



**UNIVERSITY OF
CAMBRIDGE**

**A General Legal Right to Conscientious
Exemption: Beyond Religious Privilege**

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Philosophy

To Kasik

Declaration

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

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This thesis, including footnotes, does not exceed the permitted length.

Summary

The thesis shows that there is a general legal right to exemption for conscientious objectors in the US, Canada and UK. It shows that it is a limited right: exemptions may be lawfully denied to protect the rights of others or important public interests. The thesis then investigates whether such a legal right is exclusively reserved for religious believers. The thesis shows that it is not: it is available to those that object on the basis of conscience, irrespective of whether their conscience is motivated by religious or non-religious beliefs. The thesis concludes by defending the existence of this general right by appealing to liberal values.

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CHAPTER 1: INTRODUCTION

1. The Main Claims of the Thesis

This thesis makes three main claims. The first, a normative claim, is that a general legal right to conscientious exemption is a defining feature of a liberal democracy which is committed to individual freedom and state neutrality between different conceptions of the good life. This means that a state without such a right is, all things being equal, less liberal than a state which institutionalises the right. The thesis understands a general right to conscientious exemption as follows: it is a legal right to conscientiously object to whatever obligation imposed by the law, whether under statute, common law or otherwise, and to obtain from a court of law an exemption from the duty to comply with such obligation. A conscientious objection is an objection based on the right-holder's belief that the legal duty, if complied with, would entail him committing moral wrongdoing (including religious wrongdoing). The general right is to be contrasted with context-specific legal exemptions which are usually found in statutes in relation to a particular legal obligation. Famous context-specific exemptions include exemptions from the military draft or from the duty on doctors to perform abortions. The general right is termed general because it can be invoked in any legal context and does not rely on the existence of context-specific legislative exemptions.

The general right defended in the thesis is not an absolute right. A court may refuse to grant an exemption if doing so would disproportionately impact the rights of others or the public interest. So the general right to exemption is a *prima facie* or limited legal right. The general right empowers courts to consider the moral and pragmatic issues which legislatures often do when considering to enact context-specific legislative exemptions. After considering the moral and pragmatic issues at stake, courts may accept or decline to grant an exemption to a conscientious objector. Given this feature of the general right, some may not be inclined to call it a legal right and may instead choose to call it a legal principle or claim that rights-talk is conceptually confused in relation to a *prima facie* or limited legal right.¹ The thesis uses the terminology of rights because that is the terminology that courts commonly use when referring to other rights which are limited or *prima facie*, such as various

¹ Grégoire Webber, 'On the Loss of Rights' in Bradley W Miller, Grant Huscroft and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014).

human and constitutional rights.² The defence of the first claim, the normative one, is left to the last substantive chapter of the thesis, Chapter 8.

The second claim, a doctrinal one, is that the general legal right is in fact recognised in the law of the US, Canada and the UK. These countries are here considered to be well-established liberal democracies because of their commitment, evinced through the analysis of the case law to be explored in the thesis, to individual freedom and to notions of state neutrality regarding different conceptions of the good life. The second claim is defended prior to the first claim in chapters 2, 4, and 6. The reason it is defended first is to show that the normative claim is not as implausible as it sounds. Not only is it not implausible, as the law of the three jurisdictions under analysis shows, it is well founded on legal practice. So the normative claim is best defended once any impression of implausibility has been dissipated. The legal analysis shows that the general right is not to be found in a single legal document or even unified legal doctrine. Instead, in each of the jurisdictions different legal documents and legal doctrines ground the general right. These are usually constitutional and statutory texts and doctrines protecting freedom of conscience and religion and prohibiting discrimination on the basis of belief. So the essence of chapters 2, 4, and 6 is to show that these different legal instruments and doctrines should be conceptualised together and that doing so shows that they ground the general right. Just as in the normative claim, the law of these jurisdictions holds that the general right is a *prima facie* or limited legal right. Courts decide whether a particular exemption is warranted by considering the moral and pragmatic issues raised by the objection mostly through the legal mechanism of proportionality reasoning or similar balancing mechanism.

The third and final claim is that the general right is equally available to those who object on the basis of religious and non-religious conscientious beliefs. This claim is defended in chapters 3, 5, and 7. So the general right is not a privilege of religious believers. This claim is not uncontentious, especially in relation to US law. Some courts and scholars argue that religion is somewhat special and deserves privileged protection in the law which sometimes requires that religious believers and churches be granted broad exemptions from legal duties. The thesis rejects this view. Whatever the special status of religion, the general right should not, and does not in the jurisdictions under analysis, give it privileged protection over sincere and deeply held conscientious beliefs. The thesis probes the law of

² For a moral defence of this practice see Kai Möller, 'Proportionality and Rights Inflation' in Bradley W Miller, Grant Huscroft and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) and, more generally, ; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2015).

the US, Canada, and the UK to see whether this claim is respected. It is shown that once the law is properly understood this third claim is indeed respected.

2. The Methods of Analysis

The first main claim is a normative claim and it is defended philosophically by appeal to the legal interpretivist method first developed by Ronald Dworkin.³ More will be said about this method in the introduction to chapter 8. Suffices here to say that the method investigates the practice of conscientious exemptions as it finds it in the three jurisdictions under analysis and seeks to show the practice as morally attractive. Crucially, the method is legally critical. The aspects of the practice which it rejects as morally unattractive are rejected as legal mistakes. They are mistakes because they do not fit with the underlying moral principles which animate the core of the legal practice.

The second and third main claims are doctrinal and are therefore defended doctrinally. While three different jurisdictions have been chosen it would not be correct to label the analysis in chapters 2-7 as comparative in nature. Two chapters are devoted to each jurisdiction in turn and there is no attempt to draw attention to similarities or differences between them. In this sense the chapters are self-contained. However, the same questions (i.e. is there a general right? Is it equally available on the basis of religious and non-religious beliefs?) are investigated in relation to all three jurisdictions and are answered positively. So the aim is to see whether there is a transnational consensus on the second and third main claims.

The choice of the three jurisdictions was motivated by both pragmatic and more principled reasons. In terms of the pragmatic reasons, the vast majority of the primary legal sources and some of the secondary sources were easily accessible; the analysis of these was also facilitated by the fact that the vast majority of the sources were all in English and that the jurisdictions were all largely common law-based; finally, prior to undertaking work on the thesis, some other research work had been undertaken on these jurisdictions which facilitated the analysis.

The principled reasons for the choice of these three jurisdictions include the fact that the jurisdictions are paradigmatic examples of liberal democracies committed to individual freedom and to notions of state neutrality regarding different conceptions of the good life. Asking whether a jurisdiction recognises a general right for an individual to be exempted from legally valid legal

³ Ronald M Dworkin, *Law's Empire* (Hart Publishing 1998).

obligations presupposes, at a minimum, that the jurisdiction is committed to individual rights and, especially, to rights that can, in principle, trump important public interests crystallised in the law. Such presupposition automatically excluded from the analysis jurisdictions which are not committed to individual rights or which are only nominally committed. Furthermore, asking whether the general right (if it exists) is equally available on the basis of religious or non-religious beliefs presupposes, at a minimum, that the jurisdictions under analysis have some level of commitment to protecting religious and non-religious beliefs. Such presupposition automatically excluded from the analysis jurisdictions which are altogether not committed to protecting beliefs or which clearly privilege religious beliefs over non-religious beliefs.

Of course, in addition to the selected jurisdictions, several other jurisdictions could satisfy these two presuppositions. However, the three jurisdictions appear to have three contrasting ways of approaching the relationship between the state and religion which provided an interesting background for the analysis. As is well known the First Amendment of the US Constitution prohibits the establishment of a state religion and imposes all sorts of other disabilities on the support to be given to religious institutions (some of these are explored in chapter 2 and 3). By contrast, in the UK there are close links between the state and religion, the most obvious being that the head of state is also the head of the Anglican Church. In Canada, there is no explicit constitutional position on the relationship between the state and religion. Only in very recent years has the Canadian Supreme Court started formulating general principles on the secular nature of the state according to which:

the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (...). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.⁴

These three different approaches to state secularism (i.e. one which imposes special disabilities on religion; the second which recognises a state religion; the third which requires the state neither to favour nor hinder any religious or non-religious belief) provided a good template for investigation. The rationale being that if there is a consensus on the second and third main claims despite these different conceptions of secularism, these claims are likely to be true in respect of other liberal states irrespective of their own versions of secularism.

⁴ *Mouvement laïque québécois v Saguenay (City)* (2015) 2 SCR 3 [72]. In that case the Supreme Court of Canada held that it was unlawful for the City to continue the recitation of a prayer at the start of the municipal council's public meetings. The prayer violated the state's duty of neutrality imposed by the right to freedom of conscience and religion protected in the Canadian Charter of Rights and Freedom.

3. The Implications of the Main Claims of the Thesis

If the main claims of the thesis are correct, three important implications follow. If the first claim is correct then the existence of a general legal right to conscientious exemption belongs to the list of the various criteria to be used to assess whether a state is a liberal one. This may not be surprising to some as about four decades ago, in 1979, Joseph Raz tentatively suggested that '[r]eflection on the nature of liberalism, it seems, may suggest that [...] the definition of the liberal state [...] should be widened to include the institution of a general right of conscientious objection'.⁵ This thesis provides arguments for the validity of this suggestion and provides reasons to reject views contrary to it.

If the first and second claims are correct then a second implication is that the thesis leads to embracing the counter-intuitive idea that liberal states should and in fact do provide a legal right to escape legal obligations on the basis of an individual's personal views about the morality of the law. This idea is counter-intuitive and even disturbing in at least two respects. First, it undermines the idea that, within the context of a reasonably just state, legal subjects ought to comply with all reasonably just laws which are mandatory for all. Recognising the general right to conscientious exemption seems to undermine one of the most obvious purposes of the law which is to solve for all subjects the moral problems which gave rise to the initial need for legal regulation.⁶ It seems self-defeating then that the law should recognise that its own solutions can be escaped by some individuals based on their own personal view that the law has reached a wrong moral solution.

This is especially problematic in the context of a legal duty imposed through democratic legislation. Such democratic legislation is imbued, in ideal conditions, with the following added moral merit:

the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them.⁷

⁵ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP Oxford 2009) 276.

⁶ John Finnis, *Natural Law and Natural Rights* (OUP Oxford 2011) 276,277 (Who argues that legal rules are those made by an effective authority for the common good of a community);; Scott Shapiro, *Legality* (Harvard University Press 2013) 213 (Who argues that the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality through social planning).

⁷ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 2.

It seems self-defeating then that individuals, by invoking the general right, can seek to evade the outcome of this dignified legislative process by going through a court of law, especially given that a court of law is not imbued with the same dignity of political equality embodied in a democratic legislature.

Furthermore, not only does the general right seem to undermine legal and democratic authority; it may allow individuals to seriously undermine hard-earned legal rights of third parties. Some US scholars have suggested that context-specific exemptions are being abused by those opposed to the expansion of rights for LGBTQ individuals, in particular the right not to be discriminated against in the receipt of services generally available to the public (e.g. wedding custom-made cakes), or as a way to circumvent the established right to access to abortion services.⁸ If the first and second claims are correct then these scholars may have underestimated the problem. Those opposed to these morally controversial legal rights need not await legislative grants of exemptions; they may seek to undermine those legal rights, if that is indeed their purpose, by seeking an exemption through a court of law by relying on the general right. It follows that those that want to maintain these legal rights have to fight the culture wars on two fronts: lobby legislatures to refuse to grant statutory exemptions and litigate in court against exemptions sought on the basis of the general right.

The thesis embraces the second implication of the main claims notwithstanding its very problematic aspects. The thesis shows that the idea that the general right seems to undermine legal and democratic authority is misplaced. Chapters 2, 4 and 6 show that the general right is indeed grounded in well-established legal doctrines which conscientious objectors are entitled to rely on and that most of those doctrines are based on democratically enacted legislation. Chapter 8 shows that those legal doctrines reflect an underlying moral right to exemption justified by a plurality of values, including the demands of the state's duty of neutral pluralism (the duty being grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. The legal recognition of a general right to conscientious exemption enables the state, through judicial consideration, to respect these values especially for minority conscientious views which are unlikely to be taken note of in the political process.

⁸ Douglas NeJaime and Reva Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' (2015) 124 Yale Law Journal 2516. See also Susanna Mancini and Michel Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018).

Furthermore, despite the unavoidable consequence that individuals may seek exemptions under the general right which may undermine the rights of others, especially the right to be free from discriminatory treatment, courts are well empowered to refuse, and have in some cases rightly refused, granting exemptions in these circumstances. The thesis, in chapters 2, 4 and 6, sets out the limitations that courts have recognised to the general right in a wide variety of circumstances in order to protect the rights of others or the public interest. In part 5 of chapter 8 the thesis also argues that an exemption should not be granted if doing so would result in discriminatory treatment of protected groups, such as women, racial minorities and homosexuals. This is especially important in the contemporary flurry of litigation on whether providers of goods and services to the general public, such as florists, hoteliers and bakers, can refuse their services to those in a same-sex relationship or marriage.⁹ It is argued that being subject to discriminatory treatment on the basis of a protected characteristic (e.g. gender, sexual orientation, religion or belief) is seriously humiliating and hence harmful. Not only does the humiliation provide reasons for offence and may occasion psychological harm, it also sends the signal that the person being discriminated against is a lesser member of society because of his protected characteristic. In a society where such acts are allowed, victims of such humiliation are likely to suffer loss of self-respect and self-worth, in short their wellbeing is seriously harmed. This warrants refusing exemptions from anti-discrimination rules to providers of goods and services. Admittedly, the discussion in the thesis of the possible conflict between the general right and the freedom from discriminatory treatment is brief. A fuller discussion would need to await, inter alia, proper consideration of some cases of the highest courts of the three jurisdictions which were only delivered days prior to the completion of the thesis¹⁰ or which are still to be delivered.¹¹

The third implication of the thesis, if the third claim is correct, is that, in the context of conscientious exemptions at least, religion is not privileged: individuals can seek an exemption from a legal obligation irrespective of whether their objection is inspired by religious or non-religious moral beliefs. It is shown that all three jurisdictions are, once the law is properly analysed, all aligned on

⁹ *Elane Photography, LLC v Willock* (2013) 309 P 3d 53 (Supreme Court of New Mexico) (Photographer); *Bull v Hall* [2013] UKSC 73 (UKSC) (B&B hoteliers); *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Com'n* (2018) 138 Sct 1719 (USSC) (Bakery); *Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Limited* [2016] NICA 55 (NICA) (Bakery).

¹⁰ *Masterpiece* (n 9); *Law Society of British Columbia v Trinity Western University* [2018] SCC 32 (SCC); *Trinity Western University v Law Society of Upper Canada* [2018] SCC 33 (SCC).

¹¹ The UKSC has recently heard arguments in the appeal of *Ashers Baking* (n 9). The Court has yet to deliver its judgment.

this point. This will surprise many courts and several scholars who, especially in the US context, proceed on the assumption that religion is somewhat privileged. Some courts have refused to grant exemptions to objectors on the basis that the objectors' beliefs are non-religious.¹² Many liberal scholars have denounced this privileging of religion on several philosophical grounds which are rightly embraced in this thesis in part 4 of chapter 8.¹³ The thesis, in chapters 3, 5, and 7 provides cogent legal arguments as to why these courts and scholars are wrong in their assumption that religion is somewhat privileged in relation to the general right to conscientious exemption.

¹² *Africa v Com of Pa* (1981) 662 F 2d 1025 (Court of Appeals, 3rd Circuit); *US v Meyers* (1996) 95 F 3d 1475 (Court of Appeals, 10th Circuit); *Love v Reed* (2000) 216 F 3d 682 (Court of Appeals, 8th Circuit); *Alvarado v City of San Jose* (1996) 94 F 3d 1223 (Court of Appeals, 9th Circuit).

¹³ Christopher L Eisgruber and Lawrence G Sager, *Religious Freedom and the Constitution* (Harvard University Press 2009); Brian Leiter, *Why Tolerate Religion?* (Princeton University Press 2013); Ronald Dworkin, *Religion Without God* (Harvard University Press 2013); Cécile Laborde, *Liberalism's Religion* (Harvard University Press 2017); All authors in John Corvino, Sherif Girgis and Ryan Anderson, *Debating Religious Liberty and Discrimination* (Oxford University Press 2017).

CHAPTER 2: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN US LAW

1. Introduction

This chapter investigates whether there is a general right to conscientious exemption in US law. The chapter concludes that there is. There are at least five rules of law which ground the right. These are: (1) the Free Exercise Clause of the First Amendment under Federal constitutional law as interpreted by the USSC in *Smith*¹⁴ (albeit this is now very narrow), and the Free Exercise clauses of some state constitutions who did not interpret their own constitutions according to *Smith*; (2) The Religious Freedom Restoration Act (RFRA)¹⁵ which applies to the Federal government and similar state legislation which applies in the states which have enacted them; (3) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which applies mainly to state governments in the context of land-regulation, zoning laws and prisoners; (4) Title VII of the Civil Rights Act of 1964 (and similar state level legislation) which requires certain categories of employers to accommodate the religious beliefs of their employees in performing their employment duties; and (5) the constitutional requirements of Church Autonomy. An analysis of each is provided in turn.

2. The First Ground of the General Right: The Federal and State Constitutional Right to Free Exercise of Religion

The Religion Clause of the US Constitution provides, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. This part of the chapter focuses on the Free Exercise Clause. The relationship between the Establishment Clause and the Free Exercise Clause will be properly analysed in chapter 3. The Free Exercise Clause was interpreted to ground a general right to conscientious exemption in the seminal case of *Sherbert*.¹⁶ In that case the claimant, a Seventh Day Adventist, sought unemployment benefits after being fired for refusing to

¹⁴ *Employment Division v Smith* (1990) 485 US 660 (USSC).

¹⁵ Religious Freedom Restoration Act (US Code Title 42 Chapter 21b).

¹⁶ *Sherbert v Verner* (1963) 374 US 398 (USSC).

work on Saturday which was the Sabbath in her religion. Under South Carolina unemployment legislation, she was ineligible for the benefit because she had refused her job 'without good cause'. Justice Brennan for the USSC (Justice Harlan and Justice White dissenting) held that the South Carolina restriction violated Sherbert's right to free exercise of religion. In reaching that decision the Court held that the restriction could not survive a constitutional challenge if

- a) it burdened the free exercise of the claimant's religion; and
- b) the government could not justify any incidental burden on the claimant's religion by relying on a compelling state interest.¹⁷

This test will eventually come to be known as the Compelling Interest Test or the Sherbert Test and, as analysed in this chapter, will be associated with multiple grounds of the general right. In *Sherbert* the Court held that the first requirement of the test had been satisfied as South Carolina had monetarily penalised Sherbert for her religious conscientious objection by refusing to grant her the unemployment benefit. Furthermore, there was no compelling state interest for such penalty. In fact the Court found as unsupported by evidence the justification advanced by the State that granting the benefit to Sherbert may have opened the door to the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work.

Sherbert was followed in a series of USSC cases, and read in *Yoder*¹⁸ to mean that it would be unconstitutional to apply any law of general applicability to a particular person for whom it would represent a substantial burden on his or her freedom of religious practice, unless the law was the least restrictive means of pursuing a compelling governmental interest. In *Yoder* this entailed that Amish children could not be compelled to complete the final two years of mandatory education which they objected to on religious grounds. The court found that the Amish applicants had showed 'the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education'.¹⁹ Therefore, the state's insistence on compelling them to undertake mandatory education did not comply with the requirement of the Free Exercise Clause. In line with *Sherbert*, while the legislation prescribing mandatory education remained generally applicable, the applicants were exempt from its application to them (and to those similarly situated to them).²⁰

¹⁷ *ibid* 403.

¹⁸ *Wisconsin v Yoder* (1971) 406 US 205 (USSC).

¹⁹ *ibid* 234.

²⁰ *ibid* 236.

The Compelling Interest Test in *Sherbert* was held to be good law for about 30 years until it was reinterpreted in *Smith*.²¹ In that case the majority of the USSC held that members of the Native American Church could not have access to unemployment benefits having lost their jobs as a result of using the criminally prohibited drug peyote which was required for their religious rites. The rationale, expressed by the Court's opinion delivered by Justice Scalia, was:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (...) To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," (...) contradicts both constitutional tradition and common sense.²²

The *Sherbert* Test was explicitly rejected by Scalia²³ who reinterpreted *Sherbert* as affirming a much narrower principle. He said that the test applied only in the context of unemployment benefits to the effect that 'where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason'.²⁴ However, while narrowing the scope of the *Sherbert* Test, he explicitly affirmed that it would be constitutional for the legislative branches to provide for exemptions.²⁵

Unsurprisingly, the dissenting opinion delivered by Justice Blackmun and the concurring opinion delivered by Justice O'Connor vehemently criticised the Court's opinion on the basis that it was not compatible with well-established USSC jurisprudence, including *Sherbert* and *Yoder*. Given the analysis above of those cases, this criticism in the dissenting and concurring opinions was fully justified. Nevertheless, *Smith* has now withstood the test of time and its rationale has become well-established.

Smith was badly received by the legislative branch. State and the Federal legislatures, anxious to protect religious freedom, took up Scalia's suggestion that they might intervene and provide

²¹ *Smith* (n 14).

²² *ibid* 885. Quoting first *Lyng v Northwest Indian Cemetery Protective Assn* (1988) 485 US 439 (USSC) 451. then *Reynolds v United States* (1879) 98 US 145 (USSC) 167.

²³ *Smith* (n 14) 888–890.

²⁴ *ibid* 884.

²⁵ *ibid* 890.

themselves for exemptions. This they did by enacting RFRA, RLUIPA and similar state statutes. These are analysed below in part 3 and part 4. However, while *Smith* narrowed down the Sherbert Test in the Federal Constitution, not all state judiciaries decided to follow its analysis and interpret their state constitutions in line with the approach in *Smith*. The last column in Table 1 below at page 28 shows which jurisdictions have retained the Sherbert Test or a functionally similar test as a matter of state constitutional law. This state level pre-*Smith* jurisprudence applies, for example, in the state of New York. The New York Constitution provides, in Article I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; (...) but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

The highest court in the state, the Court of Appeals, has interpreted this in *Serio*²⁶ to confer a constitutional right to conscientious exemption in ways similar, although not identical, to the Sherbert Test. In doing so, it explicitly rejected the approach in *Smith*. *Serio* concerned a number of Catholic and Baptist Bible Fellowship International social service organisations. They all objected to the duty imposed by state legislation for employers to include prescription contraceptives insurance coverage if they chose to provide their employees with insurance coverage for prescription drugs. The claimants sought an exemption on the basis of the state's Free Exercise Clause based on their religious view that the use of contraceptives is sinful. The Court of Appeals accepted that, in principle, such a right to exemption was available under the state constitution in contrast to *Smith*. It said:

In interpreting our Free Exercise Clause (...) we do not now adopt (...) the inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute. Rather, we have held that when the State imposes “an incidental burden on the right to free exercise of religion” we must consider the interest advanced by the legislation that imposes the burden, and that “[t]he respective interests must be balanced to determine whether the incidental burdening is justified”.²⁷

However, the Court did not adopt the Sherbert Test either. In deference to the legislature, an exemption would be granted only if the objector could show that ‘an interference with religious

²⁶ *Catholic Charities v Serio* (2006) 859 NE 2d 459 (NY Court of Appeals).

²⁷ *ibid* 466.

practice is unreasonable, and therefore requires an exemption from the statute'.²⁸ In the case, the Court did not find that the claimants had met the burden because, among other things, the relevant law did not oblige them to provide contraceptive coverage to their employees; instead, it provided that if the employers decided to provide insurance coverage for prescription drugs they should also provide prescription contraceptives in the coverage. The claimants were therefore not obliged to provide prescription drugs coverage and hence contraceptive coverage. While the Court was sympathetic to the view that the organisations wished to provide a wide range of benefits to their employees, including prescription drugs coverage, it held that the availability of contraceptives to their employees was ultimately the result of the organisations' free choice.²⁹

The above analysis shows that while a right to conscientious exemption can be said to be grounded at a constitutional level, it is of a somewhat limited application. At the Federal level, following *Smith*, such a right only applies in the employment benefits context and religious conscientious exemptions should be considered only in so far as 'the State has in place a system of individual exemptions'. While conscientious exemptions exist in some state constitutions, New York was here analysed, the reach of such state constitutional right to exemptions is limited: it does not apply to all states and it only applies to duties arising under state law.

3. The Second Ground of the General Right: Federal and State Religious Freedom Restoration Acts

As indicated in part 2, the decision in *Smith* to reinterpret the Sherbert Test led Congress to reinstate the Compelling Interest Test by enacting RFRA. The text of the statute has now been incorporated into the US Code. Section 2000bb-1(a) of the Code provides: 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability'.³⁰ This general prohibition is qualified, in 2000bb-1(b), as follows:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

²⁸ *ibid* 467.

²⁹ *ibid* 468.

³⁰ 42 U.S. Code Chapter 21B

(2) is the least restrictive means of furthering that compelling governmental interest.

If RFRA is successfully pleaded, the claimant is entitled, under 2000bb-1(c), to judicial relief against the governmental burden; in short a successful claimant can obtain an exemption from the legal duty.

A relatively recent high profile case to be decided under RFRA was *Hobby Lobby*.³¹ This provides the best illustration of the mechanism of RFRA. In that case the USSC was tasked with determining whether RFRA could be relied on by a family of Evangelical Christians who owned a for-profit corporation, Hobby Lobby Stores Inc., to obtain an exemption for the Stores from the requirement to provide its employees with health-care coverage which included emergency contraception coverage.³² The company's owners objected to providing emergency contraception coverage because they believed the use of such contraception to be sinful. The USSC had to determine whether the religious freedom of Hobby Lobby's owners was being substantially burdened by a compelling governmental interest in providing contraception cover.

By a 5 to 4 majority (Justices Ginsburg, Sotomayor, Breyer and Kagan dissenting) the USSC, Justice Alito delivering the majority opinion, held that requiring Hobby Lobby to provide the coverage or to face very hefty fines would result in a substantial burden on the religious beliefs of the company's owners.³³ Furthermore, even though the reason for the imposition of the mandatory cover (providing to women cost-free access to contraception) was assumed by the court to be a compelling interest,³⁴ the majority found that the government could have achieved that interest in a less restrictive way. The government could have, for example, extended the accommodation that it had already established for religious non-profit organizations to for-profit objecting employers, such as Hobby Lobby. Under that accommodation arrangement, Hobby Lobby would self-certify that it objected to providing the coverage. Upon receipt of the certification, Hobby Lobby's insurers would then be required to provide the contraceptive coverage.³⁵ Consequently, the USSC found that '[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA'.³⁶ The claimant was therefore exempt from the burden imposed by the contraceptive mandate.

³¹ *Burwell v Hobby Lobby Stores, Inc* (2014) 134 SCt 2751 (USSC).

³² *ibid.*

³³ *ibid* 31–38.

³⁴ *ibid* 39–40.

³⁵ *ibid* 40–45.

³⁶ *ibid* 49.

The decision remains controversial, not least because the minority judgment penned by Justice Ginsburg opposed almost every aspect of the majority's reasoning. Her main objection was that there could be a substantial problem with the majority's suggestion that Hobby Lobby's insurers, on notification by the company, should be required to provide the cover. The major problem was that such accommodation arrangement, offered at that time to religious non-profit organisations, may not have been deemed acceptable by Hobby Lobby's owners on religious grounds.³⁷ Indeed, the week after *Hobby Lobby* was decided, the USSC granted an injunction to Wheaton College from being compelled to follow the procedure under the accommodation arrangement on the basis that the College believed that by self-certifying its objection it was triggering the obligation on its insurers to provide the objected contraception. This, in the College's view, amounted to being made an accomplice to a sinful practice.³⁸ Albeit the injunction was not granted to Wheaton College on the basis of the merits of the case, various religious organisations have brought further challenges on the basis of RFRA to the accommodation provisions of the contraceptive cover. The USSC has recently refused to adjudicate this issue in view of ongoing out of court negotiations of the disputes.³⁹ There is thus compelling evidence that the accommodation suggested by the majority in *Hobby Lobby* as being a less restrictive means of furthering the government's interest, even if acceptable to the company in that case, would have not been acceptable to other organisations sharing similar religious scruples.

Despite the complexities of *Hobby Lobby* and the persuasiveness of the dissenting opinion, the fact that RFRA grounds a general right to conscientious exemption similar to that in *Sherbert* is clear. Under RFRA, conscientious objectors are protected from governmental burdens imposed by law. In *Hobby Lobby*, this was Federal law. However, while RFRA appears to confer a general right to conscientious exemption, it has not always been clear whether the relief it provides extends to governmental burdens imposed by state law. Remember that RFRA was enacted as a measure to re-establish the Sherbert Test and as a critical response to *Smith*. In *City of Boerne v Flores*, the USSC somewhat responding to the criticism received from Congress in RFRA, declared RFRA unconstitutional in relation to its application to state law.⁴⁰ It held that Congress, by enacting RFRA aiming for it to apply also to state law, had exceeded its power under the Fourteenth Amendment to enforce the guarantee that states must comply with constitutional rights. RFRA was in fact a means to require states to comply with Congress's rather than the USSC's interpretation of the First

³⁷ *ibid* 30.

³⁸ *Wheaton College v Burwell* (2014) 134 Sct 2806 (USSC).

³⁹ *Zubik v Burwell* (2016) 136 Sct 1557 (USSC).

⁴⁰ *City of Boerne v Flores* (1997) 521 US 507 (USSC).

