example. An amendment to the Constitution of the State of Colorado prohibited all legislative, executive or judicial action which 'entitle[d] any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination' on the basis of sexual orientation. Kennedy J held that 'laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest'.<sup>60</sup> Such a reason violates the principle of equal respect owed to all in a liberal democracy.

More difficult questions arise over when it is legitimate to enforce morality, what Perry has referred to as 'protecting moral truth'.<sup>61</sup> It is of course true that governments are motivated to act for moral reasons. The political answer that something must be prevented or done 'because this is wrong' is likely to be the case for a whole range of laws and policies from international development to laws

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<sup>58</sup> Barak supra n. 1 at 251.

<sup>59</sup> 517 US 620 (1996).

<sup>60</sup> Ibid. at 634 (emphasis in original).

<sup>61</sup> M. Perry, *The Political Morality of Liberal Democracy* (Cambridge: Cambridge University Press, 2010).

prohibiting child pornography. In fact, it would be concerning if government action was not taken for moral purposes. Therefore by their very nature governments constantly demonstrate moral values. As Greenawalt argues, by going to war a country rejects the religious view that all killing violates God's wishes and by providing higher education equally to men and women rejects the religious view that women should 'occupy themselves with domestic tasks'.<sup>62</sup> These principles may well be rejected explicitly as well, for example in state education. This though is not an illegitimate basis for restricting relevant rights, for a number of reasons.

Firstly, the government does not go to war to in order to demonstrate the wrongness of a moral or religious view. As before when discussing discrimination, this discussion is only relevant if it *only* involves 'moral disagreements that do not implicate a legitimate governmental interest'.<sup>63</sup> If there are other reasons a government can point to, the fact that moral concerns are involved is irrelevant. For this reason, the restriction on enforcing morality does not apply where actual harm is caused. If harm will be directly or indirectly caused to another person then preventing it will always be a legitimate aim. For example, sexual orientation discrimination might be outlawed because of a feeling that such discrimination is wrong. The reason why it is considered wrong is a moral reason: that homosexuality is a morally neutral trait, or at least that its wrongness is so minor that it does not justify discrimination. None of this, though, means that the state is impermissibly acting for moral reasons; the state acts to prevent harm caused by that discrimination. Secondly, in these kinds of situations the government action only places 'atmospheric burdens' on the belief. It does not coerce belief or behaviour. As discussed above, atmospheric burdens are not sufficient to constitute an interference with a right. Finally, because this is simply an inevitable part of governing, it cannot be a violation.

However, the prohibition on acting to enforce morality does mean that the purpose of 'promoting a Christian way of life' for example would be illegitimate.<sup>64</sup> Kumm argues that, 'there is little doubt that any court in a liberal constitutional democracy would insist that any reasons that depend on the premise that a

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<sup>62</sup> K. Greenawalt, 'Five Questions about Religion Judges are Afraid to Ask' in N. Rosenblum (ed.), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton: Princeton University Press, 2000).

<sup>63</sup> Perry *supra* n.61 at 93.

<sup>64</sup> M. Kumm, 'Political Liberalism and the Structure of Rights' in G.Pavlakos (ed.), *Law, Rights and Discourse* (Oxford: Hart Publishing, 2007) 142-6.

Christian way of life is the right way of life are simply irrelevant to the issue'.<sup>65</sup> The Introduction explained the importance of the right to freedom of conscience. This is another facet to this idea. As Kumm states, 'imposing upon the individual a particular conception of the good life through the coercive means of the law' is illegitimate.<sup>66</sup> Perry similarly argues that if the state were allowed to legislate on the basis of morality, it would take away this right. These two arguments both have the same basic idea: that people are free to define their own aims and thoughts about the deepest aspects of life. As Kumm puts it, 'it is not within the jurisdiction of public authorities to prescribe what the ultimate orientations and commitments of an individual should be.'<sup>67</sup>

Preventing 'moral harm', that is the idea that certain behaviour is harmful to the 'moral health' of participants, would also not be a legitimate aim. This does not mean that only precise tangible harms are relevant. Aiming to prevent symbolic harm can be a legitimate reason. For example, allowing the redistribution of tasks in employment because an employee objects to an aspect of their job for discriminatory reasons, causes no tangible harm where this does not affect the service given. The service is not denied or delayed. However, there is still symbolic harm as the user is not receiving the service on the same terms as others and thus is denied formal equality. Preventing this will be a legitimate aim.

None of this means that religious exemptions to non-discrimination laws are necessarily illegitimate. Crucially they have the aim not of advancing religion: the type of religious belief in question is usually irrelevant. Instead their aim is to advance religious freedom, and thereby actually advance the type of freedom threatened by morally based legislation.

### Rational Connection

The second issue is that of rational connection or suitability. This is a fairly weak factual test: is the measure capable of advancing the legitimate aim put forward for it?<sup>68</sup> It does not require that the measure completely fulfil the purpose or matter

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<sup>65</sup> Ibid. at 143-4.

<sup>66</sup> Ibid. at 142.

<sup>67</sup> Ibid.

<sup>68</sup> R. Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 *Ratio Juris* 131.

that another measure might fulfil the aim more efficiently. This compares to rational basis review in US law. In practice, cases are not likely to fail at this stage.

An example of a failure on this ground, however, was *Benner v Canada (Secretary of State)*.<sup>69</sup> The citizenship rules for children born before 1977 meant that the child of a Canadian father or unmarried mother who was born abroad could acquire Canadian citizenship at birth. The child of a married Canadian mother had to apply for citizenship. This process included swearing an oath of allegiance and passing criminal and security checks. Benner had serious criminal convictions and was denied citizenship. The legitimate aim claimed was to help ensure the safety of Canadian citizens, which was clearly legitimate. However, this had no rational connection to a discriminatory policy: there was no reason why the children of Canadian mothers would pose more of a risk than the children of Canadian fathers.<sup>70</sup>

In some cases though there may be arguments between the parties as to whether or not a measure does in fact advance the aim. Some discretion will be given to the government but the amount is likely to depend on the nature of the policy question and the kind of uncertainty in question.<sup>71</sup>

### Necessity

The third issue is that of necessity or no less restrictive means. A measure will be 'necessary' if there is no other measure which would impair the right to a lesser degree while equally fulfilling the conflicting purpose. However, it is up to the state to decide what level of achievement of the purpose they wish to attain.<sup>72</sup> If there is another measure which would interfere with the right less but not equally fulfil the purpose then the measure will not fail this test.<sup>73</sup> It therefore requires

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<sup>69</sup> [1997] 1 SCR 358.

<sup>70</sup> This policy existed for historical reasons: originally only fathers could pass citizenship onto their children. The law was then amended to somewhat remedy this. However as Kumm argues 'traditions, conventions and preferences' cannot be used as a legitimate aim unless they are linked to 'a plausible policy concern'. (M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141, 159) Security reasons were all that was left for the Canadian government.

<sup>71</sup> Grimm *supra* n.7 at 390.

<sup>72</sup> J. Rivers, 'Proportionality, Discretion and the Second Law of Balancing', in G.Pavlakos (ed.), *Law, Rights and Discourse* (Oxford: Hart Publishing, 2007).

<sup>73</sup> Alexy, *supra* n.3 at 397-401.

consideration of hypothetical solutions. As discussed above in the context of the *Oakes* test, it is important to separate this from the proportionality stage. It does not require a cost-benefit analysis of policies which affect the purpose to differing degrees. The existence of other policies which are not as effective, but are less rights-restrictive, may though be relevant for the proportionality test.

Necessity is aimed at the problem of overinclusivity. However, it does not prohibit overinclusiveness if this is necessary to fulfil the purpose. If because of impossible difficulties of administration it is only possible to be under- or over- inclusive, over-inclusivity is permitted. For example, security measures at airports such as body and luggage scanners are aimed at preventing terrorist and other attacks. Since there is no way a priori to fully distinguish those who are intent on committing such acts from others, such a policy must be necessarily over-inclusive and there is no less restrictive means that can be used.

### Balancing

Alexy gives a detailed analysis of how the balancing stage should be carried out. The most important aspect of this is his Law of Balancing, which states that: 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'<sup>74</sup> Thus the more a right is infringed, the more justification there must be for doing so.<sup>75</sup> Essentially then, the concept requires the extent and seriousness of the interference to be balanced against the importance of the conflicting interests and prohibits measures that impose a disproportionate burden.

Klatt and Meister, drawing on Alexy's work, argue that there are three stages to the balancing process. These are:

1. Establishing the degree of infringement with a human right
2. Establishing the importance of satisfying the competing principle [this may be another right or the public interest]
3. Establishing whether or not the importance of satisfying the competing

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<sup>74</sup> Ibid. at 102.

<sup>75</sup> Rivers *supra* n.72.

principle justifies the infringement with the human right.<sup>76</sup>

In establishing the degree of the infringement with the right, Alexy distinguishes between light, moderate and serious interferences. There is though, as he states, no necessary reason for a triadic scale, other than ease of use compared to a more complex one.<sup>77</sup> Therefore, while the thesis will consider the degree of infringement of the right, it will not assign a precise category to this, since the categories really represent points on a sliding scale.

The second stage requires assessment not only of the importance of the aim, but also how likely it is that the consequences sought to be avoided will result. In considering this, Alexy's Second Law of Balancing comes into play. This states that, 'the more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premisses'.<sup>78</sup>

At the third stage, these two considerations are balanced against each other. Balancing in this context therefore clearly means 'ad hoc' rather than 'categorical balancing'.<sup>79</sup> That is, the enquiry is not about whether a right or principle is more important than another in general, but which right is more important in this specific context. For example, the right to life is generally considered more important than the right to respect for a family life, but it may not be in a specific situation. The balancing test therefore is only concerned with marginal benefits and disbenefits – the marginal decrease in the right compared to the marginal increase in the opposing interest or right.

In summary, as Grimm states, the balancing test requires consideration of the following:

1. How deeply the right is infringed
2. How serious the danger for the good protected by the law is
3. How likely it is that the danger will materialise
4. The degree to which the impugned law will protect the good against the

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<sup>76</sup> M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) 57.

<sup>77</sup> Alexy *supra* n.3 at 408.

<sup>78</sup> *Ibid.* at 418.

<sup>79</sup> S. Evans and A. Stone Sweet, 'Balancing and Proportionality a Distinctive Ethic?', Paper given at VIIth World Congress of the International Association of Constitutional Law, Athens, 11-15 June 2007.

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While balancing is an essential part of the proportionality test, the metaphor of balancing should not be taken too far. Unlike the necessity test which is mainly factual, the balancing test is strongly normative.<sup>81</sup> There is no common metric against which the two interests are balanced. It is not like judging 'whether a particular line is longer than a particular rock is heavy'.<sup>82</sup> Rather it is about assessing 'normative considerations of comparative importance.'<sup>83</sup>

### **Proportionality and Conflicts Between Freedom of Religion and Non-Discrimination**

There is a great deal of literature about the benefits or otherwise of proportionality. I will primarily discuss its benefits for the present context of the relationship between freedom of religion and non-discrimination, although more general advantages of proportionality will also be considered. While proportionality is probably useful in many more contexts than the present, this would require examination beyond what is offered here and so my inquiry is limited.

#### Conflicting Claims

This discussion starts on the basis, as discussed in the Introduction, that both sides' claims have value, but also that this issue is often characterised by distrust and animosity, amounting in some cases to a 'culture war', where neither side is likely to give up its demands.

Even if both sides' claims are legitimate, this of course does not mean that they should necessarily be accorded equal weight in a particular case. Even though there is legitimacy in the claim to live in accordance with one's religious beliefs, that does not necessarily mean that a service provider may discriminate when providing a general service which is not obviously 'sexualised'.<sup>84</sup> Similarly, the claim not to be discriminated against has value but will probably not be accepted where a religious

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<sup>80</sup> Grimm *supra* n.7 at 394.

<sup>81</sup> J. Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *CLJ* 174.

<sup>82</sup> Scalia J in *Bendix Autolite Corp. v Midwesco Enterprises* 486 US 888, 897 (1988).

<sup>83</sup> Evans and Stone Sweet *supra* n.79 at 4.

<sup>84</sup> C.F. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *OJLS* 729, 750.



organisation wants to discriminate in appointing its religious leaders. We are left therefore in a situation of opposing valuable but varying claims. What is clear is that there is no full agreement on the morality of homosexuality at present and that some have religious objections to, for example, gay relationships. Evidently also, most gay people are not content with the less than equal situation which persists at present. What is also in flux is the role of religion in society, including perhaps the diminution of its privileged role.

The previous chapter has demonstrated the problem of drawing categorical tests which only protect non-discrimination or religious freedom rights in strictly defined categories, rather than on the particular circumstances of the situation. In contrast, under proportionality, the aim is to 'optimise' the rights: to give the greatest protection of a right that is compatible with the protection of other rights. Since these rights compete, each 'limits the legal possibility of satisfying the other'.<sup>85</sup> Importantly, rights like non-discrimination or freedom of religion are not all or nothing rules, but rather are principles that can be satisfied to varying degrees. When these rights compete, 'this means neither that the outweighed principle is invalid nor that it has to have an exception built into it'<sup>86</sup> but that one right outweighs the other, according to its weight in the particular circumstances.

#### Proportionality's Relevance

Proportionality is ideally suited for deciding these cases. It can provide a structure within which to fairly adjudicate complex and variable decisions and also reduce tensions, thereby lessening the culture wars problem. One of its main advantages is that it is context specific and fact specific.

The fact that these decisions are complex and variable means that a categorical rule is likely to fail to address the different nuances between them, as has been demonstrated. As both claims have value, it is not appropriate for one always to win over another. The question of whether freedom of religion is more important than freedom from discrimination is not one that can be answered in the abstract, but rather only in relation to a particular problem. As Samuels has pointed out, proportionality requires contextualised reasoning, which 'moves away from the

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<sup>85</sup> Alexy *supra* n.3 at 51.

<sup>86</sup> *Ibid.* at 50.

idea of rights as individualistic fixed entitlements that trump other considerations.’<sup>87</sup>

As explained, the proportionality test is not about whether a right generally is more important than another as it only leads to a judgment for a particular fact situation.<sup>88</sup> Even then the inquiry is kept within strict bounds, since it only asks whether the marginal benefit of a particular measure is sufficient compared to the interference caused by the measure.<sup>89</sup> Such an approach not only highlights the actual dispute in issue, but this narrow focus also itself helps to reduce tension. Negotiation theory draws attention to the benefits of ‘fractionating’ conflicts. If conflicts over a large issue, here say the role and position of religion in society, can be broken down into smaller issues, progress is more likely.<sup>90</sup>

The opposite can also be true: too expansive a judgment can also spark severe tensions where these were manageable before. Nussbaum refers to an extreme example in the reaction to a case in India involving the rights of Muslim women to receive maintenance after divorce beyond the period of *iddat* recognised in Islamic law.<sup>91</sup> The Supreme Court judgment not only awarded the claimant maintenance but the (Hindu) Chief Justice interpreted Islamic sacred texts and criticised Islamic practices. This led to widespread protest, some violent, and its political use by Hindu fundamentalists to criticise Islam.<sup>92</sup> This is of course an unusual case, but the possibility of cases being used in such a way remains.

Part of the ‘culture wars’ problem is that one small decision becomes a marker for whether the courts, and by extension the whole of the governmental and political system, accepts or rejects an entire way of thinking. However, under proportionality, a case can stand for only its own facts and not as a symbol for an entire cultural disagreement. Beatty refers to an Israeli case, *Horev v Minister of Transportation*,<sup>93</sup> as a possible example of this.<sup>94</sup> The issue was whether traffic

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<sup>87</sup> H. Samuels, ‘Feminizing Human Rights Adjudication: Feminist Method and the Proportionality Principle’ (2013) 21 *Fem Leg Stud* 39, 44.

<sup>88</sup> R. Alexy, ‘On Balancing and Subsumption’ (2003) 16 *Ratio Juris* 433.

<sup>89</sup> Barak *supra* n.1 at 350-2.

<sup>90</sup> M. Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (Lawrence: University Press of Kansas, 1990).

<sup>91</sup> *Mohd. Ahmed Khan v Shah Bano Begum* (1985) SCR (3) 844.

<sup>92</sup> M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) Ch 3.

<sup>93</sup> [1997] IsrSC 51(4) 1.

could be banned in an ultra-Orthodox street on the Sabbath. Barak J used an extremely fact-specific proportionality analysis to resolve the case. He argued that if the street was closed all that would be required from non-religious residents was a two-minute detour, balanced against the right of the religious residents to tranquillity during prayer time. He did not permit closure on the whole of the Sabbath as had been claimed. It is therefore possible that, 'the judicial inquiry thus turned a dispute that was viewed as a bitter cultural war and a matter of fundamental principle into a simple trade off that most reasonable people would accept'.<sup>95</sup> Since proportionality leads to a limited enquiry which does not involve repeated discussion of (much less judgment on) the morality of homosexuality or the morality of discriminatory religious beliefs generally, progress is more likely.<sup>96</sup>

Although not suggesting that law can necessarily solve every problem, a Solomonic judgment, which looks in detail at the claims made, may in some cases be able to lessen tensions and resolve issues to the satisfaction, although not complete satisfaction, of the parties. Since it 'emphasizes facts and questions of degree, rather than principles and categorical distinctions... [it] allows the judiciary to moderate the rhetorical exaggeration that characterizes how claims are presented in the political sphere'.<sup>97</sup> It is, as Barak puts it, 'balancing writ small'.<sup>98</sup>

*Gay Rights Coalition v Georgetown University*<sup>99</sup> is an example of how certain kinds of judgments can reduce tensions. An LBG student society wished to receive official recognition at a Catholic university. This was opposed on the basis that it would endorse acts contrary to Catholic teaching. The deciding judgment separated the various elements of the society's claim and held its real need was for the practical benefits of recognition (such as access to university resources in the form of room bookings, a postbox and so on), but that this could be achieved without university endorsement of their *message*. Thus Eskridge argues that the judge, by preventing

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<sup>94</sup> D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) 58-60.

<sup>95</sup> M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification' (2011) 59 *Am J Comp L* 463, 471.

<sup>96</sup> C. Sunstein, 'Incompletely Theorized Agreements' (1994) 108 *Harv L Rev* 1733.

<sup>97</sup> Cohen-Eliya and Porat *supra* n.95 at 470.

<sup>98</sup> A. Barak, 'Proportionality and Principled Balancing' (2010) 4 *Law & Ethics of Human Rights* 1, 8.

<sup>99</sup> 536 A.2d 1 (D.C., 1987).

the case from being dominated by arguments on the rights or wrongs of Catholic policy, allowed a compromise to be reached which benefited both sides.<sup>100</sup>

Of course disagreements still remained but this is in some way a benefit. The decision did not artificially end the debate by imposing a conclusion. Both sides could continue to express their different moral views through their policies and actions. After the case was decided, and after some extremely complicated political manoeuvring, the law was amended so that the non-discrimination law did not cover religious institutions such as Georgetown. Georgetown, however, still stuck to the terms of the agreements.<sup>101</sup> A workable compromise and dialogue must therefore have been established. It would be possible of course still to use the case as evidence of either the outdated homophobia of the Catholic Church, or of the overweening power of the liberal state but this is more difficult when both parties are reconciled.

As Paterson puts it, 'in reconciling the competing claims, the Court sought to accommodate both claims by way of an order carefully tailored to lessen the sum total of interest infringement such that the final result was as respectful of both interests as possible.'<sup>102</sup> While this case did not use a proportionality analysis, proportionality is inherently capable of ensuring such 'respectful' judgments result, since proportionality requires rights to be optimised where they conflict.<sup>103</sup> Thus the result is not that one right applies completely and another does not, but that there is conciliation between them, where both rights are protected as far as they can be without damaging the other.

I do not wish to hold this case out as an entirely unproblematic solution. It dates from 1979 and the District of Columbia was the first jurisdiction in the US to prohibit sexual orientation discrimination. As Eskridge notes (himself previously a gay academic at Georgetown), it could be seen as leading to a separate but equal situation, which potentially understates the hurt felt by gay students in being

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<sup>100</sup> W. Eskridge, 'A Jurisprudence of 'Coming Out': Religion, Homosexuality and Collisions of Liberty and Equality in American Public Law' (1997) *Yale LJ* 2411.

<sup>101</sup> L. Lacey, 'Gay Rights Coalition v Georgetown University: Constitutional Values on a Collision Course' (1985) 64 *Or L Rev* 409.

<sup>102</sup> H. Paterson, 'The Justifiability of Biblically Based Discrimination: Can Private Christian Schools Legally Refuse to Employ Gay Teachers?' (2001) 59 *U Toronto Fac L Rev* 59, 96.

<sup>103</sup> Alexy supra n.3 at 44-86.

treated differently.<sup>104</sup> Nevertheless, it demonstrates how judgments can lessen social tensions when decided on ‘minimal’<sup>105</sup> grounds.

Proportionality’s case-specific nature also avoids some of the rhetorical problems associated with ‘slippery slope’ arguments. Without underestimating the power of particular cases to be controversial, what can make a controversy far more heated are the, real or imagined, consequences of that decision. Part of the reason why these cases can fall so easily into the narrative of ‘culture wars’ is because they are particularly characterised by rhetorical exaggeration. Thus, in the same way as *Horev* became not just a dispute about the use of one street, but an argument about the cultural and religious nature of Israel, so a conflict about the policies of one Bed and Breakfast business for example, becomes a symbolic high-level dispute about equality and the place of religion in the public sphere. However, if decisions are case-specific, based on the particular balancing of the relevant facts, there is less room for such arguments because the result could always be different in different circumstances. Evidently these are controversial issues on which there is and should be considerable discussion. It is not suggested that proportionality, or indeed any legal test, should foreclose any of this debate in the public or political arenas. However, in a legal context, narrowing the debate can be beneficial.

As well as being factually specific, proportionality is also factually contingent. This is relevant in ensuring that courts value and respect claimants, even if they ultimately lose. By factually contingent I mean that a decision is likely to depend on a number of factors. Importantly, this means that winners and losers are not created permanently – the result may always be different in another case. As Stone Sweet and Mathews put it:

‘The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well

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<sup>104</sup> W. Eskridge and G. Peller, ‘The New Public Law Movement: Moderation as a Postmodern Cultural Form’ (1990) 89 *Mich L Rev* 707.

<sup>105</sup> C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999).

be decided differently, depending on the facts.’<sup>106</sup>

In deciding that both freedom of religion and freedom from discrimination are rights and therefore count in the balance, both sides are validated and feelings of exclusion can be lessened. The danger of a more categorical test or rule is that it not only creates ‘all-out winners and losers’ but also that it ‘delegitimizes [the losing side’s] demands in principle, as against showing how they, alas, cannot be accommodated in practice, given other important such demands. Naturally, it breeds anger and alienation.’<sup>107</sup>

This benefit can be demonstrated in other aspects of the proportionality test as well as the balancing test. A broad interpretation (although not part of the proportionality test, but as demonstrated above, linked to it) of interference means that a holistic view of religious freedom and non-discrimination can be taken. The requirement of legitimate aim ensures that these rights are only limited for appropriate reasons, thus preventing restrictions based on mere animus and demonstrating that these rights are important. The least restrictive means test should be able to identify circumstances where a conflict can be avoided or lessened. Proportionality can thus be a conciliatory and ‘wounds-healing’ form of argumentation.<sup>108</sup>

Proportionality’s fact specific nature is thus extremely important, for reasons of principle, and in its more practical effects in its ability to lessen tensions and to validate both sides’ claims.

#### Proportionality as Part of the Culture of Justification

Another great advantage of proportionality is that it requires a body that seeks to restrict rights to provide sufficient and suitable justification to those affected by these acts. <sup>109</sup> Proportionality thus inherently requires deliberation and

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<sup>106</sup> A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum J Transnat’l L* 73, 88.

<sup>107</sup> C. Taylor, ‘Living With Difference’ in A. Allen and M. Regan (eds), *Debating Democracy’s Discontent: Essays on American Politics, Law, and Public Philosophy* (Oxford: Oxford University Press, 1998) 218.

<sup>108</sup> W. Sadurski, “Reasonableness” and Value Pluralism in Law and Politics’ in G. Bongiovanni et al. (eds), *Reasonableness and Law* (Dordrecht: Springer, 2009) 140.

<sup>109</sup> Kumm, *supra* n.72. Although Chan has noted that courts sometimes reverse this burden of proof, this should, as she argues, be resisted, although the nature and extent of the evidence demanded will vary: C. Chan, ‘Proportionality and Invariable Baseline Intensity of

justification.<sup>110</sup> This is part of the broader ‘culture of justification’. What matters is not (or not only) *who* has the power to make a decision, as in a ‘culture of authority’, but *why* the decision was made.<sup>111</sup>

Calhoun argues that we should think about the ‘constitutional losers’ in litigation.<sup>112</sup> It is of course in the nature of a legal system that there will be winners and losers, and this is not in itself problematic, but she argues that judges have obligations to the parties beyond deciding fairly who should win and lose. Calhoun links this to the idea of ‘constitutional stature’, which all those who bring a rights case possess. Since they possess this constitutional stature, judges ‘should not characterize constitutional losers as valueless, as persons whose consent does not matter to judicial legitimacy, as wrongdoers rather than worthy and respected proponents of non-frivolous constitutional arguments’.<sup>113</sup> Rather, the loser has both a right for the winner’s claim to be ‘justified on some ground found satisfactory to an outside arbiter’<sup>114</sup> and for the outside arbiter to justify, and not merely enforce, their decision on the loser. Otherwise this ‘violates justices’ obligations to citizens’ and has the potential to cause ‘outrage’ among those who do not agree with the judgment, because they can correctly perceive that their claim is thought of as worthless.<sup>115</sup>

By requiring justification, proportionality preserves the interests of constitutional losers by requiring that the state justify why the right has been burdened. It means that both claims are assessed and taken seriously. Furthermore the language of justification treats both sides as *worthy* of justification and takes parties’ concerns seriously and as legitimate.<sup>116</sup> Reason giving treats people with respect as capable of making and understanding rational arguments.

Although to some extent justification is inherent in the idea of judgment giving, proportionality is particularly intimately connected with it. It provides more

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Review (2013) 33 *LS* 1.

<sup>110</sup> R. Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *ICON* 572. See also Samuels *supra* n.87 who argues that in doing so, proportionality has commonalities with feminist theory.

<sup>111</sup> Cohen-Eliya and Porat *supra* n.95.

<sup>112</sup> E. Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (Oxford: Oxford University Press, 2012).

<sup>113</sup> *Ibid.* at 4-5.

<sup>114</sup> R. Brown, ‘Liberty: The New Equality’ (2002) 77 *NYU L Rev* 1491,1556.

<sup>115</sup> Calhoun *supra* n.112.

<sup>116</sup> *C.f.* Taylor *supra* n.107.

opportunity to explain the difficulties inherent in a rule or its application compared to categorical tests. For example, in the US, under *Smith*, it would be sufficient to prove that a law was not aimed at any particular religious group. But this is not the core of the problem. A religionist could argue with some justification that whether or not the law was aimed at them is irrelevant to them: the problem is that they are being denied the opportunity to do something or are required to do something to which they have a religious objection. This core objection would be considered under a proportionality test, but not under that test. Similarly a blanket constitutional rule that, owing to a requirement of state secularism, forbade all state employees from demonstrating any religious belief in employment, does not provide any opportunity for religious people to challenge this or to receive justification for it. Indeed, since any challenge would be a challenge to, rather than under, a constitutional rule, as Taylor vividly puts it: 'they are not only being asked to make a sacrifice, they are being told they are barbarians even to see this as a sacrifice.'<sup>117</sup> Again, this affects a person's status as a constitutional loser.

Importantly, this consideration of the respective burdens and benefits of an act is based on a particular set of facts. It therefore provides an individualised decision since it considers the justifiability of the interference as it applies in each case. As Beatty argues, 'the theory behind proportionality is not intended to merely categorize a case into a group which solves the problem. Rather, proportionality is aimed at a constant review of the existence of a rational justification for the limitation imposed on the right, while taking into consideration each case's circumstances'.<sup>118</sup> It makes the burden or justification central to the process of deliberation. Proportionality is therefore connected to the idea of reasonable accommodation since the requirement of individualised justification may lead to accommodation. A general policy, such as a school uniform policy, may be entirely defensible. However, it may be a lot harder to show why the policy must be applied without an exception in a particular case.<sup>119</sup>

Deliberation and justification are also important in acting as a counter-majoritarian check. This is particularly relevant to the issues under discussion in the thesis. Both

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<sup>117</sup> Taylor *ibid.* at 216.

<sup>118</sup> Beatty *supra* n.94 at 459.

<sup>119</sup> P. Bosset, 'Mainstreaming Religious Diversity in a Secular and Egalitarian State: the Road(s) Not Taken in *Leyla Sahin v. Turkey*' in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge: Cambridge University Press, 2013). Also see *Bull v Hall and Preddy* [2013] UKSC 73 at paras 45-49.



conservative religious groups and gay people can be politically unpopular. The history of gay people is one of oppression, with remaining inequality in many areas. Paradoxically, conservative religious organisations and individuals can also be unpopular because of their wish to discriminate and apparent wish to undo hard fought rights. Because religious belief may rely on revelation or adherence to authority, whether a written text or a religious hierarchy, it may be difficult to understand if it is not shared. Furthermore, simply because both groups are likely to be minorities, and therefore their concerns may not be foremost in the minds of those making policies, a strong requirement of justification guards against the 'vice of thoughtlessness'.<sup>120</sup> Policies can overly restrict rights not because of any malice but because their impact has not been thought through or because those making policies over-estimate the importance of their goals merely because they are focused on them. Proportionality helps to guard against this danger.

The kind of justification given is also relevant. Kumm links this to Rawls' idea of public reason: the types of reasons the state uses to defend a policy should not rest on a 'comprehensive conception of the good', which is a reason relating to 'what it means to live a good, authentic life', but should instead rely on 'public reason'. A public reason is a principle that citizens can affirm on the basis of a shared rationale and that can therefore be accepted even if they do not share the same conception of a 'good life'. Reasons should not be given that are 'based on their own exclusive 'comprehensive' views (e.g. religious beliefs, or philosophical or moral views), that those with alternative world views cannot fully comprehend.'<sup>121</sup> As discussed above, it is not enough to prohibit behaviour merely because it is thought wrong. The requirement of public reason enables reciprocity and the possibility of dialogue between the parties since it provides a shared basis on which to talk.

#### Further Benefits and Potential Objections

Proportionality also has many benefits which are relevant to a wide range of cases. Firstly, proportionality allows subtle distinctions to be made between cases. Issues about the appropriate balance between religious liberty and non-discrimination are not straightforward and there is no advantage in artificially making them so.

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<sup>120</sup> Kumm supra n.70 at 163.

<sup>121</sup> P. Cumper and T. Lewis, 'Public Reason', Judicial Deference, and the Right to Freedom of Religion and Belief (2011) 22 *KLJ* 131, 135.

Proportionality ‘combines flexibility and structure’.<sup>122</sup> On the one hand it responds flexibly to each case. On the other hand though, this flexibility is not unconstrained. The test is structured. This structure creates a ‘division of argumentative labour’ which allows ‘the parcelling of various opposing considerations’<sup>123</sup> and means that the reasoning is transparent. It requires judges to ‘show their working out’.<sup>124</sup> As Coffin argues, ‘open balancing restrains the judge and minimizes hidden or improper personal preferences by revealing every step in the thought process... it offers a full account of the decision-making process for subsequent professional assessment and public appraisal.’<sup>125</sup>

Against this though, balancing has been criticised as being a process that takes place in an ‘opaque black box’,<sup>126</sup> where it is unclear what leads to the decision. Habermas has for example criticised the process of weighing rights as taking place ‘either arbitrarily or unreflectively, according to customary standards and hierarchies.’<sup>127</sup> Such criticisms are unfair. To some extent, moral reasoning has to be impressionistic, especially given the time and resource constraints courts are under, but this is not a problem particularly related to proportionality. A judgment using proportionality should explain the reasons for assigning value to a particular interest or argument and for choosing one value over another. It is more transparent than many categorical tests where it may not be apparent why a case is placed in one category rather than another, particularly in hard cases.<sup>128</sup> Indeed courts may not be clearly able to say why cases are placed in one category rather than another.<sup>129</sup>

In any case, balancing is often inherent in decision-making, even with categorisation. In deciding when rights should be protected, the rights will have to

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<sup>122</sup> M. Cohen-Eliya and I. Porat, ‘The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law’ (2009) 46 *San Diego L Rev* 267, 380.

<sup>123</sup> C. Panaccio, ‘In Defence of Two-Step Balancing and Proportionality in Rights Adjudication’ (2011) 24 *Can J L & Jurisprudence* 109, 120.

<sup>124</sup> T. Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (2007) 70 *Mod L Rev* 250, 268.

<sup>125</sup> F. Coffin, ‘Judicial Balancing: the Protean Scales of Justice’ (1988) 63 *NYU L Rev* 16, 25.

<sup>126</sup> S. Gottlieb, ‘The Paradox of Balancing Significant Interests’ (1994) 45 *Hastings LJ* 825, 839.

<sup>127</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr W. Rehg (Malden MA: Polity Press, 1996) 259.

<sup>128</sup> As the previous chapter demonstrated.

<sup>129</sup> See Jackson’s discussions of *R v Keegstra* [1990] 3 SCR 697 compared to *R.A.V. v St Paul* 505 US 377 (1992) in ‘Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on Proportionality, Rights and Federalism’ (1999) 1 *U Pa J Const L* 583.

be balanced at some point, otherwise it would be impossible to say which right or interest is more important than another. For example in US free speech law, regulation based on viewpoint is usually prohibited, but time, manner and place requirements are permitted. This is based on an implicit balancing that freedom of speech is more important than the harm caused by hate speech. In considering categorisation the court will have thought about an archetypal case or the particular case in question, but this ruling will be applied in many different contexts. However, in so doing the court is then denied the benefits of flexibility. Categorisation can thus lead to overly formalised rulings.

A different kind of argument is that proportionality makes it too easy to ‘balance away’ rights<sup>130</sup> or that it fails to protect rights because it does not treat them differently from other kinds of interest.<sup>131</sup> It is true that under legal systems which use proportionality rights tend to be widely drawn and, as can be seen from the structure of rights provisions under the Charter or the ECHR, potentially defeated by public interest justifications. A ‘right’ in this sense may therefore look different from Dworkin’s idea of rights as trumps.<sup>132</sup> However, this does not mean rights become meaningless. Rights are still given priority in the sense that justification is required for their infringement and that only particular types of reasons will be sufficient to infringe them. Furthermore, as Klatt and Meister point out, at the balancing stage, ‘higher abstract weights can be given to rights than other considerations’.<sup>133</sup>

Balancing is not an unprincipled process. If rights are not absolute (as these rights are not) then balancing them based on the particular circumstances is the most principled a resolution could be.<sup>134</sup> The creation of a balance between them creates its own principle.<sup>135</sup> Having a wide interpretation of a right, with a narrower range of cases where that right is violated is coherent. It is more honest to say that a measure interferes with, for example freedom of speech, but that the interference

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<sup>130</sup> R. Dworkin, *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2006).

<sup>131</sup> Tsakyrakis, *supra* n.19.

<sup>132</sup> K. Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

<sup>133</sup> M. Klatt and M. Meister ‘Proportionality – A Benefit to Human Rights? Remarks on the ICON controversy’ (2012) 10 *ICON* 687, 690.

<sup>134</sup> R. Alexy *supra* n.3.

<sup>135</sup> M. Minow, ‘Is Pluralism an Ideal or a Compromise?’ (2008) 40 *Conn L Rev* 1287.

is justified, rather than the act does not come under the category of protected speech at all.

A further criticism is that proportionality is too subjective and the results too dependent on the views of those hearing them because it does not provide sufficient guidance to judges as to how cases should be dealt with.<sup>136</sup> It is argued that this poses problems of legitimacy for courts.<sup>137</sup> Of course it is subjective to some degree, but the high requirement of justification, the structured decision-making process and the fact that these decisions are made with reference to the values immanent in the legal system mean that this problem is more than outweighed by its advantages.<sup>138</sup> Subjectivity is inherent in all kinds of judging, particularly in relation to constitutional issues, not just proportionality. This is particularly true in clash of rights cases where both are considered by the legal system to be *prima facie* valuable.

It could similarly be argued that proportionality is too administratively complex and uncertain. There are two issues here. Firstly, the fear is that by giving rights to religious conduct, authorities will be paralysed by the number and extent of claims made. This seems unlikely. The American concept of strict scrutiny as applied in *Sherbert v Verner*,<sup>139</sup> a test which required greater justification than proportionality, did not create a flood of cases or make administration unwieldy.<sup>140</sup> It therefore seems unlikely that proportionality will cause major practical problems. Secondly, there is the fear that authorities will not know how cases will be decided and will have to 'second-guess' the court's decision. Evidently, those making decisions need to be able to act with a high degree of confidence. But proportionality analysis is not entirely freewheeling. Over time, decisions will build up which will show the main parameters for the rights. Some discretion will also be given to the original decision-maker.<sup>141</sup>

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<sup>136</sup> F. Urbina, "Balancing as Reasoning" and the Problems of Legally Unaided Adjudication: A reply to Kai Möller' (2014) 12 *ICON* 214.

<sup>137</sup> *Ibid.*

<sup>138</sup> Alexy *supra* n.3; Barak *supra* n.1 Ch 18; Beatty *supra* n.94.

<sup>139</sup> 374 US 398 (1963).

<sup>140</sup> A. Adamczyk et al., 'Religious Regulation and the Courts: Documenting the effects of *Smith* and RFRA' (2004) 46 *J Church & St* 237.

<sup>141</sup> The issue of how and when this discretion will be exercised is complex and there are numerous points in the proportionality test at which deference could be exercised. See Brady, *supra* n. 4, Rivers, *supra* n.81 and Chan *supra* n.109.

A different kind of criticism has been made that proportionality pretends to evade moral reasoning by creating ‘the illusion of some kind of mechanical weighing of values’<sup>142</sup> and thus it ‘depoliticises’ rights.<sup>143</sup> However as Möller demonstrates, the opposite is true: proportionality is centrally concerned with moral reasoning. The aim of the proportionality test is to provide a structured way of identifying and considering the relevant moral considerations. As should have been made clear by the discussion of balancing above, although the balancing stage does involve consideration of the weight of a right and its degree of infringement in a particular circumstance, these are the result of a process of moral reasoning. There is nothing mechanical about this process. It does not require a simple cost-benefit analysis.<sup>144</sup>

Furthermore, contrary to some critics,<sup>145</sup> the balancing process does not require courts to compare incommensurables, again because the balancing process is strongly normative. It is clearly possible to make arguments that one right is more important than another in a particular situation. It is unclear how any decision could be made as to whether or not a right should be held to be violated in a particular circumstance if this was not so. Importantly, proportionality does not require all rights to be reduced to a common metric.<sup>146</sup> It is only necessary to give rights an ordinal rather than a cardinal value.<sup>147</sup>

Overall therefore, proportionality is advantageous for deciding these cases. Its fact-specific and justification based nature make it possible to resolve these disputes in an atmosphere of mutual respect, without compromising on fundamental issues. It promotes an atmosphere of give and take and acknowledges the legitimacy of the interests of both sides. Most importantly, it engages in a process of rights maximisation, rather than necessarily perceiving disputes as winner takes all. Although, like any test, it has disadvantages, these are not so serious as to render it unsuitable.

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<sup>142</sup> Tsakyrakis *supra* n.19 at 475. Similarly, Webber argues that it transforms questions of rights into ‘management and mathematical measurements’: G. Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’ (2010) 23 *Can J L Jurisprudence* 179, 191.

<sup>143</sup> Webber *ibid*.

<sup>144</sup> K. Möller ‘Proportionality: Challenging the Critics’ (2012) 10 *ICON* 709.

<sup>145</sup> E.g. Tsakyrakis *supra* n.19.

<sup>146</sup> Möller *supra* n.146.

<sup>147</sup> Klatt and Meister *supra* n.134.

## Proportionality in the US, England and Canada

This section provides an overview of how proportionality or proportionality type arguments are used in the three jurisdictions. This is given in order to demonstrate how proportionality is already being used and how the method of analysis argued for here can fit into constitutional or other legal arguments. Although the US, England and Canada are only used to give examples of cases and possible conflicts of rights and therefore whether they do or do not use proportionality is in one sense irrelevant for the purposes of my thesis, it is important to have some understanding of the prevailing types of legal reasoning given in order to understand the context of the cases. It also builds on the explanation given in the Introduction of why these jurisdictions have been chosen.

Both Canada and the UK have accepted proportionality as the appropriate test for human rights cases. Although in the UK, it has been held to be the appropriate test for Convention rights, following the Human Rights Act 1998,<sup>148</sup> this does not mean that it has always been applied or always applied strictly, as will become apparent in the next few chapters. Proportionality has a slightly longer history in Canada than in the UK and was developed there in response to the Canadian Charter of Rights and Freedoms 1982.

Proportionality has become relevant not only for challenges against state action through judicial review but also between private parties in discrimination cases. Both Canada and the UK outlaw discrimination in employment and service provision and much of this law uses variants of a proportionality test. For example, to defend a claim of indirect discrimination in English law, a policy, criterion or practice that puts persons who share a protected characteristic at a particular disadvantage must be a proportionate means of achieving a legitimate aim.<sup>149</sup> This may be relevant in this context because a religionist may claim that they have been indirectly discriminated against by not being allowed an exemption from part of their work.

Unlike English law, Canadian law does not draw a stark distinction between direct and indirect discrimination. A proportionality type enquiry is used throughout

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<sup>148</sup> See e.g. *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *Huang v Secretary of State for the Home Department* supra n.6.

<sup>149</sup> See A. Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 *ILJ* 305.

discrimination law. The test, known as *Meiorin*, contains three stages.<sup>150</sup> The employer must have adopted the standard for a purpose rationally connected to the performance of the job, there must have been an honest and good faith belief that it was necessary; and the standard must be reasonably necessary to the accomplishment of that legitimate work-related purpose. In deciding whether it is reasonably necessary it must be shown that the employee could not be accommodated without imposing undue hardship. The requirement of reasonable accommodation more clearly shows how those with strong religious beliefs could use discrimination laws to advance their concerns.

In contrast, the US does not explicitly refer to proportionality in its constitutional law.<sup>151</sup> There is debate on whether the US is 'exceptional'<sup>152</sup> in not using proportionality or whether proportionality is latent in its constitutional law. Instead, US constitutional law does not rely on one test or method of analysis. In certain contexts relevant to this thesis there is little doubt that proportionality is not used. For example, when deciding whether the establishment clause has been breached, the discussion relies on a three point categorical test, looking at purpose, effect and 'government entanglement' with religion.<sup>153</sup> Further, in the context of state interference in the selection of religious employees (by laws prohibiting discrimination or other means) a categorical rather than proportionality test is used, forbidding interference if the employee falls within the 'ministerial exception'. This is not to say that there is no balancing. This may occur in considering which category a case should be placed in, but this is likely only to be about specific issues rather than an 'all things considered' proportionality test. For example, there may be balancing in deciding whether a job was mainly religious rather than secular in nature. However, once this balancing is completed and it is decided whether a person is a 'minister' or not, no further balancing takes place.

The US test of strict scrutiny, which requires the state to have a compelling government interest, and to have narrowly tailored the law to achieve that aim,

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<sup>150</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3. See G. Moon, 'From Equal Treatment to Appropriate Treatment: What Lessons can Canadian Equality Law on Dignity and on Reasonable Accommodation Teach the United Kingdom?' (2006) 6 *EHRLR* 695.

<sup>151</sup> Although there some debate as to whether it should be used, see *District of Columbia v Heller* 554 US 570 (2008).

<sup>152</sup> Weinrib, *supra* n.2.

<sup>153</sup> *Lemon v Kurtzmann* 403 US 602 (1971).

although now no longer widely used in free exercise law<sup>154</sup> following *Employment Division v Smith*,<sup>155</sup> does bear some similarities to proportionality. The two tests have a similar purpose: to permit government action where necessary in the public interest, but to examine the necessity of restrictions of rights rigorously.<sup>156</sup> Its basic two-step structure is also similar: a first stage considering whether the act restricts a right and a second considering whether there is sufficient justification for the restriction. So in *Wisconsin v Yoder*,<sup>157</sup> a case noted in the previous chapter which concerned whether Amish children could be withdrawn from school after the eighth grade, it was decided that the government's interest in ensuring that children had an extra year of schooling was not compelling compared to the Amish's interest in maintaining their community's way of life. This type of reasoning is very similar to a proportionality analysis.

Beyond these structural similarities, the tests have similar elements. The compelling government interest includes the idea of a legitimate aim. If the measure is for an impermissible purpose, such as straightforward discrimination against an unpopular minority religion, then it will be found unconstitutional. This is similar to the way the legitimate aim test functions. The idea of narrow tailoring, or least restrictive means, includes rationality and necessity tests.<sup>158</sup> It requires a 'proportionality-like judgment of whether marginal increments in the avoidance of risks or marginal reductions in the incidence of harms sufficiently justify infringements of fundamental rights in light of available, but typically less efficacious, alternatives'.<sup>159</sup> Finally there are some elements of overall balancing.

It has been suggested that strict scrutiny is not really a balancing test because once it had been decided that a case requires it, it will not pass the test, leading to the aphorism that strict scrutiny is 'strict in theory and fatal in fact.'<sup>160</sup> Whatever the merits of this in other contexts,<sup>161</sup> it was never true in the free exercise context. An empirical study demonstrated the 'survival rate' of cases decided under strict

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<sup>154</sup> It may be relevant though where the RFRA applies.

<sup>155</sup> 494 US 872 (1990).

<sup>156</sup> R. Fallon, 'Strict Judicial Scrutiny' (2006) 54 *UCLA* 1267.

<sup>157</sup> 406 US 205 (1972).

<sup>158</sup> Cohen-Eliya and Porat *supra* n.122 at 385-6.

<sup>159</sup> Fallon *supra* n.158 at 1336.

<sup>160</sup> G. Gunther, 'The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 *Harv L Rev* 1, 8.

<sup>161</sup> Such as prohibiting viewpoint speech discrimination by the state.



scrutiny to be 59%.<sup>162</sup> This rate was even higher when only exemptions from generally applicable laws were in issue, rather than laws claimed to be discriminatory.<sup>163</sup> An earlier study looking at Courts of Appeals judgments in the 10 years before *Smith*, found the survival rate to be 90%.<sup>164</sup> More broadly, Sullivan and Frase point to cases where strict scrutiny has not been fatally strict, in contexts as diverse as the federal regulation of inter-state commerce and content neutral restrictions of speech. They also draw attention to the use of ‘intermediate scrutiny’ and ‘rational basis review with teeth’: lower standards of review that nonetheless assess the legitimacy of government action based on balancing considerations.<sup>165</sup>

This does not mean though that these methods of review are the same as proportionality. Fallon argues strict scrutiny has a narrower focus, which does not lead to an ‘all things considered’ reasonableness analysis. The question is more about whether government action is appropriately targeted, rather than whether the action was proportionate. Cohen-Eliya and Porat also point to a more theoretical difference in comparing the German use of proportionality to the US. While both countries use balancing, more opprobrium is attached to its use in the US. They argue this is because of a theoretical difference in its purpose. In the German model, proportionality is accepted as part of an ‘organic conception of the state’ based on ‘reciprocal cooperation and trust amongst all state organs’ where all interests should be optimised.<sup>166</sup> In the US by contrast, proportionality is more often seen as mere ‘ad hocery’: a way of enforcing political policy decisions, rather than a method of law.<sup>167</sup> In any case, it is certainly true that balancing and proportionality have a more residual role in the US than in, for example, Canada,

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<sup>162</sup> Although this study dates from after *Smith* it only considered cases decided with strict scrutiny, i.e. those cases unaffected by *Smith* and cases decided under RFRA.

<sup>163</sup> A. Winkler, ‘Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts’ (2006) 59 *Vand L Rev* 793.

<sup>164</sup> J. Ryan, ‘*Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment’ (1992) 78 *Va L Rev* 1407.

<sup>165</sup> E.T. Sullivan and R. Frase, *Proportionality Principles in American Law* (Oxford: Oxford University Press, 2008) Ch 4.

<sup>166</sup> Cohen-Eliya and Porat, *supra* n. 97 at 390, also ‘American Balancing and German Proportionality: The Historical Origins’ (2010) 8 *ICON* 63 and *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013).

<sup>167</sup> J. Bomhoff, ‘Lüth’s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing’ (2008) 9 *German LJ* 121.

with more use made of categorisation and excluded reasons for legislating.<sup>168</sup> The results of these differences will be explored throughout the thesis.

### **Conclusion**

This chapter has provided an analysis of proportionality and suggested its advantages for dealing with situations of moral disagreement and conflicts of rights, particularly regarding disputes about religious freedom and non-discrimination. The thesis aims to provide an argument of how these cases are best resolved, basing this on a proportionality framework. It therefore has dual aims: arguing both for specific conclusions but also for a general framework. This means that it is of course possible to agree with the framework I argue for, but disagree about results in concrete cases. As stated in the Introduction, the thesis does not aim to provide a complete overview of the law in the three jurisdictions, but rather cases are used as examples. Sometimes cases are used as good examples of how proportionality can work. Sometimes different tests are used and I will use proportionality to demonstrate how the case could have been decided or reasoned differently. Sometimes proportionality or proportionality type tests are used but I will nevertheless suggest how a proportionality analysis could also be used differently. The second part of this thesis now moves on to analyse how such an approach could work in four contexts: religious claims in secular employment, employment in religious organisations, and the provision of goods and services by religious individuals and by organisations.

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<sup>168</sup> Cohen-Eliya and Porat *supra* n. 122.

## **Chapter 4: Religious Claims in Secular Employment**

The first area this thesis examines is the right to manifest discriminatory religious beliefs within employment. Rights to religious freedom do not end at the office door. Employees may seek exemptions from certain parts of their work on the grounds that they conflict with their religious beliefs, or may wish to express their discriminatory views in or outside the workplace. These actions may though infringe the right of service users or colleagues to be treated in a non-discriminatory way, as well as affecting the interests of employers. This chapter will consider such cases, considering in particular whether registrars or those in similar jobs should be exempted from performing same-sex marriages if they have religious objections to doing so. It will draw on the approach explained in the previous chapter, arguing that applying a fact-specific proportionality test is the best way to resolve these types of cases. Even so, they are difficult to adjudicate. They involve complex moral issues and starkly raise the problem of how people with different views can live and work together.

### **Disputes around Same-Sex Marriage**

The existence of same-sex marriage/partnership (SSM/P), although opposed by many religions, is not itself a violation of religious freedom and indeed its non-existence is very probably a violation of anti-discrimination rights.<sup>1</sup> No state has required religious institutions to perform same-sex marriages and such a requirement would presumably violate constitutional or other religious freedom guarantees. Although this conflict is not in issue, the creation of SSM/P does create new clashes between religious conscience and the obligation not to discriminate.

Disagreements have arisen over claims of state employees who are responsible for performing civil marriages or partnerships for religiously based exemptions. Some religious registrars<sup>2</sup> have argued that due to the sanctity and special nature of marriage, its extension to same-sex partners was illegitimate and morally wrong. They therefore maintained they could not in good conscience facilitate such unions.

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<sup>1</sup> Canadian courts held the lack of same-sex marriage to be a violation of the Charter in *Halpern v Canada* 65 OR (3d) 161 and *Hendricks v Quebec* [2002] RJQ 2506 and some US courts have held that it was against state constitutions e.g. *Goodridge v Dept. of Public Health*, 798 N.E.2d 941 (Mass., 2003). The ECtHR held such decisions were within states' margin of appreciation in *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

<sup>2</sup> I will use the British term to refer to all those who have the power to perform or register non-religious marriages or partnerships.

While religious opposition should not by itself affect the existence of SSM/P, such beliefs can be the basis of protection of religiously motivated behaviour. Evidently though such exemptions interfere with the right to non-discrimination.

These issues have been faced by the courts in the relevant jurisdictions on a number of occasions, albeit in slightly differing situations. All apart from one give priority to the right not to be discriminated against above the right to freedom of religion.<sup>3</sup> In the English case of *Ladele v Islington LBC*,<sup>4</sup> a registrar refused to perform civil partnerships on the basis of her Christian beliefs. She was employed before the Civil Partnership Act 2004 was enacted. The Act required that a person be designated as a civil partnership registrar before they could register civil partnerships but Islington decided to designate all their registrars in order to share the new work equally.<sup>5</sup> Initially, Ladele managed to exchange her shifts with other employees when she was due to perform civil partnerships, but this became unacceptable to her employer, partly because of complaints made by her colleagues, and it held that this was a violation of Islington's non-discrimination policy, entitled 'Dignity for All'. Her line manager offered her the compromise of supervising simple signings of the register, rather than performing ceremonies, but this was unacceptable to her. With no resolution of the issue forthcoming, Ladele claimed she had been directly or indirectly discriminated against on the grounds of religion and eventually resigned. Her case was unsuccessful at Employment Appeal Tribunal and Court of Appeal levels. She then took her case to the ECtHR claiming that there was a breach of Article 14 taken with Article 9 but again failed.<sup>6</sup> Her request for a referral to the Grand Chamber was denied.

In the Canadian *Marriage Commissioners Case*,<sup>7</sup> a reference was made to the Saskatchewan High Court to decide whether an amendment to the Marriage Act 1995<sup>8</sup> to allow a marriage commissioner to refuse to solemnise a same-sex marriage would be constitutionally permissible. It was held that it was not. This followed earlier litigation under the Saskatchewan Human Rights Code where marriage commissioners had claimed rights to act in accordance with their beliefs.

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<sup>3</sup> There are legislative exemptions in Prince Edward Island: An Act to Amend the Marriage Act, 3d Sess., 62 Leg., 2005.

<sup>4</sup> [2009] ICR 387 [EAT], [2010] 1 WLR 955 [CA].

<sup>5</sup> EAT judgment *ibid.* at 390.

<sup>6</sup> (2013) 57 EHRR 8.

<sup>7</sup> 2011 SKCA 3.

<sup>8</sup> S.S. 1995, c. M-4.1.

In one of these cases, *Nichols v M.J.*,<sup>9</sup> a gay couple complained to the Saskatchewan Human Rights Commission when a marriage commissioner had refused to perform their marriage. On appeal, the Saskatchewan Court of Queen's Bench held that the commissioner had no defence to the discrimination claim. Unlike British registrars, marriage commissioners are not employed by the state, but rather are licensed by the provincial authorities to perform marriages. In Saskatchewan the Marriage Unit maintains a list of marriage commissioners but couples then arrange for and pay a fixed fee to the commissioner directly.

There are two American cases on similar points, concerning whether town clerks could refuse to give marriage licences to same-sex couples. The first involved Vermont's civil union law (now repealed and replaced with same-sex marriage) where town clerks were required to issue a civil union licence or to appoint an assistant to do so.<sup>10</sup> In *Brady v Dean*<sup>11</sup> some town clerks argued that merely to appoint an assistant infringed their rights under the Vermont Constitution. This was rejected. The only case to be partly successful in the jurisdictions under discussion here is the second American decision, *Slater v Douglas County*,<sup>12</sup> where a clerk refused to process Declarations of Domestic Partnerships. Her request for accommodation was refused. The case concerned an action for summary judgment against her by her former employer. This was denied and the case sent for trial by jury. Although a question for the jury, the judge strongly suggested it would have been possible to accommodate her without causing undue hardship: the office dealt with very few applications and these were not shared out equally among the staff. The case subsequently settled.<sup>13</sup>

### Interference

Before considering the proportionality test, as we have seen, the first issue is whether there has been any interference with the registrars' rights. As these claims arise within employment, on one understanding, since employees can resign no

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<sup>9</sup> 2009 SKQB 299.

<sup>10</sup> 18 V.S.A. §5161. This has been replaced by a same-sex marriage law, which does not have such a provision.

<sup>11</sup> 173 Vt. 542 (Vt. 2001).

<sup>12</sup> 743 F.Supp. 2d 1188 (2010).

<sup>13</sup> 'County Pays Off On Same-Sex Marriage Case' *The Roseburg Beacon*, 13<sup>th</sup> April 2011 <http://www.roseburgbeacon.com/home/2011/4/13/county-pays-off-on-same-sex-marriage-case.html> [Last Accessed 10 Feb 2014].

further protection of their religious rights is necessary, as the conflict between their conscience and their obligations can thereby be avoided. This idea, sometimes known as the specific situation rule, was the approach of the European Commission of Human Rights,<sup>14</sup> and following it, English courts.<sup>15</sup> In January 2013 in *Eweida, Chaplin, Ladele and McFarlane v UK*,<sup>16</sup> (hereafter *Eweida v UK*) the Court reconsidered this idea and it was held that there was no absolute bar to bringing claims within employment, but rather that this should merely be a factor to be taken into account.

As previously mentioned,<sup>17</sup> the specific situation rule was unnecessarily strict. That a person can resign is relevant to the balancing test and may be ultimately required, but such an approach prevented even raising the question of rights. As Gunn put it, it meant that the “fundamental rights” of the European Convention are subject to a simply contractual waiver.<sup>18</sup> Given that for most people their employment is an economic necessity, as well as providing important social benefits, employment is too important an area for religious rights not to apply. A particular form of employment may also be particularly important to a claimant. Furthermore these claims can involve only small parts of an employee’s duties and any conflict between their obligations and their religious beliefs may have arisen only after they have begun employment.

The specific situation approach was not only itself a disproportionate rule but violated the principle of providing justification. As Stychin puts it, ‘while proponents of freedom of religion may accept the need for balancing, they are more likely to advocate that it should be done openly as a majoritarian limitation on the exercise of the right, rather than *constitutively* in the definition of its scope.’<sup>19</sup> It excluded any attempt to find less intrusive measures which protected the rights and interests on both sides. It meant that any justification, no matter how unimportant the interest or how badly tailored the solution is, would suffice.

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<sup>14</sup> E.g. *Stedman v United Kingdom* (1997) 5 EHRLR 544; *Ahmad v United Kingdom* (1981) 4 EHRR 126.

<sup>15</sup> E.g. *Copsey v WBB Devon Clays Ltd* [2005] ICR 1789, albeit with criticism; *R(Begum) v Governors of Denbigh High School* [2007] 1 AC 100.

<sup>16</sup> (2013) 57 EHRR 8.

<sup>17</sup> See *supra* at p64-5.

<sup>18</sup> T.J. Gunn, ‘Adjudicating Rights of Conscience under the European Convention on Human Rights’, in J. Van der Vyver and J. Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff, 1996).

<sup>19</sup> C. F. Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) 29 *OJLS* 729.

Other jurisdictions, including the US and Canada, have not adopted such a strict interpretation. In both these jurisdictions it has been largely unproblematic to suggest that religious freedom claims can be made relating to employment.<sup>20</sup> Thus in *Nichols*, the *Marriage Commissioners Case* and *Slater*, it was not in issue that the claimant's<sup>21</sup> rights had been affected. In *Brady v Dean*, although the claim failed because there was no 'substantial burden' on the town clerks' belief, this was not because it took place within employment, but because there already was an accommodation as it was possible to appoint an assistant to issue civil union licences.

The correct approach then is to say that there was an interference with the registrars' rights since they are forced to choose between a religious obligation and their employment. The exception to this is *Brady* where, as the Court said, the obligation to appoint an assistant was too indirect to constitute a substantial burden. Notwithstanding that the town clerks may still consider this to be an immoral act, not every burden on religious practice constitutes an interference with the right to freedom of religion.

#### Legitimate Aim

The first stage of the proportionality test is to decide whether there is a legitimate aim behind the refusal to grant an exemption. The clearest legitimate aim is preventing discrimination. Even in those cases such as *Ladele* where there would be no overall effect on the service provided, since services could be provided by other employees with little or no additional cost to the employer or inconvenience to service users, there is still a legitimate aim in providing a non-discriminatory service. Firstly, preventing discrimination itself is legitimate. Gay couples are denied formal equality: they do not receive the same treatment from all public officials.<sup>22</sup> If it were not for the person's sexual orientation, the employee's duties would not have been rearranged. Even if the discrimination is not directly experienced, permitting it is stigmatising and hurtful and conveys the message that

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<sup>20</sup> E.g. *Thomas v Review Board* 490 US.707 (1981); *Moore v British Columbia (Ministry of Social Services)* [1992] 17 CHRR D/426.

<sup>21</sup> For the sake of consistency I will refer to 'claimant' regardless of the jurisdiction.

<sup>22</sup> B. MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages' (2006) 69 *Sask L Rev* 351.

a person is not equal to others.<sup>23</sup> Secondly, although the employer does not necessarily take any view on the employee's objections, and certainly does not have to share them, the underlying argument of the employee is likely to be highly offensive to many. However, this is not merely about avoiding 'bare offence',<sup>24</sup> which as argued in Chapter 3 is illegitimate. The employee is arguing that SSM/Ps or homosexual sexual practices, or perhaps even a homosexual orientation, are immoral. Employers have a legitimate aim in seeking to distance themselves from these views and to demonstrate that they think such views are unacceptable.

Another potentially legitimate, although more problematic, aim is a broader objective to create an inclusive and welcoming space for all as a matter of public policy. Such a policy includes prohibitions against discrimination but goes beyond that. It is not a coincidence that Islington's anti-discrimination policy was called 'Dignity for All'. This is what could be called the 'cultural transformation' purpose of anti-discrimination law.<sup>25</sup> This should not be interpreted too broadly though, since it could be justify severe interferences with moral autonomy.

Further aims may also be more prosaic but still legitimate, such as operational efficiency and aiming to prevent disquiet within the workplace.<sup>26</sup> In *Ladele* for example, there had been complaints from gay colleagues about her stance. Resolving the dispute had therefore become necessary.

### Rational Connection

The second step is that of requiring a rational connection between the legitimate aim and the action complained of. The connection between preventing a registrar from discriminating and the legitimate aims is clear: it would mean for example that couples do not directly experience discrimination (where this is in issue),

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<sup>23</sup> S. Gilreath, 'Not a Moral Issue: Same-Sex Marriage and Religious Liberty' [2010] *U Ill L Rev* 205; A. Koppelman, *Antidiscrimination Law and Social Equality* (London: Yale University Press, 1996) 57-76.

<sup>24</sup> As Hambler argues: A. Hambler, 'Recognising a Right to 'Conscientiously Object' for Registrars whose Religious Beliefs Are Incompatible with their Duty to Conduct Same-Sex Civil Partnerships' (2012) 7 *Religion and Human Rights* 157.

<sup>25</sup> Koppelman *supra* n.23.

<sup>26</sup> Although this aim may not be accorded much weight.



demonstrate that such discrimination is unacceptable and prevent the ‘dignitary hurt’<sup>27</sup> from awareness of an exemption. This test is met in all the cases.

### No Less Restrictive Means

As was discussed in the last chapter, the no less restrictive means or necessity test aspect of the proportionality test as described by Alexy asks what can be factually achieved. Can the ‘amount’ of freedom of religion be maintained, while increasing freedom from discrimination? In other words, is the restriction Pareto optimal?<sup>28</sup> The proposed amendment to the Saskatchewan Marriage Act failed on the basis that it had not ‘minimally impaired’ the right.<sup>29</sup> Since the Saskatchewan system relied on couples contacting marriage commissioners themselves, the commissioner would directly tell a gay couple that he would not perform a ceremony. The Court therefore held that giving a right to refuse as the marriage system stood did not constitute the least impairment of the right to non-discrimination, since an alternative system could be devised where a same-sex couple would not be confronted with direct rejection. In this alternative system, couples could approach the Director of the Marriage Unit who would give them a list of marriage commissioners who were available and willing to perform the ceremony. Thus the couple would be unaware if a commissioner had objected. The proportionality and thus constitutionality of the legislative amendment therefore failed. However, since the English registry and American marriage licence systems already use a similar system, in those jurisdictions there are no less restrictive means that could have promoted the legitimate aims as described above to the same extent.

Greater concentration on this part of the test, not merely by courts when they eventually come to review these decisions but in a more general sense by all participants before this point, could move the discussion beyond the exemption and no exemption dilemma. Although this binary choice highlights the principles behind these cases, sometimes different practical solutions are available which can adequately protect rights on both sides. The failure to consider this stage carefully,

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<sup>27</sup> *Marriage Commissioners* supra n.7 at para 107.

<sup>28</sup> R. Alexy, *A Theory of Constitutional Rights*, tr J. Rivers, (Oxford: Oxford University Press, 2002) 573.

<sup>29</sup> As explained above p62-3 the Canadian test of minimal impairment is broader than the test of no less restrictive means used in Alexy’s model.

particularly by the ECHR, which tends to consider in an overall way whether the actions are justified rather than assessing each aspect of the test separately, is therefore problematic.

Minow draws attention to a resolution of a dispute in San Francisco.<sup>30</sup> The city proposed a policy that all its contractors must provide domestic partner benefits equal to those provided to spouses. The Catholic Church opposed this for its agencies on the basis that it required them to recognise domestic partnership as equivalent to marriage. This appeared to place the parties in deadlock. However, the Archbishop of San Francisco also stated that the church approved of methods to ensure more had healthcare coverage. Thus an alternative policy was devised where a party would be compliant if they 'allow[ed] each employee to designate a legally domiciled member of the employee's household'.<sup>31</sup> This fulfilled San Francisco's aim of ensuring that gay employees, who could not legally marry, received the same benefits as married employees to the same extent as the original policy, but interfered less with the Church's freedom of religion since it made the *type* of relationship irrelevant.<sup>32</sup>

### Justification

Before considering what the appropriate balance of rights should be, more will be said here about how the balancing stage should be considered. As has been discussed previously, much of the purpose of a proportionality analysis is about contesting the claims of public authorities and requiring them to demonstrate suitable justification for their actions.<sup>33</sup> Part of this suitability is about the kinds of reasons that should be given. The justification should go not only to the onlooker, but also to those who will be bound by it.<sup>34</sup> This does not mean reasons have to be given that *will* be accepted by those who are bound by it. This may well be impossible. However, it means that arguments that a person's views are irrational or bigoted are not justificatory reasons. They express only a conclusion not reasoning and are not explicable unless the basis for judgment is shared. Such

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<sup>30</sup> M. Minow, 'Should Religious Groups be Exempt from Civil Rights Laws?' (2007) 48 *BCL Rev* 781.

<sup>31</sup> *Ibid.* at 830.

<sup>32</sup> C.f. Stychin, *supra* n.19 on similarities between queer and feminist theorists and religious arguments.

<sup>33</sup> M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 1.

<sup>34</sup> L. Swaine, *The Liberal Conscience* (New York: Columbia University Press, 2006) Ch 4.

arguments are only likely to engender resentment and a greater sense of marginalisation.

There is consistently no failure of this principle in any of these cases. For example, Elias J said with some sympathy for Ladele that, 'fundamental changes in social attitudes, particularly with respect to sexual orientation, are happening very fast and for some – and not only those with religious objections – they are genuinely perplexing'.<sup>35</sup> A similar approach was taken in *McFarlane v Relate*,<sup>36</sup> discussed below, where a relationship counsellor sought to be exempted from providing sexual therapy to gay couples. In the midst of a critical judgment, Laws LJ was keen to remark on the respectability of the religious views in question. He stated that, 'the judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as "disreputable". Nor have they likened Christians to bigots.'<sup>37</sup> In none of the decisions discussed above are the registrars told that their beliefs are wrong, merely that they must bear the burden of their beliefs. In the Canadian cases, the courts rely on a consideration of the duty of neutrality of public officials and on pointing out the hurtful effect on gay couples if refused service. In *Brady v Dean* the Court firstly relies again on the duty of neutrality of public officials but more heavily on the accommodation already given to town clerks. In *Ladele* it is the overarching importance of the non-discrimination policy to Islington Council that is significant. Although of course these arguments can be disagreed with, they provide a suitable type of reasoning. No mention is made in any of the central but contested moral claim that homosexuality must be accepted as a morally neutral trait.

A different requirement related to justification is that both sides should be permitted to have their concerns listened to and taken seriously by the decision-maker.<sup>38</sup> This is linked to a norm of promoting dialogue and deliberation. Here the cases demonstrate a different picture. In *Ladele* the initial dialogue was inadequate. Her managers seemed to have decided immediately that refusing to perform a civil partnership was 'an act of homophobia' and a breach of the Council's 'Dignity for

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<sup>35</sup> EAT judgment supra n.4 at 412.

<sup>36</sup> [2010] EWCA Civ 880.

<sup>37</sup> *Ibid.* at para 18.

<sup>38</sup> This idea of dialogue was used in G. Bouchard and C. Taylor, *Building the Future: A Time for Reconciliation* (Gouvernement du Quebec, 2008).

All' policy and thus that no accommodation should even be considered.<sup>39</sup> As Vickers argues, 'making requests for accommodation should not be treated as harassment, unless this has been done in an offensive manner'.<sup>40</sup> At an earlier stage, the decision to designate her a civil partnership registrar without any consultation, despite her having raised objections and when there was no legal obligation to do so,<sup>41</sup> demonstrates a failure of dialogue. The courts though, while pointing this out, make nothing of it. There had been the suggestion that she could supervise the simple signing of the register rather than perform civil partnership ceremonies. But this only raises further questions: to refuse to perform ceremonies is just as much discrimination as a refusal to perform civil partnerships at all, although presumably it will take place less often. It is therefore, as will be explained, just as unlawful under the law as interpreted by the Court of Appeal. Furthermore this accommodation did not match her objection: she thought that all same-sex marriage or partnership, however created, was immoral.

In contrast, while this failure of dialogue is apparent in the situation that arose in *Slater*, it is because of this that she is ultimately successful in her claim. This case is treated by the Court like any other claim to accommodate religious practices, and not conceptually as a clash of rights case. As a reasonable accommodation case, at a minimum there must be enquiry as to what accommodation is sought and a consideration of whether this accommodation would constitute an undue burden.<sup>42</sup> Since this did not occur, she was successful.

These principles of justification and deliberation are fulfilled primarily through the application of a fact-specific contextual test. This kind of test means that consideration of the harms caused to both parties are at the centre of the decision-making process and it should permit both sides to fully explain the reasons for their actions. In this sense, in the domestic courts, Ladele is curtailed in her ability to put forward her case by the unnecessarily strict interpretation of interference that was current before the ECtHR's decision in *Eweida v UK*. Furthermore, the Court of Appeal's judgment also closes down her opportunity to explain and have

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<sup>39</sup> M. Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17 *Res Publica* 21.

<sup>40</sup> L. Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 *ELJ* 280, 297.

<sup>41</sup> It was only under a legal obligation to provide enough civil partnership registrars to provide an efficient service: Civil Partnership Act 2004 s.29.

<sup>42</sup> *Brown v General Motors* 664 F.2d 292 (8<sup>th</sup> Cir. 1981).

taken seriously the harm caused to her by the denial of an exemption, since it accepts the argument that any accommodation of her beliefs is itself unlawful because of the Equality Act (Sexual Orientation) Regulations 2007. Under this law it is unlawful for a person 'concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate, by refusing to provide a person with goods, facilities or services' on the grounds of their sexual orientation.<sup>43</sup> Not only organisations but also individual employees are therefore caught by the prohibition. The Court of Appeal, like the EAT which had 'seen the force of this argument' but refused to decide it, shows obvious uneasiness with the possibility that this provision might upset locally worked out compromises, but it still accepts this reading of the Regulations. This allows a very limited scope for a proportionality analysis. At the Strasbourg level, although the ECtHR gives a much broader scope for Art 9 rights within employment than it had before, making clear that such claims can be successful<sup>44</sup> and argues that a proportionality approach is necessary, it holds that member states will have a great deal of discretion at the balancing stage.<sup>45</sup> Although this may be acceptable because of the lack of consensus in these situations in the member states and the ECtHR's role as a supervisory international court, it means that Ladele is not provided with much justification for the interference with her rights.

This justificatory process is far better realised in *Nichols v M.J.* The proportionality approach used there permits both sides to express their views, with M.J. clearly stating what effect the refusal of service had on him and the marriage commissioner stating the value of his religion to him and his desire to follow his religious conscience. However, the almost blanket rule that government officials cannot let their religious beliefs affect their actions does not focus on the actual facts of the case and therefore prevents full dialogue and consideration taking place. This is discussed further below. The problem occurs the other way round in *Slater v Douglas County*. Whilst acknowledging Slater's religious objections and the very small part of her job registering domestic partnerships comprised, the Court did not fully take into account the expressive harm suffered by same-sex couples when such an exemption is granted. There is also a very serious failure in the minority opinion of Judges Vučinič and De Gaetano in *Eweida v UK* in their

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<sup>43</sup> Reg 4(1), now Equality Act 2010 s.29.

<sup>44</sup> As demonstrated by the finding of a violation in *Eweida*.

<sup>45</sup> This discretion is also evident in the Court's ready acceptance in *Chaplin* that there were non trivial health and safety concerns in preventing her wearing a cross at work as a nurse.

discussion of *Ladele*. Rather than seeing this as a difficult question of conflicting rights, they reduce the non-discrimination claim to mere pettiness, referring to the complaints made by Ladele's gay colleagues as 'back-stabbing', to Islington's policies as 'obsessive political correctness' and put 'gay rights' in quotation marks, as if these rights have no ECHR protection. This is highly unsatisfactory.

### Balancing

In balancing these issues it might be argued that the balance should always come down on the side of the non-discrimination right because all discriminatory action denies respect and automatically assigns a less than equal worth and perhaps even less than human worth to those discriminated against. Since protecting dignity is at the core of human rights protection, it will, so this argument goes, almost always be proportionate to prohibit discrimination because the interest against it is so great. As I have argued in the Introduction though, the situation is more complex than this. Some discrimination certainly *does* deny the personhood of others or in other words the intrinsic respect granted to all merely by being human, but not every legally prohibited act of discrimination is necessarily a violation of human dignity.<sup>46</sup> There is also a difference between the obligations of a state and those of individuals. For a state to deny same-sex couples marriage or at least a functional equivalent to it is one thing; for an individual to refuse to perform it quite another.

Accommodation in these SSM/P cases should therefore not be ruled out immediately but rather depend on a fact-specific analysis of the rights involved in the particular case. In *Nichols*, while the refusal to serve was undoubtedly hurtful, Nichols merely stated that he refused to marry them because it went against his beliefs. In *Ladele* the letter she wrote to her managers describing her position was described by the EAT as 'thoughtful and temperate'.<sup>47</sup> Not all discriminatory acts that involve criticism of homosexuality or same-sex marriage will be intrinsically unacceptable.

Indeed, those involved in these disputes may need to have 'moral recognition respect'<sup>48</sup> for those with opposing views. As stated in the Introduction, having

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<sup>46</sup> M. Mahlmann 'Six Antidotes to Dignity Fatigue in Ethics and Law' in C. McCrudden (ed) *Understanding Human Dignity* (Oxford: Oxford University Press, 2013) 610.

<sup>47</sup> EAT judgment supra n.4 at 406.

<sup>48</sup> S. Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36.

moral recognition respect for something means that the ‘inappropriate consideration or weighing of that fact or feature would result in behavior that is morally wrong’.<sup>49</sup> This form of respect is not necessarily, and indeed often will not be, about respect for opinions, which many think fundamentally wrong, but rather respect for individuals, including their religious identity. Taking *Ladele* as an example, even if her actual views are rejected, her dilemma, that of being forced to make a choice between her conscience and her obligations, is understandable. The argument that one has an obligation to obey one’s conscience is a morally coherent one.<sup>50</sup> Although opposed to civil partnerships, Ladele did not seek to prevent couples from entering into them, only to have no part in them. By exchanging her shifts with colleagues she aimed to resolve her dilemma.

The balancing stage involves a fact-specific analysis of all the issues in a particular case.<sup>51</sup> The weight each interest has must therefore be assessed. This is not straightforward though. Beatty argues the courts should simply rely on the facts and listen to what each side has to say about the effect on each of them.<sup>52</sup> But this subjective approach cannot be the whole answer. While in *Nichols* the claimant was ‘crushed and devastated’, others may have experienced the situation as a mere annoyance. This would suggest, absurdly, that an exemption could be given for some marriages but not for others. On the other side, cases can involve claims of ‘dire consequences in an afterlife, perhaps for all eternity’.<sup>53</sup> If subjective effects are all that matter, even a catastrophic secular outcome could be potentially outweighed by a religious claim.<sup>54</sup> This difficulty, although real, is not insurmountable in this context. Since a person would presumably choose losing their employment over eternal damnation it is the secular effect, i.e. being forced to resign, which should be balanced. A person’s subjective experiences are though relevant to show the depth of the dilemma. As for those discriminated against, it is sufficient to consider that refusal of service *could* be highly distressing and corrosive of dignity, given that an exemption would necessarily apply to all who may seek a SSM/P.

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<sup>49</sup> *Ibid.* at 41.

<sup>50</sup> J. Childress, ‘Appeals to Conscience’ (1979) 89 *Ethics* 315.

<sup>51</sup> H. Loeb and D. Rosenberg, ‘Fundamental Rights in Conflict: The Price of a Maturing Democracy’ (2001) 77 *ND L Rev* 27.

<sup>52</sup> D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) 70-2.

<sup>53</sup> P. Cumper and T. Lewis, ‘“Public Reason”. Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998 (2011) *KLJ* 131,131.

<sup>54</sup> *Ibid.*

A factor that must be weighed, which is mentioned repeatedly in the cases but not dealt with satisfactorily, is that these are state employees. There is obviously a public interest in having public employees perform all the obligations of their role. However, throughout these cases this factor is given a great deal of weight, so much so that there is almost an absolute bar on accommodations. Nichols is referred to as a 'public official acting as government'. The Marriage Commissioners 'are not private citizens... rather they serve as agents of the Province' and are told to 'uphold the proud tradition of individual public officeholders'.<sup>55</sup> In *Brady v Dean* the Court stated that it was a 'highly questionable proposition that a public official... can retain public office while refusing to perform a generally applicable duty of that office on religious grounds'.<sup>56</sup> In *Ladele* too it is emphasised that she is 'employed in a public job and was working for a public authority'.<sup>57</sup>

Evidently the state can only work through, and enforce its policies by, its employees and office-holders but this does not mean that the duties of non-discrimination of a state are the same as the duties of an employee of the state. That a person is a state employee is relevant, but not conclusive. As Benson puts it, 'to say that someone has a public role... is relevant to the kind of review we bring to bear on the matter, but it cannot provide a complete answer that advantages one sort of claimant over another'.<sup>58</sup> Such an approach would treat all state employees, regardless of position or seniority, as the same. This also does not permit employees the chance to be rights holders and not rights violators<sup>59</sup> and risks reducing people to issues.<sup>60</sup>

Both the US and Canada have given state employees religious exemptions from particular work, thus demonstrating that the interest in neutrality, as considered by that legal system, is not absolute. There is no necessary reason to suggest that

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<sup>55</sup> Supra n.7 paras 97-98.

<sup>56</sup> Supra n.11 at 434.

<sup>57</sup> CA judgment supra n.4 at para 52.

<sup>58</sup> I. Benson, 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' (2007) 21 *Emory Int'l L Rev* 111.

<sup>59</sup> G. Trotter, 'The Right to Decline Performance of Same-Sex Civil Marriages: the Duty to Accommodate Public Servants' (2007) 70 *Sask L Rev* 365.

<sup>60</sup> Baer argues that this often occurs when discussing religious practices: S. Baer, 'Privatizing Religion. Legal Groupism, No-Go-Areas and the Public-Private Ideology in Human Rights Politics' (2013) 20 *Constellations* 68. See also L. Woodhead, 'Liberal Religion and Illiberal Secularism' in G. D'Costa et al. (eds), *Religion in a Liberal State* (Cambridge: Cambridge University Press, 2013).



an exemption has any endorsement, other than in a very limited sense, of the state. If for example an exemption was given to permit a person not to provide, or to assist in, abortions, this would not be taken as meaning that an employer thereby thought abortions were wrong, or even necessarily that they had sympathy for that view.<sup>61</sup> Similarly in *American Postal Worker's Union v Postmaster General*<sup>62</sup> it was held that some post office clerks had to be given an exemption from processing draft registration forms, but quite clearly the US state did not thereby adopt the view that pacifism was an imperative moral requirement. The US has also rejected claims that religious accommodations breach the separation of church and state,<sup>63</sup> unless they provide an absolute religious veto.<sup>64</sup> State bodies have strong obligations of equality and non-discrimination, but their obligations to all their staff, including those with conservative religious opinions, should not be forgotten.<sup>65</sup> While as discussed below, there are some employees where the interest in neutrality and non-discrimination is so strong that requests for exemptions must be rejected, this is not necessarily the case for all employees.

Assuming therefore that it should not be accepted that the religious employees in these cases should automatically lose, the extent of the interference with the religious right must be considered since the greater the interference the greater the justification that is required.<sup>66</sup> A number of factors must be examined. On the one hand, Ladele will lose her job if she cannot be accommodated, which is a severe loss. Given also that the law had changed after she was employed, she was faced with a conflict she did not expect. On the other hand, other employment is open to her, perhaps even with the same employer. It is only her actions within employment that are affected and she, seemingly, remains free to oppose SSM/P outside it. While Rivers argues that the Court of Appeal's judgment in *Ladele* 'requires individuals to (pretend to) value what they do not value',<sup>67</sup> Ladele is not necessarily even required to be hypocritical – her approval of SSM is never sought

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<sup>61</sup> E.g. *Moore v British Columbia (Ministry of Social Services)* supra n.20 (Employee given exemption from approving public funding for abortion cases).

<sup>62</sup> 781 F.2d 772 (9<sup>th</sup> Cir. 1986).

<sup>63</sup> e.g. *EEOC v Ithaca Indus. Inc* 849 F.2d 116 (4<sup>th</sup> Cir. 1988). See J. Oleske, 'Federalism, Free Exercise and Title VII: Reconsidering Reasonable Accommodation' (2004) 6 *U Pa J Const L* 525.

<sup>64</sup> *Estate of Thorton v Caldor* 472 US 703 (1985).

<sup>65</sup> R. Sandberg, 'The Right to Discriminate' (2011) 13 *ELJ* 157.

<sup>66</sup> R. Alexy, 'Balancing, Constitutional Review and Representation' (2005) 3 *ICON* 572.

<sup>67</sup> J. Rivers, 'Promoting Religious Equality' (2012) 1 *Ox J Law & Religion* 386, 399.

and is largely irrelevant. She is not required to value it or to believe it to be equal to heterosexual marriage.

However, although the obligation of non-discrimination is a high one, the effect of the discrimination was negligible and would not have been directly experienced by gay couples. Ladele is described as acting in a temperate way and only sought not to be involved in civil partnerships. Without ignoring the very real interests in non-discrimination, and although this is a borderline case, it was a disproportionate interference with her Art 9 rights for her not to be permitted to refuse to perform SSM/Ps. While it was a legitimate, and probably unavoidable, reading of the Regulations that they prohibited all employees, rather than merely the organisation as a whole, from providing a non-discriminatory service, this leads to a problematic result. There was room within the Council's employment 'for both gay people and conservative Christians, both living out their life as they saw fit.'<sup>68</sup> This will be highly disagreeable to some, including some of her colleagues, but, as Stychin puts it, 'this is pluralism at the coalface, in which purity is foregone, solutions may not be pleasing to participants, and agreements are contingent and partial.'<sup>69</sup>

The application of a proportionality test therefore demonstrates that *Ladele* is a difficult case. It should be borne in mind that if there had been discussion and compromise at the beginning, this case might never have arisen since she may never have been designated a civil partnership registrar. There may still have been offence caused at the decision to have 'given in' to bigotry, but potentially the backlash would have been less and a 'reactive vicious circle'<sup>70</sup> avoided if Islington had sought volunteers rather than required Ladele and similarly placed employees to try to seek an exemption or to leave. There was no requirement to bring matters to a head.<sup>71</sup> Once she had been designated though, this dispute became much more intractable.

In *Slater v Douglas County*, even though the reasoning did understate the interest against discrimination, holding only that 'so long as the registration is processed in

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<sup>68</sup> A. Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 *Brook L Rev* 125, 142.

<sup>69</sup> Stychin *supra* n.19 at 755.

<sup>70</sup> Malik *supra* n.38.

<sup>71</sup> P. Elias, 'Religious Discrimination: Conflicts and Compromises' (2012) 222 *EOR*. Elias J (as he then was) was the President of the EAT and gave the judgment in *Ladele*.

a timely fashion the registrants have suffered no injury',<sup>72</sup> the Court nevertheless reached the correct decision. It highlighted the need for an 'interactive process' to assess the employee's objections and the hardship giving an exemption would cause. Processing Declarations of Domestic Partnership was a very small part of Slater's job: in the two years after the law came into force there were 37 applications, each taking about 10 minutes to process, and five other clerks in her office. Furthermore the applications were not divided evenly among the staff. Again the discrimination would be felt indirectly, and couples would probably be unaware of the accommodation given. In these circumstances, Slater was entitled to an exemption from having to perform this aspect of her work.