Amendment. As such, the USSC held that '[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is'.⁴¹

Just as Congress had responded to *Smith* by enacting RFRA, various states legislatures responded to *Boerne* by enacting legislation modelled after RFRA. The third column of Table 1, at page 28, shows that there are currently 20 states with legislation similar to the RFRA, plus one state, Alabama, which amended its constitution to incorporate terms similar to RFRA. One of them is Kentucky which enacted the Kentucky Religious Freedom Restoration Act (KRFRA)⁴² which provides the same test existing under its Federal counterpart. A recent high profile case considered under KRFRA was that of the County Clerk for Rowan County, Kim Davies, who conscientiously objected to signing or allowing her deputies to sign, certificates which would enable same-sex couples to marry. Her request to be exempt from performing her duties as an elected servant of the state was rejected by the Kentucky District Court⁴³ and, after unsuccessfully seeking from the USSC a stay of the District Court's order obliging her to sign the certificates,⁴⁴ she was imprisoned for about a week for refusing to comply with the order.⁴⁵ The state court dismissed her arguments based on KRFRA mainly on the basis that 'her religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk'.⁴⁶

The above analysis shows that a right to conscientious exemption can be said to be grounded in the Federal and state level RFRA's. It would be necessary to analyse in detail each state level RFRA to show the exact ways in which they operate. Table 1 goes some way to providing the foundations of that more detailed analysis. However, for present purposes, the analysis so far undertaken should suffice to illustrate the main point of this part of this chapter that Federal and state level RFRA's ground a general right to conscientious exemption from legal obligations imposed, respectively, by federal and state law.

⁴¹ *ibid* 519.

⁴² Chapter 446.350 of the Kentucky Revised Statutes.

⁴³ *Miller v Davis* [2015] Dist Court Civil Action No. 15-44-DLB.

⁴⁴ *Miller v Davis (No 15A250)* (USSC).

⁴⁵ Alan Blinder and Richard Pérez-Peña, 'Kim Davis, Released From Kentucky Jail, Won't Say If She Will Keep Defying Court' *The New York Times* (8 September 2015) <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html?_r=2> accessed 21 April 2016.

⁴⁶ *Miller v. Davis* (n 43) [27–28].

Table 1	Jurisdiction	RFRA Statute	Constitutional Conscientious Exemption
1. ⁴⁷	Alabama		Ala. Const. Art. I, §3.01 (Alabama Religious Freedom Amendment)
2.	Alaska		Article I, section 4, of the Alaska Constitution. <i>Swanner v. Anchorage Equal Rights Commission</i> 874 P.2d 274 (Alaska 1994).
3.	Arizona	Ariz. Rev. Stat. §41-1493.01	
4.	Arkansas	2015 SB 975, enacted April 2, 2015	
5.	Connecticut	Conn. Gen. Stat. §52-571b	
6.	Florida	Fla. Stat. §761.01, et seq.	
7.	Idaho	Idaho Code §73-402	
8.	Illinois	Ill. Rev. Stat. Ch. 775, §35/1, et seq.	
9.	Indiana	2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015	Article 1, section 2, of the Indiana Constitution. <i>City Chapel of Evangelical Free, Inc. v. City of South Bend</i> , 744 N.E.2d 443 (Ind. 2001).
10.	Kansas	Kan. Stat. §60-5301, et seq.	
11.	Kentucky	Ky. Rev. Stat. §446.350	
12.	Louisiana	La. Rev. Stat. §13:5231, et seq.	
13.	Maine		Article I, section 3, of the Maine Constitution. <i>Rupert v. City of Portland</i> 605 A.2d 63 (Me. 1992).
14.	Massachusetts		The first sentence of amendment XLVI (replacing amendment XVIII) of the Massachusetts Constitution (Art 47). <i>Attorney General v. Desilets</i> , 636 N.E.2d 233, 236 (Mass. 1994).
15.	Michigan		Article I, section 4, of the Michigan Constitution. <i>McCready v. Hoffius</i> , 586 N.W.2d 723, 729 (Mich. 1998), vacated in part, 593 N.W.2d 545 (Mich. 1999).

⁴⁷ Some of the data was taken from the website of the National Conference of State Legislatures at <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

Table 1	Jurisdiction	RFRA Statute	Constitutional Conscientious Exemption
16.	Minnesota		Article I, section 16, of the Minnesota Constitution. <i>State v. Hershberger</i> 462 N.W.2d 393 (Minn. 1990).
17.	Mississippi	Miss. Code §11-61-1	
18.	Missouri	Mo. Rev. Stat. §1.302	
19.	New Mexico	N.M. Stat. §28-22-1, <i>et seq.</i>	
20.	New York		Article I, section 3, of the New York Constitution. <i>Catholic Charities of the Diocese of Albany v. Serio</i> 859 N.E.2d 459 (N.Y. 2006).
21.	Ohio		Article I, section 7, of the Ohio Constitution. <i>Humphrey v. Lane</i> , 728 N.E.2d 1039, 1043 (Ohio 2000).
22.	Oklahoma	Okla. Stat. tit. 51, §251, <i>et seq.</i>	
23.	Pennsylvania	Pa. Stat. tit. 71, §2403	
24.	Rhode Island	R.I. Gen. Laws §42-80.1-1, <i>et seq.</i>	
25.	South Carolina	S.C. Code §1-32-10, <i>et seq.</i>	
26.	Tennessee	Tenn. Code §4-1-407	
27.	Texas	Tex. Civ. Prac. & Remedies Code §110.001, <i>et seq.</i>	
28.	Virginia	Va. Code §57-2.02	
29.	Washington		Article I, section 11, of the Washington Constitution. <i>First Covenant Church of Seattle v. City of Seattle</i> , 840 P.2d 174, 187 (Wash. 1993).
30.	Wisconsin		Article I, section 18, of the Wisconsin Constitution. <i>State v. Miller</i> , 549 N.W.2d 235, 240 (Wis. 1996).
31.	Hawaii		There is some authority for the view that Article I, section 4, of the Hawaii Constitution provides for a state constitutional right to exemption. ⁴⁸ See e.g. the reasoning of the Supreme Court in <i>State v. Adler</i>

⁴⁸ Douglas Laylock, 'Professors' Letter Supporting Religious Freedom Restoration Act' 2 <<http://www.indianasenaterepublicans.com/clientuploads/Documents/Professors%27%20Letter%20Supporting%20Religious%20Freedom%20Restoration%20Act.pdf>> accessed 16 November 2016.

Table 1	Jurisdiction	RFRA Statute	Constitutional Conscientious Exemption
			<p>118 P.3d 652 (Haw. 2005). However, the decision is best interpreted as applying the more restricted Federal constitutional principle established in <i>Smith</i> that ‘where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of “religious hardship” without compelling reason’.⁴⁹ This would square well with the Court’s explicit analysis on this basis in the later <i>State v Sunderland</i> case, at footnote 6.⁵⁰</p>
32.	Montana		<p>There is some authority that Article II, section 5, of the Montana Constitution provides for a state constitutional right to exemption.⁵¹ While certain cases lend credence to that assertion,⁵² the Montana Supreme Court has not explicitly decided to depart from or adopt <i>Smith</i>.</p>
33.	North Carolina		<p>There is some authority that Article I, section 13, of the North Carolina Constitution provides for a state constitutional right to exemption.⁵³ Although some pre-<i>Smith</i> case law seems to suggest so,⁵⁴ a post-<i>Smith</i> case has explicitly stated that ‘Our courts have not yet addressed whether the analysis in <i>Smith</i> should apply with respect to the North Carolina Constitution’.⁵⁵</p>

⁴⁹ *Smith* (n 14) 884.

⁵⁰ *State v Sunderland* (2007) 168 P 3d 526 (Hawaii Supreme Court).

⁵¹ Laylock (n 48) 2.

⁵² *Cape v Crossroads Correctional Center* (2004) 99 P 3d 171 (Montana Supreme Court).

⁵³ Laylock (n 48) 2.

⁵⁴ *In re Williams* (1967) 152 SE 2d 317 (North Carolina Supreme Court).

⁵⁵ *State v Carignan* 178 NCApp 562 (North Carolina Courts of Appeal).

4. The Third Ground of the General Right: The Federal Religious Land Use and Institutionalized Persons Act

Congress reacted to *Boerne's* finding that it could not apply RFRA to the states under the 14th Amendment by re-enacting an altered version, RLUIPA, under its commerce powers in Article I, Section 8, Clause 3 of the US Constitution. RLUIPA, which has been incorporated into the US Code, applies the same test under RFRA to relieve claimants from burdens imposed by states and the Federal government in the context of land use regulation and institutionalised persons' regulations. Under § 2000cc a (1), the US Code consequently provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

The same test is used in § 2000cc-1 but this time in the context of regulations concerning institutionalised persons. The Federal courts, including the USSC, have not found the enactment of RLUIPA by Congress to be unconstitutional.⁵⁶

Holt v Hobbs provides a useful example of the application of RLUIPA. In that case prisoner Gregory Holt, held in a facility in Arkansas, wished to grow a ½-inch beard in accordance with his religious beliefs as a devout Muslim. Arkansas Department of Correction's grooming policy prohibited inmates from growing beards on pain of disciplinary action unless they have a particular dermatological condition and denied Holt's request for an exemption from this rule. Holt claimed a right to exemption from the grooming policy under RLUIPA. In particular, he asserted that the policy substantially burdened the religious exercise of his beliefs in relation to grooming and that the prison authorities could not demonstrate that the policy constituted the least restrictive means of furthering a compelling governmental interest.

⁵⁶ *Freedom Bapt Church of Del v Tp of Middletown* (2002) 204 F Supp 2d 857 (Dist Court). The constitutionality of RLUIPA was not in question in *Holt v Hobbs* (2015) 135 Sct 853 (USSC).

The prison authorities first argued that the policy prevented inmates from hiding contraband in their beards. The USSC was not at all convinced by this argument as it could not accept that contraband could be properly hidden in a ½-inch beard or that, in any case, the authorities could not inspect the beard as they routinely inspected prisoners' hair (which the policy did not demand to be short or shaven).⁵⁷ The authorities then argued that the policy allowed security officers to identify prisoners quickly and accurately. The USSC was again unpersuaded. The authorities had 'failed to establish why the risk that a prisoner will shave a ½-inch beard to disguise himself is so great that ½-inch beards cannot be allowed, even though prisoners are allowed to grow mustaches, head hair, or ¼-inch beards for medical reasons'.⁵⁸

A reasonable argument may be made for the proposition that RLUIPA does not ground a general right to conscientious exemption and that it instead creates a context-specific one, parallel to those in the abortion and military draft context. This would seem particularly true for the exemption from land use regulation established in § 2000cc: there seems to be a particular exemption granted to a specific legal obligation. However, this proposition is not sustained by a brief analysis of the case law which reveals that, although all in the context of land regulation, the legal obligations potentially covered by this part of RLUIPA are diverse. They include denial of a permit necessary to modify the building of a religious organisation;⁵⁹ bad faith denial of, and unnecessary delays in processing, necessary permits to construct a new church building;⁶⁰ refusal to allow the building of a private chapel on private property;⁶¹ zoning enforcement officer's order that homeowners cease from holding religious meetings involving more than 25 persons in private dwellings.⁶² It is for this reason that RLUIPA is included as one of the grounds of a general right to conscientious exemption.

5. The Fourth Ground of the General Right: Title VII of the Civil Rights Act of 1964 and similar state level legislation

The rules of law considered until now apply between legal persons and the state, i.e. they apply vertically. However, there are other rules of law that apply horizontally to confer a right to

⁵⁷ *Holt v. Hobbs* (n 56) [10–13].

⁵⁸ *ibid* 14.

⁵⁹ *Chabad-Lubavitch v Litchfield Historic Dist* (2014) 768 F 3d 183 (Court of Appeals, 2nd Circuit).

⁶⁰ *Fortress Bible Church v Feiner* (2012) 694 F 3d 208 (Court of Appeals, 2nd Circuit).

⁶¹ *Anselmo v County of Shasta, Cal* (2012) 873 F Supp 2d 1247 (Cal Dist Court).

⁶² *Murphy v Zoning Com'n of Town of New Milford* (2001) 148 F Supp 2d 173 (Con Dist Court).

exemption from a legal duty which a legal person is entitled to impose on another. Title VII of the Civil Rights Act of 1964 is one such rule of law. It requires certain categories of employers (most private employers, unions, and the local, state, and federal governments and their various agencies)⁶³ to accommodate the religious beliefs of their employees in performing their employment duties. While the Act generally prohibits discrimination in the workplace on the basis of various characteristics (race, colour, religion, sex, or national origin),⁶⁴ it defines religion in such a way that has been held to give rise to such a right to exemption.

The statute provides in § 2000e(j) of the US Code:

The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.⁶⁵

This provision has been interpreted by the USSC in *Hardison*. The case concerned a member of the Worldwide Church of God who, consistent with his religious belief that the Sabbath is on Saturdays, refused to work on Saturdays and was consequently dismissed. He relied on Title VII claiming he had been unlawfully dismissed. Justice White, writing for the USSC (Justices Marshall and Brennan jointly dissenting) dismissed his claim. However, Justice White did accept that the statute afforded *Hardison* a conditional right to exemption. He said:

The intent and effect of this definition [in § 2000e(j)] was to make it an unlawful employment practice under s 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.⁶⁶

Although the right here is framed in terms of accommodation and not a right to exemption, it is clear from the case that the right to accommodation includes a right to be exempt from certain employment duties. A typical case under Title VII, also at hand in *Hardison*, is for an employee to object to the employment duty to work on a day which is religiously prohibited. The employee, invoking Title VII, will typically claim a right to exemption from the duty to work on that day.

⁶³ 42 U.S.C. § 2000e(a)-(b) and § 2000e-16.

⁶⁴ 42 U.S.C. § 2000e-2(a) or s 703(a)(1) of the Act.

⁶⁵ 42 U.S.C. § 2000e(j).

⁶⁶ *Trans World Airlines, Inc v Hardison* (1977) 432 US 63 (USSC) 74.

The right to exemption in Title VII is however conditional. To establish that an exemption should be granted, an employee must establish that:

(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement. (...) If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the employer to demonstrate that it could not reasonably accommodate the plaintiff's religious needs without undue hardship.⁶⁷

In *Hardison* the employer was able to show that exempting the claimant from the employment duty would not have been reasonable because, among other things, it would have resulted in other employees having to work instead of the claimant which would have breached working arrangements established under a seniority system under the relevant collective-bargaining agreement. The USSC was also worried that obliging an employer to disregard the seniority system to allow Hardison to have his Sabbath would 'deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment'.⁶⁸

Hardison has since been authority for the proposition that an exemption can be denied if granting it would result in undue hardship for an employer. The threshold for undue hardship has been set very low by the USSC which equated undue hardship with requiring an employer to bear more than a de minimis cost to accommodate the employee's religious beliefs. The Court in fact said '[t]o require [the employer] to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue Hardship'.⁶⁹ It follows from *Hardison* that, albeit Title VII grounds a general right to conscientious exemption, an employer can readily justify refusing to grant an exemption when that would require it to bear more than a de minimis cost, admittedly a low threshold.

It is important to note that the general right to exemption under Title VII is replicated under state law. Most states have in fact enacted some form of prohibition against religious or creed

⁶⁷ *Chalmers v Tulon Co of Richmond* (1996) 101 F 3d 1012 (Court of Appeals, 4th Circuit) 1019.

⁶⁸ *Hardison* (n 66) 81.

⁶⁹ *ibid* 84.

discrimination in employment and many of such provisions are closely modelled on Title VII.⁷⁰ State anti-discrimination statutory provisions, like Title VII, require an employer to reasonably accommodate an employee's religious observances or practices unless it can demonstrate that doing so would constitute an undue hardship on the conduct of its business. Some states conduct the analysis under Title VII concurrently with analysis of its counterpart in state legislation and find that the analysis under both is identical. This was the case, for example, under Oregon law in *Heller*.⁷¹

That case involved a Jewish employee seeking time off work to attend a religious ceremony where his wife would convert from Roman Catholicism to Judaism. While Heller's immediate supervisor had initially granted him the time off work, this was subsequently rescinded by a more senior supervisor without providing a reason. Heller was fired when he insisted on attending the ceremony instead of coming to work. He brought suit against his former employer for unlawful termination under Title VII and under its Oregon counterpart. Judge Hall, writing for a unanimous Court of Appeals for the Ninth Circuit, found that '[c]ourts construe Oregon's statutory counterpart, Or.Rev.Stat. § 659.030 (1992), as identical to Title VII. (...) Accordingly, Heller's state statutory claim succeeds or fails with his Title VII claim'.⁷² She held that Heller's claim succeeded under both statutes given that the 'record does not suggest, and [the employer] has not argued, that accommodating Heller would have caused undue hardship'.⁷³ This was principally due to the fact that the employer had not provided any reason for withdrawing the initial permission given to Heller to attend the religious ceremony.

The analysis shows then that a general right to conscientious exemption from employment law duties is a pervasive feature of US law, both at Federal and state level. It is, however, a very limited right which can be readily outweighed if granting an exemption would require the employer to undertake more than a de minimis burden.

6. The Fifth Ground of the General Right: The Constitutional Requirements of Church Autonomy

⁷⁰ Some of the state case law is discussed in A Marjorie and JD Shields, 'Necessity of, and What Constitutes, Employer's Reasonable Accommodation of Employee's Religious Preference Under State Law' 107 American Law Reports 5th 623.

⁷¹ *Heller v EEB Auto Co* (1993) 8 F 3d 1433 (Court of Appeals, 9th Circuit).

⁷² *ibid* 1437, footnote 3.

⁷³ *ibid* 1440.

The Ministerial Exception in *Hosanna-Tabor*

It is well established US jurisprudence that the Religion Clauses of the First Amendment grant churches a considerable measure of autonomy from state regulation. Such autonomy often entails that exemptions from generally applicable legal rules are constitutionally mandated to preserve church autonomy. This can be best illustrated by the seminal case of *Hosanna-Tabor* in the USSC.⁷⁴ In that case a disability discrimination suit was brought against Hosanna-Tabor Evangelical Lutheran Church and School by Ms Perich, a teacher which the Church classified as a ‘called’ rather than ‘lay’ teacher. Called teachers were regarded by the Church as having been called to their vocation by God. They had to complete theological study and had the formal title ‘Minister of Religion, Commissioned’. Lay teachers, by contrast, were not required to be trained by the Synod or even to be Lutheran. Ms Perich was dismissed by the Church after she developed narcolepsy and on her return from sick leave. When she filed a disability discrimination case under the Americans with Disabilities Act, the Church invoked what is known as the ‘ministerial exception’ arguing that the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its ministers. The USSC unanimously accepted the Church’s case and held, Justice Roberts penning the Court’s opinion, that ‘[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers’.⁷⁵

Justice Roberts’s opinion justified the Court’s decision by providing an historical overview of the origin of the Religion Clauses. It recounted how the Puritans had fled England to escape the control of the national church and how the founding generation sought to avoid the same structure in the United States. Accordingly, Justice Robert held:

By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.⁷⁶

Consequently, the Court was willing to accept, just as many Circuit Courts of Appeals had already done, that the Religion Clauses granted a ‘ministerial exception’ which exempted churches from the

⁷⁴ *Hosanna-Tabor Evangelical v EEOC* (2011) 132 Sct 694 (USSC).

⁷⁵ *ibid* 702.

⁷⁶ *ibid* 703.

prohibition to discriminate in employment practices arising under the Americans with Disabilities Act and Title VII of the Civil Rights Act.

Importantly, the Court rejected the view that the ministerial exception was not compatible with the decision in *Smith*, which had held that no right to conscientious exemption was mandated by the Free Exercise Clause (except in a narrow set of circumstances) from a law of general applicability.⁷⁷ The Court accepted the ruling in *Smith*, but distinguished the present case from it on the basis that ‘*Smith* involved government regulation of only outward physical acts [i.e. an individual’s sacramental use of peyote]. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself’.⁷⁸

The USSC applied the ministerial exception to the facts and held that Ms Perich was a church minister and thereby was unable to sue the Church for discriminatory dismissal. The Court however left open two uncertainties. First, it did not provide a formula for deciding when an employee is to be considered a church minister. It did however hold that Ms Perich was one in light of her title, the substance of her title, and the religious functions she performed.⁷⁹ Second, and importantly, it left open ‘whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers’.⁸⁰ This is essentially a question of the scope of the Church Autonomy doctrine and the extent it might mandate exemptions from basic legal rules, including private law rules.

Church Autonomy and Private Law Duties

While the scope of the Church Autonomy doctrine in *Hosanna-Tabor* exempted churches from the obligations of civil rights law in the employment relationship between a church and its ministers, other cases have suggested that the Church Autonomy doctrine may exempt churches from the application of private law rules, especially of a tortious and fiduciary nature, in the relationship between churches and their non-ministerial members. This is so when enforcing a private law rule against a church would require courts to venture into questions of church doctrine. In fact it is well established that US courts are prohibited by the First Amendment from questioning the truth or reasonableness of religious doctrine. This doctrine has been recently reaffirmed by the USSC in *Hobby Lobby*, already considered in part 3.⁸¹ In that case the Secretary of Health and Human Services

⁷⁷ See discussion above from page 21.

⁷⁸ *Hosanna-Tabor* (n 74) 706.

⁷⁹ *ibid* 707–708.

⁸⁰ *ibid* 710.

⁸¹ *Hobby Lobby* (n 31).

(HHS) argued that ‘providing the [mandatory contraceptive] coverage would not itself result in the destruction of an embryo [which the claimant regarded as deeply sinful]; that would occur only if an employee chose to take advantage of the coverage’.⁸² The USSC refused to be involved in having to assess the merits of the religious beliefs of Hobby Lobby’s owners. It said that HHS’s argument

addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable) (...) [HHS’s argument] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.⁸³

The USSC then went on to list a series of authorities, including *Smith*,⁸⁴ which had affirmed that doctrine. The Court stated that ‘repeatedly and in many different contexts, we have warned that courts must not presume to determine (...) the plausibility of a religious claim’; ‘our “narrow function (...) in this context is to determine” whether the line drawn reflects “an honest conviction”’.⁸⁵

This doctrine immunising religious beliefs from scrutiny by secular courts has informed the ways certain private law duties have been enforced by US courts. In particular, courts have in effect exempted churches from the application of certain tortious and fiduciary duties on the basis that imposing such a liability would otherwise require secular courts to assess the truth or reasonableness of religious doctrine. In *Paul v Watchtower Bible*,⁸⁶ for example, the claimant, a former Jehovah’s Witness, brought various tortious claims (common-law torts of defamation, invasion of privacy, fraud, and outrageous conduct) against his former congregation for ‘shunning’ him. Shunning is a religious doctrine of the religion which requires members to avoid any contact with individuals, like the claimant, who had left the congregation or had been expelled. The Ninth Circuit Court of Appeals decided (certiorari denied in the USSC) that the congregation had a defence, a constitutional privilege, based on the Free Exercise clause under the Federal and state constitution (Washington), against incurring liability.⁸⁷ The Court found that ‘[i]mposing tort liability for shunning

⁸² *ibid* 35.

⁸³ *ibid* 36.

⁸⁴ *Smith* (n 14).

⁸⁵ *Hobby Lobby* (n 31) 37–38. Citing *Thomas v Review Bd of Indiana Employment Security Div* (1981) 450 US 707 (USSC) 716.

⁸⁶ *Paul v Watchtower Bible and Tract Society of New York, Inc* (1987) 819 F 2d 875 (Court of Appeals, 9th Circuit).

⁸⁷ *ibid* 879.

on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings'.⁸⁸

Note, however, that this constitutional privilege is not without limits. The Court in *Paul* held:

We find the practice of shunning not to constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention. (...)The harms suffered by Paul as a result of her shunning by the Jehovah's Witnesses are clearly not of the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred. Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members. (...)

Providing the Church with a defense to tort is particularly appropriate here because Paul is a former Church member. Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.⁸⁹

This suggests that not all religious doctrines are to benefit from such constitutional privilege immunising them from private law claims. Courts may, in line with the doctrine of Church Autonomy, intervene whenever a church doctrine threatens 'the peace, safety, or morality of the community'. A clear instance of this limitation would, for example, bar a church doctrine compelling members to physically assault former members. Furthermore, the constitutional privilege seems to be less compelling when the doctrine concerns non-members. However, even this limitation is rebuttable. In *Pack*,⁹⁰ for example, the Tennessee Supreme Court was faced with the doctrine of the Holiness Church of God in Jesus Name which commanded its members to handle poisonous serpents and to consume strychnine and other poisonous substances. The Court held that practising the church doctrine was contrary to the common law tort of nuisance and granted a perpetual injunction against it. The Court explicitly rejected the possibility of allowing the practice between members only on the basis that 'the state has a right to protect a person from himself and to demand that he protect his own life'.⁹¹ The implication being that Church Autonomy may not bar a tortious claim even when the church doctrine endangers the safety or other important interests of church members only.

⁸⁸ *ibid* 881.

⁸⁹ *ibid* 883.

⁹⁰ *State ex rel Swann v Pack* (1975) 527 SW2d 99 (Tennessee Supreme Court).

⁹¹ *ibid* 114 and 113.

The Fifth Circuit Court of Appeals has also qualified the scope of the doctrine of Church Autonomy in *Sanders*.⁹² The case concerned, among other things, negligence and breach of fiduciary duty claims brought against the Casa View Baptist Church and one of its ministers, Bacuum, by ex-members alleging that the minister had engaged in sexual relationships with them during course of marital counselling. Bacuum invoked the doctrine of Church Autonomy arguing that the Court had no jurisdiction to hear the suits on the basis that it would involve secular courts meddling into spiritual counselling relationship. The Court, Judge Benavides delivering its unanimous opinion, dismissed the defendants' argument. The Court did accept that 'the Free Exercise Clause protects religious relationships, including the counseling relationship between a minister and his or her parishioner, primarily by preventing the judicial resolution of ecclesiastical disputes turning on matters of "religious doctrine or practice."⁹³ However, it held that 'to invoke the protection of the First Amendment for conduct taking place within his counseling relationships with the plaintiffs, Baucum must assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief'.⁹⁴ Given that it was clear that the alleged sexual conduct he had engaged in with the plaintiffs was not dictated by any church doctrine or practices, he could not invoke the protection of Church Autonomy. Accordingly, the Court affirmed the finding by a jury that he had breached his duties towards the plaintiffs and that he was liable for punitive damages.

The Court's reasoning in *Sanders* can be taken as authority for the proposition that the doctrine of Church Autonomy cannot bar judicial intervention to enforce private law duties between Churches or their ministers and their members when such intervention does not require courts to interfere with conduct not mandated by church doctrine. While the Court did find that the issue would have raised difficult First Amendment issues had the Minister's behaviour been dictated by religious beliefs,⁹⁵ the decisions in *Paul* and *Pack* suggest that religiously-motivated sexual predation would not be protected by the doctrine of Church Autonomy.

Conclusion

It is clear that the constitutional requirements of Church Autonomy ground a general right to conscientious exemption. This is most clear, as can be seen in *Hossanna-Tabor*, in the context of the ministerial exception which exempts churches from civil rights law duties in the employment

⁹² *Sanders v Casa View Baptist Church* (1998) 134 F 3d 331 (Court of Appeals, 5th Circuit). Quoting *Presbyterian Church in US v Mary Elizabeth Blue Hull Memorial Presbyterian Church* (71) 393 US 440 (USSC) 449–450.

⁹³ *Sanders* (n 92) 336.

⁹⁴ *Presbyterian Church in US v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (n 92) 337–338.

⁹⁵ *Sanders* (n 92) footnote 7.

relationship between them and their ministers. However, Church autonomy is wider than that. As shown in *Paul*, it provides justification for a limited right to exemption for churches and their members from the enforcement of certain private law duties (e.g. defamation and negligence) when breach of these duties is motivated by church doctrine (e.g. the doctrine of shunning ex-members). However, as shown especially in *Pack*, such a right can be forfeited when the church doctrine commands practices which threaten public peace, safety, or morality.

7. Conclusion

This chapter has shown that there is a general right to conscientious exemption in US law. It has been shown that this right has five grounds. Three of those grounds exempt individuals from obligations imposed by government, whether state or Federal, acting through legislative or non-legislative means (e.g. rules imposed by prison officials on prisoners). These are (a) the state and federal right to free exercise of religion to the extent that it remains unaffected by the USSC decision in *Smith*; (b) the federal RFRA and its state counterparts; and (c) the federal RLUIPA. The two other grounds are capable of exempting individuals from legal duties imposed by or owed primarily to private individuals. Under Title VII and its state counterparts, exemptions may be granted from employment rules (e.g. working on Saturdays) imposed by public and private employers. The doctrine of Church Autonomy is a little amorphous. The doctrine of ministerial exception developed under it exempts churches from the application of civil rights norms imposed by government not to discriminate in employment of church ministers. However, Church Autonomy also exempts churches, their ministers and their members from private law duties (e.g. defamation and fiduciary duties) which, albeit developed under common law, protect the interests of, and are enforceable by, private persons. It seems then that the general right to conscientious exemption has a wide scope as it can exempt individuals from legal duties imposed by both public and private persons.

It has been shown, however, that the general right is not without limits. Each of its grounds sets clear limits. The first three grounds broadly follow the limitation set out in RFRA which says that an exemption may be refused when it (a) is in furtherance of a compelling governmental interest; and (b) refusing the exemption is the least restrictive means of furthering that compelling governmental interest. Not too dissimilarly, under Title VII and its state counterparts an exemption may be refused if granting it would otherwise impose an undue burden on an employer. However, as *Hardison* shows, the costs to be borne by an employer cannot be more than minimal. Finally, under the doctrine of Church Autonomy, the ministerial exception only applies between a church and its

ministers and exemptions from private law duties may be rejected when church doctrine commands practices which threaten public peace, safety, or morality.

The final issue to be considered is who can benefit from this general right to conscientious exemption. The constitutional, legislative and judicial material considered so far suggest that the general right is a privilege of religious believers. The next chapter explores this issue in depth and argues that construing the general right as a privilege of only religious believers, as some US courts are currently doing, is contrary to the USSC precedent in *Welsh*⁹⁶ and raises serious problems under the Establishment Clause.

⁹⁶ *Welsh v United States* (1970) 398 US 333 (USSC).

CHAPTER 3: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN US LAW: BEYOND RELIGIOUS PRIVILEGE?

1. Introduction

This chapter argues that the general right to conscientious exemption arising under US law is not a privilege of religious believers only. It is argued that the general right is also available to a category of persons who have a sincere belief that complying with a legal rule would involve a moral wrong, irrespective of whether the belief is of a religious nature. This argument is by no means incontestable. Indeed, as will be shown in part 3 of this chapter, several circuit courts have held that the general right is only available to those with religious objections. This should not be surprising given that the five grounds considered all seem to centre on religion. RFRA, RLUIPA and Title VII, for example, explicitly mention religion and no mention is made in those statutes of non-religious moral beliefs. Yet, it is argued that despite the lack of explicit words protecting non-religious conscientious beliefs, a proper understanding of US law requires that all the grounds of the general right, with the exception of the fifth (i.e. the constitutional requirements of Church Autonomy), be interpreted to be available to non-religious conscientious objectors.