A proportionality analysis though produces a different result for the *Marriage Commissioners Case*. Even if the claim had not been rejected at the least restrictive means stage, permitting an exemption would not be proportionate. The directly felt discrimination prospective couples would have faced, which would undoubtedly be felt by many as humiliating and unfair, changes the balance. This is not just a question of one or two extra phonecalls.<sup>73</sup>

In *Brady v Dean*, the claim was rejected on the basis that merely appointing an assistant did not 'substantially burden' the clerks' beliefs as it was too indirect. This is probably the correct decision. Even if not, to deny them any further exemptions was proportionate because otherwise the risk of couples not being able to enter into civil unions was too high. Such an exemption would entirely privilege the rights of those with religious objections to gay marriage above gay couples. This was not the reasoning given by the Court though which rested instead on concerns about the separation of church and state. However, as stated above, the conflation of the state and its employees is unwarranted and does not occur with other accommodations. The clerks should not have any further exemptions because of the effect on the rights of others; rather than because they are bringing their religious views into the workplace.

### **Other 'Conscientious Objection' Cases**

As mentioned above, there are some jobs where, due to the inherent obligations of the post, there is a much stronger interest in non-discrimination and neutrality

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<sup>72</sup> Supra n.12 at 1195.

<sup>73</sup> As Trotter seems to suggest supra n.55 at 377.

than for registrars. This does not mean that the proportionality test should not be applied or the possibility of dialogue and compromise should not be borne in mind. However, in these cases, prohibiting discrimination is likely to be proportionate.

The first set of these cases involves jobs with an obligation of impartiality and equality where employees cannot be seen to take sides on social issues. This includes judges and those in similar positions. To have a public objection to homosexuality, whether religiously inspired or not, or to gay relationships or marriage, where legally recognised, violates these duties.

In *McClintock v Department of Constitutional Affairs*<sup>74</sup> a magistrate wished to be excused from officiating in cases where same-sex partners might adopt or foster children. An exception was not given, and he resigned from the family panel<sup>75</sup> and claimed he had been indirectly discriminated against contrary to the Employment Equality (Religion or Belief) Regulations 2003.<sup>76</sup> The Employment Appeal Tribunal (EAT) held there was no discrimination, but this was mainly because of the way the case was argued. McClintock wished to refuse to place children with same-sex couples, not strictly because of his religious views, but because he believed it was against children's best interests. Therefore, the Tribunal held, his objections did not constitute a religious or philosophical belief. As Pitt states, this means that 'a stupid, but sincere belief, based on nothing at all, is within the scope of the protection, but an opinion based on logic and information is not.'<sup>77</sup> Whatever the merits or otherwise of this position, even if McClintock had passed this hurdle there still would have been adequate justification for refusing to accommodate him. The duty of neutrality and obligation to obey the law inherent in the role of a magistrate or judge meant that any exemption would be impermissible and refusing to give an exemption is proportionate. This is regardless of how easy it would be practically to apply an exemption, or indeed the respectful basis on which these claims might be made.

In cases where a judge goes far beyond this and states his or her objection to homosexuality in vehement and hate-filled ways, which entirely undermines the

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<sup>74</sup> [2008] IRLR 29.

<sup>75</sup> He continued to hear criminal cases.

<sup>76</sup> Now incorporated into the Equality Act 2010.

<sup>77</sup> G. Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 *ILJ* 384, 389.

dignity of those it is aimed against, there clearly should be no protection. Such a situation occurred in *Mississippi Commission on Judicial Performance v Wilkerson*.<sup>78</sup> Since it is an American case, taking place in a state with no legal protection against sexual orientation discrimination, the reasoning is of necessity entirely different from a proportionality analysis. Judge Wilkerson wrote a letter to a local paper identifying himself as a Christian and saying that 'homosexuals should be put in some kind of mental institute'. He also gave an interview to a local radio station repeating similar thoughts. The Judicial Performance Commission recommended that he should be removed from office but the Supreme Court of Mississippi held he could not be sanctioned where he spoke on 'religious and political/public issue speech specially protected by the First Amendment' and where the 'forced concealment of views on political/public issues serves to further no compelling governmental, public or judicial interest'.<sup>79</sup>

Evidently this case can only be understood within a strong First Amendment context which asks whether restrictions on speech serve a compelling interest, and which is highly suspicious of viewpoint discrimination.<sup>80</sup> Under this analysis, discriminatory speech, because it is likely to be political speech, is given the highest possible protection. A proportionality analysis would have asked a different question: were the restrictions on a person's expressive and religious freedoms proportionate? Viewpoint restrictions can be proportionate where necessary to protect the rights of others. The balancing process allows these issues to be seen as a true conflict and starts without a preconceived weight on either side. Freedom of expression is important, but so is protecting the rights of gay people and the state's interest in having, or at least being seen to have, an impartial judiciary. In refusing to permit this speech the state therefore has two legitimate aims.

It could be argued at the no less restrictive means stage of the proportionality test that the interest in non-discrimination could be met by Judge Wilkerson recusing himself in all cases where his prejudice might be in issue. Aside from any practical difficulties, recusal would not meet the fundamental interest in having, and appearing to have, impartial judges to the same extent as dismissal. Given then that the initial stages of the test are met, the various interests have to be balanced. On

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<sup>78</sup> 876 So. 2d 1006 (Miss., 2004).

<sup>79</sup> *Ibid.* at 1009.

<sup>80</sup> D. Bernstein, *You Can't Say That: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington D.C.: Cato Institute, 2003).

one side there is the interest in freedom of expression, and particularly the interest in allowing debate on political issues. On the other there is the interest of minorities not to be denigrated and subjected to hate in public speech and the important public interest in having judges give, and be seen to give, equal treatment to all. Judges are aligned with the state, and intrinsically part of the mechanism of the state, in a way that registrars are not, and thus their interests have commensurably less weight. Therefore if the test of proportionality had been applied, it would have been demonstrated that the right of non-discrimination outweighed the right to freedom of religion and expression, and therefore the Judicial Performance Commission reached the right decision.

A second type of public job where restricting discriminatory speech is likely to be proportionate is where the job is particularly tied to non-discrimination, beyond the general interest in non-discrimination relating to any public official. In *Lumpkin v Brown*<sup>81</sup> a member of the San Francisco Human Rights Commission quoted the Bible in saying that gay people should be put to death and said he believed everything written in the Bible. He was dismissed. It was held he was entitled to state his opinions as a private citizen but he had no 'job security when he preaches homophobia while serving as a City official charged with the responsibility of "eliminat[ing] prejudice and discrimination."<sup>82</sup> This is the correct analysis. When the entire purpose of a job is to promote non-discrimination it makes no sense to permit the employee to act against this objective. Furthermore, as discussed above, the vehemence with which he expressed his views is also extremely relevant, because it interferes with the right of non-discrimination more severely, and forbidding such expression is a lesser interference with freedom of religion than if all types of discriminatory speech were prohibited.

A further kind of employment where granting exemptions may be impermissible because of the nature of the role involves counsellors, although this is more complex than the previous examples given. It raises distinct issues because of the role of non-directive counselling and non-discrimination in professional ethics. There are three relevant cases on this matter. The US cases of *Ward v Polite*<sup>83</sup> and

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<sup>81</sup> 109 F.3d 1498 (9th Cir.).

<sup>82</sup> *Ibid.* 1500.

<sup>83</sup> 667 F.3d 727 (6th Cir. 2012). I discuss this case further in, 'Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty' *Rutgers J of L & Relig* (Forthcoming 2014).

*Keeton v Anderson-Wiley*<sup>84</sup> concerned students taking counselling degrees who had religious objections to 'affirming' either same-sex relationships (in Ward's case) or 'homosexuality' more generally (in Keeton's case). Ward was removed from the course in her final year when she sought to avoid counselling a client about a same-sex relationship. Her university lost its claim for summary judgment against her, and the case subsequently settled. Keeton was required to take a 'remediation plan' after she 'continually voiced her condemnation of the homosexual "lifestyle" and her support of "conversion therapy" for GLBTQ clients based on her religious ideals'. She believed that 'sexual behavior is the result of personal choice for which individuals are accountable... and that homosexuality is a "lifestyle," not a "state of being"'.<sup>85</sup> Rather than completing the remediation plan she instead claimed the university had breached her free exercise and free speech rights and sought an injunction to prevent it from dismissing her from the course if she did not comply. This was not granted.

In the British case of *McFarlane v Relate (Avon) Ltd*<sup>86</sup> a counsellor, while happy to provide relationship counselling, refused to provide sexual counselling to same-sex couples because he felt that this would require him to endorse sexual acts which were contrary to his religious beliefs. He was therefore dismissed and he claimed this amounted to indirect religious discrimination. His claim was rejected by the Court of Appeal on the basis that there was no interference with his religious beliefs as the specific situation rule applied. He sought redress in the ECtHR.<sup>87</sup> It held that there was an interference with his manifestation of his beliefs, but that there was a wide margin of appreciation in deciding where to strike the balance between competing rights, and thus the interference was justified on the basis of the rights of others.

Both US courses used the American Counselling Association's (ACA) Code of Ethics. This requires counsellors to 'affirm' their clients' values, rather than to force their own values onto them and not to discriminate on certain grounds including sexual orientation. It permitted, and in some cases required, referrals where a counsellor did not have relevant expertise or considered that they could not help the client. The British Association for Sexual and Relationship Therapy's Code of Ethics, which McFarlane was required to adhere to, had similar requirements.

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<sup>84</sup> 733 F. Supp. 2d 1368, (S.D. Ga. 2010), 664 F.3d 865 (11<sup>th</sup> Cir. 2011).

<sup>85</sup> *Ibid.* at 868.

<sup>86</sup> [2010] IRLR 872.

<sup>87</sup> (2013) 57 EHRR 8.

It is probably unsurprising, given the vehemence and strength of her views, that Keeton lost her case. However, there were major problems in the court's reasoning. Since the university's policy of not allowing students' personal religious views to affect their counselling was neutral and generally applicable and therefore not open to challenge following *Employment Division v Smith*,<sup>88</sup> she had no claim that the university breached or even affected her free exercise rights. The case was therefore primarily decided as a free speech rather than free exercise case. Under free speech law the question was whether the policy was reasonable and viewpoint neutral. The Court held that it was. The university had a legitimate pedagogical aim as 'the entire mission of its counseling program is to produce ethical and effective counselors in accordance with the professional requirements of the ACA.'<sup>89</sup> These were the 'types of academic decisions that are subject to significant deference, not exacting constitutional scrutiny.'<sup>90</sup>

Keeton certainly had a strong speech element to her case and therefore consideration of free speech concerns was relevant. The Court was also right to give discretion to the university in considering the needs of their counselling programme. However, the assessment of her claims is problematic. To ignore the free exercise element of her claim is unsatisfactory, since she not only wanted to speak, but to claim that it would be wrong for her to engage in affirming, as she saw it, immoral conduct. Even the analysis of her free speech claims is problematic because it uses a weak standard of 'reasonableness'. It therefore fails to give her adequate justification for the interference with her rights and so fails in the obligation of dialogue.

In the domestic courts, *McFarlane* suffers from similar problems because his claim is entirely rejected on the basis that he can avoid the conflict by resigning from his employment: an approach which fails to engage with the difficulties of the dilemma he faced. Laws LJ also stated that 'there is no more room here than there was [in *Ladele*] for any balancing exercise in the name of proportionality.' This unhelpfully seems to suggest that proportionality is a pretence, or at least that it is not something to be encouraged.

Despite this failure to assess many of the relevant factors, this does not mean that either of these cases should have been successful under a proportionality test. This

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<sup>88</sup> 494 US 872 (1990).

<sup>89</sup> *Supra* n.80 at 876.

<sup>90</sup> *Ibid.* at 879.



is particularly evident in *Keeton*. Her attempt to infuse her professional obligations with her strong views meant the interests of her prospective clients, who were entitled to expect that counsellors would comply with the ethical obligations laid down by their professional body, were jeopardised. Also the university was, at present at least, only seeking to require her to perform additional tasks and engage in some reflection, rather than seeking to dismiss her from the course entirely.

McFarlane's objections though were narrower and therefore cannot be immediately rejected on this basis. Nevertheless, his claim should still fail. The interests of his employer and clients are strong because discrimination violated core principles of his role and could affect his perhaps vulnerable clients. The applicable Code of Ethics stated that counsellors must respect 'the autonomy and ultimate right to self-determination of clients and of others with whom clients may be involved. It is not appropriate for the therapist to impose a particular set of standards, values or ideals upon clients'. Non-discrimination and the creation of an inclusive environment for gay people were also essential parts of Relate's ethos.

The particular facts also weaken McFarlane's case. Relate offered two different kinds of counselling: relationship counselling and psycho-sexual therapy. McFarlane appeared to object to providing any kind of sexual therapy to gay couples. Although it may have been possible to ensure he would not have to provide psycho-sexual therapy to same-sex couples, it would not have been possible to know in advance whether sexual issues would arise during relationship counselling. Permitting discrimination in that situation would be likely to cause significant disruption and harm to his clients. As for the psycho-sexual therapy, this problem only arose after McFarlane had decided to train for a diploma in this kind of counselling. This situation was therefore partly of his own making. Given these factors, the limited interference with the right of freedom of religion, and the greater interference with the right to non-discrimination, denying him an exemption was proportionate.

In *Ward* the Court of Appeals was sympathetic to her case and remanded it to the District Court for further consideration of the factual issues. As already noted, the case later settled.<sup>91</sup> As in *Keeton*, her claim was considered on two bases: free

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<sup>91</sup> L. Jones, 'Christian Counselor Bias Case Settled Out of Court', World on Campus, 13 Dec 2012  
[http://www.worldoncampus.com/2012/12/christian\\_counselor\\_discrimination\\_case\\_settled\\_out\\_of\\_court](http://www.worldoncampus.com/2012/12/christian_counselor_discrimination_case_settled_out_of_court) [Last Accessed 10 Feb 2014].

speech and free exercise. Again the Court did not use a proportionality type test but rather considered, in relation to the free speech claim, whether the policy was reasonable and viewpoint neutral and, in relation to the free exercise issue, whether the policy was neutral and of general applicability.

The viewpoint neutral policy the university sought to put forward was that there was a policy of not permitting students to refer clients. This argument was difficult to make though, because the ACA did permit referrals where this was in the client's best interests.<sup>92</sup> The Court's approach meant that the case was entirely focused on the nature of the policy rather than either of the interests at stake, leading to unsatisfactory reasoning. The problem is that there is nothing necessarily suspect in not having an absolute policy. There is, for example, a difference between referring a client who is seeking bereavement counselling from a student who has recently suffered a bereavement<sup>93</sup> and referrals for discriminatory reasons, in terms of its effect on clients' rights and interests. Although certainly the Court is right in that, 'at some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny',<sup>94</sup> there is no necessary reason why there should only be assessment of the justifiability of the policy in these situations or why these situations are necessarily the most problematic. In any case, it is not entirely clear why it was so readily assumed that the policy failed strict scrutiny,<sup>95</sup> given the strength of the interest in non-discrimination. Certainly there seemed to be a higher standard than usual in free exercise cases in considering this.

A proportionality enquiry would have dealt with this case far better. It would have meant that the discussion would not have focused entirely on the rule's generally applicable nature. If the rule was discriminatory, if for example it permitted those of non-Christian beliefs, or those whose objections were not based on religious beliefs to refer clients because they were gay, then this would have been an additional problem, but even without this it would not have meant that the policy was unproblematic. The Court argued that 'allowing a referral would be in the best

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<sup>92</sup> There was therefore a factual disagreement, which is why the case was remanded to the District Court.

<sup>93</sup> An example given in the case.

<sup>94</sup> *Supra* n.79

<sup>95</sup> The Court stated, 'the university does not argue that its actions can withstand strict scrutiny, and we agree. Whatever interest the university served by expelling Ward, it falls short of compelling.' *Supra* n.79 at 740.

interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counsellor better suited to discuss his relationship issues).<sup>96</sup> This may be persuasive if only the short term is considered. However, it does not adequately weigh the interests. It ignores the wider interest the university and the ACA have in promoting certain ways their accredited counsellors should act. The Code of Ethics is not, and neither it should it be, viewpoint neutral. As argued above, discrimination is inconsistent with the type of counselling required. Therefore the University should have been permitted to prevent Ward from discriminating.

However, this does not mean that Ward's treatment was entirely fair. The formal review to decide whether she should be dismissed from the course, at least in the way it is represented by the Court, was questionable. It appeared to focus more on her religious beliefs than on her behaviour and professional obligations, with one professor stating in his evidence that he took her 'on a little bit of a theological bout'<sup>97</sup> and another telling Ward during the review that she was 'selectively using her religious beliefs in order to rationalize her discrimination against one group of people'.<sup>98</sup> Of course, discussion of different moral and religious beliefs is good and, indeed, probably essential if a pluralistic society is to function, but it was not appropriate for this context. This is firstly because her professors were in a position of power. Secondly, it gives the appearance of bias, leading to some basis for an allegation of religious discrimination, even if there were sound reasons for the university's decision. Thirdly, and more substantively, if possible, decision makers should avoid judging people's deepest moral convictions, (unless these have to be rejected on the basis that they deny the basic dignity of all human beings), and decide disputes on low level rather than high level reasoning.<sup>99</sup> This would avoid challenging her deepest moral beliefs, respect her as a moral and reasoning agent, help realise mutual respect and reduce the cost of disagreements for participants.<sup>100</sup> Deciding greater controversies may do nothing other than create a sense of marginalisation in the losing side and make it more difficult to

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid. at 738.

<sup>98</sup> Ibid. at 737.

<sup>99</sup> C. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001).

<sup>100</sup> C. Sunstein, 'Incompletely Theorized Agreements' (1994) 108 *Harv L Rev* 1733.

compromise in the future.<sup>101</sup> Here this principle means the review should have been decided on what is required to comply with the relevant code of ethics, rather than the ‘Truth’ about the morality of same-sex relationships according to Christianity, a subject of deep complexity even for the most eminent theologians.

In conclusion to this section then, the Court was correct in saying that denying Ward a referral because ‘her conflict arose from religious convictions is not a good answer; that her conflict arose from religious convictions for which the department at times showed little tolerance is a worse answer’.<sup>102</sup> She may have an understandable sense of anger and discrimination. Nevertheless, a proportionality analysis demonstrates there are sufficient reasons why she, Keeton and McFarlane should not have been permitted to discriminate.

### **Discriminatory Religious Expression and the Workplace**

Some religious employees may not experience conscientious dilemmas between their employment obligations and their faith, but may find themselves in conflict with employment rules when they express discriminatory views in or outside the workplace. As I have previously argued, speech that does not accept the personhood or basic dignity of others can be prohibited, and this is particularly true in employment, where employers have obligations to protect their other employees from harm.

In *Apelogun-Gabriels v London Borough of Lambeth*,<sup>103</sup> the claimant distributed a document to his colleagues with extracts from the Bible. The first headings on this document were ‘sexual activity between members of the same sex is universally condemned’ and ‘male homosexuality is forbidden by law and punished by law’. He was dismissed. The interests of his colleagues not to be faced with such material together with the interests of the employer in maintaining a non-discriminatory workplace clearly outweighed the limited interference with the claimant’s right.

Similarly in *Peterson v Hewlett-Packard Co*,<sup>104</sup> Peterson objected to a series of posters put up around the office as part of a workplace diversity campaign. In

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<sup>101</sup> W. Eskridge, ‘Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics’ (2004) 114 *Yale LJ* 1279.

<sup>102</sup> *Supra* n.79 at 737.

<sup>103</sup> ET 2301976/05. See also *Haye v London Borough of Lewisham* ET 2301852/2009.

<sup>104</sup> 358 F.3d (9<sup>th</sup> Cir., 2004).

response he put up Biblical passages in his work cubicle, including an extract saying 'If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them'. Peterson said the posters were intended to be hurtful, so that 'gays and lesbians would repent'. He refused to remove them whilst the diversity posters remained. After unfruitful discussions Peterson was dismissed. The Ninth Circuit held that he had not been discriminated against on the ground of his religious belief and that accommodating him would have caused his employer undue hardship because it would have affected the company's right to promote diversity.

Koppelman wonders whether, although Hewlett-Packard was within its rights to dismiss him, this was the best resolution given that Peterson had worked there without incident for 21 years.<sup>105</sup> I disagree. Peterson's comments were hurtful and intended to be so. Quite correctly there had been a process of dialogue, with Hewlett-Packard holding no fewer than four meetings with him, but Peterson was unwilling to change. Eventually matters had to be concluded and dismissal was the only solution. As a proportionality test would demonstrate, not all the burden should be on his gay colleagues or his employer.

A more complex UK case is *R(Raabe) v Secretary of State for the Home Department*.<sup>106</sup> Raabe, a GP, was appointed as a member of the Advisory Council on the Misuse of Drugs (ACMD). Six years before his appointment he had co-authored a short paper entitled "'Gay Marriage" and Homosexuality: Some Medical Comments', which argued against the introduction of same-sex marriage in Canada. It argued that gay men were extremely sexually promiscuous and engaged in risky sexual practices, that they tended to have short relationships and that this posed a risk for children brought up by gay people and, most controversially, that there was a link between homosexuality and paedophilia. It stated that 'there is an overlap between the "gay movement" and the movement to make paedophilia acceptable' and that 'the prevalence of paedophilia among homosexuals is about 10 - 25 times higher than heterosexuals'. It also argued that it was possible for some gay people to change their sexual orientation by 'reparative therapy'. The Home Office became aware of the paper after Raabe had been appointed and it was the subject of media attention. He was then dismissed.

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<sup>105</sup> Koppelman supra n.64.

<sup>106</sup> [2013] EWHC 1736 (Admin).

This is not an employment case, but rather concerned appointment to a post where the government normally has considerable discretion in appointing and dismissing members. As a result, the Court did not use a proportionality test, instead reviewing the case on the less intensive bases of whether the decision was irrational or irrelevant considerations had been taken into account.

However, proportionality could have been considered on the basis that there was an interference with his Convention rights. The Court held that dismissing him was not an interference with his freedom of religion as, while he was motivated by his religious views, he was not manifesting them. This was because the paper purported to be a neutral scientific paper rather than a religious tract, not mentioning any religious precepts at all. It was not Raabe's opposition to same-sex marriage per se which was the issue. As stated in the previous chapter, for there to be an interference with the right of religious freedom, there has to be a close link between the religious belief and the action taken and it is more than arguable that this did not exist here. However, it was an interference with his freedom of expression. Nevertheless, even if proportionality had been applied on this basis, a combination of factors would have made his dismissal proportionate. Applying a proportionality test would not have affected the outcome of the decision.

The paper was extremely offensive, particularly in its linking of homosexuality with paedophilia. Although presented as a scientific document, the paper was not a summary of peer-reviewed studies but a polemic against gay people. Although the paper was not recent, Raabe refused to distance himself from the views it contained. As a result, other members of the ACMD had threatened to resign if he were not dismissed. There had recently been a number of high-profile resignations and the Home Office was anxious that more should not follow. It was also considered important for the ACMD to have the support of gay people because research had identified that there were particular patterns of drug misuse among some gay people. The government therefore had legitimate aims in ensuring the smooth running of the organisation and in ensuring that its pronouncements were seen as authoritative. There were no other less restrictive means short of dismissing Raabe which could have been taken which would have fulfilled these aims, and given the unusual circumstances and the very offensive nature of the paper, the dismissal was proportionate.

The question arises as to whether employers should be able to restrict a broader range of expression, which while it may be discriminatory, could not in any sense be described as hate speech. In *Smith v Trafford Housing Trust*<sup>107</sup> a Housing Manager, who had listed his employment on his Facebook page, put a link on Facebook to a news article entitled 'Gay church 'marriages' set to get the go-ahead', with the comment 'an equality too far'. After a colleague posted 'does this mean you don't approve?' he replied:

'No not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose it's [sic] rules on places of faith and conscience.'

Because of these comments he was demoted to a non-managerial position with a 40% reduction in pay. It was considered that the comments 'had the potential to cause offence and 'could be seriously prejudicial to the reputation of the Trust' and that he had committed a serious breach of its Equal Opportunities Policy. He claimed that the trust had committed a breach of contract in demoting him.

In deciding the case, the High Court did not use a proportionality analysis, since it focused on the terms of the employment contract and did not directly consider his rights to freedom of expression or religion. However, the Court took a 'principled and sensible approach',<sup>108</sup> identified the factors that would be relevant to this discussion and reached the correct conclusion. It held that in demoting him Trafford Housing Trust had breached his contract of employment.<sup>109</sup> The judge said that he had come 'without difficulty' to the conclusion that 'his moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could not sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager' and thus he did not bring the Trust into disrepute. It was held that his expression of his views could not 'objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or upset.' The subject of gay marriage is an important matter of public interest and debate which should not be entirely restricted purely on the ground it might cause offence, as this would

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<sup>107</sup> [2012] EWHC 3221 (Ch).

<sup>108</sup> D. McGoldrick, 'The Limits of Freedom of Expression on *Facebook* and Social Networking Sites: A UK Perspective' (2013) 13 *HRLR* 125.

<sup>109</sup> He made no claim that he had been unfairly dismissed.

highly restrict the right to freedom of expression. It should be accepted that such discussion, particularly in an out of work context, is permissible.

### **Proportionality and Belief**

It has been demonstrated so far that a proportionality analysis is capable of providing nuanced and fact-specific decisions in a way which categorical tests which always prioritise one right over another in particular circumstances do not. As we have also seen, it may be proportionate to restrict speech and deny exemptions for specific types of employees. In all employment, the rights of others and the public interest will always have to be considered. Is it proportionate though not only to prevent employees from obtaining exemptions from part of their duties and restricting their speech, but also requiring them to advance the conception of equality promoted by their employer?

As argued earlier,<sup>110</sup> it is certainly not necessarily a violation to be required to hold particular beliefs for a particular job, for example it is obviously not a violation of freedom of belief for a priest to be required to hold official Roman Catholic beliefs.<sup>111</sup> This is also the same for some secular jobs, for example an animal welfare charity could require its employees to have a commitment to animal welfare.<sup>112</sup> The question for current purposes is whether an employer can require some of its employees to hold a particular conception of equality, or act to encourage particular conceptions of this idea. Normally of course it will not seek to do so, being more concerned with actions rather than belief.

Where a state will mainly seek to do this is where the purpose of the employment is at least partly to care for and to inculcate beliefs in children. The aims here are twofold: firstly to advance children's well-being, perhaps by promoting messages of inclusion and secondly to exert a 'moderate hegemony'<sup>113</sup> over children's beliefs. The two are of course linked. It could be argued that rights are not relevant to these

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<sup>110</sup> See supra at p35-6.

<sup>111</sup> See *Karlsson v Sweden* (1988) 57 Decisions and Reports 172, Cm where a vicar who did not wish to work with female priests for religious reasons had no rights under the ECHR, discussed in P. Edge 'Religious Rights and Choice under the European Convention on Human Rights' [2000] 3 *Web JCLI* <http://webjcli.ncl.ac.uk/2000/issue3/edge3.html>.

<sup>112</sup> See A. Motilla, 'The Right to Discriminate: Exceptions to the General Prohibition', in M.Hill (ed.), *Religion and Discrimination Law in the European Union* (Trier: Institute for European Constitutional Law, 2012).

<sup>113</sup> S. Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26 *Pol Theory* 56.



cases since the only pertinent criterion is the obligation to provide the best environment for children. Although deciding what the 'best' environment is is open to debate, the state is entitled to make a decision on this and act accordingly. However, as in all contexts, rights set the parameters of permissible state behaviour; if a person's rights have been affected then the interference must be proportionate to the interest advanced.

Such a policy was in issue for foster parents in *R(Johns) v Derby City Council*.<sup>114</sup> The Johns wished to be approved as foster parents but were Pentecostal Christians who believed that homosexuality was wrong. They felt they could not 'lie' to a foster child and tell her the opposite. While the council thought they were 'kind and hospitable people' who would take their caring responsibilities seriously, and indeed the Johns had previously been foster parents, their views posed a problem for their application. Without a final decision having been made, the couple sought a declaration that 'adhering to a traditional code of sexual ethics' did not make a person an unsuitable foster parent. The council sought an alternative declaration that a fostering service provider 'may be'<sup>115</sup> acting lawfully if it decides not to approve a prospective foster carer who 'evinces antipathy, objection to, or disapproval of, homosexuality and same-sex relationships and an inability to respect, value and demonstrate positive attitudes towards homosexuality and same-sex relationships.'

Ensuring the best interests of the child is the most important aspect of foster parenting. This does not mean that rights are not relevant: a status-based bar on adopting or fostering could certainly be a violation.<sup>116</sup> But where there are relevant reasons to believe that a person's beliefs are potentially harmful to a child, then restricting them from fostering is likely to be proportionate. As the Court put it, 'this is not a prying intervention into mere belief' but an investigation of their probable treatment of a child.<sup>117</sup>

In the event, the Court declined to give a declaration but suggested that opinions on homosexuality *may* be taken into account. This is unobjectionable, although perhaps rather meaningless. If a couple is to be given the responsibility of caring

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<sup>114</sup> [2011] HRLR 20.

<sup>115</sup> Originally this was 'would be'. This was changed during the hearing.

<sup>116</sup> A bar on unmarried couples adopting was held to be a violation of Art 8 and Art 14 in *Re P* [2009] 1 AC 173.

<sup>117</sup> *Supra* n. 110 at para 97.

for a child who is under the state's care then they have to be deemed to be suitable parents based on the available evidence as to what promotes child welfare. The state could point to evidence that children raised by parents who were disapproving of homosexuality had greater problems in adulthood if they were gay. Any interference with the Johns' rights is justified on the basis of the rights of the child.

This is not to say that the council was necessarily right, however, to prevent the Johns from becoming foster parents nor that there might have been no way round this problem, by for example using them as short-term relief foster parents. Whether a person is suitable to be a foster parent relies on a great deal of information and expert opinion and is therefore impossible to state in the abstract. Nevertheless it is clearly proportionate to assess a person's view of homosexuality and to take this into account on a fact-specific basis.

It should be highlighted though that this is an unusual case. Normally it will not be proportionate to even consider an employee's view of homosexuality, as opposed to merely requiring certain behaviour, because this is an intrusive interference into a person's religious freedom, which is generally not justified by the employer's interest in a non-discriminatory workforce. In *Buananno v AT&T Broadband*<sup>118</sup> for example, an employee was dismissed because he refused to sign an equality statement which required him to 'value the differences between employees'. He refused to sign it since he believed this required him to value the 'sinful' state of homosexuality and to value other religions as equal to Christianity. However, he stated he would never discriminate against colleagues and valued individuals in themselves. There was nothing particular about his job which required him to have particular beliefs about homosexuality or non-Christian beliefs. Rightly, he was successful in his religious discrimination claim: such a policy was disproportionate and bore little relation to the needs of his employer.

### **Conclusion**

This chapter has argued that an approach based on a proportionality test and the principles described above is the best way of deciding these employment cases. There are few straightforward or absolute answers in this context. Employees do have (limited) rights to manifest their beliefs within employment and thus their

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<sup>118</sup> 313 F.Supp.2d 1069 (D. Colo., 2004).

claims should be taken seriously. This should include a right to put their case forward and to have their interests directly assessed by a decision-maker. For this reason, it may be permissible even for state employees to discriminate, and I have argued that registrars should be exempted by their employers from performing same-sex marriages if this is practical and if the discrimination would not be directly experienced. In other cases though, such as foster parenting, the employer has a sufficient interest not only in preventing discrimination, but possibly also in trying to ensure particular attitudes are expressed relating to sexuality. The vehemence of the speech or practice and the extent to which it undermines the dignity of others will also be relevant.

Whether or not a person has a 'right to discriminate' therefore depends on many factors and a fact-specific inquiry. Such an approach will not fully satisfy either side. This is inevitable though where no-one has the absolute right to live out their lives or to have society ordered entirely as they wish and where similar questions of identity and liberty exist on both sides.<sup>119</sup> The next chapter considers this question from perhaps an opposite perspective: if secular institutions can be required to accommodate those who disagree with the organisation's non-discriminatory ethos, when (if at all) can a religious organisation be required to employ gay people, if it believes that this is contrary to the organisation's purpose?

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<sup>119</sup> C. Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brook L Rev* 61.

## **Chapter 5: Discrimination and Religious Employment**

### **Introduction**

This chapter addresses whether religious organisations, including religious bodies such as churches, as well as religious educational establishments and social service providers, can be required not to discriminate against gay people in employment. Of course, it should always be remembered that many will not wish to: sometimes because they have no theological objections to homosexuality, or more narrowly because they do not consider it necessary for the particular position in question.<sup>1</sup> Very often these may be contested issues within religious organisations.

In an important article, Bagni proposed an approach which resembled ‘three concentric circles revolving around an epicentre’.<sup>2</sup> He argued that, ‘the spiritual epicenter of a church must be outside the scope of civil regulation... only the most compelling government interest must justify regulation of some practices...Once the church acts outside this epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships’.<sup>3</sup> His four categories, decreasing in religiosity, are:

1. Spiritual epicentre
2. Church-sponsored community activities
3. Church’s purely secular business activities and relationships between clerical or janitorial employees who perform only nonspiritual functions
4. Totally secular activities

There are inevitable definitional problems in deciding, for example, what the ‘spiritual epicentre’ includes, especially if a religion asserts that all its activities are spiritual in nature. However, this approach should not be taken as having four entirely distinct categories; rather there is a sliding scale between spiritual and secular activity, with totally secular activities by religious organisations treated the same as those carried out by secular organisations.

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<sup>1</sup> For a range of views different religious institutions have taken see P. Dickey Young, ‘Two by Two: Religion, Sexuality and Diversity in Canada’ in L. Beaman and P. Beyer (eds), *Religion and Diversity in Canada* (Leiden: Martinus Nijhoff, 2008).

<sup>2</sup> B. Bagni, ‘Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations’ (1979) 79 *Colum L Rev* 1514, 1539.

<sup>3</sup> *Ibid.* at 1539-40.

This is an important part of the proportionality enquiry: the greater the interference with the right to religious freedom, the greater the justification required.<sup>4</sup> The interference with religious autonomy is much less and the interference with the right to non-discrimination greater where the employment in question is as a cleaner rather than as a minister for example. However, Bagni's approach only focuses on religious freedom and not on the non-discrimination right. Additional questions need to be asked: is there a legitimate aim for permitting the discrimination and, even if a religious organisation is pervasively religious, is this a sufficient reason to allow it to discriminate, when balanced against the interference with the non-discrimination right?

Evidently, in assessing how much weight the claims of religious organisations should be given, it is important to consider why collective religious freedom should be protected at all. The first reason is that individual rights of conscience may directly be in issue. A leader of a religious organisation may argue that it goes against his<sup>5</sup> conscience, and against his understanding of its religious precepts, to employ someone who is gay. Lupu though argues that conscientious objection is only relevant to individuals and not institutions on the basis that only people can feel the psychological effects of being forced to act in ways they disagree with.<sup>6</sup> This is of course true, although it ignores the fact that people in those organisations may experience such effects. However, freedom of conscience is protected not only because of the psychological effects of its violation but because it is seen as valuable in its own right as part of human flourishing in a liberal society.<sup>7</sup> Only recognising individual rights to religious conscience would exclude much of what is significant about religious freedom. Maintaining collective religious freedom provides the structure and support for individual religious belief to thrive and the continuation of doctrine and thought over time. Groups provide the context for 'personal expression, development and fulfillment.'<sup>8</sup> Permitting the formation of exclusive groups allows them to provide 'a source of ideas, for those who can both

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<sup>4</sup> This is part of Alexy's First Law of Balancing, discussed above at p78-9.

<sup>5</sup> I use his deliberately here: in this context discrimination against gay people is often accompanied by discrimination against women.

<sup>6</sup> I. Lupu, 'Free Exercise Exemption and Religious Institutions – The Case of Employment Discrimination' (1987) 67 *BUL Rev* 391.

<sup>7</sup> M. Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008).

<sup>8</sup> F.M Gedicks, 'Toward a Constitutional Jurisprudence of Religious Group Rights' (1989) 99 *Wisconsin LR* 100, 116.

learn and stimulate learning when they feel they are among peers... They can provide comfort in both an emotional and material sense.<sup>9</sup> Religious organisations also act as mediating institutions: that is as organisations that stand between the individual and the state, protecting individuals from the state's interference.<sup>10</sup>

An important part of collective religious freedom, and the right of freedom of association generally, is the right to disassociate, or to exclude those who are in disagreement with the group. This can be as important as being allowed to associate at all in terms of defining or maintaining an organisation's message or purpose.<sup>11</sup> Without it, a group loses the 'authority to define and to control the terms of its own existence... The group's vision of itself, its ability freely to tell and retell its narrative story is destroyed.'<sup>12</sup> Therefore religious organisations require some degree of autonomy over their membership and message, or in other words, the 'power of a community for self-government under its own law'.<sup>13</sup> In some ways, permitting religious organisations to discriminate by requiring members and employees to adhere to religious precepts is comparable to permitting any political or moral organisation to only have employees that agree with the organisation's message.<sup>14</sup>

Many religions have strict rules about sexual morality. Therefore many may seek to exclude gay people from certain positions within their organisation. It would be difficult for a church to maintain its teaching that all sexual activity outside heterosexual marriage is wrong, if those responsible for spreading this message do not agree. There may also be a role model element. As the Supreme Court justice Alito J put it, 'When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters'.<sup>15</sup> Even if the position does not involve disseminating the faith, the mere inclusion of those who disagree with a religious precept undermines the message. Employees also represent and are the

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<sup>9</sup> C. Boyle, 'A Human Right to Group Self-Identification? Reflections on *Nixon v. Vancouver Rape Relief*' (2011) 23 *Can J Women & L* 488, 509.

<sup>10</sup> B. Hafen, 'Institutional Autonomy in Public, Private, and Church-Related Schools' (1988) 3 *Notre Dame J L Ethics & Pub Pol'y* 405.

<sup>11</sup> W.P. Marshall, 'Discrimination and the Right of Association' (1986) 81 *Nw U L Rev* 68.

<sup>12</sup> Gedicks *supra* n.8.

<sup>13</sup> J. Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) 333.

<sup>14</sup> C.H. Esbeck, 'Charitable Choice and the Critics' 57 *NYU Ann Surv Am L* 17, 22.

<sup>15</sup> *Hosanna Tabor Evangelical Lutheran Church and School v EEOC* 565 US \_\_\_\_ (2012), 132 S.Ct. 694, 713.

'public face' of the institution.<sup>16</sup>

Balanced against this, though, is the right not to be discriminated against, and possibly also the right to freedom of religion. The denial of employment because a person is gay obviously has important practical economic and social disbenefits for that person, especially when patterns of discrimination exist.<sup>17</sup> This may be particularly so for jobs not immediately thought of as religious in nature. For more centrally religious employment, such as clergy, there may also be an additional argument: that of the individual's right to freedom of religion. This is further discussed below. In all cases, allowing discrimination increases exclusion within the organisation, causing hurt to those affected and making the needs and wishes of gay people less likely to be heard. As explained in the Introduction, there is also a public interest in non-discrimination as a, 'fundamental moral value that is widely shared in our society.'<sup>18</sup> Permitting religious organisations to discriminate has repercussions outside the religious context since it demonstrates generally that such discrimination may be tolerable.

A major problem is considering what is meant by different kinds of discrimination. Organisations are generally permitted wider rights to discriminate on the basis of religion than they are on other characteristics such as gender. This leads to a problem in how to characterise sexual orientation discrimination. If same-sex sexual activity is not permitted by the religion, but an employee still considers herself a member of that religion and believes its other precepts, should discrimination against her be considered discrimination on the grounds of religion, because she is not compliant with religious rules, (which may be permitted) or discrimination on the grounds of sexual orientation (which may not be)? Furthermore, what if an employee is discriminated against because of her status as a gay person, rather than for any particular behaviour?

These are difficult questions. Religion is evidently a matter not only of belief but also of practice. A religion may find it difficult to define a person as a member unless they follow religious rules. It also goes to the heart of religious autonomy for a religion to be able to define its own criteria for membership. On the other hand,

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<sup>16</sup> P. Taylor, 'The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts' (2002) 12 *Geo Mason U CR LJ* 159.

<sup>17</sup> P. Brest, 'The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle' (1976) 90 *Harv LR* 1.

<sup>18</sup> *Ibid.* at 5.

merely because someone is gay and belongs to a discriminatory religious organisation does not necessarily mean that the religion itself does not define that person as a member, albeit a failing one, or mean that they cannot perform religious aspects of the job. Of course a person is likely to self-define as a member of that religion and denying this may be extremely hurtful. These issues will be considered throughout the discussion that follows. A hard and fast rule will be not be given, but rather the chapter will consider the question of whether sexual orientation discrimination is proportionate in particular circumstances.

This chapter will address when discrimination should be permitted in relation to religious ministers, teachers at religious schools, employees of faith based social service organisations and employees with no religious function. It will then consider specific types of organisations which may claim more extensive rights to discriminate. It will consider the idea of 'islands of exclusivity': that is whether it is proportionate for some organisations to be allowed to ensure that *all* their staff believe and follow its religious precepts. Of course, in many situations no conflicts between perceived religious need and the law will arise at all, or can be dealt with informally.<sup>19</sup> In other cases the issue will be fiercely contested. These issues will be considered through the framework of proportionality, bearing in mind the need for mutual respect and accommodation and the importance of dialogue and justification, as discussed in the previous chapter.

### **Religious Ministers**

The archetypal case where discrimination is permitted is that of religious ministers. Even this does not command universal support. Rutherford has argued that such discrimination should not be permitted. Her first, jurisdiction-specific, argument is that equality is the 'primary constitutional value' in the US constitution.<sup>20</sup> This is unpersuasive. All kinds of social and economic inequality are seen as perfectly acceptable and perhaps even mandated by the constitution.<sup>21</sup> If there is a primary constitutional value, rather than a collection of sometimes

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<sup>19</sup> See e.g. B. Popplewell, 'Church Reconciles with Gay Altar Server', *The Toronto Star* 6 June 2010 <http://www.thestar.com/news/ontario/article/819850--church-reconciles-with-gay-altar-server> [Last Accessed 10 Feb 2014].

<sup>20</sup> J. Rutherford, 'Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion' (1996) 81 *Cornell L Rev* 1049. See also H. Skjeie, 'Religious Exemptions to Equality' (2007) 10 *Critical Review of International Social and Political Philosophy* 471.

<sup>21</sup> See e.g. C. Sheppard, 'Equality Rights and Institutional Change: Insights from Canada and the United States' (1998) 15 *Ariz J Int'l & Comp L* 143.



competing values, this could easily be liberty. Presumptively, this would seem to permit such discrimination.

More generally, Rutherford argues that prohibiting discrimination would enhance the 'free exercise' of religious groups, as discrimination leads to the 'exclusion of viewpoints of disfavored groups from religious dialogue'.<sup>22</sup> While free exercise, or the manifestation of religious belief, is undeniably extremely important, it is unclear why this necessarily means that religious institutions have to change their practices to comply with some of their members' religious beliefs. Religious people always have the possibility of joining a different religious organisation more in accordance with their views, or, if enough disagree and there is the will do it, to divide, as has happened to many religious institutions. Of course, this is not without cost, perhaps severe, to the believer, for whom their religion may be the overwhelming link to their community. However, it is not clear why the opposite would not also be true: that forcing religious organisations to change would be a violation of the rights of members who agreed with the original policy. In fact, this would be a greater violation: believers who did not agree with the change would have no choice but to accept a religious institution that did not comply with their beliefs. Finally Rutherford argues that creating an incentive to change one's faith, by only providing the right to change religion, violates the free exercise clause.<sup>23</sup> Given that the state constantly and inevitably influences religious belief, this is difficult to accept.<sup>24</sup>

This does not mean there are no arguments for prohibiting discrimination in selecting clergy. In addition to the general disadvantages of discrimination discussed above, it would be important in breaking down entrenched patterns of discrimination in often non-democratic and change-resistant organisations, which have greater resources than an individual believer.<sup>25</sup> Equality is an important value in all three legal systems in issue. However, requiring non-discrimination has received little support, with all three jurisdictions permitting some discrimination

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<sup>22</sup> Rutherford *supra* n.20 at 1086.

<sup>23</sup> *Ibid.* at 1087.

<sup>24</sup> R. Finke and L. Iannacone, 'Supply-Side Explanations for Religious Change' [1993] 527 *Annals Am Acad Pol & Soc Sci* 27; W.P Marshall and D.C. Blomgren, 'Regulating Religious Organizations Under the Establishment Clause' (1986) 47 *Ohio State LJ* 293, 310: 'Although [religion] can and should be free from government coercion, it cannot be insulated from government action that might affect religious values.'

<sup>25</sup> F.M. Gedicks, 'Narrative Pluralism and Doctrinal Incoherence in *Hosanna-Tabor*' (2013) 64 *Mercer L Rev* 405.

in this area. Challenges to discriminatory policies in this context have been rare. An American woman did challenge the Roman Catholic Church's prohibition on female priests but this was, unsurprisingly, firmly rejected.<sup>26</sup> This was the correct decision. Not to permit this would be a great interference with freedom of religion and would severely constrain religious organisations from formulating their own doctrines. What is less clear is whether discrimination should be permitted in all circumstances.

With regard to the proportionality test, there would appear to be two legitimate aims in permitting discrimination, corresponding to the benefits of collective religious freedom discussed above. The first, based on conscience, is about relieving the burden on organisations (and thereby their members) when they are required to act in ways with which they do not agree. The second is based on autonomy, and is potentially broader. This recognises that the ability to choose religious leaders in accordance with religious beliefs, and without interference, is at the core of collective religious rights. As Laycock puts it, 'when the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.'<sup>27</sup>

The 'conscientious objection' argument only applies where the religion is forced to act against its beliefs. The aim of protecting religious autonomy though applies whatever the reason for dismissal or refusal to employ.<sup>28</sup> That is, it applies whether or not a person is dismissed on the basis of a religious rule, although the interference with religious autonomy is evidently much greater where the discrimination is religiously mandated. Therefore, it is clear that only a policy of complete non-interference, which permits religious organisations to be as capricious as they wish in employment decisions relating to clergy, will fulfil the autonomy aim to the same extent. Thus the rational connection test and the no less restrictive means parts of the proportionality test are met even where the discrimination is not religiously mandated. The important question therefore is one

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<sup>26</sup> *Rockwell v Roman Catholic Archdiocese of Boston* 2002 WL 31432673 (D.N.H. 2002).

<sup>27</sup> D. Laycock, 'Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy' (1981) 81 *Colum L Rev* 1373, 1391.

<sup>28</sup> Therefore it is not right to say that there is no reason to permit the discrimination where it is not religiously required as Corbin seems to suggest, in 'Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law' (2007) 75 *Fordham L Rev* 2031.

of balancing the interests. The US and Britain have reached different positions on whether this is permissible. There appear to be no cases directly on point in Canada. I will argue that the British approach better assesses the conflicting rights because it provides an opportunity for more fact-specific analysis, rather than applying a blanket exception.

In the US, Title VII of the Civil Rights Act 1964, which grants rights not to be discriminated against in employment, excludes religious organisations from its ambit in relation to their religious activities for religious discrimination,<sup>29</sup> but for no other form of discrimination. The question was therefore whether discrimination on other grounds could be constitutionally prohibited. This was first considered by the Fifth Circuit Court of Appeals in *McClure v Salvation Army*.<sup>30</sup> McClure was an officer in the Salvation Army. After she complained that she received lower pay than her male equivalents, she was dismissed. The Salvation Army put forward no theological argument for the difference in pay. The Court held that Title VII could not constitutionally be applied to ministers. It held that the 'relationship between a church and its ministers was its lifeblood'<sup>31</sup> and 'the minister is the chief instrument by which the church seeks to fulfill its purpose'.<sup>32</sup> Thus the Court should not intervene, 'otherwise there would be intrusion in matters of internal organisation which are matters of singular ecclesiastical concern'.<sup>33</sup> This has become known as the ministerial exception, although it is widely accepted that, since the term 'minister' is used by few religions, it is inappositely named.

*EEOC v Hosanna-Tabor*<sup>34</sup> is a restatement and reaffirmation of this principle by the Supreme Court. Perich was a 'called' teacher at a Lutheran private school. Her official title was 'Minister of Religion, Commissioned': a position seen by the Lutheran church as distinct from either an ordained pastor or an ordinary member of the church.<sup>35</sup> However, the main part of her job was teaching secular subjects. While there may be doubt therefore as to whether she should qualify as a 'minister' at all, that is not the important question for present purposes.

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<sup>29</sup> 42 U.S.C. §2000e.

<sup>30</sup> 460 F.2d 553 (5th Cir., 1972).

<sup>31</sup> *Ibid.* at 558.

<sup>32</sup> *Ibid.* at 559.

<sup>33</sup> *Ibid.* at 560.

<sup>34</sup> *Supra* n.15.

<sup>35</sup> D. Laycock, 'Hosanna-Tabor and the Ministerial Exception' (2012) 35 *Harvard Journal of Law & Public Policy* 840.

Perich became ill with narcolepsy. Following disability leave the school, having concerns about her health, would not permit her to return to work and asked her to resign. She refused and advised she would sue for disability discrimination. She was dismissed, as the school considered their relationship to be 'damaged beyond repair' and because she did not follow the 'Biblical chain of command'. This was a religious policy which held that all disputes should be decided within the auspices of the church and not by secular courts. Perich filed a claim of discrimination, on the basis that she had suffered 'retaliation' after asserting a claim of disability discrimination, contrary to the Americans with Disabilities Act.<sup>36</sup>

Evidently, the discrimination, if proved, was not religiously required. However, the Supreme Court's view was that the reason for her dismissal was irrelevant. The purpose of the ministerial exception was 'not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful...is the church's alone.'<sup>37</sup> The American approach then is almost a jurisdictional one: if a person is a minister, then the church will have a defence to a discrimination claim in the secular courts. This is particularly important when it is considered that 'minister' is interpreted broadly. The Fifth Circuit Court of Appeals has held that a Music Director at a church was a 'minister', although he had no religious training and his only role was to play the piano during services. The Court argued that because he 'performed an important function during the service... he played a role in furthering the mission of the church and conveying its message to its congregants'.<sup>38</sup> The expansion of 'minister' to cover teachers at religious schools will be discussed further below.

The British approach is different. *Percy v Church of Scotland*<sup>39</sup> held that a religious minister could sue for sex discrimination since she had a contract personally to execute work.<sup>40</sup> Percy was dismissed after it was alleged she had had an affair with a married elder, but she complained that a man would not have been dismissed for similar reasons. Under the Equality Act 2010, if the employment is 'for the purpose of an organised religion' the employer may impose a requirement to be of a

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<sup>36</sup> 42 U.S.C. § 12101.

<sup>37</sup> *Supra* n.15 at 698.

<sup>38</sup> *Cannata v Catholic Diocese of Austin* Case No. 11-51151 (5<sup>th</sup> Cir., Oct 24, 2012) 18.

<sup>39</sup> [2006] 2 AC 28.

<sup>40</sup> Although see *Moore v President of the Methodist Conference* [2013] 2 AC 163.

particular sex, or a requirement related to sexual orientation<sup>41</sup> if the discrimination is either 'necessary to comply with the doctrine of the religion' or 'because of the nature of the employment and the context in which it is carried out' it is necessary to discriminate 'to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.<sup>42</sup> Thus, while it is permissible to discriminate in some circumstances, the alleged discrimination in *Percy* did not fall within either of these exceptions.

As they relate to sexual orientation discrimination, the exceptions were originally contained in the Employment Equality (Sexual Orientation) Regulations 2003. These were challenged in *R(Amicus) v Secretary of State for Trade and Industry*<sup>43</sup> on the basis that they did not comply with the EU Directive they were intended to incorporate.<sup>44</sup> The wording in the Regulations does not appear in the Directive, which only allows a derogation from the principle of equal treatment where it is a genuine and determining occupational requirement to be of a particular sexual orientation. However, it was accepted that it did comply with the Directive as the criteria were 'tightly drawn and are to be construed strictly'.<sup>45</sup> The question of whether there should be a narrower approach will be considered further below.

Only one case has arisen under this provision in relation to sexual orientation and it went no further than an Employment Tribunal. In *Reaney v Hereford Diocesan Board of Finance*,<sup>46</sup> Reaney was gay and had applied for the post of Diocesan Youth Officer. The official church position was that while gay people could become clergy<sup>47</sup> they would have to remain celibate. Despite Reaney's assurance that he would remain celibate, the Bishop refused to offer him the post. He sued for sexual orientation discrimination and won on the basis that he met the church's condition relating to homosexuality and there were no reasonable grounds for the Bishop to disbelieve him.

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<sup>41</sup> There are also exemptions concerning marital status.

<sup>42</sup> Equality Act 2010 Sch 9 Para 2.

<sup>43</sup> [2004] EWHC 860 (Admin).

<sup>44</sup> Council Directive 2000/78/EC.

<sup>45</sup> *Supra* n.43 at para 103.

<sup>46</sup> ET Case No. 1602844/2006.

<sup>47</sup> Reaney was not ordained and the post could be performed by clergy or laity. However, candidates had to state that they complied with the Church's teachings on sexuality as they were considered to be 'ministers of the gospel'. The Tribunal held it was one of the small number of non-clergy posts which were 'for the purposes of an organised religion'.

### Balancing the Interests

Evidently, requiring the discrimination to be religiously mandated is a greater interference with religious freedom than if discrimination is always permissible. Whether the organisation has complied with its own rules will have to be assessed in each case. There are normally strong presumptions against interfering in religious disputes because of the lack of competence of the court in assessing such matters, the possibility of cases becoming extremely complex and contested, and the lack of state interest in deciding them.<sup>48</sup>

Balanced against the right to religious autonomy though is the right not to be discriminated against. It is obvious that the effect of discrimination can be severe. To some extent of course this will happen if discrimination is permitted at all, but any element of surprise and unfairness in these situations presumably increases feelings of hurt and exclusion quite sharply. Furthermore as Hamilton argues, 'to grant immunity to the religious organizations where its actions were not dictated by religious belief, but rather expediency or a desire for secrecy, is to invite misbehavior'.<sup>49</sup> It does not take seriously enough the individual's right to justification since the religious organisation is under no obligation to explain why the employee has been dismissed. Even if it is not used cynically, the very act of requiring religions to state their position may lead to a change in policy in some cases, partly because of the internal and external dialogue this necessitates.<sup>50</sup>

The ministerial exception, as interpreted in *Hosanna Tabor*, is extremely broad. In argument, counsel for the school argued that the court should be prohibited from hearing all cases where a minister was dismissed, even if for example they were dismissed for reporting child abuse allegations.<sup>51</sup> Certainly a claim cannot be brought for race discrimination, even if this is against the tenets of the church.<sup>52</sup> Gedicks has rightly called it a 'constitutional right on steroids'.<sup>53</sup>

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<sup>48</sup> See *Khaira v Shergill* [2012] EWCA Civ 983; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth Ex p. Wachmann* [1992] 1 WLR 1036.

<sup>49</sup> M. Hamilton, *God vs. The Gavel: Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2005) 196.

<sup>50</sup> K. Greenawalt, *Religion and the Constitution Vol. No 1* (Princeton, Princeton University Press, 2002) 382.

<sup>51</sup> F.M. Gedicks supra n. 25. See also *Weishuhn v Catholic Diocese of Lansing* 756 N.W.2d 483 (2008).

<sup>52</sup> *Young v Northern Illinois Conference of United Methodist Church* 21 F.3d 184 (1994).

<sup>53</sup> Gedicks supra n. 25 at 429.

Laycock argues that a case-by-case analysis of whether discrimination is religiously required would be practically unworkable.<sup>54</sup> However, this is not the case. Under the British approach, only a limited inquiry is called for. Determining whether or not discrimination is religiously approved will normally be fairly straightforward. In many cases the organisation's views will be set out in a formal document. Significantly, this enquiry is not a centrality enquiry: the importance of the discriminatory rule in the religion's theology is irrelevant. What matters is whether or not the rule exists. It may be harder to establish the content of a religious policy in non-hierarchical institutions, where there is no central authority. However, this is not an insuperable problem. A 'rule' could for example be as vague as that it is up to each congregation to decide its own policy. Furthermore, under the British approach, identifying 'true' religious doctrine is unnecessary, since the exemption also applies where discrimination is necessary to avoid offending the religious feelings of a significant number of the religion's followers. Such an exemption is proportionate. There is often division and doubt within religious institutions on these issues. Different sections of a religious membership may have different views on what is religiously required and be able to provide theological reasons for their views. Secular courts are not well placed to decide religious matters, both as a matter of expertise and as a matter of authority. It is therefore important that any approach does not require a court to decide religious disputes, but leaves this as a matter to be resolved internally.

US courts fear that if there is greater scrutiny of religious decisions, courts will inevitably be drawn into deciding religious questions in cases of disputed facts where the church claims dismissal is for religious reasons, such as disagreements over services<sup>55</sup> or the content of sermons.<sup>56</sup> However, this is not the case. In *Percy* for example, it would have been quite possible for the church to demonstrate that male ministers were dismissed because they had affairs, without deciding any religious matters. In many cases no non-discriminatory reason is put forward at all. This is not to say that there is no entanglement in religious matters. Where a minister argues she was dismissed for a discriminatory reason but the organisation argues it was because she failed to live up religious standards, there will have to be some enquiry into religious matters, but this will be limited: the enquiry will only

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<sup>54</sup> *Supra* n.35.

<sup>55</sup> *Tomic v Catholic Diocese of Peoria* 442 F.3d 1036 (7<sup>th</sup> Cir., 2006).

<sup>56</sup> *Young v N. Illinois Conference of United Methodist Church* *supra* n. 53.

be to assess whether the religious reason is a pretext. In order to avoid considering religious questions, this may lead to a more truncated assessment than would take place in an ordinary discrimination case, but this does not mean that no assessment can ever take place.

The ECtHR too does not categorically exclude such claims, instead balancing the rights of the employee and employer, and this has not led to the rights of religious organisations being overly restricted, although it should be noted that there are few cases which consider the position of clergy, as opposed to other employees. While under ECHR law it appears there must be some oversight of the employment situation of organised religions, religious autonomy is still an important consideration. It is therefore very unlikely to be a violation where clergy are dismissed because of disagreements over religious doctrine.<sup>57</sup>

In *Fernandez Martinez v Spain*<sup>58</sup> the applicant was ordained as a priest but later applied to the Vatican for dispensation from the obligation of celibacy and then married. His contract as a teacher of Catholic religion at a state school was not renewed after a newspaper article was published which stated that he was a member of the Movement for Optional Celibacy. He claimed that this was a violation of Arts 8 and 14. Drawing on previous cases,<sup>59</sup> the Grand Chamber held that the state had positive obligations to ensure that the right to respect for private life was protected from interference between private parties and that the rights of the two parties needed to be balanced. It therefore did not adopt the hands off approach taken by US courts. However, the Court protected the Catholic Church's rights sufficiently by drawing attention to the importance of religious autonomy and the state's duty of religious neutrality. The majority of the Court ultimately held that there was no violation of his rights.

It should be remembered that this discussion is only relevant where the interference is for a legitimate aim: non-discrimination. If the interference with the right to religious autonomy is not for a legitimate aim it cannot be proportionate.

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<sup>57</sup> See also *Williamson v UK* App No. 27008/95 (17 May 1995) and *Sindicatul Pastoral cel Bun v Romania* [2014] IRLR 49.

<sup>58</sup> App No 56030/07 (15 May 2012); [2014] ECHR 615.

<sup>59</sup> *Obst v Germany* (senior public relations employee of the Mormon Church dismissed for adultery) *Schüth v Germany* (2011) 52 EHRR 32 (church organist dismissed for adultery). There was a violation in the second but not the first case, demonstrating the fact-specific nature of the Court's enquiry.



*Hasan v Bulgaria*<sup>60</sup> provides an example. A dispute had arisen over the election of the Chief Mufti of Bulgarian Muslims. The government replaced one candidate, who appeared to have the support of Bulgarian Muslims, with the previous incumbent who had collaborated with the Communist government. This was impermissible, because the government's purported aim of ensuring civil peace did not seem plausible. The action appeared to be taken for the purpose of favouring the government's preferred candidate.

While the US approach does not protect non-discrimination rights sufficiently, it should be noted that it is far more intrusive of religious autonomy to require reinstatement rather than the payment of damages. Reinstatement truly does force a minister on an unwilling church. For this reason it is unlikely to be proportionate. In practice it is rarely sought and even more rarely given.<sup>61</sup>

As always, merely because the approach suggested here permits some legal intervention, this does not mean that legal solutions should necessarily be pursued. With good advice and discussion, the litigation in *Hosanna-Tabor* could probably have been avoided. *Hosanna-Tabor* had paid Perich's salary while she was on sick leave for much longer than was legally required. They also had a fairly strong case that permitting her to come back in the middle of the school year when a replacement teacher had been hired would have placed them under undue hardship as they tried to maintain continuity in teaching.<sup>62</sup>

Nevertheless, it would not have posed a great risk to religious freedom to have required *Hosanna-Tabor* to pay damages to Perich. This would still leave religious organisations free to create their own rules on, for example, sexual morality, even if, and in fact particularly importantly if, these are 'practices that the larger society condemns'.<sup>63</sup> Religious organisations are free to apply any policy they wish relating to employment of ministers and sexual orientation. At worst therefore, they will only be forced to adhere to their own rules. This rule thus deters hypocrisy.<sup>64</sup>

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<sup>60</sup> (2002) 34 EHRR 55.

<sup>61</sup> See A. Korn and M. Sethi, *Employment Tribunal Remedies* 4<sup>th</sup> ed (Oxford: Oxford University Press, 2011) Ch 3; B. Wolkinson and V. Nicol, 'The Illusion of Make-Whole Relief: The Exclusion of the Reinstatement Remedy in Hostility-Based Discrimination Cases' (1992) 8 *Lab Law* 157.

<sup>62</sup> Laycock *supra* n.35.

<sup>63</sup> S. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993) 34.

<sup>64</sup> G.S. Buchanan, 'The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values' (1994) 43 *Emory LJ* 1189.

On the other hand, it might be argued that allowing discrimination for clergy, wherever this was mandated by religious rules, is too broad. Although I have considered whether the British approach itself is proportionate, it does not require a proportionality assessment in each case. The lack of a proportionality requirement for discrimination for positions which are ‘for the purposes of an organised religion’ was challenged in *R(Amicus) v Secretary of State for Trade and Industry*<sup>65</sup> but was upheld on the basis that it was itself a proportionate rule. Given the importance to collective religious freedom of being able to select religious ministers in accordance with religious precepts, it is difficult to see how the selection of a minister in compliance with such precepts, at least as they relate to sexual orientation, could not be proportionate. Therefore although the British law is expressed as a rule, it can also be seen as a working out of the requirements of proportionality in a particular situation, as was in fact held.

#### Biblical Chain of Command

Clergy should, then, be able to bring claims where the discrimination is not religiously based. However, the decision to dismiss may be based on a different religious rule particularly in Fundamentalist<sup>66</sup> Protestant churches: the failure of the minister to subject herself to the religious institution and, by involving secular authorities in religious matters, breaking the Biblical ‘chain of command’.<sup>67</sup> In *Hosanna Tabor* itself this rule was irrelevant to the Supreme Court’s decision: the school would have had the right to dismiss Perich for any reason, but if the ministerial exception is narrowed, this rule could become crucial. The rule may be just as important to the religion, being Biblically based, and resonating with other religious concepts,<sup>68</sup> as a rule forbidding women ministers, for example. Preventing religious organisations from applying this rule may therefore be a great interference with its autonomy and conscience.

The fact that there is a legitimate aim and no less restrictive means of achieving this aim does, however, not necessarily mean the rule’s importance is not outweighed by other considerations. Evidently, such a policy greatly affects the

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<sup>65</sup> [2004] EWHC 860 (Admin).

<sup>66</sup> See for meaning C. Pasquiniti, ‘Fundamentalisms’ (1998) 5 *Constellations* 10.

<sup>67</sup> As in *Dayton Christian Schools v Ohio Civil Rights Commission* 766 F.2d 932 (6<sup>th</sup> Cir., 1985); 477 US 619 (1986).

<sup>68</sup> K. Boone, *The Bible Tells Them So: The Discourse of Protestant Fundamentalism* (Albany: State University of New York Press, 1989).

right to non-discrimination, increasing the number of situations where there is no recourse against discrimination. Most importantly though, it infringes the right to a fair hearing.<sup>69</sup> It means that a person may be treated extremely badly, both by secular standards and according to the rules of the religion itself, but be prevented from having any opportunity to challenge this. It can be used entirely cynically. Clergy, like any employees, can be extremely vulnerable vis-à-vis their employer. For these reasons when the interests are balanced, the right to religious autonomy, although potentially deeply affected, is outweighed by these concerns.

### Religious Ministers: Conclusion

Overall therefore a blanket rule that always allows ministers to be discriminated against is disproportionate. It 'protects unjustified discrimination and administrative blunders by a congregation'.<sup>70</sup> Instead a case-by-case assessment should be undertaken in deciding whether discrimination is religiously required.<sup>71</sup> Because of the importance of religious autonomy, the British approach, whereby a religious organisation may discriminate if it demonstrates either that the discrimination is doctrinally mandated or it is needed to avoid offending a significant number of followers, is proportionate. It draws an appropriate balance between the interests.

### Other Religious Employment

The rest of this chapter is devoted to the more difficult subject of religious employment aside from clergy. There may be great differences between the religious roles such employees perform, even if the role, such as a teacher at a religious school, is formally the same. For this reason, proportionality's fact-specific nature is very useful and relevant in this context.

### Teachers

Teachers have a dual aspect to their employment. On the one hand they are responsible for passing on religious teachings, what Buchanan calls its 'mind-

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<sup>69</sup> C.f. I. Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Ox J Law & Religion* 109.

<sup>70</sup> Gedicks *supra* n.25.

<sup>71</sup> See for a similar argument J. Vartanian, 'Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception' (2009) *U Tol L Rev* 40.

training function'.<sup>72</sup> One of the main purposes of religious institutions, including religious schools, is to 'train, persuade, or otherwise influence' those who hear their messages.<sup>73</sup> This function is not confined to teaching religious subjects. Schools may try to present religious messages in secular subjects and in other activities. Teachers may also be expected to be role models, demonstrating how to live a religiously acceptable life. If a religion wishes to pass on the message that homosexuality is unacceptable, this message will be undermined if those giving the message are gay. A school may also wish to preserve its strictly religious character and define itself in opposition to secular society. This raises issues of religious autonomy similar to those discussed above. The rights of parents to educate their children in line with their beliefs are also relevant. They may argue that the school should provide an environment where it does not undermine the moral messages they wish to pass on to their children.<sup>74</sup> Finally, it is also possible that, as in *Hosanna Tabor*, teaching is seen as part of wider ministry, and a teacher is therefore an important part of a religious community.

On the other hand, much of the work of a teacher at a religious school will be indistinguishable from that of teachers at non-religious schools or from those teachers who are not expected to disseminate religious messages. The religious interest may therefore be minor. In contrast, the interest in non-discrimination can be great. Religious schools can make up a sizeable proportion of the overall employment market for teachers. Teachers may be attracted to work in private schools for reasons entirely unconnected to their religious ethos, such as better resources and smaller classes, which may be a problem where the majority of private schools are religious.<sup>75</sup> If, rather than refuse such employment, gay teachers decide to closet themselves then this: 'stunts and often destroys the mental health of the suppressor. It impedes the development of self-esteem as well as a person's ability to build meaningful relationships.'<sup>76</sup> A discriminatory policy may also lead to intrusive and personal questioning.<sup>77</sup>

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<sup>72</sup> *Supra* n.58 at 1225.

<sup>73</sup> *Ibid.* at 1240.

<sup>74</sup> R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2013) 248-50.

<sup>75</sup> S. Brandenburg, 'Alternatives to Employment Discrimination at Private Religious Schools' *1999 Ann Surv Am L* 335. She points out that 90% of private schools in the US are religiously affiliated.

<sup>76</sup> H. Paterson, 'The Justifiability of Biblically Based Discrimination: Can Private Christian Schools Legally Refuse to Employ Gay Teachers?' (2001) *59 U Toronto Fac L Rev* 59, 84. See

Such a policy can also have negative effects on gay students, leading to a greater sense of isolation. This is particularly important given that gay teenagers are at greater risk of depression and suicide.<sup>78</sup> Furthermore, as with all discrimination it has a societal effect, sending out a general message that gay people are less worthy of respect, even to those not directly affected by the policy. In Canada and the UK, this discrimination may occur in state schools directly funded by the state. Even in private schools, in all three jurisdictions it is likely that the school will be tax exempt, which functions as a state subsidy.

### English, US and Canadian Approaches

The English approach is fairly complex. Whether it is permissible to discriminate on the basis of *religion* depends on the type of school. If it is a foundation or voluntary controlled school with a religious character, the school may reserve up to a fifth of its teaching posts as requiring a particular religious view.<sup>79</sup> Voluntary aided and private schools listed as schools with a religious ethos may discriminate for all their teaching staff,<sup>80</sup> as may free schools and academies if they are registered as having a religious character.<sup>81</sup> The legislation only gives rights to discriminate on the ground of religion. However s.60(5)(b) of the School Standards and Framework Act 1998 states that ‘regard may be had, in connection with the termination of the employment or engagement of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified’. This would seem to suggest that a teacher could be dismissed for, for example, being in a same-sex relationship if this was forbidden by the religion, although not for her sexual

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also C. Yarel, ‘Where are the Civil Rights for Gay and Lesbian Teachers?’ (1997) 24 *Human Rights* 22.

<sup>77</sup> Brandenburg *supra* n.78.

<sup>78</sup> Paterson *supra* n.79.

<sup>79</sup> School Standards and Framework Act 1998 s.58. In a voluntary aided school the land and buildings are controlled by the church and the governing body employs the staff and controls admission but the school is funded by the local authority. See L. Vickers, ‘Religious Discrimination and Schools: The Employment of Teachers and the Public Sector Duty in Law’ in M. Hunter-Henin, (ed.), *Law, Religious Freedoms and Education in Europe* (Farnham: Ashgate, 2012).

<sup>80</sup> School Standards and Framework Act 1998 s.60. In a voluntary controlled school again the land and buildings are controlled by the church, but the local authority funds, employs the staff and controls admission. Vickers *ibid*.

<sup>81</sup> School Standards and Framework Act 1998 S.124A. Free schools are state funded but can be set up by any interested parties e.g. teachers, parents, businesses.

orientation per se, even if she otherwise were a member of the religion and compliant with its religious rules.<sup>82</sup> There is no explicit exemption for sexual orientation discrimination at religious schools though, although there is a general exception where a requirement relating to sexuality is a 'genuine and determining occupational requirement' and it is 'proportionate to apply that requirement in the present case'.<sup>83</sup> This, however, was considered in *Amicus*<sup>84</sup> to be a very narrow exemption, and it was suggested that it would not cover such a case.

If requirements regarding religious behaviour include discriminatory rules relating to sexual behaviour, these are then potentially extremely wide exceptions and go beyond what many schools require to fulfil their religious purposes. Over 30% of state schools in England have a religious character.<sup>85</sup> The particular religious role of teachers may vary widely between schools, and even within schools. There are many schools where the religious ethos is merely nominal. The exceptions therefore potentially leave gay, and certainly leave non-religious, teachers vulnerable to discrimination and may lead to arbitrary decisions.

American law is more complex. As sexual orientation discrimination is not prohibited at federal level but only at state level, legislative exemptions for religious organisations vary by state, but some simply exclude religious schools from their ambit. Importantly, there are also constitutional restrictions on when discrimination can be prohibited. *Hosanna-Tabor* declined to give a test for when a person would be considered a minister, but considered that a person's title and the functions they performed, including whether they had responsibility for teaching the faith, were relevant. Some subsequent case law has considered some teachers at religious schools to be 'ministers' if they have a religious role, even if the religion does not have a concept of 'called teacher' as in the Lutheran Church. The particular importance of this is that if a teacher is considered to be a minister then, as discussed above, she can be dismissed for any reason at all, without any kind of balancing or other limits.

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<sup>82</sup> Although see *O' Neill v Governors of St Thomas More RCVA Upper School* [1996] IRLR 372.

<sup>83</sup> Equality Act 2010 Sch 9.

<sup>84</sup> *Supra* n 43.

<sup>85</sup> See Department for Education, *FOI Release: Maintained Faith Schools*: <https://www.gov.uk/government/publications/maintained-faith-schools> [Last Accessed 10 Feb 2014]. This includes many of the schools set up under the academies and free schools programmes: <http://www.education.gov.uk/schools/leadership/typesofschools/b0066996/faith-schools/faith> [Last Accessed 10 Feb 2014].

*Kant v Lexington Theological Seminary*<sup>86</sup> demonstrates how broad this exception can be. It involved a tenured associate professor who was dismissed following severe budgetary constraints. The seminary was affiliated to the Disciples of Christ, but Kant was Jewish. The seminary itself obviously had a religious purpose and like all the academic staff there, Kant helped to fulfil this religious purpose. His role though was academic rather than spiritual, albeit within a religious environment. Nevertheless, he was held to be a minister and therefore could not challenge his dismissal. Where the person concerned is of a different faith to the religious institution, such an approach stretches the meaning of ‘minister’ beyond all recognition. This is particularly serious given the devastating effect a designation as ‘minister’ has on a discrimination claim.

Such a broad interpretation is though unusual. By contrast, in *Dias v Archdiocese of Cincinnati*<sup>87</sup> a non-Catholic teacher was dismissed after she became pregnant by artificial insemination, but it was held that she was not a ‘minister’ because she was not involved in teaching Catholic doctrine, despite the school’s attempt to portray her as a role model. It was also held the school could not enforce a ‘morals’ clause in her contract because she was not aware this prohibited artificial insemination. The refusal to give clear guidance in *Hosanna-Tabor* on the definition of a minister has spawned these problems of inconsistency, but the major problem is the width of the ministerial exception and that it contains no requirement of proportionality or even balancing.

It does seem clear that a teacher of religious subjects is likely to be considered a ‘minister’. In *Weishuhn v Catholic Diocese of Lansing*<sup>88</sup> a teacher of mathematics and religion, who was also responsible for planning masses at the school and for preparing her students for confirmation, was not protected under the Whistleblowers’ Protection Act for raising child abuse claims and could not bring a sex discrimination claim, because her role was ‘primarily religious’. Similarly in *Temple Emanuel of Newton v Massachusetts Commission Against Discrimination*,<sup>89</sup> a teacher of religion could not bring a claim for age discrimination. Requiring

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<sup>86</sup> 2012 WL 3046472 (Ky. App., July 12, 2012). These cases are referred to in L. Griffin, ‘Divining the Scope of the Ministerial Exception’ (2013) 39 *Human Rights* 19.

<sup>87</sup> 114 Fair Empl.Prac.Cas (BNA) 1316 (S.D. Ohio, 2012).

<sup>88</sup> *Supra* n. 52.

<sup>89</sup> 975 N.E.2d 433 (Mass., 2012).

teachers like Weishuhn, who have clearly religious roles, to adhere to religious rules even if these are discriminatory may well be justified in a particular case because of the importance of collective religious freedom. Permitting such discrimination ensures a consistent message is given in teaching the tenets of the religion, provides role models, and allows a religious community to be organised around particular values. However, this does not mean discrimination should be accepted where it is not for a religious reason. It leaves teachers vulnerable to dismissal when this is not needed to protect an institution's religious mission or teachings.

The ministerial exception provides the most extensive protection for religious rights, but case law decided before *Hosanna Tabor* demonstrates that the free exercise clause may require other, narrower, exemptions. In *Dayton Christian Schools v Ohio Civil Rights Commission*<sup>90</sup> for example a school decided not to renew a (married) teacher's contract because she was pregnant and the school's religiously based policy was that mothers of young children should not work. When she sought to challenge this, she was dismissed for not following the Biblical chain of command. The Ohio Civil Rights Act<sup>91</sup> did not have any exemptions for religious organisations. Although the result was reversed on procedural grounds by the Supreme Court, the Sixth Circuit held that the school had a constitutional right to discriminate, as applying the law to it would have violated its free exercise rights.

The school sought to infuse religion into all aspects of teaching. Teachers were 'required to be born again Christians and to carry with them into their classes the religious fervor and conviction felt necessary... The belief system espoused by DCS touches every aspect of their life.'<sup>92</sup> The school clearly wished to be pervasively religious and to inculcate particular religious values, many of which conflicted with those of wider society, in its students. Given this, requiring all teachers to abide by religious rules may be appropriate. However, there were problems with the school's argument. The teacher was not aware of the rule at issue in the case. Although she was aware in general terms of the religiously ordained differing gender roles for men and women, she was unaware that this meant that the school would require her to give up her job when she had children. By dismissing her for

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<sup>90</sup> Supra n.70.

<sup>91</sup> Ohio Revised Code 4112.02(A).

<sup>92</sup> Supra n.70 at 936.



behaviour that she had not realised was religiously unacceptable, the school had failed to respect her right to non-discrimination. As discussed below, knowledge is an important factor.

Other cases have also concluded that religious schools may have the right to discriminate when teachers have failed to comply with religious conduct rules.<sup>93</sup> In *Little v Wuerl*<sup>94</sup> a non-Catholic teacher at a Catholic school divorced and remarried. The Court held the school could dismiss her for not following the canonical process required to have her first marriage annulled and this did not breach the prohibition on religious discrimination. It considered that applying non-discrimination laws to the school would 'arguably' infringe its free exercise rights and that 'attempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden'.<sup>95</sup> It is very questionable though whether merely because a job has some religious significance, it should then be automatically permissible to discriminate, especially where the school did not think it necessary for a teacher to be a member of the religion at all. The decision is also odd in that the Court held it could not make a determination as to whether Little rejected the teachings or doctrines of the Catholic Church. However, quite obviously, simply by not being Catholic, Little had rejected some of the Catholic Church's teachings. This was not the issue. The question should have been whether in these circumstances the school's interest in discrimination on the grounds of marital status was sufficient to outweigh the interest in non-discrimination. The judgment thus overstated the effect on religious autonomy.

In contrast, in *EEOC v Freemont Christian School*,<sup>96</sup> for example, it was held, using a balancing analysis, that it was not permissible to only pay health insurance to 'heads of households', thereby excluding married women. The school was run by the Assembly of God Church. Teachers did not have to be members but had to belong to an evangelical church and subscribe to certain doctrinal beliefs, including the belief that there are different gender roles. There was no relevant legislative exemption and the Court argued that applying the law would not infringe the

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<sup>93</sup> J. Belcove-Shalin, 'Ministerial Exception and Title VII Claims: Case Law Grid Analysis' (2002) 2 *Nev LJ* 86.

<sup>94</sup> 929 F.2d 944 (3<sup>rd</sup> Cir., 1991).

<sup>95</sup> *Ibid.* at 948.

<sup>96</sup> 781 F.2d 1362 (9<sup>th</sup> Cir., 1986).

school's free exercise rights. It noted that wages and other benefits were already paid equally to men and women and held that giving this benefit equally would not substantially affect the Church's religious practices.

To summarise, under *Hosanna-Tabor* it appears that if a teacher teaches religious subjects then she will be designated a minister and cannot make a discrimination claim, no matter how remotely this discrimination is connected to a religious aim. In some other cases a teacher may also be designated a minister, but it is unclear when. In still further cases a teacher may not be a minister, but may still have to comply with religious rules, an exception which arises out of the free exercise clause. Consideration of this issue is complex and involves questions of whether a teacher's primary duties are secular or religious and whether enforcing non-discrimination principles would lead to a substantial or de minimis burden on religious belief. Essentially this is a balancing enquiry, but the factors to be taken into account are unclear and, as the balancing is not carried out openly, the cases often seem to understate the interest in non-discrimination and occasionally give rise to somewhat Delphic pronouncements.<sup>97</sup> Alongside this there is a legislative general exemption for discrimination on the basis of religion.<sup>98</sup> Battaglia rightly criticises this case law for 'mask[ing] judicial judgments regarding burdens and interests' and failing to 'articulate those implicit judgments leading to the conclusory characterization'.<sup>99</sup> A proportionality test would make the reasoning for these decisions much more open.

In contrast, Canada's approach is more clearly a balancing one. Although there is some variation in the law between jurisdictions, the usual approach is to use a BFOR (bona fide occupational requirement) model. This permits discrimination where it is a bona fide occupational requirement that the person is, for example, of a particular religion, and this requirement is a proportionate means of achieving a legitimate aim. In common with the other jurisdictions then, religious schools may sometimes discriminate on the grounds of religious precepts.

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<sup>97</sup> D. Okamoto, 'Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights' (1987) 60 *S Cal L Rev* 1375.

<sup>98</sup> Schools are exempted under federal legislation if they are 'in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association or society,' or if the 'curriculum of such school... is directed toward the propagation of a particular religion' § 2000e-1.

<sup>99</sup> J. Battaglia, 'Religion, Sexual Orientation and Self- Realization: First Amendment Principles and Anti-Discrimination Laws' (1999) 76 *U Det Mercy L Rev* 190, 378.

In *Caldwell v St Thomas Aquinas High School*<sup>100</sup> the Supreme Court held it was not impermissible marital status discrimination where a Catholic teacher at a state denominational school was dismissed because she married a divorced man in a civil ceremony. The school did employ some non-Catholic teachers where suitably qualified Catholic teachers could not be found, but these teachers were expected to support the school's religious approach and to abide by the practices of their own religion. In deciding that compliance with religious rules constituted a BFOR, the Court stated that the purpose of the school was to impart a Catholic way of life to its students. The religious aspect of the school 'lies at its very heart and colours all its activities and programs'.<sup>101</sup> Teachers were expected to act as role models and had to be able to credibly espouse Catholic doctrine. The Court therefore considered that there existed 'the rare circumstances'<sup>102</sup> in which religious conformance was a bona fide qualification. This case is very similar to *Little v Wuerl*, with the important difference that the teacher was Catholic, and would not have been dismissed if she had belonged to a Protestant church that accepted remarriage.<sup>103</sup>

The school's interest in maintaining the religious behaviour of its Catholic staff is obviously higher than its non-Catholic staff, and this is recognised. Even so, the Court may have been overly deferential to the school in assessing its interest, in that it is questionable whether it would really have affected the school's interest greatly if it had had to accept an imperfect role model in *Caldwell*, given that it accepted other 'imperfect' role models.

### Proportionality

The Canadian and English approaches accept that the autonomy that is appropriate in selecting and dismissing clergy is not appropriate for teachers because of the less fundamentally religious nature of their employment and the fact that their role,

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<sup>100</sup> [1984] 2 RCS 603.

<sup>101</sup> *Ibid.* at 624.

<sup>102</sup> *Ibid.* at 625.

<sup>103</sup> Later cases have also permitted schools to dismiss teachers for breaches of religious doctrines. See e.g. *Garrod v Rhema Christian School* [1992] 15 CHRR D/477 (teacher could be dismissed for beginning a new relationship while separated, but not divorced, from her husband); *Kearley v Pentecostal Assemblies Board of Education* [1993] 19 CHRR D/473 (could be dismissed for remarriage while former spouse still living).

status in the religion and the religious nature of their workplace varies widely. However, at the heart of these cases is an unavoidable dilemma. Either some schools will be forced to employ those who do not agree or comply with the school's religious message, or gay teachers will be left vulnerable to discriminatory dismissals. In settling this dispute, it is not sufficient to classify certain schools as able to discriminate or to exempt all religious schools from discrimination law. It is not necessary, for example, for all voluntary aided schools or for all private schools with a religious ethos to be able to discriminate for all their teaching posts in order to maintain the level of religious ethos that they require. The 'religious intensity'<sup>104</sup> of schools varies greatly.<sup>105</sup> The British approach allows schools to discriminate where they could not demonstrate the need for teachers to follow religious rules. This denies the importance of fact-specific judgments and does not provide justification to those to whom the discrimination affects. It therefore unjustifiably privileges one right above another.

An alternative to a categorical test is to use a BFOR approach as used in Canada.<sup>106</sup> This essentially incorporates the proportionality enquiry. It focuses on the particular need for discrimination in the particular circumstances and balances the interests at stake. In this enquiry, the first question is whether there is a legitimate aim in permitting such discrimination. This will generally be easy to find, unless the stated reason for dismissal is a clearly a pretext. The religious organisation is likely to have legitimate interests in protecting its religious conscience and in protecting the religious autonomy of the school.

The next test, a rational connection between the discrimination and protecting religious conscience or autonomy, will also normally be easy to pass. This is not explicitly mentioned in the BFOR test, but as any discrimination must be proportionate, it is an essential question. Similarly, it is important to consider whether the approach taken is the least restrictive means of achieving the aim. It is conceivable that there could be some resolution if, instead of being dismissed, an employee is moved from teaching religious subjects to only secular ones. Normally though the decision will depend on whether the policy is 'proportionate' in the

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<sup>104</sup> Laycock *supra* n.27 at 1403.

<sup>105</sup> See C. Evans and B. Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *MULR* 392.

<sup>106</sup> And for some religious employment in Britain. See social service section below.

strict sense. Although this is a fact-specific enquiry, some factors are likely to be generally relevant in deciding these and similar cases.

The first and most important factor is the pervasive religiousness of the school or other workplace. Relevant to this is how strong its links are to a church or other religious body. Control over admission may be relevant if the school only accepts children of one faith. This might not though be conclusive. An evangelical Christian school may argue that it is religiously obligated to encourage as many people as possible to hear its religious message and a Catholic school in a deprived inner-city area may see providing education to those particularly in need as part of its religious mission, regardless of their religion. The schools may though require strict codes of behaviour and belief for their employees.