Two main arguments are advanced for this view. The first is based on the landmark USSC case of *Welsh*,⁹⁷ considered in depth in part 2 of this chapter. In that case the Court interpreted a Federal statute which granted exemptions from military service only to religious objectors to include individuals whose objection was self-declared to be non-religious. It is argued that *Welsh* is a compelling precedent for how the statutory rules of law (i.e. RFRA, RLUIPA, Title VII and their state counter-parts) ought to be interpreted. This argument is advanced in part 2 and 3. The second argument is that holding that the general right is a privilege of only religious objectors would fall foul of the Establishment Clause which prohibits government from favouring religion over irreligion. This

⁹⁷ *ibid.*

argument is advanced in part 4 where it is shown that it has been endorsed by the Seventh Circuit in *Centre for Inquiry*.⁹⁸

It is important to stress both the strengths and limitations of the arguments to be advanced. The argument relying on the precedential value of *Welsh* is highly persuasive for courts interpreting the statutory grounds of the general right (e.g. RLUIPA). However, like any precedent, courts may distinguish the statutory grounds of the general right from the particular Federal statute which the USSC was interpreting in *Smith*, especially because that statute concerned a particular right to exemption and not a general right. The argument of unconstitutionality based on the Establishment Clause does not suffer from this limitation. No rule of law, whether statutory, common law or based on a state constitution, can violate the Federal Constitution.⁹⁹ Consequently, if the argument of unconstitutionality is correct, the grounds of the general right ought to be interpreted in a way to avoid unconstitutionality. This is achieved by extending the general right to include certain non-religious conscientious objectors.

The argument of unconstitutionality has, however, one limitation. It cannot apply to the fifth ground of the general right. This is because exemptions dictated by the doctrine of Church Autonomy are grounded in the Federal Constitution, in particular in the Religion Clauses. Consequently, it is not possible to claim that the constitutionally required doctrine of Church Autonomy is at the same time constitutionally prohibited. It may follow then that exemptions grounded on Church Autonomy can be considered a privilege of religious believers alone. This conclusion, however, is rejected in part 5. While it is acknowledged that religious institutions may benefit from exemptions constitutionally required by the Religion Clauses, it is shown that non-religious institutions can benefit from similar exemptions based on the freedom of expressive association grounded by the USSC in the First Amendment. Particular reference in this regard will be had to *Jaycees* and to *Boy Scouts*, both USSC cases.¹⁰⁰ It will thereby be shown that Church Autonomy is an instantiation of a broader right of associations who hold moral views. Consequently, even this ground for the general right, it is argued, is not a privilege of religious objectors alone. If the above is correct, the general right to

⁹⁸ *Center for Inquiry, Inc v Marion Circuit Court Clerk* (2014) 758 F3d 869 (Court of Appeals, 7th Circuit).

⁹⁹ The USSC held that the Free Exercise Clause binds states as well as the Federal Government in *Cantwell v Connecticut* (1940) 310 US 296 (USSC). The USSC held that the Establishment Clause binds states as well as the Federal Government in *Everson v Board of Ed of Ewing* (1947) 330 US 1 (USSC).

¹⁰⁰ *Roberts v United States Jaycees* (1984) 468 US 609 (USSC); *Boy Scouts of America v Dale* (2000) 530 US 640 (USSC).

conscientious exemption in US law is not, in any of its grounds, a privilege reserved to religious believers.

2. The Welsh Principle of Interpretation of Conscientious Exemption Statutes

This part of this chapter analyses in depth the decision in *Welsh* and the principle it is authority for. However, that case cannot be properly understood without reference to *Seeger*, a USSC case decided five years prior to *Welsh*. *Seeger* concerned three individuals who were claiming to qualify for the statutory exemption from military service in the US Army. The statutory exemption was contained in s 6(j) of the Universal Military Training and Service Act which read:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.¹⁰¹

In *Seeger*, none of the three objectors professed themselves to be non-religious but all professed beliefs which did not belong to an institutionalised religion. *Seeger*, for example, stated that he held a 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.' Importantly, despite the statutory exemption requiring belief in a 'Supreme Being', he preferred to leave the question as to his belief in a deity open, and he affirmed that his 'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever'.¹⁰²

The USSC had to decide whether such self-professed religious beliefs which did not however embrace belief in a traditional 'Supreme Being' could nevertheless enjoy the statutory exemption. The USSC unanimously concluded, Justice Clark delivering the opinion, that the claimants were entitled to the exemption. It stated that 'the test of belief "in a relation to a Supreme Being" is

¹⁰¹ 50 U.S.C.App. s 456(j) (1958 ed.).

¹⁰² *United States v Seeger* (1965) 380 US 163 (USSC) 167.

whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption'.¹⁰³ This meant that there was no requirement for Seeger to hold an orthodox belief in God to qualify for the exemption. He only needed for his beliefs, whatever they might be, to be sincere and to occupy in his life a role parallel to that which an orthodox belief in God would fulfil. Crucially, the USSC did not specify what role 'orthodox belief in God' fulfils in the life of a person 'who clearly qualifies for the exemption'. However, it is suggested that a thoroughgoing enquiry of that question was not necessary. This is because the objectors in *Seeger* all claimed to be religious and the Court was not willing to impute to Congress the intention of excluding from the scope of the exemption individuals not belonging to an orthodox religious movement with an orthodox embrace of monotheism. This was especially so, in the Court's view, given the multiplicity of religions existing in the US at the time of the passing of the statute, some of which, such as some forms of Buddhism, lacked an unequivocal form of theism.¹⁰⁴ It is for that reason that the Court construed the statutory definition of 'religious training and belief' to, in effect, dispense with the requirement of belief in a deity or deities.

In deciding *Seeger*, the USSC left open the question as to whether the statutory exemption could or could not cover non-religious beliefs.¹⁰⁵ Five years later, in *Welsh*, the Court had to frontally confront that question. Between the two cases, Congress, following the USSC's indication in *Seeger*, changed the definition of 'religious training and belief' by deleting the requirement of a belief in a 'Supreme Being'. However, it kept the part of the statute which read that 'religious training and belief (...) does not include essentially political, sociological, or philosophical views or a merely personal moral code'.¹⁰⁶

Welsh had been sentenced to three years' imprisonment for failing to submit to military service. As a defence to his conviction he claimed that he was exempt under the amended s 6(j) of the Universal Military Training and Service Act on the basis of a conscientious objection. However, and crucially, he did not self-declare as a religious believer. In fact, Welsh had struck off the part in his exemption application form that declared his objection was based on 'religious training' and characterized his beliefs as having been formed 'by reading in the fields of history and sociology'.¹⁰⁷ The USSC was

¹⁰³ *ibid* 165–166.

¹⁰⁴ *ibid* 173–184.

¹⁰⁵ *ibid* 173.

¹⁰⁶ *Welsh* (n 96) footnote 2.

¹⁰⁷ *ibid* 341.

then left to determine whether Welsh was a conscientious objector for the purposes of the statute. The USSC held that Welsh was entitled to the exemption in the plurality opinion of Justice Black, joined by Justices Douglas, Brennan and Marshall. Justice Harlan delivered an opinion concurring in result only. Justices White, Burger and Stewart dissented.

In reaching its conclusion, the plurality opinion relied on the test the USSC had set in *Seeger*. Despite the statute continuing to explicitly exclude ‘essentially political, sociological, or philosophical views’, the USSC in *Welsh* held that the functional test set out in *Seeger* could be satisfied by Welsh even if he did not identify as a religious believer. The USSC reasoned thus:

What is necessary under *Seeger* for a registrant's conscientious objection to all war to be ‘religious’ within the meaning of s 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. (...) If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by God’ in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a ‘religious’ conscientious objector exemption under s 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.¹⁰⁸

The USSC’s decision could not be clearer: despite Welsh not identifying as a religious believer he was nevertheless entitled to a statutory exemption which on its face was only available to religious believers on the basis of his moral or ethical beliefs about what is right and wrong which he held ‘with the strength of traditional religious convictions’ which the Court equated with a ‘duty of conscience’.

Importantly, the Court rejected the challenge that Welsh could not qualify for the exemption because he explicitly declared that his pacifism was not a product of religious training but instead of his study of history and sociology. Furthermore, the Government insisted that Welsh’s beliefs fell within the category of beliefs excluded by the statute, i.e. essentially political, sociological, or philosophical views or a merely personal moral code. The plurality opinion rejected both challenges. First, the Court stated that, given the broad meaning given to the term ‘religious’ in *Seeger*, individuals could not be expected to know that their beliefs fell within that broad definition.

¹⁰⁸ *ibid* 339–340. Emphases added.

Importantly, the Court stated that ‘a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption’. Presumably, this is because of the disconnect between the word ‘religion’ as to be understood by lay people and the word ‘religion’ as construed broadly by the Court in the statutory exemption.¹⁰⁹

Secondly, the Court held that Welsh did not fall within the category excluded by the statute. It said:

The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.¹¹⁰

To summarise, in order to qualify for the statutory exemption Welsh did not need to declare that his objection was dictated by religious beliefs nor did his beliefs need to be based entirely on moral, ethical, or religious principles. It was sufficient that his objection was sincerely and deeply held and motivated, at least partially, by non-religious moral or ethical principles. It seems then that the plurality opinion construed the statutory term ‘religious training and belief’ to include deeply held non-religious beliefs. This was because, in the plurality opinion’s view, ‘the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life’.¹¹¹ Just as the Court, in *Seeger*, had interpreted away the requirement of belief in a Supreme Being, in *Welsh*, the Court interpreted away the requirement of ‘religious training and belief’ and narrowly construed the statutory exclusion.

No doubt the construction of the statute was one which was controversial. The concurring judgment of Justice Harlan sought to explain why the majority had taken such a non-literal approach to the definition of ‘religious training and belief’. In Justice Harlan’s view this interpretation was a result of trying to cure, through interpretation, the ‘constitutional infirmities’ of the statute¹¹² despite the plurality opinion explicitly refusing to touch on the merits of constitutional arguments advanced by the parties.¹¹³ In his view, while the free exercise clause does not compel the grant of an exemption

¹⁰⁹ *ibid* 341.

¹¹⁰ *ibid* 342–343.

¹¹¹ *ibid* 339.

¹¹² *ibid* 345.

¹¹³ *ibid* 335.

from generally applicable legal requirements,¹¹⁴ if such grant is nevertheless made by the legislature, it must not constitute an establishment of religion under the Establishment Clause. The way to prevent the grant of such exemption violating the Establishment Clause is to afford the exemption to both religious and non-religious objectors.¹¹⁵

Justice Harlan's argument will be explored in depth in part 4 of this chapter. While it is not possible to attribute to the plurality opinion the view that it was seeking to avoid a finding of unconstitutionality – the opinion in fact explicitly avoided dealing with constitutional arguments – it is argued that Justice Harlan's view is self-standing irrespective of *Welsh*. As will be shown in the next parts of this chapter, the Establishment Clause forbids Federal or state legislatures and state constitutions to reserve non-constitutionally mandated exemptions to religious objectors without extending such exemptions to some non-religious conscientious objectors. Accordingly, this chapter will explicitly argue against the position taken by the dissenting judges in *Welsh*.

The dissenting judgment concurred with Justice Harlan in his interpretation that there were constitutional problems created by the statute but, unlike Justice Harlan, was not prepared to declare it unconstitutional on Establishment Clause grounds. Indeed, the dissent was animated by the view that a religious exemption might be mandated by the Free Exercise clause under the Sherbert Test. In the minority's judgment, a constitutionally required or permitted exemption could legitimately be restricted to religious believers alone.¹¹⁶

The reasoning of the minority judgment concluding that s 6(j) was constitutional because a religious exemption may be mandated or permitted by the Free Exercise Clause should be doubted, not only because it is a dissenting judgment, but also and to the extent that its reasoning is now incompatible with the later reasoning of the USSC in *Smith* rejecting a mandatory constitutional right (under the Federal Constitution) to conscientious exemption (as shown in part 2 of chapter 2). After *Smith*, it is now clear that the Free Exercise Clause does not mandate granting a conscientious exemption from legal requirements but merely permits legislatures to do so. If legislatures do grant a statutory conscientious exemption those exemptions may be found unconstitutional under other grounds, including for violation of the Establishment Clause.

Following the analysis above, this chapter concludes that *Welsh* (once it is read in light of *Smith*) stands for the following proposition of law: Legislatures, both Federal and state, may grant

¹¹⁴ As is known, this view was later recognised by the USSC in *Smith* (n 14).

¹¹⁵ *Welsh* (n 96) 356.

¹¹⁶ *ibid* 372.

conscientious exemptions to religious objectors. However, whenever such religious exemptions are granted to protect religious beliefs, the term 'religion' ought to be construed to include sincerely and deeply held non-religious beliefs which are, at least partially, moral or ethical in content (about what is right and wrong) and which function as a religion in the life of the belief-holder. Such non-religious beliefs will typically function as a religion if they impose a 'duty of conscience' on the person. Call this principle of interpretation of statutory exemption clauses the Welsh Principle. It is argued that the various statutory grounds of the general right (e.g. RFRA, RLUIPA, Title VII and their state counter-parts) should be construed in accordance with the Welsh Principle so that the general right is not held to be a privilege of only religious objectors.

This argument is however limited. It draws only on the precedential authority of *Welsh* where the USSC squarely confronted the issue of a particular statutory exemption which on its face seemed to be reserved to religious objectors alone. Federal and state courts facing the same issue when called to interpret the statutory grounds of the general right should find the Court's approach in *Welsh* highly persuasive. However, in accordance with the doctrine of precedent, courts may be able to distinguish the statutory grounds of the general right from the statute in *Welsh*, especially given that the statute in the case concerned a specific right to exemption in the specific context of the military draft. This limitation is a good reason for proposing in parts 4 of this chapter the alternative constitutional argument which is not affected by this limitation.

3. Does 'Religion' include non-Religious Conscientious Beliefs?

This part queries whether the Welsh Principle can find support outside of *Welsh*. This query is important because, as some courts have done (see further below), it is possible to argue that the broad interpretation of 'religious training and belief' in *Welsh* may be properly confined to s 6(j) of the Universal Military Training and Service Act. Outside that context, it may be argued, 'religion' should be understood not to include certain non-religious beliefs.

This argument has some serious traction. Indeed, outside of *Welsh*, the USSC has not interpreted 'religion' so widely, and some have argued that it backtracked from that broad interpretation in *Yoder*, a seminal case decided two years after *Welsh*. This part looks at the meaning of 'religion' in USSC cases prior to and after *Welsh*. It shows that several circuits have adopted differing views as to how to characterise 'religion'. The conclusion of this part is that while it is true that outside of *Welsh* the USSC has not endorsed the Welsh Principle, it is equally true that it has not backtracked from that principle in cases subsequent to *Welsh*, including in *Yoder*. It is therefore legitimate to seek to

persuade courts to construe the statutory grounds of the general right in accordance with the Welsh Principle relying on the precedential value of *Welsh*.

Reynolds, Davis and Torcaso: Religion beyond Theism

Cases prior to *Welsh*, now clearly outdated, suggested that religion should be equated with theism, especially of a Christian type. There was some suggestion in this direction in the 1879 case of *Reynolds*. This was a landmark case where the USSC held as compatible with the Religion Clauses a Federal statute which prohibited polygamy. A member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormons, was convicted on the basis of the statute. He argued that, given that Mormons believed that they had a religious duty to be polygamous, he should be exempt from the statute on the basis of the Free Exercise Clause. The USSC unanimously rejected the availability of this defence on the basis, among other reasons, that '[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances'.¹¹⁷ We have seen that this view formed the basis of Justice Scalia rejection of the Sherbert Test in *Smith*.¹¹⁸ Importantly for the definition of religion in the Free Exercise Clause, the Court in *Reynolds* accepted as 'almost as an authoritative declaration of the scope and effect of the amendment' Jefferson's words describing religion as 'a matter which lies solely between man and his God'.¹¹⁹

If we are to believe the Court's words in *Reynolds* quoting Jefferson, then 'religion', at least as protected in the Free Exercise Clause, is to be understood as theo-centric, i.e. as 'a matter which lies solely between man and his God'. This approach was confirmed about a decade later by the Court in *Davis*, another case concerning the prohibition of polygamy and prosecution of a Mormon for the offence. There the Court, making reference to Madison, explicitly defined religion in the First Amendment. It said: 'The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will'.¹²⁰

It is deeply doubtful, however, that these theo-centred definitions of religion have withstood the test of time. Both *Reynolds* and *Davis* were late-19th century cases. A different trend has emerged in post mid-20th century cases. In *Torcaso v Watkins*, a 1961 case where the USSC held unconstitutional

¹¹⁷ *Reynolds* (n 22) 167.

¹¹⁸ See text supra n 21.

¹¹⁹ *Reynolds* (n 22) 164.

¹²⁰ *Davis v Beason* (1890) 133 US 333 (USSC) 342.

a statute which required belief in God as a test for public office, the Court held that the Establishment Clause prohibited government from ‘aid[ing] those religions based on a belief in the existence of God as against those religions founded on different beliefs’.¹²¹ It continued by stating, in an oft-cited footnote, that ‘[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others’.¹²² This signals a clear retreat from an understanding of religion as necessarily theistic which *Reynolds* and *Davis* suggested. This retreat was then consolidated four years later in *Seeger* where, as discussed in part 2 of this chapter, the Court interpreted away the requirement of belief in a ‘Supreme Being’ as part of the statutory definition of ‘religious training and belief’. Much has already been said of the Court’s definition of religion in *Welsh*.

The relevant question is whether, outside of *Welsh*, the Welsh Principle has been endorsed by the USSC in more recent times. Unfortunately, there is no clear USSC case where the Court has interpreted the meaning of religion in a way to unequivocally reaffirm the approach in *Welsh*. On the contrary, cases subsequent to *Welsh* have been taken as an indication that the wide definition of ‘religious training and belief’ offered in that case has been somewhat retracted.

Yoder and Thomas: Doubting the Welsh Principle?

In *Yoder*, already considered in chapter 2,¹²³ the USSC decided that the Free Exercise Clause provided a constitutional right to exemption from the statutory obligation on Amish parents to send their children to school in order to complete the final two years of mandatory education. The majority of the USSC held that this right to exemption was available only to religious believers. It stated:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.¹²⁴

¹²¹ *Torcaso v Watkins* (1961) 367 US 488 (USSC) 495.

¹²² *Torcaso v. Watkins* (n 121) footnote 11.

¹²³ See supra above at n 18.

¹²⁴ *Yoder* (n 18) 215–216.

The majority opinion, delivered by Justice Burger, explicitly stated that a ‘philosophical or personal’ view, such as the hermitism of Henry Thoreau,¹²⁵ ‘does not rise to the demands of the Religion Clauses’.¹²⁶ The dissenting judgment by Justice Douglas interpreted this as a retreat from *Welsh* which had only been decided two years earlier.¹²⁷ If Justice Douglas is correct, then the viability of the Welsh Principle may have been undermined by the USSC shortly after *Welsh*. It is, however, doubtful that Justice Douglas’s view is correct, for a number of reasons.

First, in *Yoder* the Court was interpreting the meaning of religion primarily for the purposes of the Free Exercise Clause. However, despite being viewed by the dissenting and concurring justices in *Welsh* as being motivated by the Establishment Clause worries, the Court in *Welsh* was interpreting a statute. It is not here suggested that the legal meaning of ‘religion’ should differ based on the constitutional or statutory context. Rather, given that the USSC has in *Smith* decided to fundamentally reinterpret *Yoder* to the effect that there is no longer a constitutional right to conscientious exemption under the Federal Constitution (with a narrow exception), the definition of religion provided in the context of a constitutional right that no longer exists should be treated with caution.

Secondly, the quoted passage in *Yoder* was *obiter dictum*. It was not in dispute that the Amish were a religious group or that their wish to withdraw their children from the final two years of mandatory education was not motivated by a religious belief. Consequently, it is not clear that the Court’s comments on Thoreau’s hermitism had any direct relevance to the resolution of the dispute facing the Court.

Finally, and importantly, the USSC, in suggesting its meaning of religion, referenced *Welsh* for the proposition that ‘determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question’.¹²⁸ So it may be too rash to suggest that the Court was retreating from its approach in *Welsh* when it referred to it when deciding what is to be protected by the Religion Clauses. One should therefore attempt to reconcile the two decisions before concluding that the Court’s definition in *Yoder* was incompatible with that in *Welsh*. In fact such reconciliation is very straightforwardly possible.

¹²⁵ Henry David Thoreau, *Walden* (CreateSpace Independent Publishing Platform 2016).

¹²⁶ *Yoder* (n 18) 216.

¹²⁷ *ibid* 247–249. The District Court in *Meyers* adopted the same view. See *US v Meyers* (1995) 906 F Supp 1494 (Dist Court) 1500.

¹²⁸ *Yoder* (n 18) 215.

Remember that the statutory exemption that the USSC interpreted in *Welsh* explicitly excluded from its scope individuals with ‘essentially political, sociological, or philosophical views or a merely personal moral code’. The Court held that these exclusions validly applied to a particular category of individuals. It said:

The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.¹²⁹

It went on to say that such beliefs based on policy, pragmatism, expediency or a personal code did not fall within the proper definition of ‘religious training and beliefs’.¹³⁰ Hence, because Welsh’s beliefs were sincerely and deeply held, were at least partially moral or ethical, and functioned in his life like a religion, the statutory exclusions did not apply to him. In short, the USSC distinguished sincerely and deeply held moral or ethical beliefs which functioned in the life of a person as a religion from beliefs based on policy, pragmatism, expediency or a personal code. The latter were not ‘religious beliefs’ whereas the former were to be interpreted as being religious beliefs.

The Court in *Yoder* should be held to have been simply relying on the distinction made in *Welsh* between beliefs which were ‘philosophical or personal’, allegedly Thoreau’s, and certain moral or ethical religious beliefs which could be considered ‘religious beliefs’ if they satisfied the criteria set in *Welsh* (i.e. were sincerely and deeply held, were at least partially moral or ethical and functioned in the life of the belief-holder as a religion). So, contra Justice Douglas, the Court in *Yoder* was not retreating from *Welsh*. Instead, it was adopting a distinction clearly made in *Welsh*. So there is no inconsistency between the two decisions, and *Yoder* cannot be interpreted as undermining the Welsh Principle.

The same distinction explains the later statements of the USSC in *Thomas*.¹³¹ In that case a member of the Jehovah Witness, a religious group holding pacifist beliefs, was denied unemployment compensation when he terminated his employment because he was transferred to a department that produced war materials. Given the similarity of the facts to *Sherbert*, the Court applied the reasoning in *Sherbert* and held that Thomas was entitled to unemployment benefit. In reaching that

¹²⁹ *Welsh* (n 96) 342–343.

¹³⁰ *ibid* 343.

¹³¹ *Thomas* (n 85).

decision, the Court stated, citing *Yoder* that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion'.¹³²

The criticisms levelled above against viewing *Yoder* as departing from *Welsh* can be equally applied to *Thomas*. While *Thomas* says that 'only beliefs rooted in religion are protected by the Free Exercise Clause', it says nothing, either positive or negative, about the expansive definition of religion provided in *Welsh*. Furthermore, in *Thomas*, there was no dispute as to whether Thomas' beliefs were religious; all accepted that they were. Finally, *Thomas* should not be afforded too much precedential weight given that it followed the reasoning of *Sherbert* which has now been heavily reinterpreted in *Smith*.

If the analysis in this section is correct, then *Yoder* and *Thomas* cannot be cited as authority against the validity of the Welsh Principle. The expansive definition of religion provided in *Welsh*, which included certain non-religious beliefs, is unaffected by later USSC cases. The next section, however, shows that various circuit courts have cited *Yoder* and *Thomas* to reject the Welsh Principle when interpreting the meaning of religion in constitutional and statutory contexts. As a proper analysis of *Yoder* shows, the approach of those courts is misguided. A better approach, one which conforms to the Welsh Principle, has been endorsed by the Seventh Circuit in *Kaufman*.¹³³ That approach will be analysed after showing the misguided efforts of the other circuit courts.

What is Religion? Two Conflicting and Misguided Approaches from the Courts below the USSC

State and circuit courts have had to rely on the little guidance provided by the USSC in the task of determining whether particular belief-systems should be classified as a religion and hence afforded the right to exemption. In so doing, different state and circuit courts have developed different approaches. Three main approaches can be identified by reviewing the cases. One, adopted by at least four circuit courts,¹³⁴ sets out a list of non-exhaustive criteria the satisfaction of which would lead to the classification of a belief-system as a religion. Another generally refuses to set out any criteria and assumes, without deciding, that a particular belief-system is a religion.¹³⁵ The third

¹³² *ibid* 713–714.

¹³³ *Kaufman v McCaughtry* (2005) 419 F3d 678 (Court of Appeals, 7th Circuit).

¹³⁴ *Africa v. Com. of Pa.* (n 12); *Meyers* (n 12); *Love* (n 12); *Alvarado v. City of San Jose* (n 12).

¹³⁵ *Wells v City and County of Denver* (2001) 257 F 3d 1132 (Court of Appeals, 10th Circuit). *Kalka v Hawk* (2000) 215 F 3d 90 (Court of Appeals, Dist of Columbia Circuit). *Kunselman v Western Reserve Local School Dist* (1995) 70 F 3d 931 (Court of Appeals, 6th Circuit). *In Re Long Term Administrative Segregation* (1999) 174 F 3d 464 (Court of Appeals, 4th Circuit).

follows the Welsh Principle by holding that certain non-religious beliefs are nevertheless to be held as religious for the purposes of the law.¹³⁶

Two cases, *Africa* and *Meyers*, are paradigmatic of the criteria-based approach. The first involved a request, under the Free Exercise Clause (*Africa* was decided prior to *Smith*), for dietary accommodation by Pennsylvania prisoner Frank Africa, a minister of the self-declared religious association MOVE. According to him, the fundamental beliefs of the movement were as follows:

MOVE's goals, he asserted, are "to bring about absolute peace, ... to stop violence altogether, to put a stop to all that is corrupt." Toward this end, Africa and other MOVE adherents are committed to a "natural," "moving," "active," and "generating" way of life.¹³⁷

Africa requested a 'religious diet' entirely consisting of raw foods (mostly plant-based but including some raw animal-based products).¹³⁸

Judge Adams, writing for the Third Circuit, developed the criteria as to what is to be considered a religion.¹³⁹ Three criteria were identified as follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.¹⁴⁰

The Third Circuit held that MOVE, as described by Africa, did not satisfy any of the three criteria. It said that

We conclude first, that to the extent MOVE deals with "ultimate" ideas, a proposition in itself subject to serious doubt, it is concerned with secular matters and not with religious principles; second, that MOVE cannot lay claim to be a comprehensive, multi-faceted theology; and third, that MOVE lacks the defining structural characteristics of a traditional religion.¹⁴¹

¹³⁶ *Kaufman* (n 133); *Center for Inquiry* (n 98); *March for Life v Burwell* (2015) 128 F Supp 3d 116 (US District Court of Columbia).

¹³⁷ *Africa v. Com. of Pa.* (n 12) 1026.

¹³⁸ *ibid* 1027–1028.

¹³⁹ In so doing he was relying on his concurring judgment in *Malnak v Yogi* (1978) 592 F 2d 197 (Court of Appeals, 3rd Circuit).

¹⁴⁰ *Africa v. Com. of Pa.* (n 12) 1032.

¹⁴¹ *ibid* 1036.

It is worth noting that the Third Circuit's analysis was informed by a reasonably detailed consideration of both *Seeger* and *Welsh*. However, and crucially, the Third Circuit relied on the passages in the later *Yoder* decision to the effect that 'to have the protection of the Religion Clauses, the claims must be rooted in religious belief'. The Third Circuit likened Africa's beliefs to those of Thoreau's which the USSC had explicitly qualified as non-religious.¹⁴² However, as analysed in part 2 above, *Yoder* was not a retreat from the Welsh Principle. The Third Circuit failed to adopt the correct reading of *Welsh* which requires asking whether a person's moral or ethical beliefs are sincerely and deeply held and function in his life as a religion. Had the Third Circuit adopted this test, it is doubtful that it would have gone on to develop the three pronged test which MOVE did not satisfy.

In *Meyers* the Africa Test was subjected to further refinements. Meyers claimed that the criminal prohibition of possessing marijuana with intent to distribute violated his right to free exercise of religion under the Federal Constitution and under RFRA. The case involved the founder of the Church of Marijuana, David Meyers, who stated that 'it is his sincere belief that his religion commands him to use, possess, and distribute marijuana for the benefit of mankind and the planet earth'.¹⁴³ The core rite of the 800 members of the Church is to smoke marijuana, the 'persecuted plant of peace', and share joints which results in 'peaceful awareness'. Through the help of 'the miracle medicine' the Church reaches out to cure those that are addicted to hard drugs and alcohol. All members of the Church of Marijuana are Christians but they also adopt as their Bible a text called 'Hemp & the Marijuana Conspiracy: The Emperor Wears No Clothes—The Authoritative Historical Record of the Cannabis Plant, Marijuana Prohibition, & How Hemp Can Still Save the World'. The Church campaigns for the legalisation of Marijuana.¹⁴⁴

Both the District Court and Circuit Court in *Meyers* accepted that Meyer's beliefs were sincerely held. However, they both found that it was not a religion for the purposes of RFRA. In so doing, the District Court set out a list of criteria similar to, but more detailed than, that set in the Africa Test. The Circuit Court adopted the test which has the following five elements:

1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death. (...)
2. Metaphysical Beliefs: Religious beliefs often are "metaphysical," (...)

¹⁴² *ibid* 1034–1035.

¹⁴³ *Meyers* (n 12) 1480.

¹⁴⁴ *Meyers (District Court)* (n 127) 1504–1505.

3. Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is “moral” or “ethical.” (...)