Araujo argues that 'to have some external, secular institution...dictate what is the "essence" of a private school and what constitutes its "central mission" places [the institution] in a peculiar position for which its expertise can claim no competence'.<sup>107</sup> However, if a school's right to freedom of religion is in conflict with another right such as non-discrimination, a secular authority must decide the appropriate balance between them. This weighing of competing rights is an important *legal* and not religious question: although religious institutions may have opinions as to where the balance should be struck, that does not automatically make it a religious question. A holistic enquiry into whether the school's religiosity is merely nominal or all-encompassing is a suitable objective factor for ascertaining the boundaries of these rights.

The second factor is the religiousness of the post. Even if a school has a religious mission, this does not necessarily mean that it should be permitted to discriminate with regard to all its teachers. It is clearly easier to demonstrate that it is a requirement that a teacher of religion belongs to a religion and complies with religious rules, as compared to a teacher of only secular subjects. Nevertheless, the school may wish the religious ethos to be infused throughout teaching and extracurricular activities. The degree of religiousness should not be assessed formulaically. The proportion of time a person spends 'doing religion' is relevant,

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<sup>107</sup> R. Araujo, "'The Harvest is Plentiful, but the Laborers are Few": Hiring Practices and Religiously Affiliated Universities' (1996) 30 *U Rich L Rev* 713, 751.

but only as part of the enquiry.<sup>108</sup> Facts such as that a person only spends 10.6% of their time teaching and supervising religious activities should not be decisive.<sup>109</sup>

A third important factor is whether the religious rule has been brought to the attention of the teacher. This allows teachers to take up employment in full knowledge of what is expected from them and provides some protection against arbitrary enforcement of rules. It also has a more intangible benefit in that it demonstrates respect to prospective employees because it shows that the organisation recognises it can only enforce its beliefs on those who are willing to accept its authority.

A related factor is whether the rule has been applied consistently. This is relevant because it demonstrates the importance of the rule to the religion. If an organisation has not previously considered the rule vital, presumptively it makes it difficult for it to claim that a further dispensation would be a great interference with its religious interest. It is likely therefore to be outweighed by the opposing interest, unless good reason can be shown. This does not mean that different standards of behaviour could not be required for different types of employee. Care should be taken though not to place religious organisations in a double bind when it comes to consistency. Since it is necessary to consider the importance of a rule on a case-by-case basis, it could be suggested that having one exception will not undermine the school's interests. However, if a rule is not applied to all this may be used to undermine the claim that the rule is necessary at all.<sup>110</sup> Therefore the requirement of consistency should not be seen as absolute. A school may well be able to show its interest in maintaining some religiously compliant staff.<sup>111</sup>

There is also a more general requirement of consistency. If gay sexual activities or relationships are the only behaviour prohibited, this looks less like an effort to maintain religious exclusivity and more like mere homophobia.<sup>112</sup> If employees have been dismissed for breaking other religious codes, or are at least required to

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<sup>108</sup> This type of approach was rejected in *Hosanna Tabor*.

<sup>109</sup> See discussion of *Clapper v Chesapeake Conference of Seventh Day Adventists* No. 97-2648, 1998 WL 904528 (4th Cir., Dec. 29, 1998) in L. Fisher, 'A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools' (2010) 16 *Wash & Lee JCR Soc Just* 529.

<sup>110</sup> A. Esau, 'Islands of Exclusivity Revisited: Religious Organizations, Employment Discrimination and *Heintz v Christian Horizons*' (2009) 15 *Canadian Lab & Emp LJ* 389.

<sup>111</sup> *Pime v Loyola University of Chicago* 585 F. Supp. 435 (N.D. Ill., 1984).

<sup>112</sup> C.f. *Brown v Dade Christian Schools* 556 F.2d 310 (5th Cir., 1977).

uphold them, it makes it more likely that the dismissal is justified. Some cases have highlighted the importance of these factors. Cases involving pre-marital pregnancy have for example highlighted the importance of applying a rule forbidding pre-marital sex equally to men and women, otherwise this is simply unlawful sex discrimination.<sup>113</sup>

It should be remembered that the BFOR approach requires some loss to both rights. Even if an exception were granted there would still be some interference with religious practices. There may be a chilling effect where organisations amend their practices to avoid the risk of litigation, even if this would ultimately not be required if assessed by the courts. On the other side, the lack of a clear prohibition of discrimination at religious schools may make gay employees vulnerable. Nevertheless, a case-by-case proportionality approach is the best way to take full account of the conflicting rights.

### **Social Service Organisations**

Religious institutions are greatly involved in a wide provision of social services from healthcare provision, to services for homeless people, to care of people with disabilities. They may receive quite extensive government funding, and in some sectors a significant proportion may be run by religious organisations.<sup>114</sup> The services they provide may be quite indistinguishable from secular services. On the other hand, the work may be seen as a vital part of a religion's mission and indeed as a kind of religious practice in itself.<sup>115</sup> In some cases the organisation may only provide a benefit for co-religionists. Alternatively it may be part of outreach work or perhaps include an element of proselytisation to service users. Like teachers, although to a lesser extent, they may be required to act as role models. In order to maintain this atmosphere, the organisation may argue that it is vital that the work is carried out by co-religionists, which they might argue includes adherence to religious precepts in non-work life. Again, I will argue that a BFOR approach which takes proportionality into account is the best way to deal with these cases.

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<sup>113</sup> E.g. *Dolter v Walhert High School* 483 F. Supp. 266, 271 (N.D. Iowa, 1980); *Vigars v Valley Christian Ctr* 805 F. Supp 802 (N.D. Cal., 1992).

<sup>114</sup> See S. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (London: Rowman & Littlefield, 1996) 7-10.

<sup>115</sup> *Ibid.* at 50-51.

In British law there are no explicit exemptions for sexual orientation discrimination for religious social service organisations. However, organisations with a religious ethos may discriminate based on religion if this is a genuine occupational requirement<sup>116</sup> and there is a general exception for sexual orientation discrimination if this is a genuine and determining occupational requirement.<sup>117</sup> The religious ethos exception has been defined fairly narrowly. In *Hender v Prospects*<sup>118</sup> it was held that there must be something specifically religious about the particular job for the exemption to apply. The fact that some religious tasks have to be carried out in order to maintain the organisation's Christian ethos is not determinative. There are no cases as to whether such an organisation may discriminate on the grounds of sexual orientation, but it is likely that such an argument would not receive much support.

The law in the US differs from state to state. Not all states prohibit sexual orientation discrimination in employment and most of those that do exclude religious organisations entirely from such laws. This leaves gay employees extremely vulnerable to discrimination. Thus in *Thorson v Billy Graham Evangelistic Association*<sup>119</sup> a mail room supervisor could be dismissed because she was gay, because sending out religious materials was part of the organisation's religious function. Some states prevent religious or other discrimination as a condition of receiving state funding, but religious discrimination is permitted even where the use of federal funds is involved.<sup>120</sup> Thus in *Lown v Salvation Army*<sup>121</sup> it was held that in government funded programmes open to the public, it was constitutionally permissible for the Salvation Army to discriminate in hiring and dismissing its workers on religious grounds.

Some claimants have attempted to bring claims on the basis of religious discrimination if there is no legal protection against sexual orientation discrimination. Such arguments have not fared well. This is partly because the cases do not fit easily into such a claim, but also because the employer's claim to maintain religious conformity is valued extremely highly. Thus in *Pedreira v*

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<sup>116</sup> Equality Act 2010 Schedule 9 Para 4.

<sup>117</sup> Equality Act 2010 Schedule 9 Para 1.

<sup>118</sup> ET Case No. 2902090/2006.

<sup>119</sup> 687 N.W. 2d 652 (2004).

<sup>120</sup> M. McClellan, 'Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?' (2004) 61 *Wash & Lee L Rev* 1437.

<sup>121</sup> 393 F Supp 2d 223 (S.D. N.Y., 2005).



*Kentucky Baptist Homes for Children*<sup>122</sup> a lesbian therapist could be dismissed from her job in a children's home because her 'lifestyle' was not in accordance with its 'Christian core values'. The Court held the organisation was permitted to ensure its staff's conduct was consistent with its Christian mission. There was a similar result, although slightly different reasoning, in *Hall v Baptist Memorial Health Care Corp.*<sup>123</sup> There a gay student services specialist at a Southern Baptist college 'permeated with religious overtones'<sup>124</sup> which trained medical staff as part of its Christian outreach mission was dismissed. Her job involved organising student societies' activities and ensuring that they complied with Baptist teachings. She also had a role in counselling students.

*Hall* is not a straightforward case of sexual orientation discrimination because she was dismissed only after she became a lay minister at a church that encouraged gay membership and taught that there was no inconsistency between Christianity and homosexuality. Southern Baptists though saw a 'homosexual lifestyle', but not the orientation itself, as 'an abomination in the eyes of God'.<sup>125</sup> She was offered a transfer of position, but refused and was dismissed because there was a 'conflict of interest'. The Court held that since she publicly opposed an important aspect of Southern Baptist teaching she could be dismissed. The Court argued this meant there was no religious discrimination because any person who publicly opposed an aspect of the college's teaching would be dismissed, whether this was for religious reasons or not.

A better approach may have been to accept that there was religious discrimination as she was dismissed because she held different opinions about a religious matter and because of her involvement in a different church, but then to say that this was justified because of the nature of her job and the importance to the college of maintaining a clear religious identity and message. Evidently there is a greater religious interest where an employee actively and publicly opposes a religious precept, rather than simply failing to abide by it. However, the court might have overstated how public Hall's opinions were. Courts should be careful not to see public openness about being gay as 'activism', in a way which would seem bizarre if a person was heterosexual. However, the decision can be approved if the College would have dismissed an employee in a similar role for a non-private disagreement

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<sup>122</sup> 579 F.3d 722, 725 (6th Cir., 2009).

<sup>123</sup> 215 F. 3d 618 (6th Cir., 2000).

<sup>124</sup> *Ibid.* at 625.

<sup>125</sup> *Ibid.* at 622.

with another major tenet of the religion. The college's claim was fairly narrowly defined: it related only to certain employees and was not claimed merely because she was gay or because of her membership in a different church. Nevertheless, in both this case and *Pedreira* there was an undervaluing of the interest in non-discrimination because it is not a legally recognised interest. In *Pedreira* there was also an overvaluing of the religious interest in that it is assumed that simply because the organisation has some interest in maintaining its religious identity, this meant that it was vitally important for it to ensure that all its staff complied with all its religious precepts.

As in the US, the approach in Canada differs according to the province but most have a BFOR approach.<sup>126</sup> *Heintz v Christian Horizons*<sup>127</sup> involved a care worker at an evangelical Christian home for children with severe learning difficulties in Ontario. When she began, she signed a Lifestyle and Morality statement that forbade, among other things, 'homosexual relationships'. After several years working there she came out as a lesbian and began a relationship. Once it became apparent that she would be dismissed, she resigned. She remained a committed Christian. She was successful in her claim for sexual orientation discrimination.

Slightly unusually, Ontario's law is not a simple BFOR but requires the organisation to be 'primarily engaged in serving the interests of persons identified by their creed' and the discrimination must be 'a reasonable and bona fide qualification because of the nature of the employment.'<sup>128</sup> At first instance, the Ontario Human Rights Tribunal held that since Christian Horizons provided services regardless of the service users' religion, it could not benefit from the exemption, regardless of the fact the work was intended as an outward manifestation of Christian belief.

The Ontario Divisional Court held that such a narrow focus could not have been meant by the legislature, as otherwise this would ignore 'the long history of assistance to the disadvantaged offered by religious groups in Canada, which have not imposed a requirement of religious membership or adherence on recipients'.<sup>129</sup> It also held it would infringe the right of freedom of religion under the Charter. Whether this is right as a matter of statutory interpretation is a matter for debate.

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<sup>126</sup> G. Demeyere, 'Discrimination in Employment by Religious Organizations: Exemptions, Defences, and the Lockean Concept of Toleration' (2010) 15 *Canadian Lab & Emp LJ* 435.

<sup>127</sup> [2008] 63 CHRR 12 (Ontario Human Rights Commission); *Ontario Human Rights Commission v Christian Horizons* 2010 ONSC 2105 (Divisional Court).

<sup>128</sup> S. 24(1)(a) Ontario Human Rights Code.

<sup>129</sup> *Supra* n. 130 at para 67.

On a Charter or proportionality analysis this though seems correct: whether the service is provided to co-religionists or the public should be a relevant factor, but is not necessarily decisive. Otherwise a religious organisation that provides some services to the public could not choose even the head of the organisation on religious grounds, even if the organisation was entirely privately funded.<sup>130</sup>

However, the court held that the discrimination was not a BFOR. It argued that Christian Horizons had not considered whether the particular employment required such discrimination. It held that the requirement 'must not just flow automatically from the religious ethos of Christian Horizons... There is no evidence that anyone... ever considered whether the prohibition on same sex relationships was necessary for the effective performance of the job of support worker in a home where there is no proselytizing and where residents are not required to be Evangelical Christians.'<sup>131</sup>

This point is important. It is the converse of what is required by secular employers for their religious staff: given the importance of the right not to be discriminated against, it must be asked whether is it possible to accommodate the other. It could though be doubted whether the failure to consider this issue was as drastic as it seemed to the Court. There had been some consideration since the Lifestyle and Morality policy arose out of consultation with the organisation's employees. As Esau argues, there is no reason in principle why the fact that the policy originated from employees rather than the leadership should necessarily matter.<sup>132</sup> Nevertheless, without an examination of whether there should have been different policies for certain positions, the important requirement of fact-specific consideration has not been fulfilled. Inevitably though, a focus on particular roles within an organisation places pressure on Christian Horizons and similar bodies to secularise themselves. It makes it very difficult to create a large outward facing body which is pervasively religious. However, this may have to be the price that is paid in order to provide sufficient protection for non-discrimination rights.

Permitting Christian Horizons to discriminate against Heintz would have had severe practical effects for gay people seeking employment in this field. It 'operate[d] over 180 residential homes across Ontario, ha[d] over 2500 employees and provide[d] care and support to approximately 1400 individuals with

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<sup>130</sup> Esau supra n.113.

<sup>131</sup> Supra n.130 at para 90.

<sup>132</sup> Esau supra n.113.

developmental disabilities' and was the largest provider of residential services in the province.<sup>133</sup> In providing this care and support, it was funded almost exclusively by the Ontario Ministry of Community and Social Services.<sup>134</sup> It was therefore conceivably 'quasi-governmental in nature'.<sup>135</sup> The interest in non-discrimination is thus very great.

Christian Horizons' religious interests are also fairly weak. It originally grew out of the desire of Evangelical parents to provide family-type, Christian settings for the provision of care to disabled adults and children. However, by the time this case arose, it had expanded to provide care regardless of religious background, and the religious element of care was diluted, although evidently still present. In these circumstances, the interest in having all employees abide by strict religious rules was fairly small. Given this, the result was correct. Certainly, this case demonstrates the 'ambiguous embrace'<sup>136</sup> of government funding.

Even if it had been proportionate for Christian Horizons to dismiss Heintz, there was also a major failing in the requirement of mutual respect in the way this was carried out. After her relationship became known, she continued to work there for five months. This was a 'disaster'.<sup>137</sup> Her performance reviews, previously positive, became very critical. A colleague made allegations of abuse against her, which were investigated without consideration of whether they were motivated by homophobia. This was unacceptable. Even if an organisation has a right to dismiss an employee, it does not have unlimited discretion in the way this is carried out.<sup>138</sup>

### **Secular Function Employees**

In situations where staff do not have any religious functions at all, the religious interest is very small and the non-discrimination right correspondingly great. In Bagni's schema, discussed at the beginning of the chapter, the work comes under

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<sup>133</sup> Although, as Esau points out, this only constituted 2% of people with developmental disabilities who were supported through government funding.

<sup>134</sup> Supra n.130 at para 2.

<sup>135</sup> B. MacDougall and D. Short, 'Religion-based Claims for Impinging on Queer Citizenship' (2010) *Dalhousie LJ* 133, 141.

<sup>136</sup> C. Glenn, *The Ambiguous Embrace: Government and Faith Based Schools and Social Agencies* (Princeton: Princeton University Press, 2000).

<sup>137</sup> Esau supra n.113 at 394.

<sup>138</sup> C.f. *Logan v Salvation Army* 10 Misc 3d 756 (N.Y., 2005) 'Those limited exemptions for religious organizations are a far cry from letting them harass their employees and treat the employees in an odiously discriminatory manner during their employment, and to use derogatory expressions toward the employees'.

his third category as it is 'far removed from the spiritual epicenter of the church'.<sup>139</sup> Whilst Canada and Britain do not permit discrimination in this context, in the US it is constitutional to exclude all employees of religious organisations from discrimination laws and some, unusual, cases *require* such discrimination to be permitted. In *Corporation of Presiding Bishop v Amos*,<sup>140</sup> a building engineer was dismissed from his employment at a Mormon owned non-profit gym that was open to the public because he failed to keep his Temple Recommend, a document showing that he complied with the tenets of the Mormon faith. As has been explained, Title VII simply excluded religious organisations from its remit for religious discrimination. Amos sued on the basis that the law infringed the Establishment Clause as it provided an unconstitutional benefit to religion. The Supreme Court held that it did not and permitting such discrimination was constitutional.

This leaves open the question of whether state or federal governments *may* legislate to prevent such discrimination. In some cases the constitutional rights of religious organisations to discriminate have been held to extend far beyond the core of religious employment. It has been held constitutionally required to allow discrimination for religiously based reasons when a lesbian sports journalist was dismissed from a church newspaper in *Madsen v Erwin*.<sup>141</sup> The Court held that 'requiring the defendants to pay damages to maintain their religious belief would constitute a substantial burden on the defendants' rights' and any assessment would involve the court in a review of 'an essentially ecclesiastical procedure'.<sup>142</sup> However, in a similar case there was held to be no First Amendment defence where a married female editorial secretary for a religious magazine did not receive allowances paid to married male employees.<sup>143</sup>

Some have defended the decision in *Amos*. Gedicks argued that:

'Forcing the Mormon church to retain an unfaithful employee and to pay his salary with tithing funds would have undermined the sacrifice narrative that is so prominent both in Mormon history and in contemporary Mormon life... it would be forced to dilute and perhaps even to abandon the powerful concept

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<sup>139</sup> *Supra* n.2.

<sup>140</sup> 483 US 327 (1987).

<sup>141</sup> 481 N.E. 2d 1160 (1985).

<sup>142</sup> *Ibid.* at 1166.

<sup>143</sup> 676 F.2d 1272 (9<sup>th</sup> Cir., 1982). See also *Whitney v Greater New York Corp. of Seventh-Day Adventists* 401 F. Supp 1363 (N.Y. 1975).

that tithing is the sacred means by which Mormons build the Kingdom of God.’<sup>144</sup>

However, merely because there is some impact on a religious belief does not mean that a religious institution should necessarily be permitted to discriminate. Where there is no religious aspect to the employment at all, being forbidden to discriminate interferes very lightly with a religion’s interest in propagating and maintaining its faith, even if there are religious motivations for the discrimination. The interest in religious autonomy and deference to religious organisations seen in *Madsen* also does not sit well with other cases. Only in a very loose way was the employer required to ‘pay damages to maintain their religious beliefs’. They could certainly ‘maintain their religious beliefs’ but they could not require that this employee abide by them. Secondly, the fears of entanglement with religious matters are overstated. The Court did not have to decide a religious issue.

Permitting such discrimination could amount to severe pressure on employees to comply with a religion out of economic necessity.<sup>145</sup> Furthermore, as has often been stated, the interest is not simply an individual one. Society generally also has a strong interest in non-discrimination, to avoid patterns of inequality and ensure that opportunities are available for all. Thus such an exemption is disproportionate.

### **Islands of Exclusivity?**

The analysis has so far assumed that it is possible to distinguish between the importance of various positions and that it is always far more important to a religion to have, for example, the leader of an organisation abide by religious precepts than a secretary. It is possible though that in some cases this assumption cannot be made. Some organisations are so pervasively religious that the only way of protecting their religious rights is for them to be able to create an ‘island of exclusivity’.<sup>146</sup> To require them to prove the religiousness of each job may radically alter and misunderstand the nature of the religious organisation. This is not an

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<sup>144</sup> Gedicks supra n.8 at 114. Although see supra n. 25 for his later, very different, views on this topic.

<sup>145</sup> N. Rosenblum, ‘Amos: Religious Autonomy and the Moral Uses of Pluralism’ in N. Rosenblum (ed.), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton: Princeton University Press, 2000).

<sup>146</sup> A. Esau, ‘Islands of Exclusivity: Religious Organizations and Employment Discrimination’ (1993) 33 *UBC Law Rev* 719.

argument that a proportionality or BFOR approach is wrong in these cases but that an ‘occupational requirement’ should not always be interpreted narrowly.

One such case is *Schroen v Steinbach Bible College*.<sup>147</sup> The College was a small Mennonite college offering degrees in Mennonite scholarship and pastoral training to about 75 students. It described itself as ‘an evangelical Anabaptist college equipping servant leaders for Church ministries’. Schroen was given the post of accounting clerk on the understanding she was a Mennonite. In fact she had been brought up Mennonite, but subsequently converted to Mormonism. When this was discovered she was dismissed. The difference between the two is quite radical and indeed Mennonites view Mormonism as a kind of ‘false cult’.<sup>148</sup> The Manitoba Human Rights Commission eventually<sup>149</sup> held that hiring a co-religionist was a BFOR.

Esau argues that, ‘to force an exclusivist communitarian religious organization, like that of Steinbach Bible College, to accept people of incompatible faiths into the community is a direct assault on the religion of the employer at its very core’.<sup>150</sup> There were religious aspects to her job. All staff were expected to be available to students and each other for religious discussions and prayer. However, the important point is not just that she had to perform religious duties, but that every element of her work was meant to be infused with Mennonite beliefs. This is a very unusual case, and it reached the right decision. Employment here is to be equated with membership of a religion. The organisation was small and privately funded and had the purpose of training future religious ministers in an exclusivist religion. The state interest in preventing discrimination was therefore very small and the interest in religious freedom great.

So far of course this discussion merely demonstrates that it may be a BFOR for a person to be of a particular religion. But what if she was gay and a Mennonite? Steinbach College listed ‘homosexual relationships’ among many other things, as prohibited for its staff. However, a gay Mennonite could still perform religious tasks, lead prayer meetings and so on in a way in which a Mormon could not. This though takes an instrumental rather than organic view of employment which is

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<sup>147</sup> [1999] 35 CHRR D/1 (Man. Bd. Adj.).

<sup>148</sup> Esau supra n. 149 at 720.

<sup>149</sup> It took more than 5 years for the investigation to be concluded.

<sup>150</sup> Esau supra n. 149 at 733.

inappropriate for such an organisation.<sup>151</sup> The College did not want to create an organisation where its employees only paid lip service to religious rules, but a community of, and adhering to, a particular, and strict, faith. Perhaps the best question to ask is whether, to the College, its 'exclusivist communitarian religious organization' with its 'close, tight, focused and interactive culture',<sup>152</sup> would be jeopardized by the forced inclusion of someone who they did not consider a compliant member of their religion.<sup>153</sup>

Esau criticises the BFOR test because of its intrusiveness and contextual nature, which he argues does not adequately protect religious institutions. That a proportionality test is intrusive cannot be denied. It requires organisations to defend their policies and is likely to require detailed evidence. However, not to assess the situation in some detail does not treat the right of non-discrimination as itself an important right. The employee of a religious organisation has a right, just as religionists have in secular employment, to an individualised assessment of whether her right has been violated. Neither right should be treated as merely an exception to each other but as rights that are a priori equal. Therefore providing a wider exception than a BFOR is unnecessary.

### **Conclusion**

There are several approaches in evidence in this area of law. Both Canada and Britain have incorporated the requirement of proportionality into assessments of discrimination in religious organisations and Canada has also done so in relation to religious schools. In other cases though, categorical tests are used which give too much discretion to religious authorities. This is particularly evident in the American doctrine of the ministerial exception. This is understandable within a system that has as a constitutional priority the separation of church and state, but it means that the value of non-discrimination is understated, or even discounted. There is a valid fear of becoming embroiled in religious disputes, but a narrower approach would not necessarily lead to this.

Rivers argues that the British law is characterised by 'narrowly drafted exceptions

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<sup>151</sup> Ibid. at 720.

<sup>152</sup> *Schroen* supra n.150 at para 61.

<sup>153</sup> *Gedicks* supra n.8.



narrowly interpreted by an unsympathetic judiciary'.<sup>154</sup> However, a proportionality approach, on which the British approach is generally based, does give religious organisations the autonomy needed to live out their religious mission. Compared to a categorical approach, 'this nuanced approach may ultimately prove better equipped to navigate the complexities of a world in which both religious and equality rights are taken seriously and given their due.'<sup>155</sup> However, although the BFOR approach is a good way to address the proportionality enquiry in this context, care must be taken that not too much is demanded from religious organisations. Intangible concerns, such as maintaining a religious ethos, may be as relevant and as worthy of protection as tangible ones such as the specific religious role performed by an employee.

Throughout this chapter it has been demonstrated that proportionality can sufficiently recognise and protect collective religious freedom, as it can individual religious freedom, whilst also protecting non-discrimination rights. Proportionality identifies relevant differences between situations, allowing differences between roles even with the same job titles to be taken into account, rather than imposing a one size fits all approach. It is also more coherent and intuitively easier to understand and to apply than many of the other tests and categorisation used in this area of law. So far therefore it has been demonstrated that proportionality is a useful concept in considering employment claims. The next chapter develops this approach outside the employment context.

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<sup>154</sup> J. Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecc LJ* 24, 52.

<sup>155</sup> C. Evans and A. Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1 *Ox J Law & Religion* 81, 107.

## **Chapter 6: Religious Organisations and Services**

The previous chapter has demonstrated that it may be proportionate to allow religious organisations to maintain their distinctive nature and to comply with the doctrines of their religion when hiring their staff, even if it results in discrimination. Religious organisations may also wish to place restrictions on who they provide services to for a number of reasons. Some organisations may provide some services only to members of their religion. This may be because the service is either seen as a benefit of membership or because it involves a religious practice and is thus only for those who abide by its religious tenets. Given potentially discriminatory rules of membership, this may constitute sexual orientation discrimination. Religious organisations may also provide extensive services to the general public, some of which may receive state funding, but may claim that for reasons of conscience they cannot serve, for example, gay people in some contexts. Religious organisations may also claim some control over the use to which their property is put. As can be seen, the number and range of circumstances where conflicts can arise is large and diverse. It will be argued that, as in the employment context, proportionality is a valuable method of resolving these varied conflicts.

### **Religious Activities**

The religious interest is at its strongest where there is a claim for inclusion into core religious activities such as religious worship. This will normally be a claim to be included in an organisation's membership. As was described in the previous chapter, associations are valuable, in part because they provide a source of comfort and meaning for members. To tell a religious group who they must accept as members violates the core of its religious freedom. As White puts it, 'individuals are hardly free to associate in pursuit of some shared set of beliefs about the good life and/or good society unless they are also free to exclude from this specific association those who do not share their distinctive beliefs'.<sup>1</sup> They must be allowed to protect themselves against those who would 'corrupt or undermine pursuit of these purposes.'<sup>2</sup> There is also limited state interest in preventing such discrimination. Whereas with employment in religious organisations, where a person may take employment for non-religious reasons, such as economic pressure, there is likely to be a freer choice in joining and leaving such

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<sup>1</sup> S. White, 'Freedom of Association and the Right to Exclude (1997) 4 *J Pol Phil* 373, 377.

<sup>2</sup> *Ibid.* at 380.

organisations as a member, and therefore this protects rights to a greater extent.

This analysis does not presuppose a monolithic view of religious belief. It is extremely unlikely that within all but the most tightly controlled organisations there will be no dissent on doctrinal or organisational matters. The relationship between religious doctrine and members' beliefs is likely to be a complex one. However, it should still be within the religious organisation's power to decide ultimately who can be a member and on what terms, even though this may well cause harm.

In fact, none of the jurisdictions under discussion here would consider claims over membership or taking part in religious worship.<sup>3</sup> Evidently, all discrimination law is limited in scope: thus for example it is not prohibited to discriminate on any basis in forming personal relationships. In the three jurisdictions, there are variations as to whether and when membership organisations are permitted to discriminate, but all accept that permitting discrimination on any ground is sometimes appropriate. Thus, under federal US law only 'public accommodations' are covered. Most states have exclusions for private clubs and there would undoubtedly be constitutional problems if there were an attempt to apply anti-discrimination laws to, for example, attendance at a religious service.<sup>4</sup> Under British law there is an explicit exception for religious organisations where the discrimination relates to 'membership of the organisation', and it does not cover religious worship at all.<sup>5</sup> One rare challenge to this was *Parry v Vine Christian Centre*,<sup>6</sup> where a transgender woman unsuccessfully claimed she should be allowed to attend the women's prayer meeting. In Canada, discrimination laws vary by province, but all are similar to the Canadian Human Rights Act which forbids discrimination in an 'accommodation, service or facility customarily available to the public'.<sup>7</sup> It is unlikely that access to religious worship would be included. A religious organisation may open its doors to all who are interested in hearing the

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<sup>3</sup> Although the New York City Commission on Human Rights held in *Southgate v United African Movement* 1997 WL 1051933 (N.Y.C. Com. Hum. Rts., June 30 1997) that a black separatist movement unlawfully discriminated when it refused to permit a white journalist to attend a publically advertised speech. However, even if the decision was correct at the time, it would be unlikely to survive *Boy Scouts v Dale* 530 US 640 (2000).

<sup>4</sup> K. Francart, 'No Dogs Allowed: Freedom of Association v Forced Inclusion. Anti-Discrimination Statutes and the Applicability to Private Organizations' (2000) 17 *TM Cooley L Rev* 273.

<sup>5</sup> Equality Act 2010 Sch 23 Para 2.

<sup>6</sup> Bridgend County Court, BG 101748, 15 February 2002, referred to in R. Ahdar and I. Leigh *Religious Freedom in the Liberal State*, 2<sup>nd</sup> ed, (Oxford: Oxford University Press, 2013).

<sup>7</sup> Canadian Human Rights Act R.S.C., 1985, c.H-6 s.14.

religious message and becoming members, but that does not necessarily thereby make it 'public'. In any case there is also an exception if there is a bona fide and reasonable justification for the discrimination.

Situations that do not fall into the archetype of religious worship at specific times at a place specifically dedicated to this purpose may though cause greater difficulty. Two cases have been brought as a result of the Nation of Islam's policy of having sex-segregated religious services. This policy extended to lectures given by its leader, Louis Farrakhan, and which were open to members and non-members. In the first, *Donaldson v Farrakhan*<sup>8</sup>, a woman sued after she was prevented from attending a meeting. In the second, *City of Cleveland v Nation of Islam*<sup>9</sup> the Nation of Islam challenged a refusal to allow it hire a convention centre because of its discriminatory policies. In both cases, it was held that the municipally owned theatres hired by the organisation were not places of 'public accommodation' in this context and that even if they were, enforcing the law in this situation would have violated the First Amendment.

Rosenblum disagrees with this reasoning.<sup>10</sup> She argues that permitting women to attend would have had only a minimal impact on the organisation's message, particularly given that the purpose was to reach a broad audience. She is correct in saying this left alternatives open to Farrakhan, in that he could have decided to only invite selected men or to hold the event in an alternative venue.<sup>11</sup> However, these alternatives would have greatly affected the ability to spread the religious message to non-members. Rosenblum's more general argument is also problematic. In pointing out that 'the government would be just as concerned about discriminatory admission to a basketball game or bake sale' and thus the restriction is content neutral, she does not thereby make her case that 'universal application of the public accommodations law is preferable to a scheme in which municipal or state authorities, or courts, assess the constitutional rights of each applicant in an ad hoc manner.'<sup>12</sup> Of course the authorities would be concerned about such discriminatory admission, but that does not mean that the situations are analogous. The opposing interest to non-discrimination when the issue is

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<sup>8</sup> 436 Mass. 94 (2002).

<sup>9</sup> 922 F.Supp. 56 (1995).

<sup>10</sup> L. Rosenblum, 'Equal Access or Free Speech: The Constitutionality of Public Accommodations Law' (1997) 72 *NYU L Rev* 1243.

<sup>11</sup> Although many other venues would, on her argument, still be public accommodations.

<sup>12</sup> *Supra* n. 11 at 1280.

admission to a basketball game is likely to be minimal at best, but much greater where the issue is access to a core religious activity. It is precisely because the opposing interest to non-discrimination is likely to vary that a fact-specific analysis is necessary. It is principled to hold that in some cases it might be proportionate to permit such discrimination depending on the weight of the conflicting right.

In the present circumstances permitting such discrimination was proportionate. In *Donaldson* the state, by allowing such discrimination, had a legitimate aim of protecting the Nation of Islam's right of freedom of religion by allowing it to choose who attended its religious events. In *City of Cleveland*, the state had a legitimate aim in protecting the rights of others in preventing discrimination taking place on its property. In both cases such legitimate aims had a rational connection to the action taken. There was also no less restrictive means that could have been taken to protect either the right of freedom of religion in *Donaldson* or the right of non-discrimination in *City of Cleveland* to the same extent. The question thus came down to the final balancing stage.

Of importance here is that the Nation of Islam believes in different religious roles for men and women. The message to be given therefore differed according to the audience. While it was not an act of worship in its strictest sense, although the lecture was to take place at a time traditionally used for men's worship, it had a religious purpose. Merely because it sought to reach a wider audience than its current membership does not necessarily negate its rights to control access to its religious events. A proportionality test is therefore protective of core religious rights. Even though there may undoubtedly be understandable anger and distress caused by a discriminatory policy, this does not mean that it will be permissible to 'disturb the intimacy'<sup>13</sup> of a religious organisation and require it to change its rules on membership and access to religious activities.

One context though where the ability to exclude certain groups from membership of a religious organisation is far less clear is that of university religious societies. Many universities have policies prohibiting religious, sex and sexual orientation discrimination for membership and leadership positions in university-affiliated societies. This may cause problems for some religious groups. In the UK,

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<sup>13</sup> I. Lupu, 'Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination' (1987) 67 *BU L Rev* 391.

controversy has arisen in many universities.<sup>14</sup> For example, Exeter University Evangelical Christian Union threatened legal action when it was suspended from its Students' Guild because it required its committee members to sign a Doctrinal Basis of belief<sup>15</sup> and thereby clearly discriminated on the basis of religion. Ultimately, this dispute was resolved and it re-joined the Guild.<sup>16</sup> At other universities, Christian Unions have chosen not to formally affiliate with Student Unions so they do not have to comply with non-discrimination and other policies.<sup>17</sup>

In the US, this issue reached the Supreme Court in *Christian Legal Society v Martinez*.<sup>18</sup> In order to receive 'Registered Student Organization' (RSO) status at Hastings College of the Law, organisations had to comply with the university's Nondiscrimination Policy. This forbade discrimination on the grounds of inter alia, religion and sexual orientation and was apparently interpreted as an 'all comers' policy: RSOs had to permit 'any student to participate, become a member, or seek leadership positions, regardless of her status or beliefs'.<sup>19</sup> However, the Christian Legal Society (CLS) required members and officers to abide by a 'Statement of Faith', which as well as requiring specific Christian views, required them not to engage in any sexual activity outside heterosexual marriage, although it permitted anyone to attend its meetings. As a result it was denied RSO status.

The Supreme Court, albeit with a strong dissent, held that the university's policy was permissible. The Court characterised the issue as being one of access to a 'limited public forum' and so the test under American free speech jurisprudence was whether the restriction was 'reasonable and viewpoint neutral'. The majority characterised the university as 'dangling the carrot of subsidy, not wielding the stick of prohibition', thus not requiring strict scrutiny.<sup>20</sup> It held that the proffered justification of ensuring the 'leadership, educational and social opportunities'<sup>21</sup>

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<sup>14</sup> D. Lister and R. Gledhill, 'Students Sue over Christian Rights at Colleges' *The Times* 16 Nov 2006, 1.

<sup>15</sup> One which would not be acceptable to many Christians.

<sup>16</sup> Christian Concern, 'Exeter Evangelical Christian Union' 12 Dec 2007

<http://www.christianconcern.com/our-concerns/universities/exeter-evangelical-christian-union>.

<sup>17</sup> Ekklesia, 'United We Stand: A Report on Current Conflicts between Christian Unions and Students' Unions' (London: Ekklesia, 2006).

<sup>18</sup> 130 S.Ct. 2971 (2010). *Alpha Delta Chi-Delta Chapter v Reed* 648 F.3d 790 (9<sup>th</sup> Cir., 2011) raises a similar point.

<sup>19</sup> *Ibid.* at 2982.

<sup>20</sup> *Ibid.* at 2986.

<sup>21</sup> *Ibid.* at 2989.

afforded by RSOs were available to all students meant the policy was a reasonable one. Merely because the policy affected some groups more than others did not mean that the policy was not viewpoint neutral.

This is a deferential form of review and there are many problems in the Court's reasoning. Firstly the dissent persuasively argued that the evidence did not demonstrate that there was an 'all-comers' policy, but rather that other organisations were permitted to control their membership by reference to the organisation's purposes, including one which was permitted to only admit students of Hispanic origin as voting members. These exceptions may of course be justifiable under a proportionality test, but they demonstrate severe difficulties in finding that the policy was viewpoint neutral. Secondly, in assessing reasonableness the majority was deferential in assuming that the aim of increasing leadership and social opportunities could actually be achieved by the policy. CLS was only one of many societies at Hastings and was created for a particular purpose. Having a pluralistic range of societies, aimed at different groups of students and requiring different interests and beliefs could have increased rather than reduced leadership and social opportunities. The fit between the goal and the policy is therefore not a close one,<sup>22</sup> which would have been an important consideration under a proportionality test.

Nice argues though that: '*Martinez* enhances liberty, making space for an individual to embrace any religious ideology regardless of his or her sexual orientation'.<sup>23</sup> This is true, but the problem is that CLS wished to espouse a particular conservative, evangelical, Protestant form of Christianity, rather than be open to anyone who identified as Christian. Nice's statement is therefore problematic: particular views on sexuality *were* relevant to this group's ideology and so its religious message could not be accepted 'regardless' of sexual orientation. An enforced change would have altered the religious ideology. It should be noted that the university also prohibited religious discrimination and therefore the society could not have prevented an atheist running for a leadership position or becoming a member. Although this may 'enhance liberty, making space for an individual to

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<sup>22</sup> A. Brownstein and V. Amar, 'Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action' (2011) 38 *Hastings Const LQ* 505.

<sup>23</sup> J. Nice, 'How Equality Constitutes Liberty: The Alignment of *CLS v. Martinez*' (2011) 38 *Hastings Const LQ* 631, 672.

embrace any religious ideology regardless of his or her' *religious beliefs*, this comes at the cost of lessening the coherence and purpose of the organisation. There was nothing to prevent those who do not agree with such an interpretation of Christianity, as of course many do not, forming their own society.<sup>24</sup>

Secondly, the court did not consider the right of freedom of association separately from the right of freedom of speech in a limited public forum. This seems a serious problem. As Bhagwat puts it, 'the primary burden imposed by Hastings was not on CLS' ability to communicate; rather, it was on its ability to select its members - in other words on CLS members' choice to associate with whomever they want.'<sup>25</sup> Whether or not the policy was viewpoint neutral is not the crux of the problem.

The various interests in this case would have been far better considered under a proportionality analysis. The university put forward as justification the ensuring of access to leadership and social activities. Although a legitimate aim, for the reasons explained above, this was not the least restrictive means of achieving this aim since having a range of societies centred on different viewpoints could protect this interest to the same extent. A more persuasive way of formulating the university's aim is to say that it has an interest in preventing discrimination on certain grounds on its campus and distancing itself from CLS' discriminatory message because such discrimination affects its students' sense of self worth and inclusion.

Being an RSO though had many practical consequences. It permitted an organisation to book rooms, use newsletters and bulletin boards and participate in a yearly students' fair. The majority of the Court held that being allowed access to these official methods of communication was not necessary because CLS could use 'electronic media and social networking sites'.<sup>26</sup> This is of course true, but ignores the problem of how the society could easily recruit new members at the university or hold events without such access. The distinction between subsidy and prohibition, which was at the basis of the majority judgment, is slight when this is

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<sup>24</sup> There may be a naming problem though: 'Evangelical Christian Union' may be better than 'Christian Union' to highlight that it only advanced a particular understanding of Christianity. See Ekklesia report supra n.18.

<sup>25</sup> A. Bhagwat, 'Associations and Forums: Situating *CLS v. Martinez*' (2011) 38 *Hastings Const LQ* 543, 553. Luther also points out that students joined the society because they were 'actively looking to mingle with those who share a common ideology', rather than to engage in 'the robust spread of ideas': R. Luther, 'Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals' (2011) 38 *Hastings Const. LQ* 673, 681.

<sup>26</sup> Supra n.19 at 2991.



taken into account. Although the majority stated that the university had asserted it would permit CLS to book rooms and hold activities, the minority pointed to the difficulties CLS had in fact faced in attempting to do so. An informal policy was therefore not satisfactory.

However, the university did still have an interest in demonstrating its disapproval of CLS' policy. A fact-specific proportionality analysis could pay attention to the fact that being an RSO brought with it a bundle of benefits. An alternative to preventing CLS from being an RSO at all would be to refuse to give CLS the *status* of being an RSO, but still to grant it some of the benefits. This is a similar analysis to the Georgetown University case described in Chapter 3, where a gay rights organisation wanted to receive official recognition in a Catholic university. Allowing Hastings to, for example, deny CLS the right to use the university's name or logo and of course to describe itself as an RSO permits it to distance itself from the discriminatory message.

There is therefore a need to balance the interests. The university's policy deeply affected the rights of the organisation. Conversely, permitting the organisation to operate would have a limited effect on non-CLS member students: membership is entirely voluntary, and students could attend events without being a member. Even the symbolic aspect of CLS's policy is small if a distinction between status and support is made. It is not noticeably greater than the symbolic exclusion caused by general knowledge of some religions' views on sexuality. Although CLS's policy may have very real effects on students' well-being, this may simply have to be tolerated. In any case, even if this conclusion is disagreed with, a proportionality analysis does far better justice to these issues than the approach of the US Supreme Court.