4. Comprehensiveness of Beliefs: Another hallmark of “religious” ideas is that they are comprehensive. (...)

5. Accoutrements of Religion: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is “religious”:

- a. Founder, Prophet, or Teacher (...)
- b. Important Writings (...)
- c. Gathering Places (...)
- d. Keepers of Knowledge (...)
- e. Ceremonies and Rituals (...)
- f. Structure or Organization (...)
- g. Holidays (...)
- h. Diet or Fasting (...)
- i. Appearance and Clothing (...)
- j. Propagation (...).¹⁴⁵

The District Court’s reasons for finding that Meyer’s beliefs did not constitute a religion were entirely endorsed by the Circuit Court.¹⁴⁶ The District Court held that Meyers hardly satisfied any of the above criteria. It only satisfied the third criteria in a minimal way, by having the ‘laudable goal’ of helping fighting addiction to alcohol and more serious drugs. However, it found that that singular ethical injunction could not constitute ‘an ethical code or moral system’.¹⁴⁷ The Church also had ‘few of the “externalities” that help to identify a set of beliefs as “religious.”’¹⁴⁸

In formulating the five pronged test, the District Court recounted the USSC’s jurisprudence in *Seeger* and *Welsh* and the Welsh Principle therein established but interpreted the ruling in *Yoder* as implying that that principle was ‘dead’ on the basis of the Thoreau example.¹⁴⁹ The Circuit Court also relied on *Yoder* and *Africa* for the proposition that ‘[p]urely personal, political, ideological, or secular beliefs probably would not satisfy enough criteria [of the five pronged test] for inclusion’.¹⁵⁰ A variety of other courts are now relying on *Yoder* for the same proposition of law.¹⁵¹ However, as now

¹⁴⁵ *ibid* 1843–1844.

¹⁴⁶ *Meyers* (n 12) 1484.

¹⁴⁷ *Meyers (District Court)* (n 127) 1505.

¹⁴⁸ *ibid* 1506.

¹⁴⁹ *ibid* 1500.

¹⁵⁰ *Meyers* (n 12) 1484.

¹⁵¹ *Friedman v Southern Cal Permanente Med* (2002) 125 Cal Rptr 2d 663 (California Court of Appeal) 673–674; 680. See also *Farina v Board of Educ of City of New York* (2000) 116 F Supp 2d 503 (Dist Court) 507 where the NY District Court stated, in the context of a statutory exemption for vaccination, that :

noted at various points, *Yoder* does not move away from the Welsh Principle which protects sincerely and deeply held moral or ethical views which function in the life of a person as a religion (i.e. non-religious conscientious beliefs).

The development of the Africa Test and the Meyers Test contrasts with the approach adopted by other circuit and state courts which have explicitly disavowed any list of criteria for classifying a belief system as a religion.¹⁵² In fact, they disavow as much as possible the whole enterprise of classifying any belief system as a religion or non-religion. The dissenting opinion of Judge Brorby in *Meyers* sets out the rationale of this conflicting approach. He summarises it succinctly thus: ‘The ability to define religion is the power to deny freedom of religion’.¹⁵³ The judge analysed some of the USSC’s jurisprudence to defend this approach. In *Thomas*, for example, the USSC had stated:

The determination of what is a “religious” belief or practice is more often than not a difficult and delicate task (...). However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.¹⁵⁴

By classifying a belief-system as religious based on its resemblance to conventional religions the Africa Test and the Meyers Test seem to contradict this clear injunction by the USSC in *Thomas*. They appear to be concerned that too inclusive a definition of religion would give licence to anyone stating that his beliefs are ‘religious’ to benefit from the special privileges afforded to religion.¹⁵⁵ However, this worry is misconceived. First, not everyone asserting that his beliefs are religious is in

Because the statutory exception of § 2164(9) is for persons whose opposition to immunizations stems from genuine and sincere “religious” beliefs, it does not extend to persons whose views are founded upon, for instance, “medical or purely moral considerations,” *Sherr v. Northport–East Northport Union Free School Dist.*, 672 F.Supp. 81,92 (E.D.N.Y.1987), “scientific and secular theories,” or “philosophical and personal” beliefs. See *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47, 51–52 (2d Cir.1988). Thus, the Court must first determine whether plaintiffs’ purported beliefs are religious, and only if they are, determine whether those beliefs are genuinely and sincerely held.

¹⁵² See n 135.

¹⁵³ *Meyers* (n 12) 1489.

¹⁵⁴ *Thomas* (n 85) 714.

¹⁵⁵ *Yoder* (n 18) 215–216; *Meyers (District Court)* (n 127) 1501; *Africa v. Com. of Pa.* (n 12) 1031.

fact sincere. If insincere, he can rightly be excluded from the benefit.¹⁵⁶ Secondly, as Judge Brorby observed in his dissent, convincing a court that a particular belief-system is a religion is not in itself sufficient to override important societal interests. Under RFRA and RLUIPA, for example, the claimant still has to show that his religious beliefs have been substantially burdened. Furthermore, government may still succeed if it can show that the burden is the least restrictive means to further a compelling interest. In *Meyers*, Judge Brorby was sure that the government would have 'no problem meeting its burden of proof'.¹⁵⁷

While the above analysis is more sympathetic towards Judge Brorby's approach, it should not be thought that that approach (call it the 'No Definition Approach') is compatible with the Welsh Principle. It is not. The No Definition Approach still requires the person to sincerely self-identify as a religious believer. In *Welsh*, the claimant did not identify as religious but still benefited from the exemption. In fact Welsh crossed out the part of his application for conscientious objector status declaring that his objection was motivated by religious training and belief.¹⁵⁸ Yet, he was motivated by a sincerely and deeply held at least partially ethical or moral belief which functioned as a religion in his life. It was on this basis that he enjoyed the exemption and not on the basis that he identified as religious. Indeed, the USSC in *Welsh* explicitly held:

The Court's statement in *Seeger* that a registrant's characterization of his own belief as 'religious' should carry great weight, 380 U.S., at 184, 85 S.Ct., at 863, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are 'religious,' that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word 'religious' as used in s 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.¹⁵⁹

This suggests that a self-declaration that a particular belief is religious or non-religious is not dispositive under the Welsh Principle. If an objector claims that his beliefs are religious that declaration is highly relevant, but not dispositive, as to how those beliefs function in his life.

¹⁵⁶ *Seeger* (n 102) 185. For application in the context of a fake church set up for the purpose of selling drugs while benefitting from the privilege granted to religion see *US v Quaintance* (2010) 608 F 3d 717 (Court of Appeals, 10th Circuit).

¹⁵⁷ *Meyers* (n 12) 1492.

¹⁵⁸ *Welsh* (n 96) 341.

¹⁵⁹ *ibid.*

Similarly, given the broad definition of religion in *Welsh*, individuals cannot be expected to know that the beliefs which they profess to be non-religious actually fall within the legal definition of that term. Hence, their declaration that their beliefs are not religious is not dispositive. Courts ought to investigate whether their beliefs are sincerely and deeply held, whether they are at least partially moral or ethical and whether those beliefs function as a religion in their lives. It follows that the No Definition Approach still falls short of the requirements of the Welsh Principle.

Atheism as a 'Religion': Kaufman

This chapter has criticised the two approaches followed by several circuit courts which have departed from the Welsh Principle. A third approach compatible with that principle has however been endorsed by the Seventh Circuit in *Kaufman*, where the Court, relying on *Welsh*, held that atheism was to be considered a religion for legal purposes.¹⁶⁰ The issue in the case was a claim by a prisoner that the Religion Clauses had been violated by prison authorities when he was denied permission to start a study group for atheist inmates. The prison officials concluded that the request was not motivated by religious beliefs and denied his request. The Seventh Circuit unanimously held that, Judge Wood delivering the Court's opinion, the prison officials had erred to view Kaufman's beliefs as non-religious. Given that his views were religious, the prison authorities had violated the Establishment Clause which prohibits government from favouring one religion over another. In reaching that conclusion, the Seventh Circuit relied, among other precedents, on both *Seeger* and *Welsh*. It said:

Without venturing too far into the realm of the philosophical, we have suggested in the past that when a person sincerely holds beliefs dealing with issues of "ultimate concern" that for her occupy a "place parallel to that filled by ... God in traditionally religious persons," those beliefs represent her religion. *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 688 n. 5 (7th Cir.1994) (...); see also *Welsh v. United States*(...); *United States v. Seeger*(...). We have already indicated that atheism may be considered, in this specialized sense, a religion. See *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir.2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion."). Kaufman claims that his atheist beliefs play a central role in his life, and the defendants do not dispute that his beliefs are deeply and sincerely held.¹⁶¹

¹⁶⁰ *Kaufman* (n 133).

¹⁶¹ *ibid* 681–682.

It seems clear from the above portion of the Court's judgment that Kaufman's atheism was considered to be a religion by applying the principles set out in *Welsh*. It was clear that Kaufman's atheistic beliefs were sincerely and deeply held. They were also at least partially moral or ethical in content. For example, they influenced the way he related to traditional religious 'beliefs, creeds, dogmas, tenets, rituals, and practices'. Finally, he claimed, and the Court accepted, that his atheistic beliefs played a central role in his life. It is clear that this role functioned as a religion in his life. Just like other prisoners with traditional religious beliefs wanted to seek out others with their same belief system, he too wanted to form a like-minded group in prison.

While the idea that atheism is a religion sounds paradoxical (in English 'atheism' is a common antonym for 'religion'), that conclusion naturally follows from the wide definition of religion given in *Welsh* and followed by the Seventh Circuit. While other circuit courts following the No Definition Approach or the Africa and Meyers Tests may be able to escape the apparent paradox, in so doing they fall short of following the precedent set by the USSC. Furthermore, as argued in part 4 of this chapter, their approaches raise deep constitutional problems, in particular with the Establishment Clause. As will be shown, the Seventh Circuit has, in *Center for Inquiry*,¹⁶² been able to totally circumvent these constitutional worries. This provides a compelling reason not to be concerned about the apparent paradoxical linguistic consequences of being faithful to the Welsh Principle.

4. The Establishment Clause Argument

This part provides a second argument why certain non-religious beliefs are entitled to the benefit of the general right. The argument, in sum, is that it would violate the Establishment Clause to construe the general right to be a privilege of religious objectors only. As will be explored, the Establishment Clause commands that 'government should not prefer one religion to another, or religion to irreligion'.¹⁶³ It follows that, it is argued, just as the benefit of the general right cannot be confined to one religion over another, it equally cannot be confined to objectors motivated by religious beliefs only. Objectors, like *Welsh*, who object on the basis of non-religious conscientious beliefs are equally entitled to the benefit of the general right. In order to avoid unconstitutionality, the grounds of the

¹⁶² *Center for Inquiry* (n 98).

¹⁶³ *Board of Ed of Kiryas Joel Village School Dist v Grumet* (1994) 512 US 687 (USSC) 703–705.

general right ought to be interpreted to include certain non-religious beliefs. One straightforward possibility is to interpret reference to 'religion' in accordance with the Welsh Principle.

It is important to emphasise that although the arguments of part 3 and of this part lead to the same result, i.e. 'religion' should be interpreted in accordance with the Welsh Principle, the routes are different. The argument of part 3 relied on *Welsh* as a precedent for the interpretation of a legal term, i.e. 'religion'. By contrast this part relies on the principle that US law cannot violate the US Constitution and that courts should seek to avoid such violations through interpretative means. Furthermore, the argument in this part is wider. While *Welsh*, as a precedent, most strongly bites on the interpretation of the statutory grounds of the general right, the constitutional argument here advanced applies to all rules of law which ground the right, with the exception of the fifth ground, i.e. the doctrine of Church Autonomy. That ground will be considered on its own in part 5 of this chapter.

This part investigates the strength of the Establishment Clause argument mainly by looking at cases where statutory exemptions were reserved as privileges of religious objectors. Analysis of these cases reveals that the Establishment Clause argument rests on solid USSC precedent. However, some caveats will have to be accepted based on the two cases of *Amos*¹⁶⁴ and *Cutter*.¹⁶⁵ Nevertheless, the strength of the Establishment Clause argument is such that this part concludes that it militates in favour of construing almost all of the grounds of the general right to include conscientious non-religious beliefs. The cases are analysed in chronological order.

Walz

The main issue in *Walz*¹⁶⁶ was whether it was permissible under the Establishment Clause to make available to religious organizations the following statutory tax exemption for religious properties used solely for religious worship:

Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes

¹⁶⁴ *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos* (1987) 483 US 327 (USSC).

¹⁶⁵ *Cutter v Wilkinson* (2005) 544 US 709 (USSC).

¹⁶⁶ *Walz v Tax Comm'n of City of New York* (1970) 397 US 664 (USSC).

and used exclusively for carrying out thereupon one or more of such purposes shall be exempt from taxation as provided in this section.¹⁶⁷

Chief Justice Burger, writing for the majority (Justice Douglas dissenting), held that it did not violate the Establishment Clause to make the statutory exemption available to religious properties used solely for religious worship. In reaching that conclusion he reflected on the possible conflict between the two Religion Clauses if both were expanded to a logical extreme. However, he concluded:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.¹⁶⁸

He found that the statute had not exceeded the 'play in the joints' afforded by the Religion Clauses. Crucial in reaching that determination was the fact that not only religious organisations benefited from the statutory exemption. He said:

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion (...). It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.¹⁶⁹

While the outcome of the case was influenced by other principles,¹⁷⁰ it bears noting that the fact that the statute did not confer on religious organisation a privilege denied to other non-religious institutions was crucial. It is therefore surprising that the dissenting judgment of Justice Douglas was of the view that the statute violated the Establishment Clause on the basis that the exemption drew a dividing line between believers, who were exempt, and non-believers, who were presumably not.

¹⁶⁷ 420, subd. 1, of the New York Real Property Tax Law, McKinney's Consol.Laws, c. 50 as quoted in *ibid* footnote 1.

¹⁶⁸ *ibid* 669.

¹⁶⁹ *ibid* 672–673.

¹⁷⁰ The Court held, for example, that 'The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other'. *ibid* 676.

Citing *Torcaso*, he held that the statute violated the principle that '[n]either the State nor the Federal Government (...) "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"'.¹⁷¹ Not only is the reasoning of the dissenting judgment doubtful in view of the reasoning of the majority, it also flies in the face of the text of the statutory exemption which does not only exempt churches and secular corporations like libraries and hospitals but, more broadly, 'a corporation or association organized exclusively for the moral or mental improvement of men and women'. It is not clear why certain organised groups of non-believers dedicated to advancing secular moral purposes could not, given the statutory text, benefit from the exemption.

One should conclude, then, that *Walz* is authority for the proposition that exemptions granted to religious organisations do not violate the Establishment Clause as long as those exemptions are also available to other non-religious entities. We shall see that subsequent USSC reinforce this proposition.

Caldor

In *Caldor* the USSC struck down, on Establishment grounds, a Connecticut statute which provided Sabbatarians with an absolute and unqualified right not to work on their Sabbath.¹⁷² To be sure, the majority judgment reached the conclusion on unconstitutionality on the standard (although now contested) test under the Establishment Clause, i.e. the Lemon Test as set out in *Lemon v Kurtzman*.¹⁷³ In *Lemon* the USSC declared unconstitutional financial assistance given to religious schools of non-religious activities on the basis that the assistance involved excessive entanglement of government with religion. The Lemon Test says that to 'pass constitutional muster under Lemon a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion'.¹⁷⁴ In *Caldor*, the USSC held that the statute failed the test as its primary purpose was to advance religion by giving an absolute right to observe the Sabbath without taking into account the interests of the 'employer or those of other employees who do not observe a Sabbath'.¹⁷⁵

¹⁷¹ *ibid* 700–701.

¹⁷² *Estate of Thornton v Caldor, Inc* (1985) 472 US 703 (USSC).

¹⁷³ *Lemon v Kurtzman* (1971) 403 US 602 (USSC).

¹⁷⁴ *Caldor* (n 172) 708.

¹⁷⁵ *ibid* 709.

The concurring judgment of Justice O'Connor, joined by Justice Marshall, reached the same conclusion but on a different basis which gives greater credence to the Establishment Clause argument pursued in this part of the chapter. The Justice stated that

The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection *without according similar accommodation to ethical and religious beliefs and practices of other private employees*. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme [as advancing religion].¹⁷⁶

Justice O'Connor's point here is that, in order to pass Establishment scrutiny, the statute should have expanded its scope of protection beyond only a particular religious belief (i.e. observing the Sabbath) to include, not only other religious beliefs, but also some ethical beliefs. The Justice did not, however, explain what ethical beliefs would need to be included. However, there is some scope to argue that the at least ethical beliefs recognised under the Welsh Principle should be included, i.e. sincerely and deeply held non-religious beliefs, which are at least partially moral or ethical in content, and which function as a religion in the lives of a person.

Amos: A Caveat to the Establishment Clause Argument?

Walz and the concurring judgment in *Caldor* both support the argument that it violates the Establishment Clause to reserve the general right to conscientious exemption to religious objectors alone. However, as acknowledged at several points, this argument cannot apply to the fifth ground of the general right, i.e. the constitutional doctrine of Church Autonomy. This is because a doctrine required by the constitution cannot at the same time violate it. *Amos*¹⁷⁷ lends further credence to the limitation of the Establishment Clause argument. In that case, the USSC scrutinised the compatibility of Section 702 of the Civil Rights Act of 1964 with the Establishment Clause. This section exempted religious employers from Title VII's prohibition of employment discrimination on the basis of religion. Its text, at the time of the decision, read:

This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected

¹⁷⁶ *ibid* 711 (emphasis added).

¹⁷⁷ *Amos* (n 164).

with the carrying on by such corporation, association, educational institution, or society of its activities.¹⁷⁸

An amendment to the section had deleted the earlier requirement that the discrimination, to be permissible, had to be in respect of the performance by the employee of work connected to the employer's religious activities.¹⁷⁹ Mayson, who had been employed as an engineer at a non-profit gym, open to the public and run by the Mormon Church, was discharged because he failed to qualify for a certificate that he was a member of the Church. He argued that the exemption would violate the Establishment Clause if construed to allow religious employers to discriminate on religious grounds in hiring for non-religious jobs. The USSC upheld the constitutionality of the exemption as applied to the non-profit activities of religious employers.¹⁸⁰

On its face, *Amos* may be relied upon for the principle that wide-ranging exemptions may be granted to religious institutions without those exemptions being granted to non-religious institutions. In fact, in *Cutter*, to be analysed in more depth below, the USSC relied on *Amos* for the proposition that '[r]eligious accommodations, we held, need not "come packaged with benefits to secular entities." [Amos, at 338]'. It is very doubtful that such reliance on *Amos* for this proposition was appropriate. First, section 702 did not grant the exemption from Title VII's duty of non-discrimination to religious employers only. It also granted, and still grants, the exemption to any 'employer with respect to the employment of aliens outside any State'. So, on its face, the statutory accommodation came packaged with benefits available also to secular entities.

The second reason why reliance on *Amos* for allowing religious privilege in exemptions is misplaced is that the proposition in *Cutter* is out of context. The full passage from *Amos* partly quoted by the USSC in *Cutter* runs, 'Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes

¹⁷⁸ Pub.L. 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.

¹⁷⁹ The previous version provided:

'This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution' (Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255).

¹⁸⁰ *Amos* (n 164) 339.

packaged with benefits to secular entities'.¹⁸¹ The proper meaning of this passage is as follows: government does not violate the Establishment Clause if it is granting an exemption addressed only to religious entities in order to alleviate a constitutional concern, in this case preserving Church Autonomy. The USSC in fact concluded:

it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.¹⁸²

The Court continued by insisting that the measure could not be faulted under the Establishment Clause, in particular as understood under the third part of Lemon Test (i.e. no impermissible entanglements between Church and State), because it was in furtherance of 'a more complete separation of the two'.¹⁸³

So *Amos*, when properly analysed, is no challenge to the view that exemptions cannot be reserved as a privilege for religious objectors alone. Indeed, the exemption at play was not only reserved to religious employers but was also available to a wide range of religious and non-religious employers, albeit in a more restricted context (extra-territorial employment of aliens). Also, while the benefit granted to religious organisations was admittedly more generous than that of other employers (because the exemption was available for them both territorially and extra-territorially), this was motivated by other constitutional concerns, in particular the doctrine of Church Autonomy.

So *Amos* is at most a qualification to the view that exemptions cannot be reserved as a privilege of religious objectors alone: if the Constitution mandates exemptions specific to religious believers, such exemptions, if granted only to religious believers, cannot be held to violate the Establishment Clause. We know, thanks to *Smith*, that RFRA, RLUIPA, and Title VII (and their state counter-parts) are not exemptions mandated by the Free Exercise Clause. However, the same cannot be said to apply to the ministerial exception and the immunities from private law doctrines that constitute the fifth rule of law of the general right to conscientious exemption. However, as will be considered in part 5, the doctrine of Church Autonomy is a manifestation of a broader freedom to expressive

¹⁸¹ *ibid* 338.

¹⁸² *ibid* 335–336.

¹⁸³ *ibid* 339.

associations which non-religious institutions also benefit from. As will be shown by reference to, for example *Boy Scouts*,¹⁸⁴ non-religious expressive associations are equally exempt in certain circumstances from the prohibition of discrimination in the selection and retention of their members.

Texas Monthly

So far *Walz* and the concurring judgment in *Caldor* strongly militate in favour of the view that the general right cannot be viewed as a privilege of religious objectors only as that would involve a violation of the Establishment Clause. We have seen that *Amos* qualifies this view. Another USSC case that reinforces the Establishment Clause argument is *Texas Monthly*,¹⁸⁵ a case where the Court held that a Texas statute which granted a tax exemption only to religious periodicals violated the Establishment Clause. The statute violated the Lemon Test because its primary purpose was to promote religion by refusing to extend the exemption to non-religious publications. The plurality opinion (by Justices Brennan, Marshall and Stevens) stated, explicitly citing *Welsh* and the concurring judgment in *Caldor*, that

Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with *similar benefits for nonreligious publications or groups*, and because it effectively endorses religious belief, the exemption manifestly fails this test.¹⁸⁶

Justice Blackmun and Justice O'Connor delivered a concurring opinion finding a violation of the Establishment Clause on similar grounds.

At oral argument, appellees suggested that the statute at issue here exempted from taxation the sale of atheistic literature distributed by an atheistic organization. (...) *If true, this statute might survive Establishment Clause scrutiny* (...). But, as appellees were quick to concede at argument, the record contains nothing to support this facially implausible interpretation of the statute. (...) Thus, constrained to construe this Texas statute as exempting religious literature alone, I concur in the holding that it contravenes the Establishment Clause.¹⁸⁷

Justice Scalia, joined by the Chief Justice and Justice Kennedy, penned a very strong dissent. In footnotes 2 and 3 of his judgment, he provided a very long list of tax exemptions granted, in his

¹⁸⁴ *Dale* (n 100).

¹⁸⁵ *Texas Monthly, Inc v Bullock* (1989) 489 US 1 (USSC).

¹⁸⁶ *ibid* 16–17.

¹⁸⁷ *ibid* 29.

view, only to religious activities. Relying on *Walz* he opined that such exemptions granted only to religious activities were compatible with the Establishment Clause.¹⁸⁸ Furthermore, and ironically in light of his judgment a year later in *Smith*, he relied on the line of cases starting with *Sherbert* for the proposition that the Free Exercise Clause may actually mandate exemptions for religious activities.¹⁸⁹ Given *Smith*, it is clear that this part of Scalia's dissent is no longer tenable because in *Smith* Scalia himself rejected the proposition that the Free Exercise Clause mandates conscientious exemptions, but accepted that it may permit them. Furthermore, his reliance on *Walz* was clearly misplaced as in that case, as explained, the exemption granted to religious properties formed part, as recognised by the USSC in *Walz*, of a larger scheme of exemptions granted to non-religious properties, including 'property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups'.¹⁹⁰

Despite Scalia's protest to the contrary, *Texas Monthly* therefore continues to stand for the proposition of law that statutory exemptions granted only to religious activities may violate the Establishment Clause unless the exemptions are extended to non-religious activities. Such constitutional infirmity may be cured by interpreting the meaning of 'religion' in line with the Welsh Principle.

Grumet

In *Grumet* the USSC was not strictly concerned with a statutory exemption but with a statute which accommodated the special religious requirements of a Jewish community to live in isolation. The USSC declared unconstitutional on Establishment Clause grounds the statute that carved out a separate district that followed village lines of the community. It here explicitly followed the approach in *Walz* and *Texas Monthly* that the benefit conferred on the religious sect was unconstitutional because 'government should not prefer one religion to another, or religion to irreligion', so that the benefit should in principle be available to non-religious entities as well.¹⁹¹

Justice O'Connor, writing a concurring opinion, reinforced the Court's analysis by relying explicitly on the Welsh Principle. She stated:

What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is

¹⁸⁸ *ibid* 31–32.

¹⁸⁹ *ibid* 38–39.

¹⁹⁰ *Walz* (n 166) 673.

¹⁹¹ *Grumet* (n 163) 703–705.

accommodating a deeply held belief. Accommodations (...) do not justify discriminations based on sect.(...) A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief. See *Welsh* (...).¹⁹²

Grumet may therefore be used as authority for the proposition that the Welsh Principle can be applied to prevent a possible violation of the Establishment Clause not only in the context of statutory exemptions but also in the context of statutes providing special accommodations which are not technically exemptions.

Boerne

Boerne provides the occasion for preliminary reflection on whether the Establishment Clause argument applies to the rules of law which it has been argued give rise to a general right to conscientious exemption. As discussed above from page 26, the majority found that RFRA was unconstitutional as applied to state law. However, the concurring judgment of Justice Stevens provides high judicial authority for the view that RFRA may violate the Establishment Clause unless interpreted in accordance with the Welsh Principle. Justice Stevens's very short concurring judgment is reproduced in full:

In my opinion, [RFRA] is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. *Wallace v. Jaffree*, 472 U. S. 38, 52–55 (1985).¹⁹³

While this reasoning just confirms the line of cases considered until now, it fails to address the possibility of the Welsh Principle curing the potential unconstitutionality of RFRA and, given the similarities between the two, RLUIPA. Both RFRA and RLUIPA apply the compelling interest test to the 'exercise of religion'. This is defined in both statutes as 'any exercise of religion, whether or not

¹⁹² *ibid* 715–716.

¹⁹³ *Boerne* (n 40) 536–537.

compelled by, or central to, a system of religious belief'.¹⁹⁴ If Justice Stevens is to be believed, atheists or agnostics do not benefit from RFRA or RLUIPA's protection. This is, however, strongly debatable. For if 'religion' can be interpreted, as in *Welsh* and *Kaufman*, to include sincerely and deeply held non-religious beliefs, which are at least partially moral or ethical in content, and which function in the life of a person as a religion, then it becomes clear that some atheists and agnostics may benefit from RFRA's and RLUIPA's protections. In any event, Justice Stevens's concurring opinion is not binding as to how religion ought to be interpreted in the context of the rules of law that give rise to the general right to exemption. It did not address the question of interpretation of religion and is, in any event, only a concurring judgment. It is however very illustrative of the severe Establishment problems that may arise should the rules of law be interpreted to be available only for religious objections.

Cutter: Undermining the Establishment Clause Argument?

Cutter provides the occasion to analyse whether the Establishment Clause argument might apply to RLUIPA. While it raises some serious doubts, on closer look there are strong reasons to ultimately downplay these doubts. Prisoners who belonged to bona fide non-conventional religions (the Satanist, Wicca, Asatru, and the Church of Jesus Christ Christian) challenged the restrictions imposed on the exercise of their religions by prison officials on the basis of RLUIPA (§ 2000cc-1 US Code). Some of the restrictions included denying them access to religious literature and opportunities for group worship, or forbidding them from adhering to the dress and appearance mandates of their religions. RLUIPA requires the compelling interest test in the context of restrictions to the free exercise of religion of a 'person residing in or confined to an institution' (usually prisons but also mental hospitals). The prison officials challenged, on Establishment grounds, the constitutionality of this section wishing not to have to justify the restrictions imposed on the prisoners under the standard required by RLUIPA. The USSC unanimously held that this section was facially constitutional, but it remains possible that its application to specific facts might produce unconstitutional results.¹⁹⁵ On its face then, it appears that the Establishment Clause argument cannot apply to RLUIPA and hence that there is no constitutional infirmity in the statute to be cured by the Welsh Principle.

The doubts raised by *Cutter* become even more serious when one reads the judgment of the Sixth Circuit which the USSC reversed. The Sixth Circuit declared that the section violated the

¹⁹⁴ 42 U.S.C.A. § 2000cc-5(7)(A) (RLUIPA). RFRA refers to this definition 42 U.S.C.A. § 2000bb-2(4) (RFRA).

¹⁹⁵ *Cutter v. Wilkinson* (n 165) 715.

Establishment Clause after applying the Lemon Test.¹⁹⁶ In its view the section had the primary effect of advancing religion. This was on the basis of two findings. First, it found that the section advanced religion ‘by giving greater protection to religious rights than to other constitutionally protected rights’. In fact, prior to the section coming into effect, prisoners that complained about violations of their fundamental rights (e.g. speech, marriage, religion, etc.) by prison authorities had their claim scrutinised under a test, the rational-relationship review test, which was fairly deferential to the prison authorities.¹⁹⁷ However, since the section came into force, the compelling-interest test was introduced only in relation to the free exercise of religion and not in relation to the other rights. There was, the Sixth Circuit found, no evidence that the free exercise of religion of prisoners was any more in danger of being inappropriately curtailed than other fundamental rights.¹⁹⁸

The Sixth Circuit also adduced a second reason why the section should be viewed as advancing religion. The Sixth Circuit stated that the section had the effect of encouraging prisoners ‘to adopt or feign religious beliefs’ in order to enjoy greater rights. It gave the following example:

Assume (...) that a prison official confiscates white supremacist literature held by two different inmates. One inmate is a member of the Aryan Nation solely because of his fanatical belief that a secret Jewish conspiracy exists to control the world. The second inmate holds the white supremacist literature because he is a member of the Church of Jesus Christ Christian, Aryan Nation (“CJCC”). (...) The non-religious inmate may challenge the confiscation as a violation of his rights to free expression and free association. A court would evaluate these claims under the deferential rational relationship test in *Turner* (...) with correspondingly dim prospects of success. However, the religious inmate, as a member of the CJCC, may assert a RLUIPA claim. (...) The religious white supremacist now has a much better chance of success than the non-religious white supremacist (...) The difference in the level of protection provided to each claim lies not in the relative merits of the claims, but lies instead in the basis of one’s claim in religious belief.¹⁹⁹

¹⁹⁶ *Cutter v Wilkinson* (2003) 349 F 3d 257 (Court of Appeals, 6th Circuit) 264.