### **Services Provided to Co-Religionists**

Beyond religious worship and teaching, religious organisations may provide more practical services only to co-religionists. For example, in the US case of *Wazeerud-Din v Goodwill Missions*<sup>27</sup> a Christian society ran a 'discipleship program' designed to combat drug and alcohol addictions, which it considered 'outward manifestations of inward sin'. It refused to admit anyone who was not 'open to considering the claims of Christ'. The program mainly consisted of intensive religious instruction. Although this case only concerns religious discrimination it

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<sup>27</sup> 737 A.2d 683 (N.J. App. Div., 1999). See also *Intermountain Fair Housing Council v Boise Rescue Mission* 657 F.3d 988 (9<sup>th</sup> Cir., 2011).

could have included sexual orientation discrimination, since the organisation could have included not engaging in homosexual sexual conduct as one of the 'claims of Christ'. The Court easily held that such discrimination was justifiable because it would otherwise require a change in the whole nature of the programme. This was a fairly straightforward case.

More complex cases arise in educational contexts. Many religious institutions run schools and, particularly in the US, colleges and universities. Some of these organisations require that students follow at least some religious rules, and may also insist that they are members of a particular religion. In some fairly rare cases in the US and Canada, university students may be prohibited from having same-sex relationships or any sexual activity outside heterosexual marriage.<sup>28</sup> The university may argue that the point of the institution is not merely or even primarily to teach secular subjects but rather to inculcate religious virtues. For example, the Student Handbook at Bob Jones University, a private Fundamentalist Christian university, gives nine 'Institutional Goals' of the university of all of which refer to Christian beliefs, such as 'To inspire regenerated students to know, love and serve Jesus Christ' or 'To direct students toward a biblical life view that integrates God's Truth into practical Christian living'.<sup>29</sup> Bingham outlines such a university's claim to discriminate as follows:

'(1) Private universities engage in "expressive association" because they serve to educate students in various disciplines, (2) if a private university asserts that homosexual conduct is inconsistent with its values, then forcing it to include a homosexual student would run counter to the views the university seeks to assert, and (3) the presence of a homosexual student may send a message that the university accepts homosexual conduct as a legitimate form of behavior when it, in fact, does not.'<sup>30</sup>

In principle this argument could be accepted. As explained in the previous chapter,

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<sup>28</sup> See *TWU v BCCT* [2001] 1 SCR 772. In the US, see e.g. Brigham Young University's behaviour code available at: <http://besmart.com/#> [Last Accessed 10 Feb 2014]. In England, designated institutions with a religious ethos may discriminate on the grounds of religion in order to maintain the religion's ethos (Schedule 9 Para 5) but only Catholic Sixth Form Colleges have been designated. It is also permissible to discriminate for vocational courses if such discrimination is an occupational requirement for the intended employment, e.g. a Catholic seminary may only accept men. However, the issue only has limited practical importance in the UK because there are no private religious universities, although it might be an issue in religious schools.

<sup>29</sup> BJU Student Handbook 3-4 available at <http://www.bju.edu/student-life/> [Last Accessed 10 Feb].

<sup>30</sup> T. Bingham, 'Discrimination in Education: Public Versus Private Universities' (2007) 36 *J L & Educ* 273.

it may be proportionate, especially where an organisation is attempting to create a community of believers, to permit religious organisations to discriminate in hiring their staff. Similar considerations, such as the religiosity of the institution and whether the rule has been brought to the student's attention, should apply where the rules are applied to students. However, given that there is likely to be less coercion on students than teachers to join these organisations and thus be subject to these rules (because students are likely to have a greater range of choices about where to attend university compared to employment opportunities), less should be demanded to justify the discrimination. If this assumption is not justified, because for example there are particular benefits in education at a religious university, or because a large number of universities have religious entry requirements and thus access to university education for all students is compromised, then this should be a crucial factor.

Sometimes it is accepted that the university may discriminate, but as a consequence of the discrimination it is subjected to disadvantage, which the university may then seek to challenge. This issue arose in *British Columbia College of Teachers v Trinity Western University*.<sup>31</sup> TWU is a private university, associated with the Evangelical Free Church of Canada. All students and staff had to accept the TWU Community Standards which forbade 'practices that are Biblically condemned', including 'sexual sins including... homosexual behaviour'. It offered a five-year degree in education, but when the course was set up in 1985 the last year had to be spent at another university, as appears to be standard practice for new courses. In 1995 TWU applied to have control over the fifth year, but this was denied by the British Columbia College of Teachers (BCCT) on the grounds that it would not be in the public interest to allow teacher education to be wholly controlled by a university which had discriminatory policies. A similar problem has arisen more recently, as the Federation of Law Societies of Canada has permitted TWU to set up a School of Law,<sup>32</sup> above criticism that such discrimination violates core professional ethics.<sup>33</sup>

In the earlier dispute the Supreme Court held in favour of TWU, holding that BCCT could not refuse to accredit the course. The majority, not applying the standard

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<sup>31</sup> [2001] 1 SCR 772.

<sup>32</sup> Federation of Law Societies of Canada, 'Trinity Western University's Proposed Common Law Program': <http://www.flsc.ca/en/twu-common-law-program/>.

<sup>33</sup> E. Craig, 'The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program' (2013) 25 *CJWL* 148.

Canadian proportionality test strictly, but weighing the factors generally, held that BCCT did not weigh the relevant rights in its assessment and neglected to consider the importance of freedom of religion and the place of private institutions in Canadian society and its constitution.<sup>34</sup> It held that when a university had a right to discriminate in its selection policies it would then be strange if exercising that right submitted it to detriment.<sup>35</sup> There was no evidence to suggest that graduates of TWU would discriminate or have a detrimental effect in public schools. Furthermore personal rules of conduct could generally be adopted provided they did not interfere with rights of others.

L'Heureux-Dubé J. dissented. For her, this was not a human rights matter but a case about providing the best possible educational environment for public school students. TWU's graduates could still become teachers and the detriment of one year at a different university was not very severe. Given the strong need for teachers to be sensitive to the concerns of gay students, it was reasonable to require students at a university which condemned homosexual behaviour to experience life at another university.

Although the Supreme Court reached the correct decision and dealt with the main arguments, applying a proportionality analysis more strictly would have sharpened the reasoning. The legitimate aim here was to provide a discrimination-free public education system. But as the majority saw it, requiring TWU students to spend a year at another university would not have done much to change ingrained beliefs, even if there had been evidence that they did or would discriminate in their employment. The connection between the two, although sufficient to pass the rational connection test, was fairly tenuous. The policy was both under-inclusive and over-inclusive. It was over-inclusive because it assumed that all TWU students would, unless required to attend another university, discriminate. It was under-inclusive because it still permitted students with objections to same-sex sexual behaviour to become teachers. The badly tailored nature of the restriction raises doubts about whether it can be proportionate.

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<sup>34</sup> Religious institutions are partially exempted from British Columbia's human rights legislation and as a private institution, the Charter does not apply to it.

<sup>35</sup> This does not strictly follow - it may be tolerable for a discriminatory organisation to exist, but only if it receives no state support of any kind e.g. *Bob Jones University v United States*, 461 US 574 (1983) (religious university which earlier banned black students, and then forbade inter-racial dating could be denied tax exemption).

If the aim is to protect against discriminatory behaviour, then the likelihood of this arising must be considered, as this is relevant to the proportionality test. As discussed in Chapter 3,<sup>36</sup> Alexy's Second or Epistemic Law of Balancing states that: 'the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premisses.'<sup>37</sup> That the students would discriminate is assumed only because of their attendance at a particular university. Although students were required to sign the Community Standards, it is possible that they may not necessarily have agreed with them but have merely agreed to uphold (or even pretended to uphold) the rules for the duration of their degree. Secondly, even if the trainee teachers were opposed to homosexuality, that does not mean that they would necessarily have sought to spread discrimination against their students or their colleagues. Indeed the Standards themselves stated that respect should be shown to everyone. Possibly, as Gonthier J put it in *Chamberlain v Surrey School District No. 36*, 'adults in Canadian society who think that homosexual behaviour is immoral can still be staunchly committed to non-discrimination'.<sup>38</sup> Furthermore, if a teacher did discriminate or vehemently expressed discriminatory ideas when qualified then appropriate action could be taken because of the rights of others, irrespective of whether they were a former TWU student or not.<sup>39</sup>

Alternatively, it could be argued that what was needed was not only non-discrimination but also the positive affirmation of gay students. This though would require a far more expansive and intrusive policy that enquired into each prospective teacher's view of homosexuality and that would in turn raise serious problems of proportionality. Of course, requiring BCCT to accept TWU's course in this situation does not mean that in all cases a university should not be subject to detriment because of its discriminatory policies: this requires a fact-specific assessment.

Even if an institution does not have such prohibitive rules on membership it may refuse to offer services, understood broadly, where this might be seen as endorsing same-sex relationships or falsely demonstrating that such relationships are equal in the eyes of the religion. This was the argument in a case that received an

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<sup>36</sup> Supra at p79.

<sup>37</sup> R. Alexy, *A Theory of Constitutional Rights* tr J. Rivers (Oxford: Oxford University Press, 2002) 419.

<sup>38</sup> [2002] 4 SCR 710 at para 127.

<sup>39</sup> E.g. *Kempling v British Columbia College of Teachers* [2005] 255 DLR (4<sup>th</sup>) 169.

enormous amount of media coverage and attracted extremely heated debate. The issue in *Hall v Powers*,<sup>40</sup> a Canadian case, was whether a student at a Catholic high school could take his boyfriend to his prom. The school refused to permit him on the basis that it would contravene its religious teachings and be seen as an endorsement of same sex relationships. Hall won an interlocutory injunction, granted on the day of the prom, to permit the couple to attend together. The case was discontinued (contrary to the wishes of the school) before a full trial.

The main basis of the decision on the interlocutory injunction is unfortunately flawed because it rests on the Court's own interpretation of Catholic doctrine. Evidently, there is a great diversity of views within the Catholic tradition as to the morality or otherwise of same-sex relationships, and, even if same-sex relationships are seen as sinful, then as to the appropriate pastoral reaction. To highlight this in a judgment is not therefore wrong. However, the Court used this uncertainty to argue that there was no religious reason why Hall could not attend the prom with his boyfriend. This oversteps the court's role. It is not legitimate for a secular court to argue that there is no religious reason for a policy when the religious authority could point to a large body of thought within the church which supported its point of view. As Donlevy puts it, 'the court chose to interpret the Catholic Church's official position regarding the ethics of human behaviour through an analysis appropriate to a secular institution, with the deciding factor in the decision being the opinions and practices of members of that institution.'<sup>41</sup>

The Court held that since the school was publicly funded and the School Board had 'establish[ed] and implement[ed] policies of general application', it was subject to the Charter and, in particular to the equal protection right of students under s.15. However, it considered that, since it was a Catholic separate school, the interference with the right was potentially justified because of its right to manage the school in accordance with Catholic beliefs. Under a proportionality enquiry, the school thus has the legitimate aims of protecting its religious conscience and its autonomy in the running of its schools. By forbidding Hall to attend with his boyfriend there was also a rational connection to this aim. As a less restrictive means of restricting Hall's rights, the school had suggested a compromise whereby

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<sup>40</sup> [2002] 213 DLR (4th) 308.

<sup>41</sup> J.K. Donlevy, 'Re-Visiting Denominational Cause and Denominational Breach in Canada's Constitutionally Protected Catholic Schools' (2005) *Education & Law Journal* 94.

a female friend of Hall's could take his boyfriend as her 'date', meaning that both could attend. However, this was unacceptable to Hall and evidently did not protect his right to non-discrimination to the same extent.

Considering the balancing of the interests, even on the most favourable reading to the Church, the religious interest was limited. The reason the school gave for forbidding Hall's boyfriend to attend was that 'interaction at a prom between romantic partners is a form of sexual activity and that, if permission were granted to Mr Hall to attend the prom with his boyfriend as a same-sex couple, this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings.'<sup>42</sup> Even on the interpretation of religious doctrine put forward by the Catholic Church, though, this endorsement would have been rather remote. There is an inconsistency in the Church's reasoning: it was not automatically assumed that opposite-sex dancing would lead to any sexual behaviour not permitted by the church or seen as sexual behaviour in itself, but the same activity by a same-sex couple is seen as intrinsically sexual.<sup>43</sup> This criticism is valid, but requiring religious teachings to be internally consistent is not the court's responsibility. Religious teachings are 'not always susceptible to lucid exposition, or still less, rational justification'.<sup>44</sup> Of more importance is that: 'the prom in question is not part of a religious service (such as a mass), is not part of the religious education component of the Board's activity, is not held on school property, and is not educational in nature.'<sup>45</sup>

Significantly though, this discussion about the particular nature of the activity misses the stronger aspect of the school's claim, aspects that careful application of the proportionality test could have foregrounded. Hall was still a student at the school and therefore subject to its control as to what constituted appropriate behaviour based on its religious beliefs. As Schneiderman puts it, 'this was a claim not merely about "same sex dancing" but also about the autonomy of the church to regulate the conduct of its members enrolled in its schools.'<sup>46</sup>

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<sup>42</sup> Supra n.41 at para 4.

<sup>43</sup> J.A. Russ, 'Shall We Dance? Gay Equality and Religious Exemptions at Private Californian High School Proms' (1988) 42 *NYL Sch L Rev* 71.

<sup>44</sup> *R(Williamson and Others) v Secretary of State for Education and Employment* [2005] 2 AC 246, 259.

<sup>45</sup> Supra n.41 at para 26.

<sup>46</sup> D. Schneiderman, 'Associational Rights, Religion and the Charter' in R. Moon (ed), *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 75.

There are two entirely different ways of looking at the importance of this dispute. On one hand it is merely about one social occasion with no religious significance, which is not closely related to the Catholic Church's message. On the other, Hall's demand could be interpreted as a challenge to the Catholic Church's whole position on same-sex relationships and a challenge to its perceived inability to respond, at minimum, compassionately towards gay people, in particular in schools. Hall can be seen as a role model to other gay students, leading them to challenge their schools' homophobic and heterosexist policies. Combine this with a new, more vocal, attitude amongst gay students<sup>47</sup> and it is unsurprising that the Church vehemently opposed Hall's claim. If this is true, then the case can be perceived as no longer a claim at the peripheries of Catholic teaching, but rather as a challenge to its centre.

This second way of seeing it though is unpersuasive. The 'slippery slope' argument is unconvincing because one decision does not lead inexorably to any future decisions. Even if Hall's success were to make other students more likely to challenge teachings on sexuality in denominational schools, these claims could be dealt with on their own merits. Furthermore, whether and in what way the case is likely to change public opinion is difficult to predict and in any event should not be relevant to the Court's decision. Therefore Hall's challenge should not be seen as a challenge to the core of Catholic rights.

This thesis has argued throughout for an approach which leaves aside ultimate moral questions, providing space for individuals and organisations to 'define [their] own concept of existence, of meaning, of the universe.'<sup>48</sup> The judgment draws attention to this idea, stating that: 'Mr. Hall has a duty to accord to others who do not share his orientation the respect that they, with their religious values and beliefs, are due. Conversely... the principal and the Board have a duty to accord to Mr. Hall the respect that he is due'. The judgment therefore attempts to reduce antagonism between the parties by pointing out that there is something of value in both sides' perspectives that is worthy of protection. It also places the dispute in context as part of an on-going relationship.

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<sup>47</sup> A. Grace and K. Wells, 'The Marc Hall Prom Predicament: Queer Individual Rights v. Institutional Church Rights in Canadian Public Education' (2005) 28 *Canadian Journal of Education* 237, 239: 'Many making up today's queer student body are vocal, visible, and proud. They are making their schools key sites in their struggles for social justice and cultural recognition and respect.'

<sup>48</sup> Kennedy J, *Planned Parenthood v Casey* 505 US 833 (1992).



The difficulty is of course in deciding ultimately where the burden of tolerance lies. The interests on both sides are limited: whether or not Hall could bring his boyfriend to the prom would not necessarily affect the Catholic Church's teachings on sexuality or even the school's ability to control or disseminate its religious message. Similarly, although undoubtedly extremely hurtful, the discrimination was only symbolic, and only related to one evening. The most persuasive factor is the school's interest in religious autonomy. The timing of the issue is also important. This was a liminal moment for Hall. He was about to leave the school. From then on the amount of direct control the Catholic Church would have over him would be of his own choosing. For these reasons, although the Court's decision is more than understandable, it is questionable whether it reached the right decision. However, a proportionality analysis, which pays careful attention to all the interests in the case, demonstrates how finely balanced the interests in this case are.

### **Non-members and Services**

This discussion will now move from claims that involve the control of members to claims made primarily by outsiders who wish to use some service run by the religious organisation, normally for secular rather than religious reasons. These cases involve different issues: the interests in religious autonomy will be less important as these cases are not about religious organisations' control over their own members, but the interest in protecting religious conscience remains important. The interests of those challenging the religious organisation's policy are also likely to be higher because they do not claim inclusion into an organisation but merely the provision of a service on equal terms.

### **Hiring of Religion-Owned Premises**

The first issue is whether religious organisations can deny the use of their premises to organisations with which they disagree. It is not enough to say that a religious organisation can avoid any conflict by not renting out the property. It may well be used to spread general awareness of the religion or be an important source of income which is relied on to fulfil the religious mission. As has been said previously, merely because a conflict is avoidable does not mean that there is no

interference with the right. Indeed one of the advantages of proportionality is that interference can be defined broadly because justification can be fully considered.

There are of course different kinds of property. A church has a greater claim over the use of sacred places such as a chapel, than it does to premises used mainly as a source of income, not used for religious purposes and rented out to all-comers. As always, the greater the interference with the religious right, the greater the justification required, and vice versa.<sup>49</sup> At the secular end of this continuum is the American case of *Bernstein and Paster v Ocean Grove Camp Meeting Association*<sup>50</sup> (hereafter OGCMA). Ocean Grove is a resort, owned by a Methodist organisation, which has its roots in the nineteenth century camp meeting revival movement.<sup>51</sup> On the resort was the Boardwalk Pavilion, which was used for religious services and concerts but which could also be hired out for weddings. When not in use it was freely open to the public. A lesbian couple, Bernstein and Paster, tried to book the Pavilion for their wedding but were refused on the basis that the Methodist Church did not approve of same-sex marriage. It was found that the Pavilion was a place of public accommodation at the time, that OGCMA had discriminated against the couple and there was no free exercise defence under the approach in *Employment Division v Smith*<sup>52</sup> since there was no targeting of religious practice.

In assessing the opposing interests under the proportionality test, much depends on whether the Pavilion is characterised as a public or private space. I do not wish to use this distinction to set up a false dichotomy between public and private or to suggest that whether the discrimination is permissible or impermissible is coterminous with this distinction. However, ascertaining the character of the Pavilion is relevant in deciding the level of interference with the religious organisation's right.

On the one hand, Bold characterises the Pavilion as private, arguing that, 'if the public sees religious institutions such as the Methodist pavilion owners allowing same-sex civil commitment ceremonies on their premises, casual observers may

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<sup>49</sup> This is Alexy's First Law of Balancing. See supra at p78-9.

<sup>50</sup> OAL Dkt. No. CRT 6145-09 (N.J. Office of Administrative Law, 2008) See M. Pearson, 'Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty' *Rutgers J of L & Relig* (forthcoming 2014).

<sup>51</sup> T.W. Messenger, *Holy Leisure: Recreation and Religion in God's Square Mile* (Philadelphia: Temple University Press, 2000).

<sup>52</sup> 94 US 872 (1990).

erroneously think the Methodist church has changed its historic stance against same-sex marriage.<sup>53</sup> He also suggests that a ceremony would have received a great deal of media interest.

This analysis makes the mere ownership of a place crucial. It follows that a religious organisation may prevent a use which it does not agree with on any premises it owns, no matter how attenuated its link. This reduces the protection given by the anti-discrimination norm. As it relates to this case it also fails to appreciate that the Pavilion was at least a partly public place. Although used for religious worship, it was not a church and was open to everyone. Non-Methodist and non-religious weddings had taken place there with no indication that the Church thereby endorsed them. Importantly also, OCGMA received a tax exemption for the Pavilion on the basis that it was open to the public.

In contrast to Bold, Lupu and Tuttle depict the Pavilion as public. They argue that, 'Bernstein and Paster asked to use a facility that was not specifically identified with Methodist worship, that ordinary observers would see as public space, and that had been available for rental by anyone willing to pay the fee.'<sup>54</sup> This analysis is more appropriate than Bold's. Although OGCMA is a religiously based organisation, this does not thereby make the property it owns necessarily religious. Given the particular circumstances and use to which the Pavilion was put, the religious interest is fairly small. The risk of confusion between the Methodist Church's precepts and the actions it permits on some of its property therefore appears remote. Perhaps the fears about people erroneously thinking that the Methodist Church endorsed same-sex weddings could be met by having a sign saying that any activity taking place there did not necessarily represent the views of the Methodist Church.

Of course, none of this means that OGCMA necessarily had to allow anyone to use the Pavilion. Their obligation was only not to discriminate, not to actively provide places for same-sex weddings. OGCMA could use it only as a religious space if it so wished and indeed did so after the case was brought, with it then being classified for tax purposes as a religious space rather than a public one. Thus the laws on

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<sup>53</sup> F. Bold, 'Vows to Collide: The Burgeoning Conflict between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws' (2009) 158 *U Pa L Rev* 179, 202.

<sup>54</sup> I. Lupu and R. Tuttle, 'Same-Sex Equality and Religious Freedom' (2010) 5 *Nw J L & Soc Pol'y* 274, 285.

non-discrimination in public accommodations did not apply to it. Another lesbian couple later tried to make a complaint to the Human Rights Tribunal, but this was rejected on the basis there was no cause of action.<sup>55</sup> The choice OGMGA was put to was therefore not a disproportionate one. However, a proportionality approach does recognise that there was some religious interest in the control of property, which the approach under *Smith* does not, as it is only concerned with situations where religious practices are deliberately targeted.

In other cases the religious organisation has a stronger claim to control over its premises. *Dignity Twin Cities v Newman Center & Chapel*<sup>56</sup> is a case at the other end of the spectrum. Dignity is a national organisation of LGBT Catholics who press for change within the Catholic Church on matters relating to sexuality as well as acting as a support group. A chapter of this organisation had rented a chapel and meeting rooms owned by the Roman Catholic Archdiocese of St Paul and Minneapolis for a number of years. However, the Archdiocese then reconsidered its policy and decided it would permit it to hire the premises only if it signed a document affirming the Church's teachings on homosexuality, which it refused to do. Dignity then made a complaint to the Minneapolis Commission on Civil Rights which initially rejected the claim for a lack of jurisdiction. The Commission Appeals Board held though that there was a violation of Dignity's civil rights, except in so far as this related to the chapel. However, the Minnesota Court of Appeals overturned this decision on the basis that the entire relationship between the two parties was a religious one. It held that deciding the case would involve excessive state entanglement in church affairs and would infringe the Church's free exercise rights.

This was the correct decision. As the Court pointed out, 'Dignity's sole reason for using the facility was for worship and involvement in the Catholic tradition... They utilized the facility because of its religious identity.'<sup>57</sup> In the context of this case there was little difference between using the Chapel and using the rest of the Center. Suggesting a less restrictive means of preserving the Newman Center's rights by differentiating between different parts of the Center, as the Commission Appeals Board sought to do, although potentially appropriate, was here not an adequate response to the Center's concerns.

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<sup>55</sup> *Ibid.*

<sup>56</sup> 472 N.W.2d 355 (Minn. Ct. App., 1991).

<sup>57</sup> *Ibid.* at 357.

Although the case certainly involved discrimination, this was primarily an internal religious dispute and it would have been inappropriate for this to have been resolved by an external body. Dignity's aim is to challenge the Catholic Church's doctrines on homosexuality. Of course, within every religious organisation there is dissent, but this does not mean that a religious leadership must provide facilities to allow it to take place. The fact that non-religious groups, such as Weight Watchers and the Alliance for Sustainable Agriculture, used the premises (although Dignity was the only one to use the Chapel) did not negate this. In contrast to Dignity, these relationships involved purely secular business relationships. The Center's religious interest was therefore greater than Dignity's. Dignity could continue its work in another venue.

The Canadian case of *Smith v Knights of Columbus*<sup>58</sup> falls between the two cases just outlined. A lesbian couple booked a hall run by the Knights of Columbus, a Catholic fraternal organisation, and owned by the Archdiocese of Vancouver, for their wedding reception. The hall was on the same piece of land as a chapel and a parish school and was primarily used for parish activities, but could be hired for other events. It was advertised via a sign outside which had no indication of its religious character. Unfortunately the events that then unfolded were characterised by confusion and misunderstanding on both sides. The couple did not realise the hall was owned by the Catholic Church or who the Knights of Columbus were. The manager of the hall did not realise the wedding was to be between two women. When this was discovered, and apparently on the misunderstanding that a wedding rather than a wedding reception was to take place there, the Knights of Columbus cancelled the booking.

The couple complained to the British Columbia Human Rights Tribunal. The question was whether the Knights' religious beliefs constituted a 'bona fide and reasonable justification' for the discrimination. The Tribunal held that it was not enough that the Archdiocese owned the hall, especially since there was no warning given of any restriction on its use. It therefore correctly rejected an absolute rule which would nullify any non-discrimination obligation of the Archdiocese, including a limited obligation to consider whether such discrimination was necessary for its religious purposes. Oddly though, the Tribunal also stated that a

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<sup>58</sup> 2005 BCHRT 544.

‘person cannot be compelled to act in a manner that conflicts with [his/her] belief.’ This is clearly too wide. More relevantly, it held that the Knights did have the right to restrict the use in the circumstances, but it ‘could have taken additional steps that would have recognized the inherent dignity of the complainants and their right to be free from discrimination’.<sup>59</sup>

Quite clearly, the situation that arose was not the least restrictive means of interfering with the couple’s rights while preserving the Knights’ rights. The Knights could have provided more information to the couple as to the ownership and management of the hall before the booking was taken, without this infringing their rights at all. In fact this would have greatly reduced the likelihood of conflict. The couple said that had they known this they would not have tried to make a booking because of the Catholic Church’s position on gay marriage. To take a booking and then cancel it is also likely to cause more distress than if the booking had not been taken at all. Even in cancelling the booking the Knights could have done more to protect the couple’s interests while still acting in accordance with their beliefs. As the Tribunal suggested, it ‘could have taken steps such as meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any expenses they had incurred and, perhaps offering assistance in finding another solution.’<sup>60</sup> The confusion as to whether there was to be a wedding reception or a wedding itself also meant that the situation was not given the consideration it deserved, even though the Knights later said they did not distinguish between the two and had religious objections to holding a wedding reception. Given all these factors, the couple’s claim should have been successful, as indeed it was.

These cases demonstrate that the organisation’s right to control the use of their premises is not absolute, even if there are religious objections to the activity. Nevertheless, in all these cases the religious organisation’s claim is taken seriously and assessed. It is not rejected a priori on the basis that it can solve this dilemma by not offering the property for hire at all, although of course that is relevant, and may in the end be the best solution. Furthermore, the opposing interest is also recognised as important. These cases therefore take the conflict seriously and demonstrate a conciliatory form of reasoning.

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<sup>59</sup> Ibid. at para 123.

<sup>60</sup> Ibid. at para 124.

There has so far been no legal challenge to a refusal to hire out religious-owned property under British law. Under the Equality Act 2010, a religious organisation may discriminate on the grounds of sexual orientation regarding the 'use or disposal of premises owned or controlled' by a religious organisation, where this is necessary either to comply with the doctrine of the organisation, or 'to avoid conflict with the strongly held convictions of a significant number of the members of the religion or belief'.<sup>61</sup> The EHRC's (Equality and Human Rights Commission) guidance states, however, that a religious organisation may discriminate 'provided it does not normally hire out its premises for payment'.<sup>62</sup> Under this interpretation, this could mean that if a religious organisation hired out its church for some purposes, such as concerts of religious music, this would be enough to mean it could not subsequently discriminate, even if all the previous events had been consistent with its religious mission.

It is unclear on what the EHRC's interpretation is based. The Act states that the exemption does not apply where the organisation's 'sole or main purpose is commercial'.<sup>63</sup> A restriction on discrimination in commercial activities is likely to be justifiable, as will be discussed in the next chapter, but the Act does not say that a non-commercial organisation cannot hire out its premises for payment and the income used to support the organisation's non-commercial aims. The EHRC's stance would be very restrictive. However, the contrary reading is also not without its problems, because it seems to propose an absolute right to discriminate. There is nothing to prevent gay organisations alone from being singled out where the organisation otherwise hires its premises out to all-comers, since there is no proportionality test. This is therefore problematic.

#### Services Provided to the General Public

Religious organisations' interactions with wider society go well beyond hiring out premises. As was discussed in the previous chapter, religious organisations also provide a number of welfare services, which may receive state funding, and in some cases would otherwise be provided by the state, such as health care, addiction counselling or care of children or vulnerable adults. In some cases

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<sup>61</sup> Schedule 23 Para 2.

<sup>62</sup> Equality and Human Rights Commission, *Your Rights to Equality from Voluntary and Community Sector Organisations (Including Charities and Religion or Belief Organisations)* (Equality and Human Rights Commission, 2011) 21.

<sup>63</sup> Schedule 23 Para 2(2).

religious organisations may argue that due to reasons of conscience they cannot provide a particular service to gay people.

Many practical and symbolic issues arise out of these restrictions. The first practical issue is whether a service can still be easily accessed even if refused by a religious organisation. In most cases, but certainly not all,<sup>64</sup> the religious provider is likely to only be one provider among many and a person can choose to use another service. Indeed, permitting religious providers may increase choice since some people may prefer to use specifically religious services. It may therefore fit into policies of welfare pluralism, which aim to encourage competition and choice in the provision of services.<sup>65</sup> Furthermore, if large and well-established charities refuse to provide services unless they have an exemption there may be an impact on services if this is denied.

Although these practical issues are important, symbolic harms are more likely to motivate disagreement. These symbolic harms can be characterised either as the loss to dignity caused by state-sponsored discrimination<sup>66</sup> or, alternatively, as ‘concerning the extent to which the discourse of equality and gay rights trumps the sincerely held faith-based views of a minority.’<sup>67</sup> In Britain, these issues have arisen most controversially over whether Catholic adoption agencies can refuse to place children with gay couples. In many ways the controversy is not surprising. Any issue about the best environment for raising children, including either fear of children remaining in care when suitable parents are available or which challenges ‘the heterosexual family as the "gold standard" of parenting’<sup>68</sup> is bound to be

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<sup>64</sup> E.g. B.R. Clark, ‘When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict,’ (2003) 82 *Or L Rev* 625, 629.

<sup>65</sup> L. Salamon, ‘The New Governance and the Tools of Public Action: An Introduction’ (2001) 28 *Fordham Urb LJ* 1611. See for the UK context, e.g. E. Carmel and J. Harcock, ‘Instituting the “Third Sector” as a Governable Terrain: Partnership, Procurement and Performance in the UK’ (2008) 36 *Policy and Politics* 155; National Council for Voluntary Organisations, *Faith and Voluntary Action: An Overview of Current Evidence and Debates* (London: NCVO, 2007), for the US see e.g. I. Lupu and R. Tuttle, ‘The Faith Based Initiative and the Constitution’ (2006) 55 *De Paul L Rev* 1 and for Canada e.g. D. Good, ‘Promises and Pitfalls: Experience in Collaboration between the Canadian Federal Government and the Voluntary Sector’ (2003) 22 *Journal of Policy Analysis and Management* 122 and S. Phillips, ‘The Limits of Horizontal Governance: Voluntary Sector-Government Collaboration in Canada’ (2004) 26 *Society and Economy* 383.

<sup>66</sup> R. Wintemute, ‘Religion vs. Sexual Orientation: A Clash of Human Rights?’ [2002] *Journal of Law & Equality* 125.

<sup>67</sup> C.F. Stychin, ‘Faith in Rights: The Struggle Over Same-Sex Adoption in the United Kingdom’ (2008) 17 *Const F* 7, 8.

<sup>68</sup> *Ibid.* at 8.



controversial. Although practical issues of ensuring adequate access to adoption services were relevant, as Stychin argues, 'the issue assumed a symbolic importance far beyond its practical relevance. It was widely agreed that there were many avenues open to same-sex couples wishing to pursue adoption aside from the Catholic agencies and, intuitively, it seemed unlikely that many same-sex couples would be adamant on pursuing adoption only through a Catholic agency.'<sup>69</sup>

In this heated debate, the adoption agencies could be characterised as bigots, ignoring the best interests of children in care for the sake of dogma.<sup>70</sup> Those arguing against an exemption could also be characterised as ignoring the best interests of children in forcing 'unsuitable' parents onto vulnerable children and as forcing a minority to 'either violate their clear Church doctrine, or ignore their religious vocation'.<sup>71</sup> In England this dispute has led to an extremely long, but unsuccessful, legal battle by one adoption agency, Catholic Care (Diocese of Leeds) (hereafter Catholic Care), to gain an exemption. This issue has also led to extensive debates in a number of states in America, most notably in Illinois and Massachusetts, but not to many legal challenges. In contrast, in Canada private adoption agencies may discriminate on religious grounds and this has not so far been noticeably controversial.

In Britain, voluntary adoption agencies do not care for children in care themselves but instead recruit and assess potential adoptive parents and provide support and training. The local authority is responsible for matching children with prospective parents approved by these agencies. Alternatively, potential adopters can apply directly to the local authority. As a concession, religious voluntary adoption agencies were granted an exemption from the prohibition of sexual orientation discrimination until December 2008, under a temporary exemption from the Equality Act (Sexual Orientation) Regulations 2007. The Regulations enacted a general rule that a person providing a service to the public or a section of the public must not discriminate<sup>72</sup> and which otherwise came into force on 30 April 2007.

In order to continue to provide services, which it refused to do without an

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<sup>69</sup> Ibid.

<sup>70</sup> E.g. National Secular Society, 'Catholic Adoption Agency Loses Fight Over Gay Adoption' 3 Nov 2012 <http://www.secularism.org.uk/news/2012/11/catholic-adoption-agency-loses-fight-over-gay-adoption> [Last Accessed 10 Feb 2014].

<sup>71</sup> C.T. Rutledge, 'Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom' (2008) 15 *Duke J Gender L & Pol'y* 297, 299.

<sup>72</sup> Equality Act 2010 s.29.

exemption, Catholic Care attempted to bring itself under a permanent exemption, now s.193 of the Equality Act 2010 which provides that:<sup>73</sup>

(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—

- (a) the person acts in pursuance of a charitable instrument, and
- (b) the provision of the benefits is within subsection (2).

(2) The provision of benefits is within this subsection if it is—

- (a) a proportionate means of achieving a legitimate aim, or
- (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

This is essentially a legislatively-mandated proportionality enquiry. Catholic Care wanted to change its Memorandum of Association to say that it only provided adoption services to married heterosexual couples. To do this it needed the permission of the Charity Commission of England and Wales and this could only be given if Catholic Care's work fell under the exemption in s.193. This litigation has been extremely lengthy. The Charity Commission originally refused permission to make the required change in November 2008. Catholic Care appealed to the Charity Tribunal in June 2009,<sup>74</sup> which upheld this decision. This was further appealed to the High Court,<sup>75</sup> which held the change could potentially be lawful and sent the decision back for reconsideration by the Charity Commission. The Charity Commission again refused permission.<sup>76</sup> Catholic Care appealed this decision to the First-Tier Tribunal (Charity)<sup>77</sup> and subsequently to the Upper Tribunal (Tax and

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<sup>73</sup> The law at the beginning of the dispute until 1 October 2010 was as follows:

*Reg 18(1) Nothing in these Regulations shall make it unlawful for a person to provide benefits only to persons of a particular sexual orientation if – (a) he acts in pursuance of a charitable instrument, and (b) the restriction of benefits to persons of that sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument*

*(2) Nothing in these Regulations shall make it unlawful for the Charity Commission for England and Wales... to exercise a function in relation to a charity in a manner which appears to the commission or to the holder to be expedient in the interests of the charity, having regard to the provisions of the charitable instrument.*

Similar issues arose under both provisions though.

<sup>74</sup> *Father Hudson's Society and anor v Charity Commission* [2009] PTSR 1125.

<sup>75</sup> *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520.

<sup>76</sup> Decision of the Charity Commission of England and Wales 21 July 2010.

<sup>77</sup> [2011] Eq LR 597. The First-Tier Tribunal (Charity) and Upper Tribunal (Tax and Chancery Chamber) have taken over the responsibility of the Charity Tribunal and, in this respect, the High Court, following the coming into force of the Tribunals Courts and Enforcement Act 2007.

Chancery Chamber).<sup>78</sup> Both of these appeals were unsuccessful.

In Scotland, interpreting the same legislation, the Office of the Scottish Charity Regulator (OSCR) initially gave permission for a Catholic adoption agency, St Margaret's Children and Family Care Society, to change its Constitution to allow it to provide services in accordance with the teachings of the Catholic Church and to give preference to married Catholic couples. This situation continued for a number of years, but the OSCR reconsidered its decision in January 2013, following a complaint from the National Secular Society. However, the Scottish Charity Appeals Panel overturned this decision in January 2014.<sup>79</sup> Importantly though, the charity did not have a blanket policy prohibiting gay people from becoming adoptive parents. Rather, it only gave preference to those who wished to adopt within the framework of Catholic teaching on the family, and the interests of the adopted child were always considered to be paramount. Thus the Panel considered that the discrimination was indirect rather than direct. Nevertheless, there are inconsistencies between the Scottish and English decisions.

The issue at the heart of the English dispute was whether Catholic Care could demonstrate that providing adoption services only to married heterosexual couples was a proportionate means of achieving a legitimate aim. The justification put forward did not rely on the religious rights of the agency. Although there could be an argument that the work of a Catholic adoption agency was a direct outworking of its religious mission and therefore interference in the way it was run was a violation of its religious rights,<sup>80</sup> this argument was, at the time, doomed to failure on account of the very narrow interpretation of Art 9 that had been given by the British courts.<sup>81</sup> As the courts had held that there is no interference where a person is required to choose between their employment and following their religious conscience, it would have been strange to hold there is an interference where a religious charity cannot run its services in the way in which it wishes. Following the Court of Appeal's decision in *Ladele v Islington LBC*,<sup>82</sup> the fact that the service took place in the public sphere also made finding an interference difficult. Although the test for interference is now broader after the ECtHR's decision in

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<sup>78</sup> [2012] UKUT 395 (TCC).

<sup>79</sup> App 2/13 (31 Jan 2013).

<sup>80</sup> Such an argument was though accepted by the Scottish Charity Appeals Panel, *ibid*.

<sup>81</sup> See Ch 4.

<sup>82</sup> [2010] 1 WLR 955.

*Eweida v UK*,<sup>83</sup> to be successful, the claim must go beyond a mere licence to provide these services. In order to continue its service, Catholic Care would have to contract with the state. Essentially then, Catholic Care would have had to argue that there was an obligation to require the state to fund a particular activity by a particular organisation because of its religious nature. This would place such a burden on the state that it cannot be accepted.

An American case is instructive on the point. The Illinois Circuit Court concluded in the factually very similar case of *Catholic Charities of the Diocese of Springfield v State of Illinois*<sup>84</sup> that there is no legally cognisable interest in requiring the state to contract with a particular contractor. Catholic Charities had contracted annually with the state for forty years to provide foster care and adoption services. In 2011 the state refused to renew its contract because it would not provide these services to unmarried cohabiting couples. The Court held that since there was no legally recognised protected property interest in the renewal of its contracts, Catholic Charities had no claim when it was not renewed.

The justification Catholic Care instead advanced was based on the interests of children in care. The charity specialised in finding placements for 'hard to place children', which included older children, sibling groups and children with disabilities. It placed about ten children per year. The funding it received from the local authority for each child it placed was not sufficient payment for the work it did, leading to a shortfall of about £13,000 per placement. It therefore relied on charitable donations to make up the difference. These largely came through the auspices of the Catholic Church. The Church stated that if the charity did not have an exemption it would no longer be operating in accordance with Catholic principles and it could therefore no longer support it. Since this income stream would no longer be available, the charity would have to close and its capacity and expertise would be lost.

The High Court held that this could in theory constitute justification but subsequently both the First-Tier Tribunal (Charity) and the Upper Tribunal (Tax and Chancery Chamber) held that this justification was not in practice made out. The charity failed to demonstrate that it would affect to any great extent the interests of children in care, since there was no evidence that more children would

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<sup>83</sup> (2013) 57 EHHR 8.

<sup>84</sup> 2011-MR-254 (7<sup>th</sup> Cir., Aug 18, 2011).

be adopted if it remained open. There therefore did not exist the ‘convincing and weighty reasons’ required for discrimination based on sexual orientation by ECHR law.<sup>85</sup>

It may seem surprising that the closure of an adoption agency has no effect on the number of children adopted. As explained in the judgments, this was mainly because of the complexities of the adoption system and its funding. Voluntary adoption agencies are paid an ‘inter-agency fee’ by the local authority for each placement they make. However, because this is more expensive than placing children through the local authority itself, local authorities are reluctant to use such agencies.<sup>86</sup> Although if Catholic Care closed this would reduce the number of routes by which an adopter could be approved, an increase in the number of potential adopters registered with voluntary adoption agencies did not necessarily mean that more children would be adopted. Furthermore, as the Upper Tribunal pointed out, the local authorities did not seem to have experienced greater problems in finding adopters since Catholic Care stopped providing adoption services in 2008, as they had simply made more use of other agencies. Although voluntary adoption agencies have higher success rates than local authorities, Catholic Care’s success rate was comparable to other voluntary agencies. There was therefore no *particular* benefit of Catholic Care continuing to provide services.

Refusing to permit it to discriminate was therefore the appropriate conclusion. An attention to the facts actually demonstrates that much of the reasonable fears caused by the ‘forced’ closure of an adoption agency were misplaced, as it relates to the current English experience. Whether an exemption was granted or not would seem to have little effect on the needs of children in care. This further demonstrates the lack of practical importance of the issue and could potentially lower some of the tension caused by refusing an exemption.

However, there are problems with the judgments and decisions. They are strongly influenced by the Court of Appeal’s judgment in *Ladele*, which had been interpreted to mean that there is an absolute rule that it is impermissible to rely on discriminatory religious ideas in the public sphere. In the Charity Commission’s decision there is perhaps also an implied lack of respect in the assertion that the views of Catholic donors who do not wish to donate to a charity that does not

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<sup>85</sup> *EB v France* (2008) 47 EHHR 509.

<sup>86</sup> J. Selwyn, *Adoption and the Inter-agency Fee* (London: Department for Children, Schools and Families, 2009).

follow the Catholic church's teachings on the family cannot be relevant because these views are discriminatory. The Upper Tribunal, which held that the attitude of donors had a 'legitimate place in a pluralist, tolerant and broadminded society', though corrected this problem.<sup>87</sup> These judgments are also very clear on the importance of non-discrimination, repeatedly holding that very weighty reasons must be given for discrimination.

Although this was the correct legal decision, the discussion so far leaves open the question of whether the government was necessarily right not to grant an exemption as a matter of policy. Practical concerns could have been met by notice requirements to prospective adopters that only heterosexual married couples would be accepted and an obligation to refer to other agencies if approached.<sup>88</sup>

Of course symbolic issues would still remain. There is the danger that the state will be seen as approving the view that gay couples are not suitable adopters. However, as was discussed in Chapter 4, there is no reason in principle why this view should be ascribed to the state merely because an exemption is given. Rather it would only demonstrate that 'these positions were merely tolerated, in the proper sense of the word, that is to say that they were exceptions made to positions of which the government disapproved, but given on the principled ground that there was no imperative *raison d'état* why those conscientious objections should be overridden at the present stage.'<sup>89</sup> Nevertheless, this still involves an acceptance that these are views that can be tolerated and that ending discrimination against gay people is not an 'imperative *raison d'état*'. An exemption can therefore undermine dignity since 'people are harmed in respect of their civil status if they are refused a service that is available to all other citizens.'<sup>90</sup>

There is also a strong argument that if charities are to be given public money then the state can decide the terms on which the services are provided. The government may have a number of purposes alongside the practical provision of a service, which may include non-discrimination and inclusivity. This may have a heavy impact on some charities, but the argument might be that, 'if they cannot in good conscience provide the public service without sexual orientation discrimination

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<sup>87</sup> Supra n.79 at para 45.

<sup>88</sup> R.F. Wilson, 'A Matter of Conviction: Moral Clashes over Same-Sex Adoption' (2008) 22 *BYU J Pub L* 475.

<sup>89</sup> D. McIlroy, 'Legislation in a Context of Moral Disagreement: The Case of the Sexual Orientation Regulations' (2007) 159 *Law & Just - Christian L Rev* 114, 127.

<sup>90</sup> R. Plant, 'Religion, Identity and Freedom of Expression' (2011) 17 *Res Publica* 7, 15.

then the solution is that they should withdraw from the public activity'.<sup>91</sup>

On the other hand, an exemption can fulfil a symbolic role in favour of religious conscience, as well as against gay people. It may symbolically demonstrate that the work of religious charities is valued and that religious beliefs are given a space within an accommodationist and pluralist society and thus reduce (whether well founded or not) fears of marginalisation.

We should be careful, however, not to create false dichotomies. There does not necessarily have to be an either/or situation where the only options are no exemption and the closure of adoption agencies or an exemption and discrimination. A closer look at the situation arising after the legislation in fact demonstrates this. Although some did stop their adoption placement service, ultimately most organisations found a way to reconcile their religious message with the law.<sup>92</sup> Religious agencies run by the Church of England, although initially opposed to the legislation,<sup>93</sup> decided that they could comply with it without compromising their religious mission. This was also the case for one Catholic charity, Nugent Care, which continues to provide adoption services and has maintained its official religious links.<sup>94</sup>

In other cases the situation is more complex. Although the Roman Catholic Bishop of Lancaster strongly opposed the legislation and demanded the charity in his diocese, Catholic Caring Services, sever its links with the Church if it decided to comply with it,<sup>95</sup> this did not lead to the organisation's closure and indeed it took over the work of another Catholic adoption agency that had felt forced to close. Apart from changing its name to Caritas Care, and the resignation of the Bishop as a trustee, there appear to be no other organisational changes.<sup>96</sup> The Catholic Children's Society, now renamed Faith in Families, has similarly severed its formal

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<sup>91</sup> M. Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17 *Res Publica* 21, 37.

<sup>92</sup> T. Philpot, 'Keeping the Faith', *Community Care*, 22 January 2009.

<sup>93</sup> BBC News, 'Churches Unite over Adoption Row', 24 January 2007 [http://news.bbc.co.uk/1/hi/uk\\_politics/6293115.stm](http://news.bbc.co.uk/1/hi/uk_politics/6293115.stm) [Last Accessed 10 Feb 2014].

<sup>94</sup> Accounts and information on each charity is available from the Charity Commission's website: <http://www.charitycommission.gov.uk/search-for-a-charity/?txt=nugent+care> [Last Accessed 10 Feb 2014].

<sup>95</sup> R. Butt, 'Bishop Hits Out at Adoption Agency over Gay Couples Rule', *The Guardian* 21 Dec 2008.

<sup>96</sup> Details available from the Charity Commission's website: <http://www.charitycommission.gov.uk/search-for-a-charity/?txt=caritas+care> [Last Accessed 10 Feb 2014].

links with the Catholic Church but continues to exist.<sup>97</sup>

Father Hudson's Society, which originally sought an exemption alongside Catholic Care, dealt with the legislation by hiving off its adoption work into a separate charity, Adoption Focus. Whilst Father Hudson's Society is still run as a Catholic charity, Adoption Focus is not. The Catholic Children's Society (Arundel and Brighton, Portsmouth and Southwark) has reacted similarly, severing its official links with the Church and renaming itself Cabrini Children's Services but maintaining unofficial links. All gifts from parishes and schools go into a restricted fund, which does not fund adoption services.<sup>98</sup>

This variety of reactions to legislation is reflected in other jurisdictions. In Massachusetts, Illinois and Washington DC, Catholic charities have stopped placing children for adoption. However, such laws have not necessarily meant the entire closure of religious adoption agencies. In San Francisco, Catholic Charities 'withdrew from direct child placement services but joined with a nonprofit organization that manages an Internet database of children available for adoption, and assists with adoption referrals to any prospective parent, including gays and lesbians.'<sup>99</sup> In Massachusetts, Catholic Charities of Boston transferred its adoption staff and caseload to a private agency.<sup>100</sup>

The various responses to the legislation have been highlighted because they indicate that it is possible to achieve solutions whereby, most importantly, children's needs are met, but where also the interests in non-discrimination of prospective adopters and society, and the interests of religious organisations and their staff can be also protected. Too often this topic was merely used as a 'banner' where the discourse was 'reduced to simplistic all-or-nothing positions' rather than a discussion which took as its basis 'the equal worth of each person and tolerance for different ways of life'.<sup>101</sup> However, this does not necessarily support the idea of an exemption. In many cases the actual result is not far off what would have

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<sup>97</sup> Details available from the Charity Commission's website:

<http://www.charitycommission.gov.uk/search-for-a-charity/?txt=fai+h+in+families> [Last Accessed 10 Feb 2014].

<sup>98</sup> <http://www.charitycommission.gov.uk/search-for-a-charity/?txt=cabrini+childrens+services>. [Last Accessed 10 Feb 2014].

<sup>99</sup> M. Minow, 'Should Religious Groups Be Exempt from Civil Rights Laws?' (2007) *BCL Rev* 781, 843.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 843.



happened if there had been an exemption with a referral requirement: religious organisations are co-operatively working with and referring to non-religious agencies and in many cases this has included the transfer of staff.

### **Conclusion**

Many of the court decisions and pieces of legislation discussed in this chapter are justifiable. They demonstrate respect to both parties by recognising the difficult nature of these decisions and weighing the particular interests at issue. Nevertheless it has been demonstrated that those cases which use a proportionality, or at least a balancing, test are best able to account for and weigh the different interests. In assessing these conflicts this approach has rejected any absolute right to discriminate, although it has suggested that discrimination should be permitted in relation to religious membership and worship. In considering these issues, the courts have rarely suggested that there is no real conflict between religious precepts and the law as the religious organisation has a choice as to whether it provides the service. This idea is though apparent in the next issue to be considered: religious individuals and the provision of services.

## **Chapter 7: The Secular Marketplace and Religious Claims**

This final substantive chapter addresses the question of when individuals can discriminate in providing services. A desire to control who can be the recipient of services is not just limited to religious organisations. Religious individuals may also claim that their freedom of religion is breached when they, or the businesses they run, are required, as they see it, to facilitate or aid acts contrary to their beliefs, such as relating to same-sex marriage. A florist may refuse to provide flowers for a gay couple's wedding, saying that, 'As a born-again Christian, I must respect my conscience before God and have no part in this matter.'<sup>1</sup> A landlord may refuse to rent a flat to a gay couple because he believes that 'same-sex relationships are "unnatural and against nature" and "the Bible warns against being associated with such wickedness"'.<sup>2</sup> This area raises some very complex issues, including the extent of religious rights and the question of whether businesses can have rights to manifest religious beliefs, as well as the central question of whether and how to balance conflicting rights. As before, it will be demonstrated that proportionality provides a workable and nuanced method of deciding these cases. These issues will be considered in the context of healthcare, housing and general commercial services. The range of situations where conflicts can arise is immense as is, correspondingly, the potential width of any exemption. For this reason among others, as will be demonstrated, it may be more difficult to claim an exemption than in other contexts.

### **Interference**

The question of whether there is an interference with the right of freedom of religion, where a person claims they are religiously obliged to refuse to provide a service, can be a particularly difficult one. The English approach is evolving, partly due to the ECtHR's decision in *Eweida v UK*.<sup>3</sup> As previously outlined, the ECtHR in *Eweida* rejected the 'specific situation rule' which had held that if a person could avoid a conflict by resigning their employment or taking similar action then there was no interference with the right. However, this principle was never as straightforwardly accepted in the present context as it was in the employment

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<sup>1</sup> <http://www.cbc.ca/news/canada/new-brunswick/story/2011/03/16/nb-riverview-florist-1009.html> [Last Accessed 10 Feb 2014].

<sup>2</sup> *Robertson and Anthony v Goertzen* 2010 NTHRAP 1 (5<sup>th</sup> September 2010).

<sup>3</sup> (2013) 57 EHRR 8.

sphere, even though it could be argued that a person could give up their business and find alternative employment in the same way.

These issues were raised in *Bull v Hall and Preddy*<sup>4</sup> (hereafter *Bull*), which was decided by the Supreme Court in November 2013. A similar case, *Black and Morgan v Wilkinson* (hereafter *Black*)<sup>5</sup> reached the Court of Appeal in July 2013. The facts of both cases are simple. In *Bull* the owners of a Bed and Breakfast business refused to let a same-sex couple in a civil partnership stay in a double room, although they would have allowed them to stay in a twin bedded room had one been available, because they felt this would be condoning sexual activity outside opposite-sex marriage and this contravened their beliefs. In *Black* too the owners refused to let a same-sex couple share a room, but the couple was not in a civil partnership.

The Supreme Court accepted that the Bulls' rights under Article 9 were engaged, although this may have been because the assumption was not challenged in the appeal. Lady Hale stated that the Court of Appeal had reached the same conclusion. However, this is slightly open to doubt. Rather, the Court of Appeal gave two substantive judgments, which appear to reach different conclusions as to whether there was an interference, with the third judge agreeing with both judgments.<sup>6</sup> Rafferty LJ's judgment appears to adopt the specific situation rule, that is that there is no interference with freedom of religion where a conscientious dilemma could be avoided by resignation or similar conduct. She quotes approvingly the Court of Appeal's discussion in *Ladele v Islington LBC*<sup>7</sup> of the ECtHR case, *Pichon and Sajous v France*,<sup>8</sup> which held that there was no interference with pharmacists' rights under Article 9 where they were fined for refusing to supply contraception because they could manifest their beliefs outside a professional context. However, since she runs this issue together with that of whether 'the limitations are necessary in a democratic society for the protection of the rights and freedoms of others', whether she actually adopts the specific situation rule is unclear. Since she concludes that 'to the extent to which the Regulations limit the manifestation of the Appellants' religious beliefs, the limitations are necessary',<sup>9</sup> she avoids the important question of whether there is an interference. The concurring judgment of Morritt LJ did

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<sup>4</sup> [2013] UKSC 73.

<sup>5</sup> [2013] 1 WLR 2490.

<sup>6</sup> [2012] 1 WLR 2514.

<sup>7</sup> [2010] 1 WLR 955.

<sup>8</sup> App no. 49853/99 (2<sup>nd</sup> Oct 2001).

<sup>9</sup> *Supra* n. 6 at 2531.

however hold that there was an interference with the Bulls' religious beliefs, and this was also the conclusion of the Court of Appeal in *Black*. In any case the Supreme Court was right to treat the two issues of interference and justification separately. Whether a right has been infringed is an analytically separate question from whether this infringement is justified. Moreover, as has been argued throughout this thesis, even where a claim must fail because of the importance of a conflicting right, it is important to acknowledge the loss caused. Separating these two questions can help to do this.

In these cases it is right that an interference should have been found because there is a clear link between the owners' belief, that sexual activity outside heterosexual marriage is immoral and that they would be facilitating it by providing accommodation, and their act in refusing to let same-sex couples stay. If this were not the case, the dilemma they face between being asked either to violate their conscience or to give up their business, which may be very difficult financially, would be given no legal weight or recognition.

In Canada, under a proportionality test, it is recognised that there is an interference in such circumstances. In *Ontario (Human Rights Commission) v Brockie*,<sup>10</sup> a printer refused to print stationery for the Canadian Gay and Lesbian Archives because he believed, 'that homosexual conduct is sinful and, in the furtherance of that belief, he must not assist in the dissemination of information intended to spread the acceptance of a gay or lesbian lifestyle.'<sup>11</sup> Although he did not object to serving gay customers and had indeed provided services to 'a commercial organization which produces underwear marketed to the gay male population',<sup>12</sup> he felt that this was too direct a link and therefore violated his conscience. This was conceded to be an interference with his rights.

Compared to the straightforwardness of this conclusion under a proportionality test, the question of whether a religious freedom right is engaged under US law is very complex and may have to be considered under a number of legal tests. Firstly, it could be argued there is an infringement of a person's free exercise rights. However, since the Supreme Court's decision in *Employment Division v Smith*<sup>13</sup> that

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<sup>10</sup> [2002] 222 DLR (4th) 174.

<sup>11</sup> *Ibid.* at para 3.

<sup>12</sup> *Ibid.* at para 15.

<sup>13</sup> 494 US 872 (1990).

laws could only be challenged on this basis where they were not neutral or generally applicable, this is only a limited right. Evidently, the vast majority of anti-discrimination laws will be neutral and generally applicable, in that they prohibit everyone from discriminating on particular grounds, and do not target those who believe they should discriminate for certain religious reasons.

However, *Smith* does permit challenges where a 'hybrid' right is infringed. As explained earlier,<sup>14</sup> this is where the Free Exercise Clause is considered 'in conjunction with other constitutional protections, such as freedom of speech and of the press.'<sup>15</sup> What this means in practice is unclear. This concept has been the subject of much academic criticism<sup>16</sup> and indeed, "one circuit court of appeals has categorically declined to apply the hybrid rights doctrine, citing its unworkability, and several other federal appellate and trial courts have criticized it.'<sup>17</sup> It has been interpreted as meaning that there must be a 'colourable' or 'conjoined' claim regarding another right,<sup>18</sup> although this does not make its meaning much clearer. Nevertheless it has been found to be relevant in some cases in this context.

In *Thomas v Anchorage Equal Rights Commission*<sup>19</sup> a landlord claimed that being required to rent property to unmarried couples infringed his free exercise rights. The Ninth Circuit Court of Appeals held the claim was sufficiently associated with freedom of speech to make the claim a hybrid claim under *Employment Division v Smith*, since landlords were forbidden to state that they preferred not to rent to unmarried couples. A compelling interest therefore had to be demonstrated. The case demonstrates the flawed and arbitrary nature of the hybrid right exception. Whether or not the landlord could state that he preferred not to rent to unmarried couples is only a peripheral concern. The real issue is not what he can say, but what he can do. It is also far from clear why an additional small interest of a different kind should make a case subject to strict scrutiny, while a great interference with one right does not require any justification.

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<sup>14</sup> See supra at p57-8.

<sup>15</sup> Supra n.13 at 881.

<sup>16</sup> See e.g. K. Greenawalt, 'Quo Vadis: The Status and Prospects of "Tests" under the Religion Clauses' [1995] *Sup Ct Rev* 323; D. Laycock, 'The Remnants of Free Exercise' [1990] *Sup Ct Rev* 1; Note, 'The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions' (2010) 123 *Harv L Rev* 1494.

<sup>17</sup> S. Aden and L. Strang, 'When a "Rule Doesn't Rule: The Failure of the *Oregon Employment Division v. Smith* "Hybrid Rights Exception"' (2003) 108 *Penn St L Rev* 573.

<sup>18</sup> *Ibid.*

<sup>19</sup> 165 F.3d 692 (Alaska, 1999).

The second route by which it is possible to claim that a right has been infringed is to bring a claim under the federal Religious Freedom Restoration Act (RFRA). As previously discussed, this reinstated the test under constitutional law before *Smith* and therefore requires a compelling state interest to be demonstrated when there is a substantial burden on religious belief. However, it has limited coverage. Cases can only be brought against the state and not in disputes between private parties. It was also held in *City of Boerne v Flores*<sup>20</sup> that it could only constitutionally apply to federal, rather than state action. Since prohibitions against sexual orientation discrimination are, apart from rare exceptions,<sup>21</sup> state rather than federal laws, it is not relevant to this area of law. Some states do have a state RFRA, or have equivalent protection in the state constitution. These provide similar protection to the federal RFRA, but apply to state rather than federal law. While they could be used to challenge state anti-discrimination legislation, these too do not apply in disputes between private parties.

Under US law therefore it may be very difficult to have a religious claim recognised as even infringing a right. For example, in *Elane Photography LLC v Willock*,<sup>22</sup> summary judgment was granted against a photography company which refused to photograph a same-sex couple's commitment ceremony because the owners believed that same-sex marriage was immoral. The owners, the Huguenins, had no claim under the Free Exercise clause because the law prohibiting discrimination in public accommodations did not 'selectively burden any religion or religious belief'.<sup>23</sup> They had no claim under either the New Mexico RFRA or the federal RFRA, because the other party was a private individual. The Huguenins therefore have no opportunity to raise their claims at all and so the harm caused to them is not recognised. They are essentially told that they have suffered no injury even though they have been put to a difficult conscientious dilemma (although of course this may well be justified).

Even if it is accepted that a RFRA applies, there have been further difficulties in establishing that being prohibited from discriminating in providing such services constitutes a substantial burden on a person's free exercise. In *Smith v Fair*

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<sup>20</sup> 521 US 507 (1997).

<sup>21</sup> E.g. federal government employees: Executive Order 13087 of May 28, 1998.

<sup>22</sup> 284 P.3d 428 (N.M.App, 2012), 309 P.3d 53 (N.M. 2013). See for further discussion of this case, M. Pearson, 'Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty' *Rutgers J of L & Relig* (forthcoming 2014).

<sup>23</sup> *Ibid.* at para 37.

*Employment and Housing Commission*,<sup>24</sup> a woman refused to rent an apartment to an unmarried couple because she believed that sex outside marriage was immoral and ‘that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.’<sup>25</sup> The Court though held there was no substantial burden because the law only made compliance with her religious beliefs more expensive and ‘investment in rental units [is not] the only available income-producing use of her capital’<sup>26</sup> She could therefore, ‘avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood.’<sup>27</sup>

This is a similar analysis to the ‘specific situation’ rule in ECHR and British law and like that rule it is severely restrictive. Firstly, as a practical matter it is perhaps questionable whether other forms of livelihood were easily available to an elderly woman whose income was based on the rent from four properties. Furthermore, as O’Neil puts it, ‘the potential impact is much deeper than simply making adherence to faith more expensive. Suggesting that rental property owners could find other lucrative investments has a callous ring, quite at variance with *Sherbert’s* solicitude for the conscientious Sabbatarian.’<sup>28</sup> *Sherbert v Verner*<sup>29</sup> was a Supreme Court case which held that a woman’s free exercise right was substantially burdened where she lost her job because, as a Seventh Day Adventist, she refused to work on Saturdays, and she was then denied unemployment benefit on the basis that she failed to accept suitable work without good cause. This was recognised even though she was not directly prevented from practising her religion, but rather it was only made ‘more expensive’.

*Smith v Fair Employment and Housing Commission* fails to take seriously rights of conscience. No justification is required to be given for acts which may place significant burdens on Smith’s ability to live in accordance with her beliefs. As Lin puts it, it is surprising to say that a person’s right of freedom of religion is not burdened in a situation where she is ‘preclude[d] entirely... from engaging in a

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<sup>24</sup> 12 Cal. 4<sup>th</sup> 1143 (Cal., 1996).

<sup>25</sup> *Ibid.* at 1194.

<sup>26</sup> *Ibid.* at 1175.

<sup>27</sup> *Ibid.*

<sup>28</sup> R. O’Neil, ‘Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights’ (1999) 32 *UC Davis L Rev* 785.

<sup>29</sup> 374 US 398 (1963).

particular type of commercial activity on the basis of [her] religious convictions,'<sup>30</sup> unless she violates her conscience. Of course, this is not to say that she should not ultimately have to bear this burden, but the Court's approach excludes this cost entirely from consideration.

Indeed, the extremely limited nature of religious freedom rights under US law is demonstrated by the fact that religious claimants have put forward often artificial arguments, in an attempt to have a case decided under a more beneficial test. In *Elane Photography* the argument was made that the photography had an expressive element, and therefore the Huguenins' freedom of speech was violated because they would thereby be forced to demonstrate that they approved of same-sex marriage. This argument was advanced because, in contrast to free exercise cases, an interference with freedom of speech would lead to strict scrutiny. However, both the Court of Appeals of New Mexico and the New Mexico Supreme Court rejected this claim. The Court of Appeals held that 'Elane Photography's commercial business... is not so inherently expressive as to warrant First Amendment protections. The conduct of taking wedding photographs, unaccompanied by outward expression of approval for same-sex ceremonies, would not express any message.'<sup>31</sup> It also stated that they could have placed a message on their website that they disapproved of same-sex marriage.

The New Mexico Supreme Court's argument was broader. It too considered that the Huguenins were unlikely to be seen as endorsing same-sex marriage, but also held that in any case where a business is a public accommodation, being required not to discriminate in providing services to the public would not affect its free speech rights. This is because the state is not thereby forcing the business to express a particular message. The Court held that 'this determination has no relation to the artistic merit of photographs produced by Elane Photography.'<sup>32</sup> Whichever route is taken to this conclusion, the Huguenins were not successful.

While the Supreme Court's argument is perhaps too broad, the conclusion is unsurprising. The Huguenins' claim was a claim of conscience not expression. Their real fear was not that people would misinterpret their beliefs, but that they

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<sup>30</sup> A. Lin, 'Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry' (2001) 89 *Geo LJ* 719, 732.

<sup>31</sup> Court of Appeals decision *supra* n.22 at 439.

<sup>32</sup> Supreme Court decision, *supra* n.22. at 66.



believed aiding certain activities was wrong. Although the failure of the speech argument is recognised, it is a failure to appreciate the value of conscience which leads to the casting around for alternative arguments.

These issues demonstrate problems with finding an interference because of the limited coverage of rights protection under US law. Nevertheless, even under a proportionality approach, which takes a wide interpretation of rights, the objection could be raised that the disapproved of act is too remote from the action a person is being asked to do to count as an interference. Thus for example, by providing a wedding cake, a service provider is not directly facilitating a same-sex marriage, still less being asked to enter into one herself. It could be argued that she cannot claim that her conscience is affected where she is not directly responsible for an 'immoral' act.

Whilst in some cases involving the provision of services the link will be too remote, this is not always the case. Generally, aiding an 'immoral' act can be sufficient for both moral and even legal culpability.<sup>33</sup> If I sold a knife to someone knowing that he was going to use it to stab his partner it would not be an answer to my moral culpability that I sold knives in the ordinary course of my business. There would still be moral culpability even if there no were no causal link, for example if I knew that another provider would sell the knife. This is of course an extreme example but my point is only that facilitation or approval of particular acts is generally seen as morally relevant.

There should also be no automatic bar to finding an interference in the commercial sphere. As discussed in Chapter 2, the fact that an act takes place in the public sphere may be very relevant to the question of justification because it may affect the rights of others, but that does not mean that there should be an automatic bar on such claims or that interference should be assessed so narrowly as to exclude them. There is still a relevant conflict between a person's perceived conscientious obligation and a state enforced legal obligation. It may be true that there is no infringement of 'core' beliefs, in the sense of interference with religious worship, but, as has been demonstrated,<sup>34</sup> this is not a sufficient understanding of what freedom of religion requires. Although there is a need to protect the interests of

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<sup>33</sup> For an analysis of Catholic teaching on cooperation with immoral acts see J. Garvey and A. Coney, 'Catholic Judges in Capital Cases' (1997) 81 *Marq L Rev* 303.

<sup>34</sup> See Ch 2.

others, this can be resolved by the use of a proportionality test, rather than by its categorical exclusion.

Nevertheless, as I have previously argued, there still must be a close connection between the act and the belief and not every act motivated by a religious belief will be an interference. Since whether or not there is an interference will depend on context, the exact point at which it becomes too remote is difficult to establish in the abstract and will depend on a fact-specific analysis. An example of where the act is too remote is *Blanding v Sports & Health Club*.<sup>35</sup> A gay man had his membership of a gym revoked because he performed ‘a quick, impulsive dance step’ during a conversation with other members about a piece of music.<sup>36</sup> This action was taken against a background of conflict. After gay members of the club had ‘engaged in open sexual activity and sexual harassment’, the gym, which was run by Evangelical Christians, enforced a policy of ‘foreclosing opportunities for what it considered to be inappropriate behavior’, against its gay members and only against them, limiting opportunities to socialise and putting posters up entitled ‘What God thinks of Homosexuality’.<sup>37</sup> The owners claimed an exemption from the discrimination law on the basis of the free exercise clause.<sup>38</sup> They claimed they had religious objections to same-sex sexual activity but stated that they had a ‘heartfelt love for anybody... we can hate the sin but we love the sinner’.<sup>39</sup>

As the Court held, since Blanding was discriminated against purely because of his sexual orientation, and this according to the owners’ own testimony was not contrary to their religious beliefs, there was no interference with their religious rights. The act complained of was so remote from anything they had religious objections to that there could not be an interference.

A separate issue is whether businesses themselves can have religious freedom rights. In *Blanding*, the Court held that the company could not raise a free exercise claim because the club’s purpose was to make a profit. It had no ‘institutional free-exercise rights or derivative free-exercise rights.’<sup>40</sup> The question of whether businesses can have free exercise rights of their own is something that is hotly

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<sup>35</sup> 373 N.W. 2d 784 (Minn.App., 1985).

<sup>36</sup> *Ibid.* at 788.

<sup>37</sup> *Ibid.* at 787.

<sup>38</sup> The case predates *Employment Division v Smith*.

<sup>39</sup> *Supra* n.35 at 791.

<sup>40</sup> *Ibid.* at 790.

debated in many of the cases challenging the ‘contraception mandate’ currently being heard in US courts. The contraception mandate requires businesses to include contraception coverage (which includes the morning after pill) in their employees’ health plans. Some organisations and corporations owned or controlled by people with religious objections to this, have claimed that this violates both their individual free exercise right and the free exercise right of the corporation. There are numerous cases currently before the courts on this matter.<sup>41</sup>

In the Tenth Circuit’s decision in *Hobby Lobby v Sebelius*<sup>42</sup> the Court held, overruling the District Court’s decision,<sup>43</sup> that a company could raise a defence of its own for the purposes of the RFRA. Partly this was a matter of statutory analysis. The RFRA states that ‘the government shall not substantially burden a person’s exercise of religion’.<sup>44</sup> The Court argued that in interpreting statutes, the ordinary rule is that ‘person’ can refer to a corporation or a business and it saw no reason to depart from this.<sup>45</sup> It also noted that corporate groups had been able to bring cases in the past and that Hobby Lobby engaged in religious proselytisation by taking out hundreds of newspaper advertisements ‘inviting people to “know Jesus as Lord and Savior.”’

In contrast, the District Court’s decision was that Hobby Lobby did not have its own religious freedom rights. Its explanation was that, ‘general business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.’<sup>46</sup> This reasoning though is not completely persuasive. It could be said about a religious institution, such as a church, that it does ‘not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction

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<sup>41</sup> The Becket Fund has a list of the current cases:

<http://www.becketfund.org/hhsinformationcentral/> [Last Accessed 10 Feb 2014]

<sup>42</sup> D.C. NO. 5:12-CV-01000-HE (10<sup>th</sup> Cir., 27 June 2013). The Supreme Court will hear the case in March 2014.

<sup>43</sup> 870 F.Supp. 2d 1278 (W.D. Okla., 2012).

<sup>44</sup> 42 USC § 2000bb-1.

<sup>45</sup> Although the 6<sup>th</sup> Circuit reached the opposite view in *Autocam Corp. v Sebelius* No. 12-2673 (6<sup>th</sup> Cir., Sept 17<sup>th</sup> 2013).

<sup>46</sup> *Supra* n.43 at 1291.

of their individual actors'. After all, apart from metaphorically, an institution is incapable of acting except through its members.<sup>47</sup>

Is it therefore possible for the owners of a company to infuse an otherwise secular company with religion, such that the company can claim its own religious freedom rights? Hobby Lobby is run by a management trust the purpose of which is to 'honor God with all that has been entrusted' to the Greens and to 'use the Green family assets to create, support, and leverage the efforts of Christian ministries.'<sup>48</sup> Similarly, the US company Interstate Batteries' mission statement is 'to glorify God as we supply our customers worldwide with top quality, value-priced batteries, related electrical power-source products, and distribution services.'<sup>49</sup> Can the provision of batteries be turned into a religious activity by the intentions of a company's owners?

The issue of whether commercial organisations have their own rights under Art 9 has not yet been fully considered by the ECtHR. The ECtHR's early approach was that Art 9 was only an individual right and even organised religions had no rights of their own.<sup>50</sup> This failed to perceive the communal nature of much religious belief, and the importance of institutional support in maintaining religious practices. More recently though a range of types of religious organisations have been able to bring claims. For example, in *Cha'are Shalom Ve Tsedek v France*,<sup>51</sup> a complaint by a Jewish liturgical association which wished to have access to slaughterhouses in order to perform ritual slaughter in accordance with its members' beliefs, was held to be admissible. Similarly in *Verein Gemeinsam Lernen v Austria*<sup>52</sup> a private non-religious school could complain that it had been discriminated against compared to church schools. However, the Court has not yet accepted that purely commercial organisations can bring cases under Art 9,<sup>53</sup> although cases may be considered under other Convention provisions such as Art 10.<sup>54</sup>

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<sup>47</sup> Colombo also makes this point in 'The Naked Private Sphere' (2013) 51 *Hous L R* 1.

<sup>48</sup> *Supra* n.42.

<sup>49</sup> Available at Interstate Batteries' website:

<http://corporate.interstatebatteries.com/mission/> [Last Accessed 10 Feb 2014]

<sup>50</sup> *Church of X v UK* App No 3798/68, 29 CD 70 (17 December 1968).

<sup>51</sup> 9 BHRC 27 (2000).

<sup>52</sup> (1995) 20 EHRR CD 78.

<sup>53</sup> *Kustannus OY Vapaa Ajattelijä AB et Al. v Finland* (1996) 22 EHRR CD 69.

<sup>54</sup> E.g. *Glas Nadejda EOOD v Bulgaria* App No. 14134/02 (11 Oct 2007).

Vischer contends that businesses should have free exercise rights.<sup>55</sup> He argues that corporations can and should express moral views and that conscience is developed in association with others. Therefore, he claims that it is important to have a 'moral marketplace' which permits diversity of views through different providers, allowing customers to select those which have greatest affinity with their own beliefs. He states that, 'when it comes to facilitating the living out of conscience, the relevance of the local church and Wal-Mart are different in degree, not in kind.'<sup>56</sup>

Evidently, institutions are important in the development of conscience and belief and potentially this can include for-profit organisations. However, even if there is a difference only in degree this does not mean that all businesses should be able to claim religious freedom rights. Even if they are not merely an aggregation of individuals' rights,<sup>57</sup> collective religious rights must ultimately derive from individual rights, otherwise an organisation could have rights even if it had no members.<sup>58</sup>

If rights are derived from individuals, then two things must be demonstrated. Firstly there must be an identifiable group of people from whom rights can be derived, and secondly, there must be some purpose which the individuals intend the organisation to perform. While in religious organisations, members, however this is defined, are the relevant original rights holders, in companies the rights could potentially derive from far more diverse groups with many more diverse interests, including directors, shareholders, employees and customers.<sup>59</sup> To consider just one of these, as Corbin points out, it is impossible to assume that employees share the religious views of their employer or have sufficient autonomy to move to employment run on religious lines of which they approve. As she argues, to ignore this affects the conscience rights of these employees.<sup>60</sup>

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<sup>55</sup> R. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: Cambridge University Press, 2009) and 'Do For-Profit Businesses Have Free Exercise Rights?' (2013) 21 *J Contemp Legal Issues* 369.

<sup>56</sup> *Ibid.* at 205.

<sup>57</sup> J. Rivers, 'Religious Liberty as a Collective Right' in *Law and Religion*, R. O'Dair and A. Lewis (eds), (Oxford: Oxford University Press, 2001).

<sup>58</sup> L. Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 *OJLS* 197.

<sup>59</sup> This is a similar argument to J. Nelson, 'Conscience, Incorporated' *Mich St L Rev* (Forthcoming 2014).

<sup>60</sup> C. Corbin, 'Corporate Religious Liberty', available from <http://ssrn.com/abstract=2327919> [Last Accessed 10 Feb 2014]. She therefore argues that granting free exercise rights to corporations would protect the rights of the elite at a cost to others.

The question of function is also more complex. The purpose of religious organisations is normally to spread particular viewpoints, develop doctrines and maintain exclusionary communities. This is not the purpose of ordinary businesses: they do not normally do anything that is recognisably religious. Therefore it is difficult to show that businesses have religious freedom rights of their own. However, this should not be an absolute rule. *Some* for-profit organisations are designed around, and to spread, certain viewpoints. Since the right derives from its purposes, if an organisation has as one of its main aims the spreading or affirming of a religious viewpoint then it is possible that it can have free exercise rights.<sup>61</sup> However, this would not include the Interstate Battery example given above: although religion may be important to its owners, the business itself is not fulfilling any religious purpose. For Hobby Lobby too, although it does perform some religious activities, such as religious advertising, this is incidental compared to its major business of selling craft materials.

It should be stressed that this discussion is about how rights come to exist, rather than what the right entails. Even if an organisation's rights are derived rather than freestanding, an organisation can still act to protect its own conception of conscience and autonomy. It does not mean that an organisation's doctrines are contingent on the opinions of the majority of its members or that it has to be at all democratic in the selection of its leaders or in the development of doctrine.

#### Interference: Conclusion

This section has considered whether an interference can potentially be found when a person or business is required not to discriminate in providing a service. It has been argued that in many circumstances it can be, with regard to individual claims, but this will occur more rarely where a business itself claims rights. This approach is theoretically sound and practical. It excludes claims where the claimed right is very remote from the act that is objected to, but at the same time it does not put formalistic barriers in the way of cases where there is a genuine conflict between a

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<sup>61</sup> *Tyndale House Publishers v Sebelius* 904 F.Supp.2d 106 (D.D.C., 2012) may be an example. Colombo supra n.47 similarly argues that a business corporation can be 'a genuine community of individuals—investors, owners, officers, employees, and customers—coming together around a common vision or shared set of goals, values, or beliefs.' I would agree that a business could have free exercise rights in such a situation. However, Colombo appears to claim that businesses should have free exercise rights much more widely than this, arguing that a free exercise claim arises where a corporation adheres to a set of beliefs and undertakes conduct on account of these beliefs and government action substantially burdens such conduct, thus including cases such as *Hobby Lobby*.

person's conscience and the law, since the rights of others can be considered at the justification stage.

In permitting a broad interpretation of interference a proportionality approach is advantageous. Losing parties are explicitly held to have a constitutional interest that is worthy of protection, although outweighed in the current circumstances, rather than this interest simply being delegitimised in principle.<sup>62</sup> In doing so proportionality requires justification: even if a party has to lose because of the rights of others, they still have a right to adequate justification as to why the right cannot be protected in a particular situation. This is missing in many of the cases which do not use a proportionality-type approach. The question of proportionality itself will now be considered.

### **Legitimate Aim**

In a case where an interference with a religious right is claimed the legitimate aim will normally be straightforward, since it will be to protect the rights of others by enforcing non-discrimination. Conversely, there will normally also be a legitimate aim in protecting the religious rights of others.

### **Rational Connection**

The next question is whether there is a rational connection between the legitimate aim and the action taken. Again, this is not generally an issue. However, in the Canadian case of *Eadie and Thomas v Riverbend Bed and Breakfast*<sup>63</sup> the British Columbia Human Rights Tribunal held that the refusal to let a gay couple stay had no rational connection to the function of the business and therefore there was no defence to the claim of unlawful discrimination. The version of the rational connection test it applied was whether a standard was adopted 'for a purpose or goal that is rationally connected to the function being performed'.<sup>64</sup> Since the services the Bed and Breakfast provided were not religious in nature, the owners' religious beliefs were not relevant. As was discussed previously, the question of function is relevant to whether a right of freedom of religion can be claimed by a business. It is therefore correct to say that there is no rational connection between

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<sup>62</sup> C. Taylor, 'Living With Difference' in A. Allen and M. Regan (eds), *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* (Oxford: Oxford University Press, 1998) 218.

<sup>63</sup> 2012 BCHRT 247.

<sup>64</sup> *Ibid.* at para 117.

the business's rights and the action taken.

However, this is not a full answer because the owners' individual rights are also relevant. The test of rational connection the Tribunal used comes from *Meiorin*:<sup>65</sup> a case about whether it amounted to sex discrimination to require all fire-fighters to be able to run 2.5 kilometres in 11 minutes. This standard was easier for men to achieve than women. In this context, the test was appropriate. It means that the employee has the right to be accommodated, unless it can be demonstrated that this imposes undue hardship on the employer. The functions of the job are therefore relevant: if a purpose is not rationally connected to the function of the job it cannot be undue hardship not to comply with it.

However, when applied to questions of individual rights of freedom of religion this test is unsuitable. A person's individual right of conscience is not reducible, or even necessarily particularly related to, the functions she performs in her professional life. Issues raising a problem of conscience can arise whatever functions a person performs and indeed can arise *because* of a conflict between these functions and conscientious beliefs. Therefore in *Eadie* it should have been found that there was a rational connection between the action the owners took and the protection of their religious conscience. If this was held not to be so, it gives those in employment unwarranted greater protection than those who are self-employed by the application of the same test. In the employment cases, the employer must justify their treatment of an employee by reference to the function of the job: thus giving the employee a potentially extensive right. In contrast, in the provision of services, a focus on function could completely exclude the claim. This gives greater protection to employees, not because the interference with their rights is likely to be any greater, but because the test is unsuited to the situation of self-employed people. This unsatisfactory conclusion is not reached in other cases, such as *Brockie*, where the claimant refused to print materials for the Canadian Lesbian and Gay Archives.<sup>66</sup> In one sense, Brockie's purpose was to provide printing services, an entirely secular function, which could have no rational connection even to a refusal to print materials which directly denigrated his religious views. A rational connection should be found where the exemption would protect the owner's religious conscience.

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<sup>65</sup> *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (1999) 3 SCR 3.

<sup>66</sup> *Supra* n.10.



### No Less Restrictive Means

It could be argued that as a less restrictive alternative to forbidding such discrimination completely, the state should only intervene and prevent discrimination if a person is unable to obtain a service elsewhere. Vischer argues, continuing the line of reasoning explained above, that it is important for companies, like other associations, to be able to develop a 'distinct moral identity.'<sup>67</sup> Although he is in favour of non-discrimination rights in the context of employment and housing,<sup>68</sup> because there is unlikely to be a truly equal readily available alternative in these areas, he states that in most other commercial contexts, organisations should be able to raise a defence of 'market access' when providing services. This would mean that there would be no breach of discrimination law where a service-provider could demonstrate that a person could obtain the service from an alternative provider.

His starting point is that both the service provider and the customer have rights of conscience in the sense of 'an individual's capacity to develop and claim a moral worldview as her own... and her ability to live consistently with that worldview'.<sup>69</sup> To take the example of *Elane Photography* mentioned above, he argues that both Willock's and the owners' consciences are relevant. The owners, the Huguenins, claim that they cannot provide photography for a same-sex commitment ceremony because they wish to live out their Christian convictions, which tell them that same-sex marriage is immoral and they should do nothing to approve it in every aspect of their lives. Willock also wishes to live out her convictions by marrying<sup>70</sup> her partner in a public ceremony with all the traditional trappings a wedding normally involves.<sup>71</sup>

Clearly, they have very different beliefs about the morality or otherwise of same-sex relationships and marriages. Vischer argues that the state should not take sides in the debate over these competing moral convictions and thus the state should not intervene if Willock can find an alternative photographer. He believes that if the Huguenins are forced to provide a service, when another provider could be found, then their conscience is unnecessarily trumped by an opposing claim of conscience,

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<sup>67</sup> *Supra* n. 55 at 202.

<sup>68</sup> *Ibid.* at 28.

<sup>69</sup> *Ibid.* at 43.

<sup>70</sup> This was not a legal marriage since same-sex marriage is not recognised in New Mexico.

<sup>71</sup> Vischer *supra* n.55 at 2.

since Willock's conscientious belief in the morality of same-sex marriage could be protected by using another provider. He therefore criticises anti-discrimination laws like California's Civil Rights Act because, he argues, 'it is not premised on securing individuals' access to essential goods and services. Instead it is premised on the expressive value of non-discrimination as a universal norm in the marketplace'.<sup>72</sup>

Vischer's argument is not straightforward. Unlike McConnell,<sup>73</sup> he does not make the claim that the state should not intervene because it should not take sides in the dispute or even that it cannot deliberately declare that non-discrimination is a symbolically valuable norm. McConnell's argument is that the state should treat views on homosexuality in the same way as it treats religion under the First Amendment: it 'should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality and should refrain from using its power to favor, promote, or advance one position over the other,' leaving 'private forces in the culture to determine the ultimate social response'.<sup>74</sup>

That argument is unpersuasive because, as was discussed in the Introduction, the state has an obligation to demonstrate equal concern and respect to all as part of the non-discrimination right.<sup>75</sup> Not intervening does not demonstrate neutrality on this issue. Since there is no place for the state to stand which is neutral on this issue, it is more than justifiable that it symbolically states it is against this harm. A failure to act to prevent systemic discrimination demonstrates at least a lack of interest in those being discriminated against and perhaps tacit approval of the policy. As Dworkin stated with reference to the system of racial segregation as it existed in the southern USA, a 'political and economic system that allows prejudice to destroy some people's lives does not treat all members of the community with equal concern.'<sup>76</sup> While permitting discrimination on the grounds of sexual orientation where there is a market access defence probably would not 'destroy some people's lives', at least under the social situations as currently exists in the three jurisdictions, it clearly causes real harm to those affected.

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<sup>72</sup> Ibid. at 306.

<sup>73</sup> M. McConnell, 'The Problem of Singling Out Religion' (2000) 50 *DePaul L Rev* 1.