¹⁹⁷ The rational-relationship review test under *Turner v Safley* (1987) 482 US 78 (USSC). requires courts to consider: (1) whether there is a ‘valid, rational connection’ between the prison regulation and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation.

¹⁹⁸ *Cutter (6th Circuit)* (n 196) 264–266.

¹⁹⁹ *ibid* 266–267.

The USSC did not accept the reasoning of the Sixth Circuit and, referring to *Amos*, said: ‘Religious accommodations, we held, need not “come packaged with benefits to secular entities.” [Amos], at 338’.²⁰⁰ It also stated that, had the Sixth Court’s reasoning been correct, other religious accommodations provided by the prison authorities would need to be found unconstitutional. It said that Ohio ‘provides inmates with chaplains but not with publicists or political consultants, and allows prisoners to assemble for worship, but not for political rallies’.²⁰¹ The USSC appears then to have rejected the idea that exemptions cannot be reserved to religious objectors alone by negating the need for exemptions to be granted to religious and non-religious people in order to survive the Establishment Clause.

There are however strong reasons to reject the view that, following *Cutter*, the Establishment Clause argument is no longer valid either generally or in relation to RLUIPA. First, as explained above, the decision in *Amos* was at most a qualification of the view that exemptions cannot be a privilege of religious believers alone: if the Constitution mandates exemptions specific to religious believers (e.g. under the constitutional doctrine of Church Autonomy), such exemptions, if granted only to religious believers, cannot be held to violate the Establishment Clause. In *Cutter* there was no reason to think the section was mandated by the Constitution. Following *Smith*, there is strong authority that the section was not mandated by the Free Exercise Clause as the Clause can no longer be read to provide a right to exemption from generally applicable legal requirements. There was also no issue of Church Autonomy raised in the case as was the case in *Amos*. It seems then that the reliance on *Amos* was misplaced.

Despite the misplaced reliance, the precedential force of a unanimous decision of the USSC cannot be ignored. If *Cutter* cannot be reconciled with the wealth of previous cases setting out the Establishment Clause Argument (none of which *Cutter* overruled) then *Cutter* must be a further qualification to that which should be confined to its specific setting. *Cutter* may then be used as authority for the following proposition: in settings in which the government exerts a degree of control unparalleled in civilian society (such as prisons, mental hospitals and perhaps the army), government may legitimately alleviate its restrictions on religious freedom by granting exemptions available to religious believers without violating the Establishment Clause (the ‘Cutter Exception’).

But does the Cutter Exception now entail that RLUIPA no longer needs to address the concern that the Establishment Clause prohibits exemptions being a privilege of religious believers only? There are good reasons to answer no. First, only § 2000cc–1 was under scrutiny in *Cutter*. On the other

²⁰⁰ *ibid* 724.

²⁰¹ *Cutter v. Wilkinson* (n 113) 274–275 quotations omitted.

hand, § 2000cc, which requires the compelling interest test for religious exercise in relation to land use, was not under consideration. There is no reason to think that the Cutter Exception should apply in the context of general land use where the government does not exert a degree of control unparalleled in civilian society. In fact, there is reason to reach the opposite view. Recall the concurring judgment of Justice Stevens in *Boerne*. In that case he held that RFRA was unconstitutional because the benefits it grants to religious believers in land use are not available to atheists or agnostics. Religious freedom in land use is now regulated by § 2000cc and, if Justice Stevens was correct, it is potentially unconstitutional because its benefits are only available to religious believers.²⁰² As argued earlier, however, Justice Stevens did not consider the application of the Welsh Principle curing the potential unconstitutionality of RFRA. Consequently, the Establishment Clause argument is still applicable to § 2000cc and the section may be cured by the Welsh Principle.

Also, and importantly, consider the possibility that the white supremacist prisoners example put forward by the Sixth Circuit leaves open the possibility that in a particular set of facts § 2000cc–1 may still be held to be unconstitutional on Establishment Clause grounds. *Cutter* was only a facial challenge not a fact-specific one. In fact, the example pitted the right to free exercise of religion (under RLUIPA) of a religious white supremacist against the free speech and free association rights of a non-religious white supremacist prisoner. The Sixth Circuit did not try to argue that the latter white supremacist should, despite his self-characterisation as non-religious, still be held to hold ‘religious beliefs’ in the *Welsh* sense (i.e. he sincerely and deeply believed in the ethical and moral values of white supremacy and his white supremacy beliefs functioned as a religion in his life). We have seen that, when considering the case of prisoner Kaufman,²⁰³ the Seventh Circuit held that a prisoner may claim that prison authorities are interfering with his right to free exercise of religion even when his ‘religion’ is atheism. Similarly, it is plausible to argue that a prisoner could claim that white supremacy is his ‘religion’ in the *Welsh* sense and hence be entitled to the same standard of review as a member of the Church of Jesus Christ Christian, Aryan Nation. These specific facts would require the USSC to directly address any problem under the Establishment Clause of treating differently these two white supremacists and to accept or reject the Welsh Principle. Neither the facts of the case (the parties accepted that the prisoners were all members of bona fide religion) nor the hypothetical example of the Sixth Circuit raised this issue. So *Cutter* still leaves quite open the possibility that the definition of religion under RLUIPA could embrace certain non-religious beliefs

²⁰² *Boerne* (n 40) 536–537.

²⁰³ *Kaufman* (n 133).

which, if they satisfy the criteria set out in *Welsh*, should nevertheless be considered ‘religious’ for legal purposes.

Center for Inquiry: Endorsing the Establishment Clause Argument and Applying the Welsh Principle

The USSC cases considered in this part, with the exception of *Amos* and *Cutter*, strongly suggest that exemptions which are construed to be available to religious objectors alone would violate the Establishment Clause. In order to avoid such unconstitutionality, exemptions should be interpreted in accordance with the Welsh Principle. This reasoning has been recently endorsed by the Seventh Circuit in *Center for Inquiry*.

The issue in the case concerned the statutory injunction in the Indiana Code § 31–11–6–1 that marriages could only be performed by entities listed in the Code. The first entity was ‘(1) A member of the clergy of a religious organization (...), such as a minister of the gospel, a priest, a bishop, an archbishop, or a rabbi’. The list continued by adding the following secular entities: ‘(2) A judge. (3) A mayor, within the mayor’s county. (4) A clerk or a clerk-treasurer of a city or town (...). (5) A clerk of the circuit court’. The list carried on by allowing certain religious institutions which do not have a clergy to perform marriages. These were ‘(6) The Friends Church (...). (7) The German Baptists (...). (8) The Bahai faith (...). (9) The Church of Jesus Christ of Latter Day Saints (...). (10) An imam of a masjid (mosque (...))’. Humanists were not included in the list.

Suit was brought against the statute by the Center for Inquiry, which the Circuit Court referred to as a

nonprofit corporation that describes itself as a humanist group that promotes ethical living without belief in a deity. The Center seeks to show, among other things, that it is possible to have strong ethical values based on critical reason and scientific inquiry rather than theism and faith. The Center maintains that its methods and values play the same role in its members’ lives as religious methods and values play in the lives of adherents.²⁰⁴

However, and importantly, it was not willing to classify itself as a religious organisation in order to enable its ‘secular celebrants’ to solemnise humanist weddings.²⁰⁵ It argued that the statute violated the First Amendment by giving some religions a privileged role. Judge Easterbrook, delivering the Court’s unanimous opinion, held that the statute violated the principle of neutrality in the First

²⁰⁴ *Center for Inquiry* (n 98) 871.

²⁰⁵ *ibid.*

Amendment 'under which states cannot favor (or disfavor) religion vis-à-vis comparable secular belief systems'.²⁰⁶ Even though the District Court did not specify under which of the two Religion Clauses this principle of neutrality comes from, it is clear that it is well established in the Establishment Clause as formulated, for example, in *Grumet* that 'government should not prefer one religion to another, or religion to irreligion'.²⁰⁷

The Seventh Circuit cited some of the USSC decisions already analysed to reach its conclusion, including, *Grumet*, *Welsh*, *Seeger* and also its own earlier decision in *Kaufman*. It said:

(...) humanists are situated similarly to religions in everything except belief in a deity (and especially close to those religious that lack deities). An accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation. Neutrality is essential to the validity of an accommodation. See *Kiryas Joel Village School District v. Grumet*, (...)

The Supreme Court also has forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives. See, e.g., *Welsh v. United States* (...); *United States v. Seeger* (...); *Torcaso v. Watkins* (...) (secular humanism must be treated the same as religion). (...) we held in *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir.2005), that, when making accommodations in prisons, states must treat atheism as favorably as theistic religion. What is true of atheism is equally true of humanism, and as true in daily life as in prison.²⁰⁸

Finally, the Court rejected the challenge that Center for Inquiry could not be treated equally to the religions which had been allowed to celebrate marriages on the basis that the Center refused to classify itself as a religion. The Court endorsed the argument advanced above that self-identification as a religion is not dispositive as to whether a belief system is to be considered as a religion.²⁰⁹ Indeed, the Court went one to state that '[a]theists don't call their own stance a religion but are nonetheless entitled to the benefit of the First Amendment's neutrality principle'. It went on to adopt the broad definition of religion in *Seeger* and *Welsh* by finding that a 'state may accommodate religious views that impose extra burdens on adherents (...) but this does not imply an ability to favor

²⁰⁶ *ibid* 873.

²⁰⁷ *Grumet* (n 163) 703.

²⁰⁸ *Center for Inquiry* (n 98) 872–873.

²⁰⁹ See *supra* n 159.

religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions'.²¹⁰

Center for Inquiry summarises and endorses the argument made in this part of this chapter that the Establishment Clause prohibits reserving the general right as a privilege of religious believers alone. This would involve a violation of the principle that government cannot prefer one religion to another, or religion to irreligion. In order to avoid this violation, the grounds of the general right ought to be interpreted in accordance with the Welsh Principle: references to 'religion' should be interpreted to include sincerely and deeply held non-religious beliefs, which are at least partially ethical or moral in content, and which function as a religion in the life of a person.

As has been admitted, the constitutional doctrine of Church Autonomy, the fifth ground of the general right, is immune from the constitutional argument because it is a doctrine required by the Constitution and therefore it cannot be said to be at the same time in violation of the Constitution. The next part of this chapter will therefore be devoted to the problems raised by the doctrine of Church Autonomy. It is shown that the principles of the doctrine are not a privilege of religious organisations only. In fact the doctrine is a religion-specific manifestation of a broader right which non-religious expressive associations which are committed to particular moral views can benefit from. If this is true, then under the US Constitution churches are not special, and religious associations cannot be singled out for preferential treatment on the basis of the doctrine of Church Autonomy. The next part outlines the USSC authorities that sustain this view.

5. Is Church Autonomy Special?

This part of this chapter asks whether non-religious institutions and groups can benefit from the principles of the doctrine of Church Autonomy. The answer is that they can benefit from very similar principles not under the Religious Clauses of the First Amendment but instead under the freedom of expressive association which is also protected by the First Amendment. Recall from part 6 of chapter 2 that the doctrine of Church Autonomy has two principles which are relevant for the purposes of the general right to conscientious exemption. The first is the ministerial exception most authoritatively articulated by the USSC in *Hosanna-Tabor*.²¹¹ Under this, churches are exempt from

²¹⁰ *Center for Inquiry* (n 98) 873.

²¹¹ See text *supra* n 74.

the obligation not to discriminate when employing or dismissing their ministers. The second is the right for church members and churches to be immune from private law suits when such suits would require judges to get involved to assess the merits or question a church doctrine. We have seen that this immunity is limited: as shown especially in *Pack*,²¹² such a right can be forfeited when the church doctrine commands practices which threaten public peace, safety, or morality. Both principles, it will be shown, are available to non-religious associations under the freedom of expressive association.

It is not here claimed that there is a perfect parity between the doctrine of Church Autonomy and the freedom of expressive association. We shall see that there are some differences in the internal standards. Nevertheless, the significant overlaps between the two doctrines strongly suggest that religious institutions, in so far as the general right to conscientious exemption is concerned, are not uniquely privileged under the First Amendment. Three USSC cases (*Jaycees*, *Rotary International* and *Boy Scouts*) that illustrate the freedom of expressive association are analysed in turn and comparisons are drawn between them and some of the cases considered under the doctrine of Church Autonomy.

Jaycees and Rotary International: The Freedom of Expressive Association

The United States Jaycees, founded in 1920 as the Junior Chamber of Commerce, is a non-profit membership corporation. Its objective is primarily to 'promote and foster the growth and development of young men's civic organizations in the United States'.²¹³ The organisation excluded women from holding full membership. Women could instead hold associate membership entailing that they could not vote, hold local or national office, or participate in certain leadership training and awards programs. Two local chapters of the Jaycees brought suit against the parent organisation alleging that the exclusion of women from full membership required by the national organization's bylaws violated the Minnesota Human Rights Act (the 'Act') which prohibited discrimination on the basis of sex in the 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation'.²¹⁴ Jaycees alleged that compelling it to accept women as full members would violate, inter alia, its constitutional right of free association. Justice Brennan, delivering the Court's opinion (Justice O'Connor concurring only in outcome), held that the Act did not violate the Jaycees' freedom of association.

²¹² *Pack* (n 90).

²¹³ *Jaycees* (n 100) 612–613.

²¹⁴ Minn.Stat. § 363.03, subd. 3 (1982).

In reaching that conclusion the Court analysed the scope of freedom of association. This part will only focus on the Court's analysis as relevant to the freedom of expressive association. Justice Brennan recognised that

we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. (...) In view of the various protected activities in which the Jaycees engages (...) that right is plainly implicated in this case.²¹⁵

Importantly for purposes of comparison with the doctrine of Church Autonomy, the Court recognised that the right protected an expressive association from governmental interference with the internal organisation or affairs of the group. It said

By requiring the Jaycees to admit women as full voting members, the (...) Act works an infringement of the last type. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.²¹⁶

This is important because it overlaps with the rationale for the ministerial exception which, as the USSC said in *Hosanna-Tabor*, is also grounded in freedom from governmental interference with the internal organisation or affairs of a church.

Although the rationales overlap, the two rights are not co-extensive. Freedom of expressive association is broader than the ministerial exception because, unlike the ministerial exception, it covers all members of an organisation and not only its governing members. However, the freedom is narrower than the ministerial exception because it is not absolute. In *Hosanna-Tabor*, as soon as the USSC concluded that the called teacher was a church minister, it exempted the church from the application of anti-discrimination legislation. In *Jaycees* this was not the case. The Court in fact held:

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests,

²¹⁵ *Jaycees* (n 100) 621.

²¹⁶ *ibid* 623.

unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.²¹⁷

This limitation of the freedom was fatal to the Jaycees as the Court accepted that the Act's goal of 'eliminating discrimination and assuring (...) citizens equal access to publicly available goods and services' was a compelling state interest.²¹⁸ Furthermore, the Court held that the government had sought to achieve that compelling state interest through the least restrictive means available. Indeed, the Court did not find that the Act imposed a substantial burden on the Jaycees. This was because

The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.²¹⁹

It is important to note that the limitation of the Jaycees' freedom of expressive association was accepted because the organisation did not have as one of its 'ideologies or philosophies' that women were to be excluded from full membership. The organisation was dedicated, as its byelaws attested, to the development of young men. Including women in its full membership did not mean that the organisation now had to be devoted to the development of young men and women. Rather, both male and female full members would continue in the association's aim of promoting the development of young men. As it will become apparent when *Boy Scouts* is analysed, if the association had had as one of its expressive aims the exclusion of women from its full membership, just like e.g. the Catholic Church excludes women from priesthood, the Court's analysis would have differed.

Almost identical facts arose and reasoning was employed by the USSC in *Rotary International*. The association is 'an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world'.²²⁰ Membership of the association was open only to men but women could attend meetings, give speeches, and receive awards. A local Rotary club brought suit against Rotary International on the basis that it discriminated against women by excluding them from full membership in violation of the Unruh Civil Rights Act. Rotary International claimed that applying the

²¹⁷ *ibid.*

²¹⁸ *ibid* 624.

²¹⁹ *ibid* 627.

²²⁰ *Board of Directors of Rotary International v Rotary Club of Duarte* (1987) 481 US 537 (USSC) 539.

prohibition of the Act to it would violate, among other things, its freedom of expressive association. The USSC held (Justice Scalia concurring) that the application of the Unruh Act to the association pursued the compelling state interest in eliminating discrimination against women and only worked 'some slight infringement on Rotary members' right of expressive association'.²²¹ Accordingly, following its precedent in *Jaycees*, the Court dismissed Rotary International's argument.

Boy Scouts: Judicial non-Intervention in the Ideologies of non-Religious Institutions

Both *Jaycees* and *Rotary International* show that the ministerial exception is not a special privilege of churches only. Secular institutions also have a right, albeit a limited one, to exclude any of their members, respective of their position of responsibility, if that is part of their expressive message. In *Jaycees* and *Rotary International* the USSC did not find that the organisations had satisfied the requirements of the freedom. However, the bite of the freedom, and its overlap with the doctrine of Church Autonomy, was more clearly shown in *Boy Scouts*.²²²

The facts and main legal issue of the case were set out in the USSC's majority judgment (Justices Souter, Ginsburg and Justice Breyer dissenting) penned by Chief Justice Rehnquist. He said:

The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.²²³

Unlike *Jaycees* and *Rotary International* whose institutional values did not exclude women from full membership, the Boy Scouts argued that 'homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean"'.²²⁴ Importantly for purposes of comparison with the doctrine of Church

²²¹ *ibid* 549.

²²² *Dale* (n 100).

²²³ *ibid* 643–644.

²²⁴ *ibid* 650.

Autonomy, despite acknowledging that ‘morally straight’ and ‘clean’ do not self-evidently exclude homosexual conduct, the Court held that it was not a court’s role to inquire into the asserted beliefs of a group or ‘to reject a group’s expressed values because they disagree with those values or find them internally inconsistent’. In reliance for this proposition it quoted the portion in *Thomas* which said ‘[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection’.²²⁵

It is not here claimed that the Court was categorising the Boy Scouts’ beliefs as religious beliefs, perhaps following the Welsh Principle. Rather, the Court was applying the same rationale we saw when analysing the doctrine of Church Autonomy to the context of expressive associations. In part 6 of chapter 2 it was shown that immunities for religious organisations and their members from private law suits was dictated by the constitutional prohibition on courts to assess religious doctrine.²²⁶ In *Boy Scouts* the USSC extended this principle to expressive associations claiming that their beliefs were also to be immunised from judicial inquiry. This extension was not well received by the dissenting opinion.

Indeed Justice Stevens’ opinion contained a lengthy analysis of the evidence regarding Boy Scouts’ beliefs on homosexuality and concluded that its asserted stance against homosexuality had not been unequivocally expressed prior to the litigation and its official documents were at best silent on the issue of homosexuality.²²⁷ Justice Stevens also rejected the stance that judges should not inquire into a group’s asserted beliefs as ‘an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further’.²²⁸ Justice Stevens was however being unfair to the majority’s opinion which demanded and in fact inquired into the sincerity of the asserted view. The majority, after reviewing public statements made by the Boy Scouts, including statements in previous litigation, found that it sincerely held the view that homosexual practices were inconsistent with its values.²²⁹ This is compatible with the same permissible judicial inquiry under the doctrine of Church Autonomy. In *Hobby Lobby*, for example, the Court stated that ‘repeatedly and in many different contexts, we have warned that courts must not presume to

²²⁵ *ibid* 651.

²²⁶ See text *supra* n 81.

²²⁷ A summary of the dissenting opinion’s review is at *Dale* (n 100) 684.

²²⁸ *ibid* 686.

²²⁹ *ibid* 651–653.

determine (...) the plausibility of a religious claim'; 'our "narrow function (...) in this context is to determine" whether the line drawn reflects "an honest conviction"'.²³⁰

Boy Scouts thus reveals the significant overlap between the doctrine of Church Autonomy and the freedom of expressive association. Even more significant for the overlap was the outcome of *Boy Scouts*. Rather than relying on *Jaycees* and *Rotary International*, the Court relied on *Hurley*, a free speech case where the Court held that it would violate an organisation's right to free speech to compel it to include an LGBT advocacy group in a public parade it was responsible for.²³¹ The Court in *Boy Scouts* accordingly found:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.²³²

Just as the Church in *Hosanna-Tabor* was made exempt from anti-discrimination law on the basis of its religious doctrine and right to group autonomy, similarly in *Boy Scouts*, a secular group was made exempt from the application of anti-discrimination law on the basis of its freedom of expressive association which recognises the right for non-religious groups to define their own values free from judicial encroachment and grants them a measure of group autonomy. Admittedly, *Boy Scouts* did not immunise the association from private law suits arising under the common law (e.g. tortious or fiduciary duties) as some cases regarding religious institutions have done. However, *Boy Scouts* and the prior cases on the freedom of expressive association contain the founding blocks which courts can use to find that secular institutions may enjoy the same limited right to immunity from private law suits.

Conclusion: Church Autonomy is not Quite Special

The conclusion of this part is that religious and non-religious groups alike enjoy the right to exemption from certain duties, especially anti-discrimination law duties, on the basis of their ability to define their own values and to organise themselves with a measure of autonomy. Religious

²³⁰ *Hobby Lobby* (n 31) 37–38. Citing *Thomas* (n 85) 716.

²³¹ *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 US 557 (USSC).

²³² *Dale* (n 100) 659.

institutions enjoy that right under the constitutional doctrine of Church Autonomy. Non-religious institutions enjoy similar rights under the freedom of expressive association. We have seen that the two rights are not perfectly matched. Religious institutions enjoy what is apparently an unqualified right to dismiss or hire their ministers. However, non-religious institutions enjoy a limited right not to be forced to include individuals in their membership. Both types of institutions may enjoy the right to be exempt from anti-discrimination legislation. However, under the cases analysed, it seems that only religious institutions and their members can benefit from a limited right to immunity from private law suits when enforcing such suits would require courts to inquire into the validity of religious doctrine. However, non-religious expressive associations also enjoy the right to be immunised from judicial inquiry into the validity of their values. It follows that courts may well find that non-religious expressive associations should also benefit from a limited right to immunity from private law suits when enforcing such suits would require courts to inquire into the validity of their expressive values. Despite the imperfect overlap between the doctrine of Church Autonomy and the freedom of expressive association, it can be concluded that USSC jurisprudence upholds the view that religious associations are not uniquely privileged under the First Amendment. Non-religious associations can also benefit from exemptions on the basis of their beliefs.

6. Conclusion: Conscientious Exemptions beyond Religious Privilege

This chapter has argued that the general right to conscientious exemption should not be understood as a privilege of persons who object on the basis of religious beliefs. Two arguments have been advanced for the view that the general right should be held to be also available at least to persons objecting on the basis of sincerely and deeply held non-religious beliefs, which are at least partially ethical or moral in content, and which function as a religion in the life of the belief-holder. The first argument, principally relying on the precedential force of *Welsh* is to interpret the reference to ‘religion’ in the statutory grounds of the general right to include these category of non-religious beliefs. Part 3 has shown that some circuit courts have rejected this approach while it has been endorsed by the Seventh Circuit, especially in *Kaufman*.²³³

Another argument, the Establishment Clause Argument, has been advanced. This shows that the USSC has consistently held that exemptions that are reserved to religious objectors only violate the

²³³ *Kaufman* (n 133).

Establishment Clause which prohibits government from favouring religion over irreligion. Some qualifications to this argument were conceded on the basis of *Amos* and *Cutter*. In order to avoid unconstitutionality all the grounds of the general right, with the exception of the fifth one, ought to be interpreted to be available at least also to persons objecting on the basis of sincerely and deeply held non-religious beliefs, which are at least partially ethical or moral in content, and which function as a religion in the life of the belief-holder.

Finally, it was shown that under the fifth ground of the general right, i.e. the constitutional doctrine of Church Autonomy, religious institutions enjoy exemptions which non-religious associations can also benefit from under the freedom of expressive association. While the parity between religious and non-religious institutions is not perfect, the underlying principles are the same and courts may develop the benefits to be more equally matched in future cases.

The detailed legal analysis undertaken reveals that, for the most part, the general right to conscientious exemption in US law should not be regarded as being available only to individuals who object on the basis of religious beliefs. Equally entitled, as a matter of law, to the benefit of that general right are individuals objecting on the basis of sincerely and deeply held non-religious beliefs, which are at least partially ethical or moral in content, and which function as a religion in the life of the belief-holder.

CHAPTER 4: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN CANADIAN LAW

1. Introduction

This chapter investigates whether there is a general right to conscientious exemption in Canadian law. The chapter concludes that there is. There are at least three rules of law which ground the right. These are (a) the duty of reasonable accommodation which applies to both private and public bodies under Federal and provincial legislation which prohibits discrimination on the basis of religion or creed; (b) the constitutional duty applied in administrative law which requires governmental action or administrative practice not to disproportionately infringe section 2(1) of the Canadian Charter²³⁴ which guarantees freedom of conscience and religion; and (c) the requirement that norms of general application be compatible with section 2(1) of the Charter and be proportionate. This chapter considers in depth each ground in turn.

2. The First Ground of the General Right: The Duty of Reasonable Accommodation Arising under Anti-Discrimination Statutes

Several pieces of legislation, both at Federal and provincial level, have as their main concern the prohibition of discrimination on the basis of various protected grounds, such as race, religion, and sex. The statutes are generally referred to as human rights codes or acts.²³⁵ However, with the exception of the Quebec Charter (analysed in more detail in the beginning of part 3 of this

²³⁴ Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

²³⁵ Canadian Human Rights Act (1977); British Columbia Human Rights Code (1969); Alberta Human Rights Act (1966); Saskatchewan Human Rights Code (1979); Manitoba Human Rights Code (1970); Ontario Human Rights Code (1962); Quebec Charter of Human Rights and Freedoms (1975); Nova Scotia Human Rights Act (1963); New Brunswick Human Rights Act (1967); Newfoundland Human Rights Act (1969); Prince Edward Island Human Rights Act (1968); Yukon Human Rights Act (1987); and Nunavut Human Rights Act (2003).

chapter),²³⁶ they are not comprehensive legal instruments protecting civil and political rights (e.g. US Bill of Rights or UK Human Rights Act). Rather their central focus is to prohibit both private and public employers and providers of services generally available to the public to discriminate on the basis of several protected grounds. This chapter and the next refer to these statutes as anti-discrimination statutes rather than as human rights codes or acts in order to make evident their central focus.

It is under the case law arising under these various Canadian anti-discrimination statutes that the first ground of the general right to conscientious exemption can be found. The first ground is the duty of reasonable accommodation. This duty, which applies to private and public persons, requires the duty-bearer to accommodate the reasonable requests of the right-bearer from complying with legally enforceable obligations which they object to. This may, at times, require the duty-bearer to exempt the right-bearer from legal obligations. In *Simpsons-Sears*, the Supreme Court of Canada (SCC) first found this duty of accommodation implied in anti-discrimination legislation despite the lack of explicit statutory acknowledgment of the duty in the relevant legislation.²³⁷

Simpsons-Sears: Introducing the Duty of Reasonable Accommodation

The statute at issue in *Simpsons-Sears* was the Ontario Human Rights Code which prohibited, and still prohibits today, discrimination against employees on the basis, amongst other things, of their creed.²³⁸ The relevant portion of the statute under consideration was as follows:

4.-(1) No person shall (...)

(g) discriminate against any employee with regard to any term or condition of employment, because of (...) creed (...) of such person or employee.

Mrs O'Malley was employed as a salesperson at the respondent, Simpsons-Sears, which required full-time employees to sometime work on Friday evenings and Saturdays. Several years after commencing her employment, Mrs O'Malley became a member of the Seventh-Day Adventist Church and could no longer work on weekends as this period is the Church's Sabbath. After informing her employer of her new beliefs, she accepted her employer's offer of part-time work and the possibility of being considered for other work which did not involve her working during the Sabbath. After working under this arrangement for a few months, she decided to renounce the

²³⁶ Charter of Human Rights and Freedoms, CQLR c C-12.

²³⁷ *Ontario Human Rights Commission v Simpsons-Sears* (1985) 2 SCR 536.

²³⁸ Ontario Human Rights Code, R.S.O. 1980, c. 340 (repealed). The current version of the Code is R.S.O. 1990, c. H.19.

possibility of full-time work because her newly acquired husband preferred her to work part-time. She then brought a claim of creed discrimination against her employer seeking compensation for the difference in remuneration between full-time and part-time employment lost from the date of her conversion to that of her marriage.

The main issue for the SCC to decide was whether

the requirement to work on Saturdays, while itself an employment rule imposed for business reasons upon all employees, discriminates against the complainant because compliance with it requires her to act contrary to her religious beliefs and does not so affect other members of the employed group.²³⁹

The SCC unanimously decided (in a judgment delivered by McIntyre J) that there had been discrimination and that Mrs O'Malley was entitled to the compensation she sought.²⁴⁰ In reaching that decision the SCC offered a thorough examination of the quasi-constitutional status of anti-discrimination legislation, the necessity to interpret such quasi-constitutional legislation in a way which impedes discrimination and, consequently, the need to safeguard individuals from practices which, albeit not intended as such, were in effect discriminatory. A way to combat such unintended discrimination was to import from US Title VII jurisprudence²⁴¹ the duty of reasonable accommodation short of undue hardship. This section focuses on the Court's analysis of the duty of reasonable accommodation.

The outcome of the case was based on the premise that unintended discrimination is prohibited by Canadian anti-discrimination legislation generally. This premise, however, could not find support in the text of the legislation itself which was silent on the issue. Instead, the SCC anchored its premise in the nature of the legislation which it found to be 'quasi-constitutional'.²⁴² The Court stated that '[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary — and it is for the Courts to seek out its purpose and give it effect'.²⁴³

²³⁹ *Simpsons-Sears* (n 237) [11].

²⁴⁰ *ibid* 29.

²⁴¹ See part 5 of chapter 2. The US jurisprudence was first analysed in the USSC in *Hardison* (n 66).

²⁴² The term 'quasi-constitutional' was not introduced in *Simpsons-Sears*. However, the term has now been firmly established at least since the SCC decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* (2000) 1 SCR 665 (SCC).

²⁴³ *Simpsons-Sears* (n 237) [12].

The immediate consequence of finding the statute to be quasi-constitutional was that the SCC held that its nature demanded a non-literal interpretation in order to further its purpose.²⁴⁴ Not controversially, the SCC identified the Code's purpose to be 'the removal of discrimination'. However, more controversially, the Court held that the Code's 'main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination'.²⁴⁵ This enabled the Court to find that the intention to discriminate was not a necessary ingredient of discrimination. Absent statutory mention of the concept, the Court was then able to import, citing US jurisprudence,²⁴⁶ the idea of adverse impact discrimination. It described this as follows:

It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.²⁴⁷

It was then open to the Court to find that Mrs O'Malley had been discriminated against on the basis of her creed given the newly introduced concept of adverse impact discrimination. However, there was a particular difficulty with this conclusion. The Code provided, in s 4(6), that discrimination on the grounds of age, sex, and marital status could be nonetheless justified if the employer could adduce a bona fide occupational qualification defence. No such defence was available in the Code for discrimination on the basis of creed, meaning that adverse impact discrimination could never be justified. The Court was unhappy with this conclusion as it would have entailed an absolute right to freedom of creed in the context of adverse impact discrimination.²⁴⁸

The solution to the problem of an absolute right to creed in adverse impact discrimination cases was to introduce, despite the lack of any statutory provision for it, and borrowing again from US jurisprudence,²⁴⁹ the concept of the duty of reasonable accommodation.²⁵⁰ The Court described the nature of the duty as follows:

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *Griggs v Duke Power Co* (1971) 401 US 424 (USSC).

²⁴⁷ *Simpsons-Sears* (n 237) [18].

²⁴⁸ *ibid* 22.

²⁴⁹ *Hardison* (n 66).

The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.²⁵¹

While it was for the employee to prove the existence of adverse impact discrimination, it was for the employer to prove that the steps taken to accommodate were reasonable and further steps would have resulted in undue hardship.²⁵² On the facts of the case, the SCC held that the employer had not discharged its burden of proving that any further steps towards accommodating Mrs O'Malley's needs would have resulted in undue interference or undue expense. Albeit some accommodation had been offered, i.e. she was offered part-time job and considered for some full-time jobs, no evidence at trial was adduced that taking further steps would have resulted in undue hardship. Consequently, the employer had not discharged its burden of proof and was liable to pay the claimed compensation.²⁵³

The outcome of the case therefore suggests that the onus on the employer to accommodate the employee, unlike under US jurisprudence, is not minimal or easily dischargeable (usually referred to as '*de minimis*' in US jurisprudence).²⁵⁴ In fact, the SCC eventually explicitly refused to follow the US *de minimis* rule *Renaud*. In Canada law, the accommodation must be a real or substantial one, subject to the caveat that the employer need not suffer undue hardship.

Renaud: Rejecting the 'De Minimis' Rule

In *Renaud*,²⁵⁵ another case involving a Seventh Day Adventist dismissed for refusing to work on his Sabbath, the employer, a public school, argued that the Canadian doctrine of reasonable accommodation should be interpreted in a similar way to its US counterpart as provided by the US Supreme Court ('USSC') in *Hardison*.²⁵⁶ In *Hardison*, the USSC had held that the duty of reasonable accommodation does not require the employer to bear more than a minimal cost as that may require an employer to grant a special privilege to a particular employee based on the employee's

²⁵⁰ *Simpsons-Sears* (n 237) [20].

²⁵¹ *ibid* 23.

²⁵² *ibid* 28.

²⁵³ *ibid* 29.

²⁵⁴ *Hardison* (n 66).

²⁵⁵ *Central Okanagan School District No 23 v Renaud* (1992) 2 SCR 970.

²⁵⁶ *Hardison* (n 66).

religion. Such special privilege, amongst other things, may have created special problems under the Establishment Clause.²⁵⁷

The SCC, relying on *Simpson-Sears*, explicitly rejected this view. First, the Court held that the Establishment Clause concern that existed in *Hardison* was not present in a Canadian context.²⁵⁸ Secondly, the SCC found that the 'Hardison de minimus test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate'. It went on to state that what constitutes reasonable accommodation 'is a question of fact and will vary with the circumstances of the case'.²⁵⁹ In the case at hand, the Court held that the employer failed to satisfy the duty despite the fact that the proposed accommodation, a Sunday to Thursday shift for the employee, was opposed by the employee's worker's union (but not by the employee) and that the employer would have had to incur the costs associated with defending the grievance.²⁶⁰

Meiorin and Grismer: Reasonable Accommodation in the Unified Approach to Discrimination

It is to be noted that even though the duty of reasonable accommodation was introduced by the SCC in *Simpsons-Sears* in the context of adverse-impact discrimination, the duty has survived the SCC's rejection in later cases of the distinction between direct and adverse impact discrimination. In fact the duty of reasonable accommodation now plays a role also in what used to be classified as direct discrimination. The rejection of a distinction between direct and adverse-impact discrimination was announced in *Meiorin*, a case where a woman firefighter challenged her dismissal following her inability to pass the aerobic component of the fitness test required by all firefighters. She claimed and succeeded in showing that the aerobic test was discriminatory against women as it did not take into account the fact that, owing to physiological differences, most women have lower aerobic capacity than most men.²⁶¹

The SCC rejected the distinction between direct and adverse impact discrimination for a variety of reasons, including the fact that the distinction was, in the SCC's view, artificial.²⁶² The SCC then

²⁵⁷ *ibid* 69–70. Especially footnote 4.

²⁵⁸ *Renaud* (n 255) [25].

²⁵⁹ *ibid* 26.

²⁶⁰ *ibid* 53–56.

²⁶¹ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (1999) 3 SCR 3.

²⁶² The SCC provided seven detailed reasons for rejecting the distinction and moving towards a unified approach to discrimination. *ibid* 26–49.

introduced a unified approach to discrimination. The effect of *Meiorin's* unified approach was appropriately summarised by the SCC in *Grismer* (where a man with reduced peripheral vision successfully challenged as discriminatory the refusal to grant her a driving licence without an individual assessment of her driving capabilities) as follows:

Meiorin announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them.²⁶³

Under the unified approach, once an individual has shown that a particular legal requirement is prima facie discriminatory, the duty-bearer then needs to discharge the burden of showing that there is reasonable justification for the requirement. Complainants may show that there has been prima facie discrimination if 'they have a characteristic protected from discrimination under the [anti-discrimination legislation]; that they experienced an adverse impact with respect to the [requirement they object to]; and that the protected characteristic was a factor in the adverse impact'.²⁶⁴ The duty-bearer may provide a reasonable justification for the requirement if:

- (1) it adopted the requirement for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the requirement in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
- (3) the requirement is reasonably necessary to accomplish its purpose or goal, in the sense that the duty-bearer cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.²⁶⁵

²⁶³ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (1999) 3 SCR 868 [19]. Emphases in the original.

²⁶⁴ *Moore v British Columbia (Education)* (2012) 3 SCR 360 (SCC) [33].

²⁶⁵ *Meiorin* (n 261) [54]. *Grismer* (n 263) [20].

Conclusion

The introduction of the duty of reasonable accommodation through judicial interpretation into Canadian anti-discrimination legislation is fundamental for grounding the general right to conscientious exemption in Canadian law. This is for several reasons.

First, as *Simpsons-Sears* and *Renaud* show, the duty entails at times an exemption for the right-bearer from an otherwise valid legal duty on the basis of a conscientious objection (in both cases the duty to comply with an employer's demand on working times). Secondly, this duty is implied in all anti-discrimination legislation independently of its explicit statutory recognition. In fact, in *Simpsons-Sears* the relevant legislation made no mention of such duty. This is significant as anti-discrimination legislation exists in all Canadian jurisdictions, both at the Federal level and in every province and territory, each statutes applying within the areas of competence of the Federal, provincial or territorial jurisdiction.

Thirdly, these anti-discrimination statutes impose the duty on both public bodies and private persons as the prohibition of discrimination is directed to both public and private persons. The Canadian Human Rights Act, for example, applies, among others, to trade unions, private employment and to the Crown generally.²⁶⁶ In *Simpsons-Sears* the employer was a private employer, while in *Renaud* it was a public school. Also, in *Renaud*, the SCC held that the trade union was also under a duty of reasonable accommodation and violated it by not consenting to the accommodation proposed by the school.²⁶⁷

Finally, the duty of reasonable accommodation goes well beyond the employment context. All the statutes prohibit discrimination in other areas. For example, the Canadian Human Rights Act prohibits discrimination 'in the provision of goods, services, facilities or accommodation customarily available to the general public' (s 5), 'in the provision of commercial premises or residential accommodation' (s 6), and employment (s 7-11). In the Quebec Charter, freedom of contract is restricted so that '[n]o one may in a juridical act stipulate a clause involving discrimination. Such a clause is without effect' (s 13).

In *Grismer*, the SCC applied the unified approach, including the assessment of the duty of reasonable accommodation, in the context of the provision of services (i.e. vehicle licencing services) to a visually impaired man. Other Canadian courts and tribunals have applied the duty of reasonable accommodation in service provision in the context of religious beliefs. In *Webber*, for example, the

²⁶⁶ See ss. 25 and 66.

²⁶⁷ *Renaud* (n 255) [53–56].

Court of Queen's Bench of Alberta found that a private school had discriminated against two high school Sunni students in its provision of educational services to them by refusing to accommodate their request to pray on campus during school hours.²⁶⁸ Also, the very high-profile case of *Multani* (to be analysed in depth in part 3) was framed as a claim under the anti-discrimination provisions of the Quebec Charter and the Canadian Charter for failure of a public school to accommodate the request of a Sikh student to wear the kirpan, a ceremonial dagger, on school premises during school hours. As will be seen later, however, the case was decided not under anti-discrimination provisions but under the freedom of conscience and religion provisions of the Quebec and Canadian Charters.²⁶⁹

In conclusion, the duty of reasonable accommodation arising under various Canadian anti-discrimination statutes provides the grounding for a wide-ranging and general right to conscientious exemption in every Canadian province, territory and in the Federal sphere. It is a general right that arises well beyond the context of employment context (it exists in the provision of goods and services and beyond) and which imposes a corresponding duty on both public and private persons. In due course we shall investigate whether the benefit of this right is reserved to religious people or whether it embraces non-religious conscientious objectors.

3. The Second Ground of the General Right: The Duty which requires Governmental Action or Administrative Practice not to Unreasonably Infringe the Constitutional Right to Freedom of Conscience and Religion

The right to freedom of conscience and religion arises under the Canadian Charter. S 2(a) of the Canadian Charter reads, '2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion (...)'.

The right also arises under the Quebec Charter. The Quebec Charter is not only an anti-discrimination statute which binds private and public employers and providers of goods and services. It also provides for several civil, political, social and economic rights which bind Quebec. S 3 of the Quebec Charter reads, '3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, (...)'.

According to s 52 of the Charter, Quebec legislation enacted subsequently to the Charter cannot derogate from the civil and political rights thereof, except such legislation expressly states that it applies despite the Charter.

²⁶⁸ *Webber Academy Foundation v Alberta (Human Rights Commission)* [2016] ABQB 442 (ABQB).

²⁶⁹ *Multani v Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256 (SCC).

The Quebec Charter is effectively a bill of rights for Quebec. However, the Canadian Charter also binds Quebec and, in case of conflict between the two, the Canadian Charter is supreme, being part of the supreme Canadian Constitution which binds all provinces in Canada.²⁷⁰

This part of this chapter considers the second rule of law which grounds the general right and identifies it in the right to freedom of conscience and in s 2(a) of the Canadian Charter and in s 3 of the Quebec Charter as applied in the administrative law context. The cases to be considered, in particular *Multani*, make clear that the content of the right in both Charters is co-extensive. Of course, the Quebec Charter is applicable only in Quebec while the Canadian Charter is applicable in Quebec, in the other provinces, and at the Federal level.

Multani

The SCC considered the implications of the right to freedom of conscience and religion for conscientious exemptions in the high-profile *Multani* case.²⁷¹ The complainants in that case were Balvir Singh Multani and his son Gurbaj Singh Multani who were orthodox Sikhs. They believed that their religion required them to wear a kirpan at all times. A kirpan is a religious object that resembles a dagger. The school board of the school attended by Gurbaj allowed him to wear the kirpan at school provided that it was sealed inside his clothing. However, the school governing board refused to agree to the arrangement proposed by the school board on the basis that wearing a kirpan violated art 5 of the school's Code de vie (code of conduct), which prohibited the carrying of weapons and dangerous objects at school. It was not in dispute that the governing board had the necessary authority under the Education Act to approve the Code. The governing board's decision was confirmed by the school board's council of commissioners ('Council'). The Multanis argued that, inter alia, the refusal of the Council to allow Gurbaj to wear the kirpan at school violated s 2(a) of the Canadian Charter and s 3 of the Quebec Charter. The SCC agreed with this argument.

The SCC was unanimous in its decision that the right to religious freedom under the Quebec and Canadian charters had been violated without an appropriate justification. However, the Court did not reach a unanimous view as to the appropriate analytical approach. What divided the Court was

²⁷⁰ S 52(1) of the Constitution Act 1982 provides that 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'. Despite the fact that Quebec has not yet formally given its consent to the enactment of the Constitution Act 1982, the SCC has held that as a matter of law this consent is not legally necessary for the Constitution Act to bind all parts of Canada, including Quebec. See *Re: Resolution to Amend the Constitution* (1981) 1 SCR 753 (SCC).

²⁷¹ *Multani* (n 269).

whether the decision of the Council had to be reviewed under administrative law standards or under constitutional law standards. Two opposing perspectives were offered, on one side, by Charron J (writing for the Court) and, on the other side, by Deschamps J and Abella J (concurring in outcome but dissenting in reasoning). A third opinion was delivered by LeBel J, who was sympathetic to Charron J's perspective. This third opinion is not analysed in any depth because the subsequent case law focused on the diverging reasoning of the majority opinion and that of Deschamps J and Abella J. In fact, as will be illustrated later by reference to *Hutterian Brethren*²⁷² and *Doré*²⁷³, the dissenting reasoning has, to a large extent, become the law in force in Canada.

The dissenting reasoning opined that the correct way to fashion the Multani's case was through administrative law principles. The justices made a vital distinction between violations of the constitutional right to religious freedom occasioned by a legislative act (i.e. 'a norm such as a law, regulation, or other similar rule of general application'²⁷⁴) and that occasioned by governmental action or administrative practice ('decisions and orders made by administrative bodies'²⁷⁵).²⁷⁶ For legislative acts, the analysis proceeded in two steps. The complainant first has to show that his religious freedom has been violated. The respondent may then be able to justify the violation relying on s 1 of the Canadian Charter (or its counterpart in s 9.1 of the Quebec Charter as the case may be) which reads

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The relevant test of s 1 was elaborated in *Oakes*²⁷⁷ (where a person in possession of drugs successfully challenged the constitutionality of the statutory presumption of being a drug trafficker as violative of the presumption of innocence) and is now called the Oakes Test. It consists of two parts. First, the measure infringing the constitutional right must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves the proportionality test which requires

²⁷² *Alberta v Hutterian Brethren of Wilson Colony* (2009) 2 SCR 567.

²⁷³ *Doré v Barreau du Québec* (2012) 1 SCR 395.

²⁷⁴ *Multani* (n 269) [103].

²⁷⁵ *ibid.*

²⁷⁶ *ibid* 85.

²⁷⁷ *R v Oakes* (1986) 1 SCR 103.

balancing the interests of society with those of individuals and groups. The proportionality test has three parts. First, the measures adopted must be carefully designed to achieve the objective in question (rational connection stage). Second, the measures should impair as little as possible the right or freedom in question (minimal impairment stage). Finally, the deleterious effects of the measure must not outweigh its salutary effects (balancing stage).²⁷⁸

The dissenting opinion held that the s 1 analysis/Oakes Test was not appropriate for governmental action or administrative practice mainly because these cannot be considered ‘law’ under the ‘prescribed by law’ requirement of s 1 as they are not norms of general application.²⁷⁹ Instead, governmental action or administrative practice has to be considered under normal administrative law principles. In the instant case the Council’s decision to refuse the accommodation was subject to the administrative law standard of review of reasonableness: its decision would be not lawful unless it was reasonable. A reviewing court owed deference to the fact-finding ability and particular expertise of the primary decision-maker.²⁸⁰ In the particular case, the Council had acted unreasonably because:

it did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student. It merely applied the Code de vie literally. By disregarding the right to freedom of religion, and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the [Council] made an unreasonable decision.²⁸¹

It is particularly telling that what the dissenting reasoning found to have vitiated the Council’s decision was its failure to accommodate the request of the Multanis by refusing to exempt Gurbaj from the Code and not allowing him to carry the kirpan with appropriate safeguards. It follows that, for the dissenting reasoning, the duty of reasonable accommodation is part of the reasonableness standard: failure to discharge the duty (until the point of undue hardship) would vitiate the reasonableness of the governmental action or administrative practice. For the justices, then, ‘[r]easonable accommodation and undue hardship belong to the sphere of administrative law and human rights legislation (...).’²⁸²

²⁷⁸ *ibid* 73–75.

²⁷⁹ *Multani* (n 269) [112–125].

²⁸⁰ *ibid* 96.

²⁸¹ *ibid* 99.

²⁸² *ibid* 134.

The majority reasoning offered an integrated approach. It rejected the dissenting opinion's premise that governmental action or administrative practice could not be considered 'law' under the 'prescribed by law' requirement of s 1. Consequently, while allowing that an administrative law standard of review would have been appropriate to the extent that the claim was based on anti-discrimination legislation, a separate Charter-based claim had to engage in the Oakes Test analysis once it was established that a constitutional right was infringed.²⁸³ Having found that the Council had infringed the religious freedom of the Multanis, she proceeded to the Oakes Test. She found that the reason for the Council's decision, i.e. providing a safe learning environment in schools, was sufficiently important to warrant overriding a constitutionally protected right or freedom.²⁸⁴ As regards the rational connection stage of the proportionality test, she found that prohibiting Gurbaj from wearing his kirpan to school was intended to further this objective. She did not, however, find that the Council's decision passed the minimal impairment stage. The reason for this view warrants special attention as it introduces the duty of reasonable accommodation into this stage of the proportionality analysis.

Charron J approved of the approach taken by the Court of Appeal in the earlier stage of the litigation that the duty to accommodate is a corollary of the minimal impairment stage. She explained that a justification for the purpose of s 1 could not be considered sufficient if reasonable accommodation was possible and had not been offered.²⁸⁵ This analysis appears correct, as, under the minimal impairment stage, a measure must be carefully tailored so that rights are impaired no more than necessary. Consequently, if an accommodation of a particular right is possible and does not cause undue hardship, denying such an accommodation would not be minimally impairing the right. Note, however, that reasonable accommodation and the minimal impairment stage are not equated. Rather, the relationship between them is that a failure to provide a reasonable accommodation short of undue hardship will result in a finding that a measure is not minimally impairing a right.

In light of the above, Charron J went on to analyse whether the refusal to grant the accommodation to the Multanis was necessary for safety concerns. She found that it was not. The primary reason for this conclusion was that there was no evidence that the safeguards (sealing the kirpan under Gurbaj's clothing) accepted by the Multani were not sufficient to meet the safety concerns. In particular, there was no evidence that Gurbaj or other Sikhs carrying kirpans in schools posed a real

²⁸³ *ibid* 17.

²⁸⁴ *ibid* 44–48.

²⁸⁵ *ibid* 52–53.

safety security threat. The asserted safety risks were purely speculative.²⁸⁶ From this followed that the absolute prohibition by the Council of carrying kirpans at school was more than minimally impairing, as a reasonable accommodation could have been offered. Consequently, the infringement of the religious freedom of the Multanis was not justified.

The analysis of the two differing opinions confirms that, under both analyses, a conscientious objector has a general right to exemption under the Canadian Charter's and Quebec Charter's protection of conscience and religion in respect of an obligation imposed by an administrative decision or governmental action. Either way, Gurbaj had a right to be exempt from the prohibition of weapons imposed by the Code. The school board's decision to refuse to grant the exemption was either unreasonable under administrative law standards (dissenting opinion) or incompatible with the Oakes Test (Charron J's opinion). Whichever analysis one undertakes, the outcome for the general right is the same: there is a general right to conscientious exemption arising under s 2(a) of the Canadian Charter and s 3 of the Quebec Charter from obligations imposed by an administrative decision or governmental action. The right is not absolute. Under the administrative law standard it must be shown that the refusal to grant the exemption is unreasonable (failure to comply with the duty of reasonable accommodation will result in a finding of unreasonableness). Under the constitutional law analysis, a refusal to grant an exemption may be justified by reference to the Oakes Test.

Despite the agreement under both analytical frameworks as to the existence of a general right to conscientious exemption, it is still legitimate to ask which of the two frameworks applies. Is it the constitutional standard or the administrative law standard? The answer provided by subsequent case law, especially *Doré* and *Loyola*, is that both standards apply but each standard has different addressees. The constitutional standard is addressed to the administrative body in its decision-making processes whereas the administrative standard is addressed to a court reviewing the decision of the administrative body. The complexity of this position is unpacked below, and its relevance to the general right to conscientious exemption is shown.

Doré

In *Doré* the SCC reconsidered the analytical framework endorsed by the majority in *Multani*. The case concerned the decision of a disciplinary council to reprimand a lawyer for the content of a letter he wrote to a judge insulting the judge after a court proceeding. As in *Multani*, the legality of the code of ethics which authorised the council to issue the reprimand was not under challenge. Instead,

²⁸⁶ *ibid* 56–69.

the lawyer claimed, unsuccessfully, that the reprimand violated his freedom of expression under s 2(b) of the Canadian Charter.

The unanimous judgment of the Court in *Doré* was delivered by Abella J who had co-written the dissenting opinion in *Multani*. She took the time to criticise the majority judgment in *Multani* before proposing an alternative analytical framework. The main criticism of *Multani*, framed by academics and endorsed by Abella J, was that 'the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion'.²⁸⁷ Importantly, *Multani* was not compatible with post-*Multani* developments in administrative law which emphasised the deference owed by courts to administrative bodies when making decisions in their areas of expertise. In particular in *Dunsmuir* (decided two years after *Multani*), the SCC had held that:

deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.²⁸⁸

Given that a s 1/Oakes Test analysis to be undertaken by the courts over an administrative body's decisions risked undermining *Dunsmuir's* 'more robust conception of administrative law',²⁸⁹ the SCC in *Doré* decided to depart from the approach taken by the majority in *Multani*. It decided instead that the primary responsibility for deciding whether an administrative decision or governmental action infringed a Charter right lies with the administrative body or governmental department itself because 'the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the Charter values are being balanced'.²⁹⁰ So the administrative decision-maker, not the reviewing court, has to undertake the proportionality analysis. Its decision on proportionality is owed deference by the reviewing court 'so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47)'.²⁹¹ What role remains, then, for the reviewing court? It ensures that the decision-maker's

²⁸⁷ *Doré* (n 273) [33].

²⁸⁸ *Dunsmuir v New Brunswick* (2008) 1 SCR 190 [49].

²⁸⁹ *ibid* 34.

²⁹⁰ *Doré* (n 273) [52].

²⁹¹ *ibid* 56.

assessment is reasonable by asking whether ‘in exercising its statutory discretion, the decision-maker has properly balanced the relevant Charter value with the statutory objectives’.²⁹²

The new framework outlined by *Doré* blends elements of each of the opposing opinions in *Multani*. It confirms the majority’s view that the Oakes Test has to be undertaken. However, contra the majority view in *Multani*, it is not the court’s role to undertake the Oakes Test but it is the administrative decision-maker’s. *Doré* then affirms the *Multani* dissenting opinion’s view that the decision of the decision-maker is to be judicially reviewed on the reasonableness standard. How does this work in practice and what relevance does this have for the general right to conscientious exemption? The decision in *Doré* was analysed in 2015 by the SCC in *Loyola High School*²⁹³ which brought out its implications for the general right to conscientious exemption.

Loyola

In *Loyola* a Catholic school claimed, partially successfully, that the refusal by the Minister of Education to grant it an exemption from the mandatory core curriculum Program on Ethics and Religious Culture (ERC) violated freedom of religion under s 2(a) of the Canadian Charter. The ERC required schools to teach about the beliefs and ethics of different world religions from a neutral and objective perspective. Like all courses in the mandatory curriculum, the Minister could grant private schools an exemption from the ERC Program if they offered an alternative program that the Minister deemed to be equivalent.²⁹⁴ *Loyola* wished to teach the entirety of the course from a Catholic perspective. Abella J, writing for the majority, found that the Minister’s decision was unreasonable but only to the extent that it did not allow *Loyola* to teach about Catholicism from a Catholic point of view.²⁹⁵ The minority judgment by McLachlin CJC, Moldaver J and Rothstein J would have additionally allowed *Loyola* to engage critically but respectfully with other religious and ethical viewpoints from a Catholic perspective while however describing and explaining those viewpoints in an objective and respectful way.²⁹⁶

Abella J reaffirmed in her judgment the *Doré* framework:

²⁹² *ibid* 57–58.

²⁹³ *Loyola High School v Quebec (Attorney General)* (2015) 1 SCR 613.

²⁹⁴ Section 22 of the Regulation respecting the application of the Act respecting private education, CQLR, c. E-9.1, r. 1, states: ‘22. Every institution shall be exempt from the [compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent’.

²⁹⁵ *Loyola* (n 293) [6].

²⁹⁶ *ibid* 162.

This case (...) squarely engages the framework set out in *Doré*, which applies to discretionary administrative decisions that engage the Charter. *Doré* requires administrative decision-makers to proportionately balance the Charter protections — values and rights — at stake in their decisions with the relevant statutory mandate. (...)

On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate: *Doré*, at para. 57.

This seems to settle, specifically in the context of conscientious exemptions, the question on which *Doré* differed from *Multani*: the administrative law analysis rather than a constitutional review analysis prevails. This is not to say that the reasonableness standard will always have to apply for a Charter-based judicial review of administrative measures. Reasonableness is not the only administrative law standard. Canadian administrative law may also, when appropriate, proceed on the correctness standard which may require a reviewing court to engage itself in the Oakes Test (i.e. the constitutional analysis). Which administrative standard applies and when is a question that goes beyond the scope of this thesis.²⁹⁷

Conclusion

How does the above matter for the general right to conscientious exemption? It shows that both administrative decision-makers and reviewing courts have distinct roles in the joint responsibility of ensuring that a conscientious exemption is granted when appropriate. The primary responsibility falls on the administrative decision-maker. It must exercise its discretion to grant an exemption in a way that does not disproportionately affect the objector's Charter-based right to conscientious exemption under s 2(a) of the Canadian Charter and its Quebec Charter counterpart. This entails that due consideration has to be given to the right when a decision-maker is taking decisions or developing processes. The right to conscientious exemption is therefore part and parcel of the decision-making process of public bodies. Courts come into the picture only when things go wrong

²⁹⁷ In *Edmonton* the SCC stated:

The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”, “true questions of jurisdiction or vires”, and issues “regarding the jurisdictional lines between two or more competing specialized tribunals” (paras. 58-61).

See *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd* [2016] SCC 47 [24]. For application in the context of s 2(a) Canadian Charter see *Mouvement laïque québécois v Saguenay (City)* (2015) 2 SCR 3.

and will scrutinise whether the decision to refuse an exemption was a reasonable one. So the duty on administrative decision-makers to grant a conscientious exemption when appropriate on the basis of the constitutional right to freedom of conscience and religion is only a matter of degree different from the similar duty of reasonable accommodation imposed on them by anti-discrimination legislation. Both duties are explicitly recognised in the case law and may be referred to when an objector is seeking an exemption. Of course, in relation to both the Charter and anti-discrimination legislation, courts and human rights tribunals retain a supervisory jurisdiction over the decision-maker to ensure that it has complied with its duty.

4. The Third Ground of the General Right: Norms of General Application Must be Compatible with the Right to Freedom of Conscience and Religion

The *Multani* majority decision had proposed that both legislative and administrative measures challenged on the basis of the constitutional right to freedom of conscience and religion be subject to the same analytical framework. Under that framework, the concept of reasonable accommodation would be a helpful device when undertaking the minimal impairment stage of the proportionality analysis. Following *Doré* and *Loyola* it is now settled that that analysis no longer applies to administrative measures. Administrative decision-makers now have to undertake the proportionality analysis themselves and their analysis will normally be subject to the reasonableness standard at judicial review. Failure to grant a reasonable accommodation short of undue hardship will likely vitiate the reasonableness of the decision.²⁹⁸

Does the portion of *Multani* relating to legislative measures still hold true today? Strictly speaking, the majority judgment relating to legislative measures in *Multani* was *obiter* as the issue at play (the Council's decision) did not concern a legislative measure but an administrative one instead. Furthermore, the minority judgment explicitly rejected the unified analytical scheme for legislative and administrative measures, and opined that the concept of reasonable accommodation, while helpful in the administrative law context, was inappropriate for scrutinising legislative measures.²⁹⁹

²⁹⁸ *Multani* (n 269) [99], *ibid* 134.

²⁹⁹ *Multani* (n 269) [131–132].

Given that the majority judgment's analysis concerning the administrative law approach was rejected in *Doré* and *Loyola*, it might be reasonable to doubt that *Multani* is still good law in relation to the constitutionality of legislation when conscientious objections are concerned. This doubt was confirmed as correct by the SCC three years after *Multani* in *Hutterian Brethren*.³⁰⁰ In that case, the SCC rejected adopting reasonable accommodation as a useful conceptual tool in the minimal impairment stage of the Oakes Test.

Hutterian Brethren

Alberta required all drivers to have a driving licence with a photograph of the licence holder, subject to exemptions for people who objected to having their photos taken on religious grounds. In 2003 the Province eliminated the exemption in order to reduce the risk of driver's licences being used for identity theft. The members of the Wilson Colony of Hutterian Brethren objected on religious grounds to having their photographs taken as they viewed this as violating the Second Commandment ('thou shalt not make unto thee any graven image'). The Province offered to lessen the impact of the universal photo requirement by, among some options, issuing special licences without photos. However, it insisted that their photos needed to be taken for purposes of placement in the central data bank. The members of the Wilson Colony rejected the proposal and initiated proceedings on the basis that the refusal to grant the exemption violated their right under s 2(a) of the Canadian Charter.