<sup>74</sup> Ibid. at 44.

<sup>75</sup> R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978).

<sup>76</sup> R. Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 *Iowa L Rev* 36-7.

Indeed, Vischer recognises this, permitting the state not only to ensure practical access but to embody an anti-discrimination norm by 'refusing to enter into contracts with discriminatory vendors, or by trumpeting the importance of non-discrimination through public awareness campaigns.'<sup>77</sup> The problem is then that Vischer's argument does not persuasively answer why the state may act coercively in these contexts but not others. For the purposes of the proportionality test, once he has accepted that it is legitimate for the state to act in pursuit of a non-discrimination policy, it is clear that his approach does not provide a less restrictive alternative to forbidding discrimination completely, because it does not protect the right to non-discrimination to the same extent.

Vischer's argument is also problematic because it is also odd to say that a person has a right to a service which they need to live out their moral convictions. If Willock had been unable to find a photographer because none was available in the area, that would clearly be no concern of the state, even if she claimed this was necessary to live consistently with her worldview. Rather, in most situations,<sup>78</sup> she only has a right not to be discriminated against. Vischer's argument turns all the relevant interests into one of conscience, but not every choice is a conscientious one. It is thus better to see *Elane Photography* as a clash between conscience and non-discrimination, rather than between two ideas of conscience.

### **Balancing**

This section considers the final balancing stage with reference to a number of cases and situations. Even if claims have not failed before they reached this stage, they have not been noticeably successful. As will be demonstrated, these situations generally involve a minor interference with freedom of religion and a great interference with the right of non-discrimination. Although the right to freedom of religion includes more than mere religious worship, the right to manifest religious beliefs in the commercial sphere is normally on the periphery of the religious right. In contrast, the effects on those discriminated against can be pervasive and extensive. However, whilst these cases have often reached justifiable conclusions, the reasoning could be improved, notably because a proportionality approach can recognise that there is a conflict of rights at stake.

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<sup>77</sup> *Supra* n.55 at 306.

<sup>78</sup> C.f. *Griffin v County School Board of Prince Edward County* 377 US 218 (1964) (impermissible to avoid order to de-segregate schools by closing all public schools and providing vouchers to attend private segregated schools instead).

### One-off Commercial Services

Conflicts can potentially result from a huge number of issues, and disputes have arisen over wedding cakes,<sup>79</sup> DJs,<sup>80</sup> rainbow coloured cupcakes to celebrate National Coming Out Day<sup>81</sup> and photography.<sup>82</sup> This section will consider 'one-off commercial services': services with no intrinsic religious aspect, that are normally provided without restriction to the general public, and that do not involve an on-going relationship. Often, but not necessarily, these are disputes related to same-sex marriage. As always, in a proportionality enquiry it is necessary to consider what interests are in question and how deeply they are affected.

As indicated in the discussion in the previous section, some have seemed to suggest that the only interest opposing the religious one is that of practical access to a service. Laycock appears to see the opposing interest as one of 'inconvenience'<sup>83</sup> in finding an alternative. He states that, 'in more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.'<sup>84</sup> I am not sure why the analogy (although an imperfect one) does not lead Laycock to the opposite conclusion: that the symbolic harm caused by unequal treatment should at least be taken into account and may be decisive.<sup>85</sup> The harm caused to those families was not merely one of convenience. It was the constant reminder of a caste system which, by various mechanisms, highly circumscribed the life of black people. Although the situation for those discriminated against on the grounds of their sexual orientation is not as extreme or pervasive as this, his analysis still ignores

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<sup>79</sup> L. Moran, 'Baker Refuses to Make Wedding Cake for Lesbian Couple' *New York Daily News*, 4<sup>th</sup> Feb 2013, <http://www.nydailynews.com/news/national/baker-refuses-wedding-cake-lesbian-couple-article-1.1254776> [Last Accessed 10 Feb 2014].

<sup>80</sup> In *Posillico v Spitzer* No. 1300-06 (Sup. Ct. Nassau County) two Catholic DJs refused to accept a booking for a Gay Men's Health Crisis event. The case was withdrawn.

<sup>81</sup> N. O'Callaghan, 'Death by a Thousand Cuts: Why Market Mechanisms Won't Solve the Culture Wars' (2010) 49 *Journal of Catholic Legal Studies* 335.

<sup>82</sup> *Engel v Worthington* 23 Cal. Rptr.2d 329 (Cal. App., 1993).

<sup>83</sup> D. Laycock, 'Afterword' in D. Laycock et al. (eds), *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, (Lanham, Maryland: Rowman & Littlefield, 2008) 198.

<sup>84</sup> *Ibid.* at 199.

<sup>85</sup> M. Curtis, 'A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for those who Discriminate Against Married or Marrying Gays in Context' (2012) 47 *Wake Forest L Rev* 173.

'the dignitary and equality harm inherent in discrimination against a historically vulnerable minority'.<sup>86</sup>

Laycock has also suggested signage requirements alerting customers to the fact that they refuse to serve, for example gay couples, to minimise surprise.<sup>87</sup> However, it is questionable whether this would not in fact make the situation worse for gay people. In some areas it may mean more suppliers claim an exemption because of social pressure to conform to traditional mores<sup>88</sup> or because it may be easier to declare a discriminatory policy through a sign rather than face-to-face.<sup>89</sup> In addition a sign is an 'embodiment of second class citizenship'.<sup>90</sup> Gay people may be forced to see it regularly, and this may act as a reminder of discriminatory attitudes even if they are not seeking that service. Finally, whether told by an employee or through a sign, the end result is still the same: a person is still denied a service because of her sexual orientation. While taken in isolation these issues may seem comparatively trivial, and only a minor interference with the right of non-discrimination, focusing only on practical access does not take into account the broader context of discrimination and marginalisation or the emotional consequence of repeated refusals. As Hunter puts it, these cases involve a claim to 'cultural citizenship':<sup>91</sup> part of a claim to access the public, social sphere.

In *Brockie*<sup>92</sup> the Ontario Divisional Court, using a proportionality approach, held for these reasons that the interference with the religious right was justified and Brockie unjustifiably discriminated in refusing to print the stationery required. The Court argued that discrimination on the grounds of sexual orientation, demeaned 'the self worth and personal dignity of homosexuals, with adverse psychological effects and social and economic disadvantages'<sup>93</sup> and avoiding this was a pressing

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<sup>86</sup> T. Flynn, 'Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace' (2010) 5 *Nw J L & Soc Pol'y*. 236.

<sup>87</sup> *Supra* n.86.

<sup>88</sup> As Laycock admits.

<sup>89</sup> Researchers posing as gay couples seeking accommodation for their honeymoon were more likely to be refused if they emailed rather telephoned the owners. They concluded the personal nature of the contact made it more difficult to refuse. D. Howerton, 'Honeymoon Vacation: Sexual-Orientation Prejudice and Inconsistent Behavioral Responses' (2012) 34 *Basic and Applied Social Psychology* 146.

<sup>90</sup> Flynn *supra* n.89.

<sup>91</sup> N. Hunter, 'Accommodating the Public Sphere: Beyond the Market Model' (2001) 85 *Minn L Rev* 1591.

<sup>92</sup> *Supra* n.10.

<sup>93</sup> *Ibid.* at para 47.

and substantial objective. It pointed out that Brockie was acting in the commercial sphere and his actions were on the periphery of religious freedom. This reasoning, although entirely correct, does perhaps overlook the fact that Brockie did not refuse to serve gay people as such, but rather an organisation with particular aims relating to sexual orientation. Nevertheless his refusal was still for discriminatory reasons and could still have a demeaning effect. Importantly and correctly though, the Court held that the balance of interests might be different in other cases and that 'there can be no appropriate balance if the protection of one right means the total disregard of another.'<sup>94</sup> This case demonstrates that proportionality can take both rights seriously, but still protect important non-discrimination rights where necessary. Here Brockie was only asked to print office stationery, but the Court indicated the outcome might be different if he were asked to print material 'that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs'.<sup>95</sup> Although the reference to a 'gay and lesbian lifestyle' is somewhat perplexing, this does convey the idea that there is a balance to be made and both rights are important.

In *Elane Photography*, although the link between the act objected to and the service required is limited, an interference should have been found. However, the Huguenin's claim must nevertheless fail. They were providing a commercial service which did not necessarily imply any sort of approval for same-sex marriage. Indeed it would have been possible for the Huguenins to employ another photographer to cover same-sex weddings.<sup>96</sup> Although they may still argue that this would be contrary to their beliefs, and of course it might be, the interference would then be extremely limited. This case is also different to *Ladele*.<sup>97</sup> In *Elane Photography* the couple were directly confronted with a denial of service, rather than affected by a rearrangement of duties. Furthermore, the distance from the act objected to, same-sex marriage, is much greater in *Elane Photography*, and therefore is less of a burden on the religionists' rights. Finally, since there is nothing distinctive about this case to distinguish it from any other supply of services case, granting an exemption would lead to an evisceration of the anti-discrimination principle. The Huguenins are therefore left with a conflict between their legal obligations and

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<sup>94</sup> Ibid. at para 56.

<sup>95</sup> Ibid.

<sup>96</sup> As suggested by Chai Felblum, now an EEOC (Equal Employment Opportunity Commission) Commissioner. Noted in Vischer, *supra* n.55 at 303.

<sup>97</sup> *Supra* n.7.

their beliefs which cannot be lifted through the law. They must decide whether to give up their business or to comply with the antidiscrimination law. Deciding this case at the justification rather than at the interference stage though, as a proportionality test allows, at least recognises this conflict and focuses attention on the claims actually in issue.

That no exemption can be given is even clearer in *Blanding*, the case involving a gay man who was banned from using a gym. Even if, which is extremely doubtful, there was an interference with the right of the company's owners, permitting Blanding to use the gym only posed a very restricted burden on them. They were not required to facilitate or aid anything they were religiously opposed to: they were only required to let a gay man use a gym on the same terms as a heterosexual man. If an exemption was accepted here this would effectively prohibit all sexual orientation discrimination laws where a person had religious objections to homosexuality.

This section has considered the right to discriminate in the standard case of interchangeable services and concluded that such claims should not usually be successful because of the importance of the non-discrimination interest and the peripheral nature of the religious interest. It has also demonstrated that a proportionality analysis deals with these issues fully and provides a coherent method of balancing the interests. The rest of this chapter considers more complex situations that may involve a different balance of interests.

### Healthcare

An area which involves different interests from straightforward commercial services is that of healthcare. Healthcare is understood as intrinsically involving ethical considerations.<sup>98</sup> Doctors are not 'mere technicians who will perform requested services on demand'<sup>99</sup> and they are expected to apply ethical considerations to all their work. It is thus widely assumed to be acceptable, even required, for doctors to refuse to perform certain treatments on the grounds of conscience. In some cases there is a legal right not to be subjected to any detriment for refusing to perform certain procedures. Thus in Britain, doctors and nurses do

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<sup>98</sup> M. Wicclair, 'Is Conscientious Objection Incompatible with a Physician's Professional Obligations?' (2008) 29 *Theor Med Bioeth* 171.

<sup>99</sup> M. Wicclair, 'Conscientious Objection in Medicine' (2000) 3 *Bioethics* 205, 215.

not have to participate in providing abortions, unless the treatment is necessary ‘to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman’.<sup>100</sup> In some jurisdictions, conscience is given extremely broad protection. In Mississippi for example, the Health Care Rights of Conscience Act gives any provider of medical care the right to refuse to provide any treatment (understood broadly) if they conscientiously object.<sup>101</sup> There is no exception even if there is a possibility that serious harm or death may result. This starkly raises the question of the rights and interests of others.

Of course, these ethical considerations may conversely mean that discrimination is particularly problematic. There is an important distinction between a refusal to provide a particular treatment, and a refusal to provide a treatment to a particular person or group: the first denies treatment because of *what* is to be done, the second because of *who* a person is, meaning that some, in a distinction not based on health needs, can access healthcare when others cannot. A fear of discrimination may also lead to withholding information which may have relevance to treatment.<sup>102</sup> Quite simply also, access to healthcare is extremely important and can literally be a matter of life or death.

One example of a conflict is *North Coast Women’s Care Med. Group, Inc. v San Diego County Super. Ct.*<sup>103</sup> In this case a lesbian woman, Benitez, sought to have intrauterine insemination (IUI) in order to conceive. The only licensed practitioner at North Coast Women’s Care for the particular procedure required had religious objections to performing it, although there was dispute about whether this was because Benitez was unmarried, which would have been legally permissible, or because she was gay, which would not. The doctor’s objection was that he would be directly responsible for creating life and could only countenance this within marriage. Benitez claimed the clinic had unlawfully discriminated against her.

Although the clinic’s claims based on the Free Exercise Clause and free speech were rejected, the religious freedom arguments were considered under strict scrutiny

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<sup>100</sup> Abortion Act 1967 s.4.

<sup>101</sup> Discussed in B. Dickens, ‘Legal Protection and Limits of Conscientious Objection: When Conscientious Objection is Unethical’ (2009) 28 *Med Law* 337.

<sup>102</sup> E. Cayton, ‘Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes’ (2010) 19 *Law & Sexuality* 193.

<sup>103</sup> 189 P.3d 959, 962 (Cal., 2008).



under the Californian state constitution.<sup>104</sup> The Supreme Court of California considered the compelling state interest for the interference with the doctor's religious freedom to be 'ensuring full and equal access to medical treatment irrespective of sexual orientation.' This is clearly a legitimate aim. In considering whether there were any less restrictive means to achieve the goal the majority held that, 'defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives "full and equal" access to that medical procedure though a North Coast physician lacking defendants' religious objections'.<sup>105</sup> This alternative did not however apply because there was no such practitioner at North Coast and therefore even if strict scrutiny applied, 'the Act furthers California's compelling interest and there are no less restrictive means for the state to achieve that goal'. There was also a concurring judgment which argued that 'at least where the patient could be referred with relative ease and convenience to another practice, I question whether the state's interest in full and equal medical treatment would compel a physician in sole practice to provide a treatment to which he or she has sincere religious objections.'<sup>106</sup>

Both judgments take seriously the need to balance the interests of the parties. The reasoning of the majority is similar to the approach I took in Chapter 4, as it suggests considering accommodation by exchanging work between employees, where this is possible and as long as this does not inflict directly experienced discrimination. The concurring judgment in *Benitez* though understates the interest in non-discrimination by confining it only to practical considerations, and even understates these. It underestimates the stress caused by referral, particularly where time is an important factor and overlooks the fact that there were health insurance restrictions on which medical practices Benitez could use, although in the end her insurance company made an exception for her.

Again, this case demonstrates that a proportionality approach works in this context. Providing this kind of service affects a person's right of conscience more than, for example, providing flowers for a same-sex wedding because the link between the act in question and the disapproved of conduct (either unmarried or gay parenting) is so close. The doctor is the direct facilitator. However, although it involves a greater infringement of rights from the point of view of the believer, it

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<sup>104</sup> Although it was not conclusively decided that this was the appropriate standard.

<sup>105</sup> *Supra* n.103 at 969.

<sup>106</sup> *Ibid.* at 971.

also involves a greater infringement of the non-discrimination right, ironically because of the importance of the issues. Reproductive healthcare, including the decision to have a child, is of crucial importance to a person's aspirations and concerns, and potentially to a person's sense of identity. To have this refused for discriminatory reasons is therefore a serious interference. For these reasons the case was correctly decided.

### Housing

Housing, like healthcare, raises issues separate from the general commercial provision of services, because it can simultaneously raise questions of forced association on one side and real need on the other. The question of exemptions to discrimination laws for landlords who, because of their religious beliefs, refuse to rent their properties to particular groups has especially arisen in the US in relation to discrimination against unmarried heterosexual couples. In the US, while the Fair Housing Act prohibits discrimination on many grounds, discrimination on the grounds of sexual orientation or marital status is only prohibited, if at all, at state level.<sup>107</sup> Since these issues involve the interpretation of state law, different states have reached different conclusions, some holding that there is no burden on the religious landlord's right at all and some holding that there has not only been an interference, but a violation. However, none of the cases are particularly satisfactory.

It was argued above that not finding an interference with the right of freedom of religion in these contexts does not take this right seriously. Some cases though make the opposite mistake. In *Thomas v Anchorage Equal Rights Commission*<sup>108</sup> the value of non-discrimination is entirely understated and is reduced to the level of minor inconvenience. Thomas refused to rent to unmarried couples because of his religious beliefs. Although the decision was withdrawn for technical reasons,<sup>109</sup> the majority held that 'the only palpable injury suffered by an unmarried tenant turned away by a Christian landlord for religious reasons is a marginal reduction in the number of apartment units available for rent'.<sup>110</sup> It thereby even minimises the

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<sup>107</sup> 42 U.S.C. §3601-3619. It prohibits discrimination on the grounds of race, color, religion, sex, familial status, or national origin but not sexual orientation.

<sup>108</sup> *Supra* n.19.

<sup>109</sup> Rehearing was granted and opinion withdrawn on the basis that the dispute was not ripe for review: 192 F.3d 1208 (9<sup>th</sup> Cir., 1999).

<sup>110</sup> *Supra* n.19 at 718.

practical interest. As Failinger points out, housing is different from other sorts of goods because there is a restricted supply and it varies greatly in affordability, location, size and style.<sup>111</sup> To say that someone still has access to the housing market is not sufficient. More fundamentally, the majority in *Thomas* also completely failed to see the symbolic and accumulative effect of discrimination, including the fact that a prospective tenant 'has no way of knowing the next landlord will see things differently, or the next, and that ultimately he will find a decent place to live,'<sup>112</sup> which can have a substantial effect on the tenant's sense of inclusion and security.

A similar Canadian case looks at the question differently. In *Robertson and Anthony v Goertzen*<sup>113</sup> a landlord refused to rent to a gay couple, going so far as to retain their deposit and to threaten that he would not renew Anthony's sister's lease, who lived in another apartment owned by him, if they moved in. The legislation at issue forbade discrimination on the grounds of sexual orientation but exempted conduct where there was a bona fide and reasonable justification.<sup>114</sup> In order for this to be established it had to be proved that 'accommodation of the needs of an individual would impose undue hardship on a person who would have to accommodate those needs.'<sup>115</sup> Although this is a slightly different enquiry to a proportionality test, the case involves the same kind of discussion. The decision deals with the two interests fully, clearly highlighting the effect on the couple of both the symbolic effect of discrimination and of being denied the apartment, as well the importance of the claimant's religious beliefs to him, but rightly holds that there can be no exemption. Quite clearly, even if the discrimination can be justified, the landlord's acts went beyond a 'mere' refusal and entirely failed to treat the couple with the respect owed to them. Since to permit such behaviour would interfere more deeply with the non-discrimination right, whilst not giving any greater protection of the religious freedom right, it does not pass the no less restrictive means part of the proportionality test. Even if that were not the case, the negative effects on the prospective tenants, even given simply the practicality of finding alternative accommodation in a fairly remote part of Canada with a limited rental market, outweigh the harm caused to Goertzen.

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<sup>111</sup> M. Failinger, 'Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords' (2001) 29 *Cap U L Rev* 383.

<sup>112</sup> *Ibid.* at 398.

<sup>113</sup> 2010 NTHRAP 1 (5<sup>th</sup> September 2010).

<sup>114</sup> Northwest Territories Human Rights Act ss.5 and 12, SNWT 2002, c 18.

<sup>115</sup> Northwest Territories Human Rights Act s.12.

Of course, as has been argued throughout this thesis, consideration of the particular facts is essential, and a proportionality approach can always recognise this. To refer to a 'landlord' as if the situation and interests did not vary is not appropriate. There can be a great difference between, as Knutson puts it, a 'Donald Trump type landlord'<sup>116</sup> renting out a 100-unit apartment building and a widower who wants to rent out one bedroom in his home. This distinction was not recognised in *Wisconsin ex. rel. Sprague v City of Madison*.<sup>117</sup> Two women, Hacklander-Ready and Rowe, rented a four-bedroom house and wished to find housemates, with the permission of their landlord, to share the rent. Although they initially agreed to rent a room to a lesbian woman, Sprague, they changed their minds the next day. Sprague then sued and was successful. The Court dismissed the housemate's privacy defence shortly, stating that privacy rights were not relevant as 'appellants gave up their unqualified right to such constitutional protection when they rented housing for profit.'<sup>118</sup>

This is unsatisfactory. Any profit seems very limited: the purpose was to share the rent rather than enter into commercial activity. There are legitimate concerns over privacy and intimate association.<sup>119</sup> The home is normally seen as a particularly protected space from outside intrusion, although of course this protection is not absolute. Selecting a housemate may be more akin to looking for friendship rather than the commercial provision of services, since in sharing living space there is inevitably some kind of personal relationship. Choosing a flatmate may therefore involve consideration of a huge range of concerns, some of which may be discriminatory. For this reason there are many services which find flatmates for particular groups such as students, Christians or gay people. Of course permitting such discrimination still limits available accommodation and may contribute to systemic discrimination, but these problems are outweighed by the other interests.

An exemption in these situations is not unusual and indeed the ordinance at issue in *Sprague* was changed before the case was heard to add: 'Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room,

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<sup>116</sup> S. Knutson, 'The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws - Which Interest Prevails?' (1996) 47 *Hastings LJ* 1669.

<sup>117</sup> 1996 WL 544099 (Wis. Ct. App., 1996).

<sup>118</sup> *Ibid.* at 1.

<sup>119</sup> The seminal article on this concept is K. Karst, 'The Freedom of Intimate Association' (1980) 89 *Yale LJ* 624.

apartment or dwelling unit with another person or persons.’ Indeed, in the later case of *Fair Housing Council of San Fernando Valley v Roommate.com*,<sup>120</sup> it was held that it would be unconstitutional to apply the federal Fair Housing Act to housemates. The Fair Housing Act already had an explicit exemption for owner-occupied accommodation of less than five units.<sup>121</sup> Many US states also have legislative exemptions<sup>122</sup> as does Britain<sup>123</sup> and many Canadian provinces.<sup>124</sup> Although of course these include many cases where the objection is not based on conscience, privacy and associational interests nevertheless clearly make this a proportionate solution. The only complicating factor in *Sprague* is that Hacklander-Ready and Rowe had accepted *Sprague* and then changed their minds. Since this is likely to cause greater harm, and does not protect an important opposing interest, it may have been proportionate to have permitted damages on this basis.

There should therefore be a small landlord and housemate exemption where living space is to be shared. However, outside this context, in cases where there are not these privacy or associational interests, such as in the *Thomas* case described above, discrimination should not be permitted because of the importance of the need for accommodation and the limited interference with religious rights, where there will only be limited contact with the tenant. In considering the balance of interests in different circumstances, proportionality thus provides workable solutions to this problem.

### Bed and Breakfast Accommodation

If there is a justifiable claim not to share a house in some landlord and tenant situations, then is there a right to discriminate in allowing people to stay in bed and breakfast accommodation? Perhaps oddly, debates about the rights of bed and breakfast accommodation owners in England assumed a greater amount of attention than would be warranted by their number.<sup>125</sup> This is undoubtedly connected with ‘the powerful rhetorical imagery of the home, a particularly

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<sup>120</sup> 666 F.3d 1216 (9<sup>th</sup> Cir., 2012).

<sup>121</sup> 42 U.S.C. § 2000a(b)(1).

<sup>122</sup> *Supra* n. 117 at footnote 1.

<sup>123</sup> Equality Act Schedule 5 para 3.

<sup>124</sup> E.g. British Columbia Human Rights Code [RSBC 1996] s.10(2)(a).

<sup>125</sup> N. Cobb, “Gay couple’s break like *Fawlty Towers*”: Dangerous Representations of Lesbian and Gay Oppression in a Era of ‘Progressive’ Law Reform’ (2009) 18 *Social & Legal Studies* 333.

important protected private space in liberal thought.<sup>126</sup> The construction of the home as a private space though, although rhetorically useful for some,<sup>127</sup> is not a sufficient analysis of the issues. After all the owners have deliberately and for profit invited others into that space. In *Bull*,<sup>128</sup> the owners objected that when unmarried couples in their own family came to stay they made them sleep in different rooms. Evidently though, this is a very different situation as there is no commercial basis to it. Discrimination law tends not to intervene in personal situations such as this because of fears over infringing privacy and individual autonomy. Bed and breakfast accommodation cases also involve different considerations from the flatmate example given above, because they do not usually involve the same degree of intimacy and will normally be for a very limited duration. There is little expectation of forming personal relationships.

Disputes have sometimes not been about complete refusals to provide accommodation to gay couples but about a refusal to provide double-bedded accommodation. This is still discrimination since it treats gay couples differently from heterosexual couples. It may be experienced as prurient and an invasion of privacy and therefore particularly demeaning.

No religious claim in any of the jurisdictions has been successful in this context. In *Bull*, while the Bulls were considered to have directly discriminated against Hall and Preddy by treating them differently from a married couple, Lady Hale considered whether this was a violation of their Convention rights,<sup>129</sup> She pointed out, using a proportionality analysis, that Article 9 included the right to manifest beliefs in 'worship, teaching, practice and observance', held this right was of importance and that proportionality will require reasonable accommodation to be made for religious adherents in some cases. However, she held that the claim had to fail because of the importance of the rights of others. She drew attention to the requirement for 'very weighty reasons' to justify sexual orientation discrimination and argued that discrimination involves an affront to gay couples' 'dignity as human beings'. This analysis is an excellent example of how proportionality can pay close attention to the rights of both parties, acknowledge the importance of

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<sup>126</sup> Ibid.

<sup>127</sup> See for use of the 'home' argument: The Christian Institute, 'Christian B&B loses court case brought by gay couple', 18 Oct 2012 <http://www.christian.org.uk/news/christian-bb-loses-court-case-brought-by-gay-couple/> [Last Accessed 10 Feb 2014].

<sup>128</sup> Supra n.4.

<sup>129</sup> Ibid. at paras 41-55.

each, and create a judgment which does not rest on a hierarchy of rights, but rather attempts to 'harmonise' the rights, based on the particular situation.<sup>130</sup>

Finally, as has been described, in *Eadie and Thomas v Riverbend Bed and Breakfast*<sup>131</sup> the Tribunal held there was no rational connection between the Bed and Breakfast's purpose and the restriction of accommodation. As has been demonstrated, this approach is flawed because it focuses only on the nature of the business and ignores the individual rights of the owners. However, the judgment also went on to consider justification and here the reasoning is unassailable. The Tribunal held that the owners were engaged in a commercial activity, that it was their 'personal and voluntary choice to start up a business in their personal residence' and that 'there are occasions when the exercise of personal religious beliefs in the public sphere may be limited or carry a cost.'<sup>132</sup>

There appears, quite rightly, to be a general conclusion that the right to non-discrimination outweighs the right to religious freedom in this situation. Importantly, this does not rest on an easy assertion that the owners should simply give up their businesses or that their religious beliefs are irrelevant in the public sphere, but rather on a careful analysis of the interests in question.

### **Conclusion**

This chapter has addressed how religious claims should be treated in the secular marketplace. Again, it has been demonstrated that the proportionality test provides a valuable way of resolving these claims, which is far more coherent than the varying tests used in US law, which often do not permit such claims to be raised at all, or which do not address the clash of rights directly. Although a proportionality test attempts to fully understand and set out the interests in issue, it leads to the conclusion that in most cases it will be necessary for religious individuals' interests to give way to non-discrimination interests. These situations are at the periphery of religious individuals' rights, but can greatly affect the right to be able to live in dignity, free from pervasive discrimination.

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<sup>130</sup> L. Cariolou, 'The Search for an Equilibrium by the European Court of Human Rights' in E. Brems (ed), *Conflicts Between Fundamental Rights* (Antwerp: Intersentia, 2008).

<sup>131</sup> *Supra* n.63.

<sup>132</sup> *Ibid.* at paras 165 and 168.

## **Chapter 8: Conclusion**

There were two starting points to this thesis. The first was that, at least in some contexts, aspects of the conflict between freedom of religion and gay rights are part of a 'culture war'. This does not mean that these issues are necessarily perceived by all as of fundamental importance, but rather that when disputes arise they are often characterised by rhetorical exaggeration, gain much media and other attention and are used to symbolically demonstrate fundamental cultural and political disagreements rather than being focused on the particular issue in question. The second starting point was that there was value in the broad rights being claimed: in the claims to protect religious conscience and autonomy and in the claims to non-discrimination. There was therefore a need for a legal mechanism of deciding cases which would encourage a situation whereby 'the irreconcilable can exist side by side, civilly, in the public sphere, and [find] ways of living together',<sup>1</sup> and which would protect both rights as far as possible. The argument of this thesis has been that proportionality is an ideal method of doing so.

In Chapter 3, a number of claims were made about the specific benefits of using proportionality to resolve cases involving a conflict between non-discrimination rights and freedom of religion. The four case study chapters, which applied the proportionality test to numerous situations, demonstrate that these claims have been justified.

My first argument was that proportionality provides a fact-specific and nuanced analysis for deciding these difficult issues. This point has been clearly illustrated in, for example, considering whether and when it is permissible for religious schools to apply discriminatory religious rules to the selection and dismissal of teachers. I argued that a proportionality approach, which could take into account a number of factors, such as the religiosity of the school and the role of the employee, provides a far more subtle and appropriate way of deciding whether discrimination should be permissible than a categorical approach as employed, for example, in English law,<sup>2</sup> where the only relevant issue is the type of school.

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<sup>1</sup> C. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *OJLS* 729, 753.

<sup>2</sup> School Standards and Framework Act 1998 s.60.



This fact-specific nature gives rise, it was argued, to a number of related benefits. The first is that proportionality does not try to answer whether one right generally is more important than another, but rather only provides an answer for a specific fact situation. It was argued that this is particularly significant given that both freedom of religion and non-discrimination are valuable rights, which should both be protected as far as possible, but the weight to be given to each may not be equal in a particular case. This fact and context specific nature of proportionality is clearly evident from the number of different conclusions on particular cases reached throughout the thesis, some of which protect freedom of religion above non-discrimination rights, and some the opposite. This also demonstrates the argument made that proportionality means that constitutional winners and losers are not created permanently because a decision is likely to depend on a number of factors. Proportionality thus means that there is no 'hierarchy of rights' with either right being seen as the exception to the other, but rather demands consideration based on the particular facts. In this way, the actual dispute in issue is highlighted, an important point when dealing with such potentially controversial matters.

The thesis has also underlined the importance of protecting 'constitutional losers': those who raise a constitutional claim but who are unsuccessful. It has accepted Calhoun's argument that these constitutional losers still possess 'constitutional stature' and should be treated as such.<sup>3</sup> It was argued that proportionality is a conciliatory form of reasoning because losing claims can be accepted as in principle worthy of protection, even if they are unsuccessful in a particular case.

This point was particularly illustrated in the last chapter. Although it was argued that most of the claims of religious individuals to discriminate when providing services to the public should be unsuccessful, a proportionality analysis makes it clear that these losing claims are in principle legitimate and that it is a loss that these claims cannot be protected, even though they are outweighed by other factors in particular contexts. This is evident from *Elane Photography v Willock*,<sup>4</sup> where the owners of a photography business refused to photograph a gay couple's wedding because they claimed that they would not photograph events to which they had religious objections. There was no easy basis under which to examine

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<sup>3</sup> E. Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (Oxford: Oxford University Press, 2012).

<sup>4</sup> 309 P.3d 553 (N.M., 2013).

their defence to a discrimination law in US law. The owners of the company had no claim under the Free Exercise Clause because the law prohibiting discrimination was neutral and generally applicable and therefore was acceptable following the ruling in *Employment Division v Smith*.<sup>5</sup> They had no claim under the state RFRA because the case involved two private parties. They were left therefore with a rather weak argument that being required not to discriminate interfered with their freedom of speech, but again it was held that this right was not affected. In contrast, if this case had been decided under a proportionality approach, it could have been accepted that being required not to discriminate constituted an interference with their freedom of religion and therefore taken the loss caused to them seriously.

In addition to advantages related to proportionality's fact specific and contextual nature, this thesis has argued that the concept is intrinsically linked to justification. In particular it has argued that proportionality always requires justification where a right is infringed and that the justification required relates specifically to the injury at stake. This advantage can be seen in *Ward v Polite*,<sup>6</sup> where a counselling student wished to be permitted to refer a gay client if he required counselling about relationship issues. Since under US law the question was whether the university had a neutral and generally applicable policy in not permitting a referral, the principal argument in the case became whether other students had been permitted referrals for any reason. While a strict non-referral rule would be accepted under this test, a policy which permitted exemptions for some reasons and not others would be far more difficult to justify. A proportionality test would have avoided this narrow focus on the stringency of the non-referral rule, would have more easily allowed the university to put forward its interest in non-discrimination, and could also have considered the interest of Ward's future clients.

A similar point was also evident in *Christian Legal Society v Martinez*,<sup>7</sup> which concerned whether a university should be required to allow an evangelical Christian student society to have discriminatory membership rules. Since under US law the issue was whether there was a reasonable and viewpoint neutral rule, the case concentrated on the rather tangential issue of whether the university really required student societies to have an 'all comers' policy, as it claimed, rather than

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<sup>5</sup> 494 US 872 (1990).

<sup>6</sup> 667 F.3d 727 (6<sup>th</sup> Cir., 2012).

<sup>7</sup> 130 S.Ct. 2971 (2010).

considering how great an interference the university's policy was to the students' freedom of religion and how far an exemption would have affected the non-discrimination right. Again a proportionality approach would have focused far better on the justification for the interference with the society's rights of freedom of religion and association, in comparison to the US approach.

A further argument was made that rights can be defined broadly under a proportionality test, without overly restricting the autonomy of the state or other body, because the extent of the justification required will depend on the degree of interference. For example, it has been demonstrated that an interference with freedom of religion can be recognised under a proportionality analysis where a person is required to act contrary to their conscience in their employment. This is so even though the employee is only peripherally involved in an 'immoral' act and the dilemma could be avoided by resignation, because these factors can be taken into account at the justification stage.

It was argued that this broad interpretation of rights is advantageous since it means that claims are not rejected at a preliminary point before the state or other body is required to justify its actions. It also helps to ensure that obligations to 'constitutional losers' are met since weaker claims can be accepted as interfering with a person's rights and therefore the loss to them acknowledged, even if the claim fails. My argument was that justification was not only important in a practical sense since it ensured that rights are not unnecessarily restricted, but also that it has symbolic significance. I argued that giving justification treats each party in a dispute as *worthy* of justification: as people who can be expected to accept the process of adjudication, even though they disagree with the result. Justification also adds to a process of dialogue, meaning that decisions are not simply imposed on losing claimants.

The advantages of a broad interpretation of rights have been particularly evident when comparing proportionality to the US approach to freedom of religion, which only requires justification to be given where a law is not neutral or generally applicable. In cases where a religious believer objects to providing a commercial service for discriminatory reasons, no justification is required, since religious rights are not considered to be infringed. This is so even though the rule or law may have a significant effect on her ability to live her life in accordance with her

religious beliefs. In contrast, as can be seen from the Canadian case of *Ontario (Human Rights Commission) v Brockie*,<sup>8</sup> proportionality is compatible with a broad understanding of rights and therefore does require justification to be given in these circumstances. *Bull and Hall v Preddy*<sup>9</sup> is also a good example of this, involving owners of a private hotel who refused to allow a gay couple to stay in a double-bedded room. Even though the owners were unsuccessful, the Court clearly acknowledged their religious beliefs and that it was a loss to them to be required not to discriminate.

In addition to demonstrating the advantages of proportionality, this thesis has also demonstrated that proportionality provides a better method of analysis than other tests. As I argued in Chapter 2, to draw stark distinctions between action and belief or public and private in considering where the boundaries of religious freedom lie may lead to unfairness, since it does not consider the particular circumstances in which a right has been claimed and may both overly restrict and overly protect religious rights. These points have been demonstrated throughout my thesis. For example, I have argued that a strict public/private distinction is not suitable for resolving the question of when it is permissible to have discriminatory criteria for the selection of employees, or conversely for deciding when employees should be permitted religious exemptions from equality policies. I have argued that it is disproportionate for employees, even those at the core of organised religions such as clergy, not to receive some protection from discrimination law, even though this is clearly not 'public' employment. The converse of this is demonstrated for example by my argument that it is not sufficient to hold that because a person is a state official they can never be permitted a religious exemption, since this equates a person with the state in a way which is unwarranted, but rather that in each case a fact-specific analysis should be made which considers the nature of the role, the exemption claimed and the effect this would have on the non-discrimination right.

This thesis has demonstrated the difference between the usually proportionality-based reasoning of Canada and the UK, and the far more categorical approach used by the USA. While the UK uses proportionality to a lesser extent than Canada, there are numerous situations where proportionality is used. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim, thus

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<sup>8</sup> [2002] 222 DLR (4th) 174.

<sup>9</sup> [2013] UKSC 73.

incorporating a proportionality analysis into the decision. While there is no general justification available for direct discrimination, a proportionality requirement is relevant to the consideration of whether a genuine occupational requirement to be, for example, of a particular sexual orientation has been shown. In charity law, a proportionality test is used to decide whether it is permissible to restrict benefits to those who share a protected characteristic. Finally, a proportionality test, although often not strictly applied, is used in assessing whether there has been a violation of Art 9 under Convention law.

By contrast, analysis under the US Free Exercise Clause tends to focus on requiring policies to be neutral and generally applicable, rather than considering whether there is sufficient justification for interference with the right. While there are serious practical and theoretical explanations as to why the US has not embraced proportionality,<sup>10</sup> a return to the pre-*Employment Division v Smith* approach, which required strict scrutiny when considering freedom of religion claims, would go a long way in improving the law. There is though little sign that this is likely to occur. In addition, the complete lack of protection against sexual orientation discrimination in many US states is clearly problematic.

Overall therefore this thesis has consistently shown that proportionality is a feasible and advantageous method of analysis which provides a superior evaluation of the issues than alternative tests. Furthermore, in doing so, it has reached numerous conclusions as to how to resolve specific conflicts between non-discrimination rights and freedom of religion in four contexts: discriminatory acts or expression by employees in secular organisations; employment by religious organisations; the provision of services by religious organisations; and the provision of services by religious individuals. These conclusions will be briefly outlined here, although it is important to note that summarising the thesis in this way may appear to minimise the importance of the process of analysis by which they were reached.

Firstly, in the context of secular employment the thesis has argued that in some cases it may be proportionate to accommodate employees' religious objections to certain acts such as performing same-sex marriages, where the discrimination will

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<sup>10</sup> J. Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013).

not be directly experienced, and that an exemption should not be ruled out automatically solely because it will lead to discrimination or because a person is a state employee. Clearly this is not to say that exemptions should always be given, and where an obligation of non-discrimination is specifically related to the employment exemptions should not be granted. This chapter also demonstrated that the rejection of the specific situation rule in *Eweida v UK*,<sup>11</sup> meaning that the merits of Article 9 claims were fully assessed in employment cases, was a welcome development. In addition to considering religious exemptions, this chapter also dealt with the question of discriminatory speech within employment, holding that where speech amounted to hate speech it is always permissible to prohibit it and that for some positions greater interferences with freedom of expression may be proportionate. The chapter concluded by stating that, while in some cases it may be permissible for employers to require employees to have particular non-discriminatory views, these cases would be very rare, and the employment must intrinsically require such beliefs.

With regard to religious employment, it was argued that an absolute rule permitting any form of discrimination for clergy is not proportionate, but discrimination that is based on religious rules or on the religious beliefs of a religion's followers should be permissible. It argued in the context of other religious employment that discrimination is permissible where there is a bona fide occupational requirement for a person to follow discriminatory religious rules. Whether this is the case will depend on a number of factors, including the religiosity of the organisation and the nature of the role.

In the context of the provision of services, it was argued that religious organisations should be able to discriminate in access to religious worship and similar activities. However, where the religious mission is far more attenuated, such as the hiring out of religious premises for profit, organisations should only have limited freedom to discriminate. The thesis also discussed in some detail the claim of Catholic adoption agencies to discriminate and concluded that, within the English context, there was no legal justification for discrimination where these activities were publicly funded, and that the facts demonstrated that most adoption agencies could find a way to both protect their religious conscience and provide services. The final chapter concluded that claims by religious individuals to

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<sup>11</sup> (2013) 57 EHRR 8.

discriminate in providing services will rarely be successful, particularly if there is no religious aspect to the service.

### **Concluding Thoughts**

Glendon argues that, 'in its simplest American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.'<sup>12</sup> This thesis has demonstrated though how a particular type of 'rights talk'<sup>13</sup> can be used to avoid such a stark analysis. As this thesis makes clear, there is no reason why a discussion of contentious moral and political issues in terms of rights should necessarily 'lead one to think in absolute terms and to shun compromises'.<sup>14</sup> Rather, as Afridi and Warmington have argued, the 'use of principles like proportionality has the potential to elevate the level of debate beyond, "I invoke my claims as a right and this trumps consideration of all other issues". It can help to develop a better understanding of all of the rights and all of the people affected by a conflict.'<sup>15</sup> This thesis has explained how proportionality can achieve these outcomes.

Stychin hopes for a situation 'of accommodation and compromise which avoids intransigence and instead seeks out common ground'<sup>16</sup> in this context. Although legal methods like proportionality can only be part of the solution, and non-legal mechanisms should also be pursued,<sup>17</sup> since courts are inevitably called on to resolve some of these disputes, the law has an indispensable role to play in this process. While it may be true that 'you can't hurry love'<sup>18</sup> proportionality can perhaps at least help to promote Stychin's objectives. This thesis therefore ends on

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<sup>12</sup> M. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> A. Etzioni, 'Moral Dialogues: A Communitarian Core Element' in A. Allen and M. Regan (eds), *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* (Oxford: Oxford University Press, 1998).

<sup>15</sup> A. Afridi and J. Warmington, *Managing Competing Equality Claims* (London: Equality and Diversity Forum, 2010).

<sup>16</sup> *Supra* n.1 at 755.

<sup>17</sup> Many commentators have made this point including: A. Donald, *Religion or Belief, Equality and Human Rights in England and Wales* (Equality and Human Rights Commission, 2012); J.G Brown, 'Peacemaking in the Culture War Between Gay Rights and Religious Liberty' (2012) 95 *Iowa L Rev* 747; J.D. Hunter, *Before the Shooting Begins: Searching for Democracy in America's Culture War* (New York: The Free Press, 1994); J. Nedelsky and R. Hutchinson, 'Clashes of Principle and the Possibility of Dialogue: A Case Study of Same-Sex Marriage in the United Church of Canada' in R. Moon (ed.) *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

<sup>18</sup> A. Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 *Brook L Rev* 125.

a positive note: that these disputes need not be intransigent and that there is a way to resolve these complex and difficult conflicts, which are at times politically and socially sensitive, in a way which respects both rights as far as possible.



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