The majority of the SCC, McLachlin CJC delivering the judgment, applied the Oakes Test and concluded that the violation of the Hutterian Brethren's right to freedom of religion was justified. She said:

I conclude that the limit on the Colony members' freedom of religion imposed by the universal photo requirement for holders of driver's licences has been shown to be justified under s. 1 of the Charter. The goal of minimizing the risk of fraud associated with driver's licences is pressing and substantial. The limit is rationally connected to the goal. The limit impairs the right as little as reasonably possible in order to achieve the goal; the only alternative proposed [i.e. a licence with no photo neither taken nor stored in a central data bank] would significantly compromise the goal of minimizing the risk. Finally, the measure is proportionate in terms of effects: the positive effects associated with the limit are

³⁰⁰ *Hutterian Brethren* (n 272).

significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.³⁰¹

Abella J, LeBel J and Fish J dissented. In Abella J's view the effect of denying the exemption disproportionately affected the claimants. She argued that the unavailability of the exemption would entail that the Hutterites would no longer be able to drive and, consequently, that would affect the ability of the community to sustain itself independently. Furthermore, she could not see how, given that over 700,000 Albertans did not have a driver's licence, the photos of approximately 250 Hutterites would have any discernible impact on the province's ability to reduce identity theft.³⁰²

Despite the difference in outcome, the analytical process of all justices was identical: the denial of the exemption violated the Hutterites' freedom of religion and needed to be justified under the Oakes Test. When undertaking the analysis under that test, and in particular under the minimal impairment stage, no member of the minority attempted to utilise the duty of reasonable accommodation. This should not be surprising as Abella J, the drafter of the main dissenting opinion, had also been co-responsible, together with Deschamps J, for the dissenting judgment in *Multani* which rejected the duty of accommodation in relation to norms of general application (i.e. 'a norm such as a law, regulation, or other similar rule of general application'³⁰³). Likewise, McLachlin CJC in *Hutterian Brethren* explicitly rejected any role for the duty of reasonable accommodation in the Oakes Test analysis in relation to norms of general application.³⁰⁴

In rejecting the reasonable accommodation analysis, McLachlin CJC explicitly referred to the minority judgment in *Multani* and approved of the distinction between norms of general application, where the duty of reasonable accommodation was not appropriate, and administrative decisions and governmental action, where the duty of reasonable accommodation might be helpful.³⁰⁵ The inappropriateness of the duty of reasonable accommodation in the context of norms of general application was due to the fact that legislatures, unlike administrative decision-makers, cannot be expected to tailor legislation to the individual needs of prospective claimants. Legislatures can only be expected to have regard to the wider public interest. Consequently, '[t]he question the court must answer is whether the Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned'. While a

³⁰¹ *ibid* 104.

³⁰² *ibid* 114–116.

³⁰³ *Multani* (n 269) [103].

³⁰⁴ *Hutterian Brethren* (n 272) [71].

³⁰⁵ *ibid* 66–68.

disproportionate impact on a particular individual or group could lead to a finding of an unjustified Charter violation, imposing a duty of reasonable accommodation on the legislature would be unhelpful in determining that question.³⁰⁶

Despite rejecting the incorporation of the duty of reasonable accommodation in the Charter analysis, *Hutterian Brethren* is unequivocally clear that individuals have a Charter right, under s 2(a) Canadian Charter and its Quebec counterpart, to an exemption on the basis of a conscientious objection from legal norms of general application. That right is not absolute. A refusal to grant an exemption may be justified if the requirements of the Oakes Test can be met. In *Hutterian Brethren* the SCC held that the Oakes Test had been satisfied and, consequently, the refusal of the exemption was justified. However, as we shall see, the Court has found on a subsequent occasion, in *R v NS*,³⁰⁷ that the refusal to grant an exemption was not satisfied.

R v NS

In *NS* the norm of general application being objected to was the common law rule that ‘witnesses in common law criminal courts are required to testify in open court, with their faces visible to counsel, the judge and the jury’.³⁰⁸ *NS*, a Muslim woman who wore the niqab (a cloth that covers the face), wished to testify in a trial where she had accused her uncle and cousin of having sexually assaulted her. The trial judge had ordered her to remove the niqab as the inability of the defence to see her face would impede the defence’s ability to read her demeanour and thereby compromise the accused constitutional right to a fair trial. The SCC had to decide how to reconcile the two conflicting rights to freedom of religion and to a fair trial. It decided that a case by case analysis would be required. McLachlin CJC, giving the majority judgment, held:

a witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:

(a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

³⁰⁶ *ibid* 69–70.

³⁰⁷ *R v NS* (2012) 3 SCR 726.

³⁰⁸ *ibid* 22.

(b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.³⁰⁹

Two dissenting judgments were delivered. The first, by LeBel J, would have favoured a clear rule that a witness could not wear a niqab during a criminal trial as it could not be reliably predicted whether the inability to fully read the demeanour of the witness would compromise the fairness of the trial.³¹⁰ Abella J, delivering the other dissent, would have allowed the wearing of the niqab in all circumstances, except when the trial revolved around the identity of the niqab wearer.³¹¹ This was mainly because there were already several circumstances in which a witness was not required to show her face in a criminal trial (e.g. children in some proceedings, admissible hearsay evidence, telephone evidence, etc) without there being a substantial impact on the fairness of the proceedings.³¹²

Neither of the two approaches suggested by the dissenting judgments was accepted by the majority. Abella J's approach would undermine the longstanding and unchallenged common law assumption that being able to see the face of a witness assists in assessing her credibility and thereby is important for a fair trial.³¹³ Importantly for present purposes, however, LeBel's approach of a blanket prohibition of a witness wearing the niqab:

is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible. Importantly, it limits religious rights where there is no countervailing right and hence no reason to limit them. As such, it fails the proportionality test which has guided Charter jurisprudence since *R. v. Oakes* in 1986.³¹⁴

The rejection of LeBel's approach indicates two things for the purposes of the general right to conscientious exemption. First, just like legislation, the common law is a norm of general application and may violate the right to conscientious exemption under art 2(a) of the Canadian Charter and its Quebec Charter counterpart. Second, following *Multani*, a particular common law rule that violates s

³⁰⁹ *ibid* 3.

³¹⁰ *ibid* 69.

³¹¹ *ibid* 83.

³¹² *ibid* 108.

³¹³ *ibid* 48.

³¹⁴ *ibid* 51.

2(a) can only be justified under the Oakes Test. The rejection of LeBel's suggested common law rule by the SCC illustrates a clear instance where the Court has indicated that the common law may unjustifiably violate the general right to conscientious exemption. As suggested by the majority, the common law rule regarding the demeanour of witnesses ought to accommodate the conscientious beliefs of a particular witness while not compromising the fairness of the criminal proceedings. How such accommodation and compromise between religious and fair trial rights ought to be undertaken has been outlined by the SCC.

Conclusion

The above analysis reveals that s 2(a) of the Canadian Charter and s 3 of the Quebec Charter grounds a general right to conscientious exemption. Norms of general application (e.g. statutes, regulations and the common law) may only violate that right if they can withstand the scrutiny of the Oakes Test.

5. Conclusion

The three rules of law identified above show that a general right to conscientious exemption exists in Canadian law. The primary source of this right is to be found in anti-discrimination statutes and the duty of reasonable accommodation that case law has read into them. This rule of law is the most extensive. It arises in each Canadian jurisdiction, it binds public and private persons, and it arises in a variety of contexts, including employment and provision of goods and services. The right to freedom of conscience and religion under the Canadian and Quebec Charters also gives rise to a general right to conscientious exemption which applies to public bodies but not to private persons. As analysed, depending on which exercise of public power is concerned (administrative action or law of general application) the legal analysis will differ. Administrative bodies' refusal to grant an exemption cannot be unreasonable. Legislative measures cannot infringe that right disproportionately.

CHAPTER 5: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN CANADIAN LAW: BEYOND RELIGIOUS PRIVILEGE?

1. Introduction

As analysed in the previous chapter, the Canadian and the Quebec Charters both protect freedom of conscience and freedom of religion. The Canadian Charter groups both freedoms together in s 2(a) and states that '2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion (...)'. Similarly s 3 of the Quebec Charter says '3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion (...)'. The analysis in the previous chapter has shown that a general right to conscientious exemption arises under both provisions. However, all the cases analysed related to freedom of religion. This is because, as to be seen, the case law on freedom of conscience is very meagre. That is, of course, not to say that the general right to conscientious exemption is not available to non-religious conscientious objectors. As to be seen, various Canadian courts and tribunals have held that it is clearly available, although the Supreme Court of Canada ('SCC') has not directly confronted the question other than in *obiter dicta*.

It is not altogether clear whether the general right to conscientious exemption arising under anti-discrimination statutes is available to non-religious conscientious objectors. This is because the prohibition of discrimination in these statutes is often, but not always, confined to religion or religious creed. It is sometimes extended to political beliefs. However, except in a handful of cases, Ontario being a notable exception, it does not appear to be available to non-religious conscientious objectors. Table 2 summarises the belief-based characteristics which these statutes protect and some non-exhaustive sources which may guide in their interpretation. The table does not include the other non-belief based characteristics, such as sex, race and disability, which the statutes protect. The general picture is that religious beliefs appear to be privileged in relation to the general right that arises from these statutes. It will be seen, however, that this appearance of religious privilege is deceptive in two ways.

First, when the case law which defines religious freedom is investigated one finds that it also protects non-belief in religion (e.g. atheism and non-belief in a particular religion). Second, as to be

argued, the absence of protection of non-religious conscientious beliefs (e.g. non-religious vegetarianism) may be held to violate s 15 of the Canadian Charter. This section says:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The appropriate remedy for this violation, in line with some well settled SCC cases, is for a court to read into these statutes a requirement that non-religious conscientious belief is a protected characteristic. This would entail that under these statutes a general right to conscientious exemption is available for non-religious conscientious beliefs.

This chapter first sets out what is religious freedom and shows that the freedom protects non-belief in religion. It also shows that freedom of conscience and freedom of religion are distinct, albeit overlapping, freedoms. The chapter then proceeds to analyse the case law that has given an indication of what is conscience for the purposes of s 2(a) of the Canadian Charter (and its Quebec counterpart). Finally, it provides a legal argument as to why courts are obliged to read anti-discrimination legislation as prohibiting discrimination on the basis of non-religious conscientious beliefs. In sum, the chapter argues that the general right to conscientious exemption in Canadian law is not a privilege of religious believers in any of the rules of law that ground it.

Table 2		
Legislation	Prohibited grounds	Interpretation aids
Canadian Human Rights Act (1977)	religion	N/A
British Columbia Human Rights Code (1969)	religion and political belief	N/A
Alberta Human Rights Act (1966)	religion and political belief	N/A
Saskatchewan Human Rights Code (1979)	religious creed and political belief	S 2(1)(d) Saskatchewan Human Rights Code: 'Creed means religious creed'
Manitoba Human Rights Code (1970)	religion or creed, or religious belief, religious association or religious activity (s 9(2)(d))	'Section 9(2)(d) will be interpreted to include the presence or absence of a religion, creed, religious belief, religious association or religious activity'. (Manitoba Human Rights Commission Board of Commissioners' Policy - Policy # I-13 (2002) available at http://www.manitobahumanrights.ca/publications/policy/policy_defining-religious-belief.html)
Ontario Human Rights Code (1962)	creed	'The Code does not define creed, but the courts and tribunals have often referred to religious beliefs and practices. Creed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life. The following characteristics are relevant when considering if a belief system is a creed under the Code. A creed: <ul style="list-style-type: none"> ▪ Is sincerely, freely and deeply held ▪ Is integrally linked to a person's identity, self-definition and fulfilment ▪ Is a particular and comprehensive, overarching system of belief that governs

		<ul style="list-style-type: none"> ▪ one’s conduct and practices ▪ Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence ▪ Has some “nexus” or connection to an organization or community that professes a shared system of belief. <p>Given the breadth of belief systems that have been found to be a creed under the Code – from Raelianism to the “spiritual cultivation practices” of Falun Gong – organizations should generally accept in good faith that a person practices a creed, unless there is significant reason to believe otherwise, considering the above factors. ’ (Ontario Policy on Preventing Discrimination Based on Creed – 2015 available at http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed)</p>
Quebec Charter of Human Rights and Freedoms (1975)	religion, political convictions NB: Also affirms freedom of conscience, freedom of religion, and freedom of opinion among other freedoms in Ch.1(3)	N/A
Nova Scotia Human Rights Act (1963)	religion, creed, and political belief, affiliation or activity	<p>‘Creed</p> <p>A set of principles (spiritual or other) or a philosophy of life (usually spiritually-based)</p> <p>A professed system and confession of faith, including both beliefs, observances and worship. A belief in a god or gods or a single supreme being is not a requisite. <i>Creed is a protected characteristic</i> in the Nova Scotia Human Rights Act’ (HRC Human Rights in the workplace A Glossary of Terms, 2011 available at</p>

		https://humanrights.novascotia.ca/sites/default/files/RREI-Glossary.pdf)
New Brunswick Human Rights Act (1967)	religion and political belief and activity	N/A
Newfoundland Human Rights Act (1969)	religious creed, religion and political opinion	N/A
Prince Edward Island Human Rights Act (1968)	Creed or religion, and political belief	'Creed or religion refers to a shared belief system or faith but may not cover personal, moral, ethical or political views'. (PEI HRC – A Guide to the PEI HRA, p 24 available at http://www.gov.pe.ca/photos/original/YRTK.pdf)
Yukon Human Rights Act (1987)	religion or creed, or religious belief, religious association or religious activity and political belief	N/A
Nunavut Human Rights Act (2003)	creed, religion	N/A

2. Religious Freedom as Protecting Non-Belief in Religion and as a Subset of Free Conscience

The scope of religious freedom was established very early on in the SCC's case law on the Canadian Charter. While the early cases indicate that religious freedom protects mainstream religions such as Christianity, Islam and Judaism, it was clear that it also protected minority religions. There were some very early indications that it may also protect non-belief in religion. As the case law has developed over the years, it is now abundantly clear that people who disbelieve in religion are protected by the Canadian Charter. It is also clear that religion falls within the broader concept of freedom of conscience. The first part of this chapter outlines the relevant case law, broadly chronologically.

Big M Drug Mart

Big M Drug Mart Ltd was charged with unlawfully carrying on the sale of goods on a Sunday contrary to a Sunday trading law, the Lord's Day Act. The company challenged the compatibility of the Lord's Day Act with s 2(a) of the Canadian Charter. The SCC ruled for the very first time on the meaning of religious freedom under s 2(a) of the Charter. It held that, Dickson J delivering the Court's majority judgment, the true purpose of the Act was to compel the observance of the Christian Sabbath. This, the Court held, violated the Charter's protection of freedom of conscience and religion.³¹⁵ Furthermore, the violation could not be justified under s 1 of the Charter because the motivation of the legislation, i.e. compelling Christian beliefs, was not of sufficient importance to warrant overriding a constitutionally protected right or freedom.³¹⁶

Dickson J provided in his judgment principles concerning the scope of s 2(a) which continue until the present day to define the notion of freedom of conscience and religion. He found that religious freedom includes, as a minimum, the freedom to believe in a religion; the freedom to declare those religious beliefs; and the freedom to manifest those religious beliefs by worship, practice, teaching or dissemination. However, he added that religious freedom is more expansive than that. It includes the non-absolute freedom not to be compelled to act in a way contrary to a person's beliefs or

³¹⁵ *R v Big M Drug Mart Ltd* (1985) 1 SCR 295 [137].

³¹⁶ *ibid* 140–143.

conscience.³¹⁷ This is because religious freedom falls within the larger concept of freedom of conscience. As Dickson J goes on to say in a much quoted paragraph:

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.³¹⁸

This famous paragraph indicates two fundamental things which are crucial for understanding who is to benefit from the general right to conscientious exemption. First, as noted, freedom of religion falls within the larger category of freedom of conscience: as Dickson J said, religious beliefs are only paradigmatic instances or conscientious beliefs. Hence, freedom of conscience is capable of having a content which is different from that of freedom of religion, i.e. the Charter's protection of conscience is not confined to freedom of religion. Unfortunately, as will be shown, the SCC has not yet entirely articulated the extent of freedom of conscience which is not freedom of religion. Secondly, the more narrow freedom of religion includes the freedom to hold and manifest a religion but also a freedom not to be compelled to hold or manifest a religion. This paragraph is therefore the seed of what will become the standard understanding of s 2(a): Freedom of conscience is not limited to freedom of religion and freedom of religion is really a freedom to hold and manifest beliefs, whether positive or negative, about religion (i.e. it is a freedom to hold and manifest religion-related beliefs). The next sections show how these principles developed in subsequent cases.

³¹⁷ *ibid* 94–95.

³¹⁸ *ibid* 124.

Edwards Books

Edwards Books (also commonly known as *VideoFlicks*) concerned another Sunday trading law, the Retail Business Holidays Act 1980 (Ontario). Traders asserted that the requirement to close their shops on Sundays infringed, among other things, s 2(a) of the Canadian Charter. The Court held that, although this act had a secular purpose (i.e. providing a universal day of rest for employees), it nevertheless infringed the freedom of religion of those traders who held their Sabbath on a Saturday.³¹⁹ However, in applying the minimal impairment stage of the Oakes Test, the Court concluded that the legislation was not disproportionate because it provided, in s 3(4), an exemption for retailers which close their business on Saturdays and have seven or fewer employees engaged in the service of the public and less than 5,000 square feet used for such service. Albeit some large Saturday-observing retailers would not benefit from this exemption, the Court held that most Saturday-observing retailers would benefit from it. The alternative, having Saturday-observing retailers enjoy the exemption after satisfying a board of a conscientious or religious objection, would allow too much state-sponsored enquiry into individuals' most personal and private beliefs exposing them to unwarranted public airing and testing.³²⁰

Dickson CJC, delivering the principal majority judgment of the Court, relied extensively on *Big M Drug Mart Ltd*. However, he did extend the principles in that case in at least three relevant respects. First, he clarified that indirect and/or unintentional burdens can violate freedom of conscience and religion. He said that '[i]t matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)'.³²¹ This allowed him to find that the Retail Business Holidays Act, despite not having the purpose of coercing a particular religious belief, could still violate s 2(a). Secondly, Dickson CJC held that, given the potential wide scope of measures which may infringe s 2(a), that section could not be interpreted so to compel 'legislatures to eliminate every miniscule state-imposed cost associated with the practice of religion'.³²² He feared that individuals could otherwise challenge, for example, taxation imposed on all products, including religious products.³²³ Consequently, s 2(a) ought to be read in a way so that 'legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs

³¹⁹ *R v Edwards Books and Art Ltd* (1986) 2 SCR 713 [108–113].

³²⁰ *ibid* 137–141.

³²¹ *ibid* 97.

³²² *ibid* 98.

³²³ See for example *O'Sullivan v Canada* (1991) 1 FCR 522 where the claimant refused to pay a portion of income tax as a way to protest against the lawfulness of certain abortions.

is not prohibited if the burden is trivial or insubstantial'.³²⁴ Finally, he said that 'legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion'.³²⁵ This was to exclude s 2(a) from applying to common legislation, such as that prohibiting theft and murder, because those legislative prohibitions coincide with common religious prohibitions.

It is worth noting that Dickson CJC, just as he had done in *Big M Drug Mart Ltd*, reiterated that freedom of conscience and freedom of religion are distinct rights under s 2(a). He said that 'I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects'.³²⁶ He did not go on to expand on the other ways in which the two rights may differ. Nevertheless, this further illustrates the view that conscience and religion are not entirely overlapping freedoms. Indeed, as *Big M Drug Mart Ltd* suggests, freedom of religion falls within the larger category of freedom of conscience. This was later reiterated in the subsequent SCC case of *Morgentaler*, albeit in a concurring judgment.

Morgentaler: Defining Conscience and Freedom of Conscience

Morgentaler did not centrally concern s 2(a) of the Canadian Charter. Instead, it concerned whether the abortion provisions of the Criminal Code infringed the 'right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice' under s 7 of the Charter. The outcome of the case was that the Criminal Code did violate art 7 and could not be saved under the Oakes Test. No analysis will be here undertaken of the various reasons offered by a much divided SCC in that case. Three concurring judgments were delivered, one by Dickson CJC (Lamer J concurring), the second by Beetz J (Estey J concurring), the third by Wilson J. One dissenting opinion was delivered by McIntyre J (La Forest J concurring).

Given that the case focused on s 7, *Morgentaler* could be thought not to be capable of assisting in the enquiry into the meaning of s 2(a). However, the judgment of Wilson J is, up to today, one of the few SCC cases which provide some glimpse as to the meaning of freedom of conscience under s 2(a). But how did she link s 7 and s 2(a) together? She held that the right to personal integrity under s 7 could not be interfered with except in accordance with 'the principles of fundamental justice'. Among these principles were the fundamental rights and freedoms included in the Charter, including

³²⁴ *Edwards Books* (n 319) [98].

³²⁵ *ibid* 102.

³²⁶ *ibid* 140.

s 2(a).³²⁷ Unlike other s 2(a) cases, Wilson J emphasised freedom of conscience. She explained her reasoning thus:

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(a) of the Charter. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially *a moral decision, a matter of conscience*. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount, or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual.³²⁸

This passage is indicative as it provides a working definition of conscience for the purposes of s 2(a) of the Charter. Simply put, freedom of conscience is the freedom to hold and manifest a moral belief. If the same principles which apply to religious freedom (articulated in *Big M Drug Mart*) apply to freedom of conscience then it follows that freedom of conscience includes, as a minimum, the freedom to hold a particular moral belief (e.g. that certain abortions are permissible or non-permissible); the freedom to declare those moral beliefs; and the freedom to manifest those moral beliefs (e.g. by undergoing an abortion or refusing to undergo one). It must also include the non-absolute freedom not to be compelled to act in a way contrary to a person's moral belief (e.g. not to be compelled to forgo or undertake an abortion). Following *Edwards Books*, direct or indirect, intentional or unintentional, foreseeable or unforeseeable measures may infringe freedom of conscience. However, trivial or insubstantial interferences with a person's conscience do not violate a person's conscience. Finally, certain legislative measures which coincide with a particular moral belief do not for that reason alone violate freedom of conscience of people with different moral beliefs. We need not give much credit to the earlier dicta by Dickson CJ's in *Edwards Books* that 'freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects'.³²⁹ In fact it is clear that certain moral beliefs may entail collective aspects: e.g. individuals with a particular moral belief (e.g. 'pro-choice' or 'pro-life') may associate to influence public policy to further their shared moral beliefs.

The analysis above extends the requirement of freedom of religion to freedom of conscience. That is called for because, according to *Big M Drug Mart*, freedom of religion falls within the larger category of freedom of conscience. Wilson J helps identify why free conscience is broader than free religion.

³²⁷ *R v Morgentaler* [1988] 1 SCR 30 [306–308].

³²⁸ *ibid* 309 emphases added.

³²⁹ *Edwards Books* (n 319) [140].

Freedom of religion is a narrower concept in the sense that it singles out only a subset of moral beliefs, i.e. those rooted in religion. Freedom of conscience is broader because it applies to all moral beliefs, including religious ones. If there are certain conditions to enjoy the narrower freedom of religion it is likely that all or most of those same conditions apply to the broader freedom of conscience. There may of course be other conditions which are exclusive to freedom of conscience. However, until this day, it cannot conclusively be known which they are as *Morgentaler* remains the most extensive SCC's discussion of freedom of conscience. However, one can be fairly confident that the two freedoms are distinct. As Wilson J continued:

[I]n a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.³³⁰

Part 3 of this chapter will show how lower courts have applied the concept of freedom of conscience. The next section, however, returns to freedom of religion and conclusively shows that freedom of religion is the freedom to hold and manifest positive and negative beliefs about religion.

Ross and Simoneau: Religious freedom as freedom to hold and manifest religious belief and unbelief

Ever since *Big M Drug Mart* we know that religious freedom requires the protection of non-belief in religion. In fact the SCC had said that

Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.³³¹

Two subsequent SCC cases bring out those principles to the forefront and perhaps extend it: *Ross*,³³² decided in 1996, and *Simoneau*,³³³ decided in 2015.

In *Ross*, a parent brought a discrimination claim under the Brunswick Human Rights Act against a school board which employed a teacher, Ross, who publicly made anti-Semitic statements. The SCC had to determine whether the disciplinary measures imposed on Ross would infringe his freedom of

³³⁰ *R v Morgentaler* (1993) 1 SCR 462 [313].

³³¹ *Big M Drug Mart* (n 315) [108].

³³² *Ross v New Brunswick School District No 15* (1996) 1 SCR 825.

³³³ *Simoneau* (n 4).

expression and freedom of religion guaranteed under ss 2(a) and 2(b) of the Canadian Charter. The SCC described his views as follows:

[Ross] made racist and discriminatory statements in published writings and in appearances on public television. In his published writings, which consist of four books or pamphlets published from 1978 to 1989, and three letters to New Brunswick newspapers, Ross (...) argued that Christian civilization was being undermined and destroyed by an international Jewish conspiracy.³³⁴

He was ordered by a school disciplinary board, among other things, not to publish anything ‘that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion’.³³⁵

The Canadian Jewish Congress had submitted to the Court that Ross’s anti-Semitic views could not be held to be religious views. The Court rejected that submission and applied the Oakes Test to justify the infringement of Ross’s religious freedom. The justification succeeded only partially: the school was entitled to confine him to non-teaching positions but was not entitled to ban him from advocating his anti-Semitism outside the school.³³⁶

The Court’s reasons for rejecting the Jewish Congress’s submission, however, are not altogether clear. Three hypotheses may be considered. First, Ross’s anti-Semitism may have been required by Ross’s religious views. However, in describing his anti-Semitic views no particular description of Ross’s religion was offered by the Court. The Court only specified that his views were anti-Semitic. Second, the fact that Ross held a particular view about someone else’s religion may itself be considered a religious view. This is a more likely option and it would be a natural extension of the principle that non-belief in a religion is protected by religious freedom as non-belief in a religion may entail criticising and disparaging, even harshly and unjustly, the religion in question, in this case Judaism. The problem with this hypothesis, however, is that anti-Semitism is not non-belief in Judaism but a discriminatory view about Jews generally, irrespective of whether they subscribe to Judaism (of course a Jew need not subscribe to Judaism). The third hypothesis is that Ross sincerely believed that his anti-Semitic views were religious and it was not the Court’s role to tell him whether what he believed to be a religious view was or was not religious. This third option seems to fit best with the Court’s response to the Jewish Congress’s submission when LA Forest J unanimously speaking for the Court said:

³³⁴ *Ross* (n 332) [3].

³³⁵ *ibid* 7.

³³⁶ *ibid* 104–110.

In this case, the respondent's freedom of religion is manifested in his writings, statements and publications. These, he argues, constitute 'thoroughly honest religious statement[s]', and adds that it is not the role of this Court to decide what any particular religion believes.

I agree with his statement about the role of the Court. In *R. v. Jones*, [1986] 2 S.C.R. 284, I stated that, assuming the sincerity of an asserted religious belief, it was not open to the Court to question its validity.³³⁷

In due course, when *Amselem*³³⁸ is considered, it will become clear that Canadian courts generally accept assertions that a belief is a religious one if a person sincerely believes it to be so. However, this does not entail that the second hypothesis offered above is to be rejected outside the context of *Ross*. Beliefs about a religion or religions generally, including non-belief, may itself be a form of belief protected by religious freedom. This becomes clear when *Simoneau* is considered.

Simoneau was a self-declared atheist who regularly attended Saguenay City's municipal council's public meetings. A tradition of the council, later crystallised in a bye-law, required the meetings to start with a prayer to an 'Almighty God'. Simoneau considered that the prayer constituted discriminatory interference with his freedom of conscience and religion, contrary to s 3 (freedom of conscience and religion) and s 10 (prohibition of discrimination on the basis of religion) of the Quebec Charter. The SCC (majority judgment delivered by Gascon J) equated the scope of religious freedom under the Quebec Charter (both under ss 3 and 10) to that under s 2(a) of the Canadian Charter.³³⁹ It concluded:

Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions (...). If the state favours one religion at the expense of others, it imports a disparate impact that is destructive of the religious freedom of the collectivity (...). In a case such as this, the practice of reciting the prayer and the By-law that regulates it result in the exclusion of Mr. Simoneau on the basis of a listed ground, namely religion. That exclusion impairs his right to full and equal exercise of his freedom of conscience and religion.³⁴⁰

Importantly for our purposes, the SCC held that Simoneau's atheism was protected by religious freedom under the Charters. After quoting from *Big M Drug Mart's* exposition of the scope of

³³⁷ *ibid* 70–71.

³³⁸ *Syndicat Northcrest v Amselem* (2004) 2 SCR 551.

³³⁹ *Simoneau* (n 4) [65–68].

³⁴⁰ *ibid* 64.

freedom of religion, the Court said that '[t]hese protections are not limited to religious beliefs. The freedom not to believe, to manifest one's non-belief and to refuse to participate in religious observance is also protected.' It then went on to state that 'freedom of religion includes the freedom to have no religious beliefs whatsoever. For the purposes of the protections afforded by the charters, the concepts of "belief" and "religion" encompass non-belief, atheism and agnosticism'.³⁴¹ These statements clearly provide support for the proposition that freedom of religion is better understood as freedom to hold and manifest religious belief or unbelief. On a layperson's understanding of religion, atheism and agnosticism cannot normally be considered religious beliefs. Instead, they are different kinds of religious unbelief, respectively that theism is false or that it is not possible to determine the truth or falsity of theism. The scope of freedom of religion is best said then, on the layperson's understanding, to be freedom to hold and manifest religious belief and unbelief.

If it is accepted that religious freedom in Canadian law follows this layperson's understanding and that it is the freedom to hold and manifest religious belief and unbelief, it remains to be determined what 'religion' is. The 2004 landmark case of *Amselem* provides the answer.

Amselem: 'Religion' as a Subjective Freely and Deeply Held Belief-System of Spiritual Faith

*Amselem*³⁴² provides perhaps the most useful case study of the breadth of the reach of religious freedom and the general right to conscientious exemption in Canadian law. It is also the best authority for the meaning of religion in the Canadian context. In that case the appellants, who were practising Orthodox Jews, lived in two units in a residential development in Montréal. They intended to build and keep a succah, a temporary religious building, on the balconies of their properties for nine days. The syndicate of co-ownership, Syndicat Northcrest, refused to permit the buildings, claiming erecting a succah was in violation of the by-laws as stated in the declaration of co-ownership, which prohibited decorations, alterations and constructions on the balconies. The Syndicat proposed to accommodate the religious beliefs of the appellants by allowing a communal succah to be built in the property's gardens. The appellants however insisted on setting up individual succot on their balconies claiming that communal succot were not compatible with their religious beliefs.

³⁴¹ *ibid* 70.

³⁴² *Amselem* (n 338).

The SCC, Iacobucci J delivering the majority judgment, held that the declaration of co-ownership infringed the appellants' religious freedom as protected by the Quebec Charter (and Canadian Charter). Applying the Oakes Test, Iacobucci J held that the interference with the appellants' rights was severe while the inconvenience to the Syndicat of tolerating a temporary building for a short period with adequate safety and aesthetic precautions was minimal.³⁴³ In reaching that conclusion Iacobucci J provided a useful summary of the scope of religious freedom under the SCC's case law, defined 'religion' and added additional principles as to how to determine whether a specific belief is a religious belief. Given that the case law on the scope of religious freedom has already been analysed in this chapter, this section will focus on the definition of religion and how to determine whether a specific belief is religious.

In defining religion Iacobucci J asserted that '[w]hile it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion'.³⁴⁴ This has to be read in a way compatible with the earlier and later case of *Ross* and *Simoneau* which make clear, as explained, that religious freedom protects also non-belief in religion, i.e. atheism and agnosticism, and also discriminatory anti-religious views, i.e. anti-Judaism/anti-Semitism. Iacobucci J then continued by providing a general definition of religion. He said:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.³⁴⁵

Notice then that under this definition theism is not a necessary requirement of a religion. For Canadian law a religion may well be godless. Rather, the essence of religion is a freely and deeply held belief-system connected to an individual's spiritual faith and integrally linked to a person's self-definition and spiritual fulfilment. This belief-system may then allow the individual to connect to a transcendental subject or object, which may be, but need not be, theistic.

³⁴³ *ibid* 3.

³⁴⁴ *ibid* 39.

³⁴⁵ *ibid*.

It is important to emphasise that this definition is built on a subjective view of religion. This is made clear by the view that 'religion is about freely and deeply held personal convictions or beliefs'. This subjectivity flows over into the procedure of determining whether a particular belief is entitled to the protection of religious freedom. Iacobucci J said in this respect:

claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make (...). In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*R. v. Videoflicks Ltd.*, supra, at p. 735) and not that a particular belief is "valid".³⁴⁶

This led the SCC to reject the contention made by the lower court that, after having heard evidence from two Rabbis, Judaism does not require, contrary to the appellants' beliefs, an individual succah but permits communal succot.³⁴⁷ Iacobucci J empathetically affirmed that '[i]t is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine'.³⁴⁸ Furthermore, it mattered not whether the particular religious belief was a religious obligation, custom or was a supererogatory religious act. All such enquiries into the degree of religiosity of a belief were unwarranted. All that is required is that the claimant sincerely asserts that a belief or practice has a 'nexus with religion'.³⁴⁹

Note, however, that this subjectivity does not extend to the belief that a person's religious freedom has been infringed. Whether or not an infringement of a constitutional right exists is an objective matter to be decided by the courts.³⁵⁰ As is clear from *Edwards Book*, trivial or insubstantial infringements of a person's freedom of religion are outside the scope of the Charters.³⁵¹ The same goes for the analysis under the Oakes Test as to whether any infringement of a person's religious freedom is justified: it is an objective enquiry undertaken by the courts. However, whether or not a particular belief or requirement is religious is primarily a subjective matter.

³⁴⁶ *ibid* 43.

³⁴⁷ *ibid* 66.

³⁴⁸ *ibid* 67.

³⁴⁹ *ibid* 46 and 69.

³⁵⁰ *SL v Commission scolaire des Chênes* (2012) 1 SCR 235 [24].

³⁵¹ *Edwards Books* (n 319) [98].

Conclusion: the general right to conscientious exemption as available to individuals with religious beliefs and non-beliefs

The analysis of the Canadian case law undertaken reveals the scope of religious freedom. This helps to identify the partial beneficiaries of the general right to conscientious exemption. Whenever reference is made to religion in the rules of law that constitute the general right to conscientious exemption the beliefs protected are those that are religion-related. Religion, in Canadian law, is essentially understood as a subjective freely and deeply held belief-system of spiritual faith. However, as *Ross* and *Simoneau* make clear, one need not hold this particular belief-system to benefit from the general right. One need only have a belief that is religion-related. Atheists, agnostics, and anti-religious people who object to legal requirements on the basis of their atheism, agnosticism and anti-religious beliefs are equally entitled to the general right. So it is clear that in Canadian law the general right is not a privilege of religious people, it is at least a privilege of people, including non-believers, who hold non-beliefs in religion.

Furthermore, as *Morgentaler* suggests, freedom of conscience and freedom of religion are distinct but related rights under the Canadian and Quebec Charters. Hence, it may follow that under the Charters a general right to conscientious exemption is available to individuals holding non-religious conscientious beliefs. The next section investigates and concludes that this is in fact the case, despite the paucity of cases on the issue.

3. Is the General Right to Conscientious Exemption Available to Conscientious Objectors who have a Non-religious Conscientious Belief?

Freedom of conscience is distinct from, albeit profoundly related to, freedom of religion. This is what the concurring judgment of Wilson J in *Morgentaler* suggests on the basis of the earlier suggestion in *Big M Drug Mart*.³⁵² If, as we know, there is a general right to conscientious exemption on the basis of freedom of religion, is there a similar right on the basis of freedom of conscience? Wilson J did not answer that question in *Morgentaler* and the SCC has not approached that question yet. However, a few lower courts, including the Federal Court of Appeal (FCA), have suggested that that is the case.

³⁵² *Morgentaler* (n 330) [313].

Roach

In *Roach*³⁵³ the Federal Court of Appeal ('FCA') confronted the question frontally when Roach, a committed republican anti-monarchist and non-Canadian citizen who was undergoing the process of naturalisation, sought to be exempted from affirming or swearing the citizenship oath that read:

I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.³⁵⁴

He argued that 'the citizenship oath in its present form violates his freedom of conscience under para. 2(a) since it is against his "conscience to make oaths to all but the Supreme Being and to principles such as truth, freedom, equality, justice and the rule of law"'.³⁵⁵ As will be explained shortly, the framing of his conscience claim in these specific terms was fatal to his case.

The FCA, in the partially dissenting judgment of Linden JA, but with whom the other judges concurred on the s 2(a) issue, relied on Wilson J's judgment in *Morgentaler* agreeing that freedom of conscience was distinct from freedom of religion. He said:

It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong (...). Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under para. 2(a) of the Charter.³⁵⁶

This passage reaffirms, in its first sentence, the view expressed at various points earlier that freedom of religion is a subset of the larger freedom of conscience. It also reiterates, in its second sentence, the view that the content of freedom of conscience is the freedom to hold and manifest a moral belief. Finally, it gives unequivocal expression, in its final sentence, to the view that a conscientious objection may be expressed on the basis of a non-religious moral view. However, despite these findings, Roach was held not to be entitled to the exemption he sought on the basis of ingenious reasoning by the Court.

³⁵³ *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (1994) 2 FCR 406.

³⁵⁴ Schedule to the Citizenship Act, RSC 1985, c C-29.

³⁵⁵ *Roach* (1994) (n 353) [24].

³⁵⁶ *ibid* 25.

The FCA held that in order to benefit from the protection of free conscience the interference with his freedom must not have been trivial or insubstantial (following *Edwards Books*). The Court then held that, given that he was not being asked to swear or affirm ‘to the Queen as he alleges, nor to anyone but a Supreme Being, if he chooses to swear’,³⁵⁷ there was no interference with his freedom of conscience. This, however, misses the point of Roach’s claim. Being a committed anti-monarchist, he was actually objecting, as the FCA itself admitted,³⁵⁸ to the content of the oath which required his allegiance to the Queen. He was not objecting to the fact of swearing in the presence of any official or in the presence of the Queen personally (he would not have had to swear in the presence of the Queen in any event). The Court was however able to avoid the essence of his objection as he had framed his objection in the terms of objecting ‘to make oaths to all but the Supreme Being and to principles such as truth, freedom, equality, justice and the rule of law’.³⁵⁹ As the FCA admitted ‘[t]his is not to say that the appellant might not have made a valid argument regarding freedom of conscience had he articulated a conscientious objection to the content of the oath or affirmation’.³⁶⁰

Despite the outcome, *Roach* remains the highest Canadian legal authority for the view that the general right to conscientious exemption is available under the Charters on the basis of a non-religious moral view, such as republican anti-monarchism. Other lower courts and tribunals have, however, concluded the same.

Zundel

In *Zundel*³⁶¹ an anti-Semite posted various anti-Semitic statements on the internet in violation of s 13 of the Canadian Human Rights Act, now repealed, which prohibited publications ‘likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination’. He claimed, inter alia, that the prohibition violated his freedom of conscience. The Canadian Human Rights Tribunal agreed that s 13 violated his freedom of conscience which it said, referencing *Morgentaler*, ‘has been held to protect non-theocentric beliefs’.³⁶² However, applying the Oakes Test, it was held that the violation

³⁵⁷ *ibid* 28.

³⁵⁸ *ibid*.

³⁵⁹ *ibid* 24.

³⁶⁰ *ibid*.

³⁶¹ *Citron and Toronto Mayor’s Committee v Zundel* [2002] C T.D. 1/02.

³⁶² *ibid* 261.

of his freedom of conscience by s 13 was justified 'when it is necessary to protect the human dignity and self-worth of members of a designated group, such as, in this case, the Jewish community'.³⁶³

Maurice

*Maurice*³⁶⁴ was decided in the Canadian Federal Court by Campbell J. Maurice, a prisoner in the custody of the Correctional Service of Canada (CSC), had multiple times requested a vegetarian diet as mandated by his non-religious moral beliefs (albeit he had previously been a Hare Krishna vegetarian). The requests had been denied on the basis that, according to the CSC's own guidelines (Religious Diets General Guidelines³⁶⁵), special diets were only authorised for religious beliefs or on medical grounds. Campbell J held that Maurice's freedom of conscience had been violated by the CSC's refusal to provide him a vegetarian diet.

He first held that the CSC's guidelines were explicitly based on the Charter's freedom of religion under s 2(a). Because that section protected both conscience and religion, the CSC could not incorporate one and ignore the other. He said '[t]he CSC cannot incorporate s.2(a) of the Charter in a piecemeal manner; both freedoms are to be recognized'.³⁶⁶ He then continued by reaffirming that freedom of conscience protects the freedom to hold and manifest moral beliefs. Accordingly, Maurice's ethical vegetarianism was protected by freedom of conscience:

Vegetarianism is a dietary choice, which is founded in a belief that consumption of animal products is morally wrong. Motivation for practising vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of "conscience".³⁶⁷

The judge found that, given that provision was already in place to provide religious vegetarians with their requested diet, 'accommodating a vegetarian's conscientiously held beliefs imposes no greater burden on an institution than that already in place for the provision of religious diets'.³⁶⁸

The judge concluded by stating that cogent evidence must be provided by an inmate seeking to benefit from freedom of conscience to prove, on a balance of probabilities, that he holds a conscientious belief. This was satisfied in Maurice's case given that he had made multiple requests

³⁶³ *ibid* 279.

³⁶⁴ *Maurice v Canada (Attorney General)* [2002] FCT 69.

³⁶⁵ The current version is Correctional Services of Canada, 'Religious and Spiritual Accommodation in CSC Institutions' (2006) <http://www.csc-scc.gc.ca/chaplaincy/092/doc_e.pdf> accessed 26 March 2017.

³⁶⁶ *Maurice* (n 364) [8].

³⁶⁷ *ibid* 9.

³⁶⁸ *ibid* 13.

and grievances, had expended much time and effort in launching judicial review proceedings and had tried to maintain a vegetarian diet in his conditions.³⁶⁹

Maurice reaffirms once more the real bite of freedom of conscience in the Canadian Charter. It also clarifies that a public body who is obliged to comply with the Charter cannot selectively comply with its Charter obligation to respect religion while ignoring the obligation to respect freedom of conscience. The fact that a non-religious conscientious belief may lack an institutional dimension which some religious beliefs have (e.g. religious texts and teachings of a church) may pose an obstacle in determining whether a particular conscientious belief is sincerely held. However, the same obstacle is present, especially following *Amselem*, in relation to certain religious beliefs. In *Amselem* the SCC held that the fact that 'claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make'.³⁷⁰ The same applies, following *Maurice*, to non-religious conscientious beliefs: the test is whether, on a balance of probabilities, a person can provide evidence that he sincerely holds a non-religious moral belief. If so, and to the extent that interference with his freedom of conscience is not trivial or insubstantial, any violation of his right can only be justified under the Oakes Test.

Other Cases Mentioning Conscience

Morgentaler and the three cases considered in the previous sections are the only cases in the entirety of the Canadian case law, both at federal and provincial level, that undertake a reasonably detailed analysis of freedom of conscience under the Canadian and Quebec Charters.³⁷¹ Other cases only mention the right in passing. This section considers the remaining cases as relevant.

Chamberlain raised the issue of whether a school board lawfully refused to allow three books depicting same-sex parented families to be used in the instruction of classrooms of five and six year old children (K-1 level children). The majority decided that the school board's decision was unreasonable under the School Act³⁷² because, inter alia, the proper interpretation of the Act required that K-1 level children should be able to discuss their family models, whatever these may be, and that all children should be made aware of the diversity of family models that exist in society.

³⁶⁹ *ibid* 14.

³⁷⁰ *Amselem* (n 338) [43].

³⁷¹ The Manitoba Court of Appeal considered freedom of conscience under s 2(a) of the Canadian Charter in *Mackay et al v Manitoba* [1985] CarswellMan 227. However, that decision was vacated for lack of a factual basis in raising a Charter issue by the SCC in *Mackay v Manitoba* (1989) 2 SCR 357.

³⁷² School Act, R.S.B.C. 1996, c. 412.

The school board therefore failed to cater for some of the school's family models which consisted of same-sex parented families.³⁷³

The dissenting judgment in the SCC by Gonthier J (Bastarache J concurring) proceeded not on the basis of the School Act but on the basis of the Canadian Charter. Gonthier J said:

I am of the view that when one examines the totality of the context, the disagreement is actually about the appropriate way, in the K-1 classrooms of Surrey, B.C., to teach and guarantee tolerance and non-discrimination of all persons in a way which respects the rights of parents to raise their children in accordance with their conscience, religious or otherwise.³⁷⁴

Interestingly, Gonthier J also held:

To permit the courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s. 2(a) protection of the freedom of religion and conscience, as well as s. 15 protection against discrimination based on conscience, religious or otherwise.³⁷⁵

The earlier of the two passages confirms what should be by now uncontroversial, i.e. that freedom of conscience is a broader freedom which includes freedom of religion. However, and interestingly for the purposes of the argument to be advanced later that Canadian anti-discrimination statutes violate s 15 of the Canadian Charter, the latter passage seems to assert that s 15 of the Charter protects 'conscience, religious or otherwise'. This is surprising as s 15 only lists religion as one of the enumerated protected characteristics on the basis of which discrimination is prohibited. As we shall see, however, it is well-established that the protected characteristics enumerated in s 15 are not the exclusive protected characteristics. Other non-enumerated characteristics, such as sexual orientation, have been held to be protected by the s 15 of the Charter.³⁷⁶ To date, however, there is no high judicial authority, other than the dissenting judgment in *Chamberlain*, affirming that non-religious conscience is a protected characteristic under s 15.

³⁷³ *Chamberlain v Surrey School District No 36* (2002) 4 SCR 710 [56–72].

³⁷⁴ *ibid* 79.

³⁷⁵ *ibid* 150.

³⁷⁶ *Vriend v Alberta* (1998) 1 SCR 493.

Four subsequent decisions consider freedom of conscience in passing and all mainly rely on *Roach*³⁷⁷ for the proposition that a right to freedom of conscience, independent of freedom of religion, exists under the Canadian Charter. In *Duperreault*, the Canadian Umpire under the Employment Insurance Act rejected the proposition that requiring a worker to answer a questionnaire enquiring whether he had attempted to cross the picket line formed by his union infringed his freedom of conscience. The Umpire held that ‘in the context of a labour dispute, the relevant freedom is the freedom of association protected by paragraph 2(d) of the Charter and that paragraph 2(a) has no application’.³⁷⁸ Both *Chainnigh*³⁷⁹ (in the Canadian Federal Court) and *McAteer*³⁸⁰ (in the Ontario Court of Appeal) concerned anti-monarchists (including Roach himself) who objected to an oath of allegiance to the Queen. Both cases were unsuccessful even though in both cases freedom of conscience was considered as a separate right under the Canadian Charter. However, no significant analysis of that freedom was undertaken.

Finally, in *Hughes*³⁸¹ the Alberta Provincial Court rejected a freedom of conscience claim against Calgary City’s Responsible Pet Ownership Bylaw which prohibited the keeping of pet chickens on residential property. Hughes, being the founder of the advocacy group Canadian Liberated Urban Chicken Klub (CLUCK), testified that he kept urban hens and ate their eggs because of his philosophy regarding sustainable food choices which involved minimising the amount of consumption of non-self-grown food.³⁸² After considering some of the cases on freedom of conscience and religion, the Court rejected his conscience claim and held that he could not show that any burden on his conscience imposed by the Byelaw was not trivial or insubstantial.³⁸³

Conclusion: The General Right to Conscientious Exemption is Available to Objectors who hold a Non-Religious Conscientious Belief

Despite the paucity of the case law and despite the absence of unequivocal finding in the SCC, the cases analysed show that the general right to conscientious exemption is available to objectors who hold non-religious beliefs, such as anti-monarchism, ethical vegetarianism and the conscientious keeping of urban hens as part of a wider belief in sustainable nutrition. *Roach*, decided by the FCA,

³⁷⁷ *Roach* (1994) (n 353).

³⁷⁸ *In the Matter of a claim by Guy Duperreault* [2006] CarswellNat 5140 [19].

³⁷⁹ *Giolla Chainnigh v Canada (Attorney General)* 69.

³⁸⁰ *McAteer v Canada (Attorney General)* [2014] CarswellOnt 10955.

³⁸¹ *R v Hughes* [2012] ABPC 250.

³⁸² *ibid* 16–18.

³⁸³ *ibid* 102.

remains the best authority for that view. However, it should not be forgotten that early suggestions for that view were present in the concurring judgment of Wilson J in the SCC's case of *Morgentaler*. In turn, Wilson J based his reasoning on the well-established decision of *Big M Drug Mart*. Furthermore, albeit in a dissenting judgment, that view has been reaffirmed in the SCC by Gonthier J (Bastarache J concurring) in the context of moral views on instructing children on the moral permissibility of same-sex parented families. So the view has a strong pedigree and it may be fair to conclude that the general right to conscientious exemption is available to objectors who hold a non-religious conscientious belief.

Remember, however, that freedom of conscience appears to be protected only under the Canadian and Quebec Charters. As table 2³⁸⁴ showed, none of the anti-discrimination statutes mention conscience as a protected characteristic. They only mention 'religion', 'creed' or 'religious creed'. Most of them also mention 'political belief'. No cases have been found under those statutes which interpret those terms to include non-religious conscientious beliefs.³⁸⁵ This means that the rule of law under these statutes which ground a general right to conscientious exemption (i.e. the duty of reasonable accommodation) seems to be a privilege of only those with religious beliefs or non-belief in religion. In particular, given that, unlike the Canadian Charter, these statutes provide a general right to exemption from private law duties (for example in employment and in the provision of goods and services), it appears that non-religious conscientious objectors have no general right to exemption in the context of private law duties. The next section argues that the appearance is only illusory. Properly interpreted in light of the Canadian Charter, those statutes include a right to conscientious exemption for objectors who hold a non-religious conscientious belief.

4. The Duty of Reasonable Accommodation: Beyond Religion to Conscience

The duty of reasonable accommodation arising under Canadian anti-discrimination statutes appears to guarantee the general right to exemption as a privilege of only those with religious beliefs or non-belief in religion. This section argues that this, if true, would violate both the equality rights under s 15 and freedom of conscience under s 2(a) of the Canadian Charter. This violation, it is argued,

³⁸⁴ At p 112.

³⁸⁵ The chapter puts to one side the fact political belief as protected by the anti-discrimination legislation may be a form of non-religious conscientious belief. In any event, even if this was the case, political belief is not protected under all anti-discrimination statutes. Also, and importantly, this would still mean that all non-religious conscientious beliefs which are not political remain unprotected.

would not be saved by a s 1/Oakes Test analysis. The appropriate remedy for this violation would be to read into these statutes conscience as a protected characteristic. This part of the chapter takes each step in turn. However, before commencing the analysis, a real life scenario of the importance of the argument ought to be illustrated.

Why Conscience Matters

S 1 of the Ontario Human Rights Code³⁸⁶ prohibits discrimination on the basis of creed. Prior to the non-legally binding guidance issued by the Ontario Human Rights Commission (OHRC) in 2015, it was not clear whether creed covered only religious beliefs. The current guidance makes clear that the Code protects not only religious beliefs when it says that '[c]reed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life'.³⁸⁷

In 2012, Kentenci, an animal rights activist university student and ethical vegan, brought a discrimination claim on the basis of creed against her university, Ryerson University. She alleged that particular professors took issue when, in her scholarship, she equated the value of animals to the value of humans. She submitted that she was insulted and demonised for her equation, that her academic work was unfairly evaluated, and that various professors withdrew their support for her academic work and for her doctoral application.³⁸⁸ At a summary hearing the adjudicator Michelle Flaherty at the Ontario Human Rights Tribunal decided to determine first whether there was a reasonable prospect that the alleged facts amounted to discrimination on the basis of creed and, only then, determine whether Kentenci's ethical veganism amounted to a creed under the Code.³⁸⁹ She found that none of the acts of the University constituted discriminatory treatment but were expressions of academic judgement, albeit some of those acts were offensive and possibly unfair. Consequently, the Tribunal did not need to decide whether ethical veganism constituted a creed.³⁹⁰

Despite the outcome of *Kentenci*, the case can provide a useful reference point for the relevance of the argument to be advanced. Because it is not clear that ethical veganism, either prior to or after the amendment of the OHRC's guidance, constitutes a creed, had Kentenci succeeded in proving

³⁸⁶ R.S.O. 1990, Chapter H.19.

³⁸⁷ Ontario Human Rights Commission, 'Policy on Preventing Discrimination Based on Creed' (2015) <http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20based%20on%20Ocreed_accessible_0.pdf> accessed 26 March 2017.

³⁸⁸ *Kentenci v Ryerson University* [2012] HRTO 994 [3].

³⁸⁹ *ibid* 11.

³⁹⁰ *ibid* 43–62.

that she was discriminated against by her University, it would not have been clear whether she would have even had a prima facie case as her ethical veganism was not religious but was a non-religious moral view. In fact the OHRC has publicly stated that ‘the Policy does not say one way or the other whether ethical veganism is a creed’.³⁹¹ This can be legally problematic because some individuals are vegans directly due to their religious beliefs, e.g. some Seven Day Adventists, some members of the Christian Vegetarian Association and some Rastafari. Had Kentenci’s beliefs been rooted in any of these religions, proving that her beliefs constituted a creed would not have been particularly challenging.³⁹² However, given that when she brought her case the OHRC’s guidance confined creed to religious beliefs, she would have struggled to formulate a prima facie case on the basis that her ethical veganism was not based in a religion.

This continues to be relevant even after the amendment of the OHRC’s guidance. As figure 1 shows, Ontario and Nova Scotia are the only Canadian jurisdictions where there is some explicit basis to argue that non-religious conscientious beliefs (other than political beliefs) are protected under anti-discrimination law. This would entail that, especially if not living in Ontario or Nova Scotia, a student in Kentenci’s position who has been discriminated against on the basis of her non-religious ethical veganism would have no legal redress.³⁹³ This conclusion is not confined to ethical vegans. As the discussion on the case law on conscience reveals, other non-religious conscientious beliefs, such as non-religious pro-life or pro-choice beliefs, anti-monarchism, ethical vegetarianism and the conscientious keeping of urban hens as part of a wider belief in sustainable nutrition, may be targeted for discrimination by private and public persons.

³⁹¹ ‘In Response to Claims That Ethical Veganism Is Now a Creed’ (*Ontario Human Rights Commission*) <http://www.ohrc.on.ca/en/news_centre/response-claims-ethical-veganism-now-creed> accessed 26 March 2017.

³⁹² In *R v Chan* [2005] ABQB 615 the Court of Queen’s Bench of Alberta held that vegetarianism was protected under freedom of religion as part of a prisoner’s religious beliefs as a combination of Buddhism, Chinese Taoism and Confucianism.

³⁹³ A claim based on the Canadian Charter would be unlikely to be applicable given that the SCC has found that certain universities are not bodies subject to the Charter. See *Mckinney v University of Guelph* (1990) 3 SCR 229 (SCC). This case law may need revisiting by the SCC since certain provincial courts have found that universities may be subject to the Charter while other courts have found the opposite. See, as an example of the former, *Pridgen v University of Calgary* [2012] ABCA 139 (ABCA). See, as an example of the latter, *BC Civil Liberties Association v University of Victoria* [2016] BCCA 162 (BCCA).

Equality Rights and Conscience: Outline of the Argument

This section argues that the failure by legislators, both Federal and provincial, to protect non-religious conscientious beliefs under Canadian anti-discrimination legislation violates the guarantee of equality rights under s 15(1) of the Canadian Charter.

The jurisprudence on s 15(1) has had a very complicated evolution as the test under that section has been changed several times.³⁹⁴ This thesis addresses the historic changes to the understanding of that section only to the extent relevant for the argument. Suffices to say that the current test under s 15(1) has been finally clarified by a unanimous SCC in 2015 in *Taypotat*.³⁹⁵ The case concerned the requirement in the Election Code for candidates who wished to be Chief or a Band Councillor of the Kahkewistahaw First Nation in Saskatchewan to possess a Grade 12 educational qualification. The SCC held that the educational requirement was not discriminatory against older community members who live on a reserve despite it barring Louis Taypotat, who had been Chief for most of the previous three decades, from running again for office.³⁹⁶ The unanimous SCC, Abella J delivering the judgment, held that the current analysis for a s 15(1) claim had been correctly set out in her dissenting judgment in the earlier 2013 case of *Droit de la famille* (analysed in detail below).³⁹⁷

There she had argued that legislation will violate s 15(1) if it creates a distinction based on an enumerated ground (i.e. race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) or a non-enumerated ground analogous to the enumerated grounds. The distinction must be shown to create an arbitrary or discriminatory disadvantage. The legislation can be saved under s 1/Oakes Test.³⁹⁸ It is argued here that the failure by Federal and provincial legislation to include conscience as a prohibited ground of discrimination violates this section. In particular, it is argued that the failure to include non-religious conscientious beliefs as a protected characteristic in anti-discrimination legislation creates a distinction based on the non-enumerated analogous ground of conscience. This perpetuates an arbitrary disadvantage by denying those who have a non-religious conscientious belief an advantage (i.e. protection from discrimination) which others in a comparable situation (i.e. those with religious beliefs) enjoy. This discriminatory distinction cannot be justified under s 1/Oakes Test. Reliance will be placed in this analysis on the

³⁹⁴ The changing jurisprudence is set out in the judgment by Abella J in *Quebec (Attorney General) v A* (2013) 1 SCR 61 [135–186]. However, she reaches the wrong conclusion as to the correct test under s 15(1).

³⁹⁵ *Kahkewistahaw First Nation v Taypotat* (2015) 2 SCR 548.

³⁹⁶ *ibid* 34.

³⁹⁷ *Droit de la famille* (n 394).

³⁹⁸ *Taypotat* (n 395) [19–20].

SCC cases of *Vriend*³⁹⁹ and *Droit de la famille*. Both cases concerned failure by legislatures to confer a statutory benefit on the basis of an analogous ground, respectively sexual orientation and marital status.

Vriend and Droit de la Famille

In *Vriend* the SCC held that the legislative failure to include sexual orientation as a protected characteristic under the Alberta's Individual's Rights Protection Act⁴⁰⁰ ('IRPA') violated s 15(1). The analysis of the SCC proceeded under a somewhat different test to the current test under *Taypotat*. The test, as summarised by Cory J, who gave the Court's unanimous judgment on the s 15(1) issue, was as follows:

The essential requirements (...) will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.⁴⁰¹

It is unwise to excessively rely on *Vriend* for an argument that certain anti-discrimination statutes violate s 15(1) because the test for a valid claim under that section has since changed. However, various findings in *Vriend* that do not rely on the correct s 15(1) test can offer great assistance in answering some objections to the argument. Furthermore, given that *Vriend* directly touched on the absence of protection from discrimination for a non-enumerated analogous characteristic in an anti-discrimination statute, its relevance to the present argument cannot be overstated. When the correct s 15(1) test is relevant to the force of the argument, reliance will be placed on the dissenting judgment of Abella J in *Droit de la famille*. As stated, in *Taypotat* a unanimous SCC held that the dissenting judgement of Abella J had correctly identified the relevant s 15(1) test. This justifies relying on the dissenting judgment rather than on the majority judgment.

In *Droit de la famille* the SCC was asked whether dependent de facto spouses in Quebec could constitutionally, under s 15(1), be denied access to implied statutory protections (e.g. the right to claim support from each other and an equal division of the family property) on the basis that their spousal relationship lacked the formality of a civil union or marriage. The majority of the SCC, in a judgment delivered by Lebel J, held that, in order for there to have been a violation of s 15(1), it was essential to answer the following test: '(1) Does the law create a distinction based on an enumerated

³⁹⁹ *Vriend* (n 376).

⁴⁰⁰ R.S.A. 1980, c. I-2 (now repealed).

⁴⁰¹ *Vriend* (n 376) [74].

or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?⁴⁰² While the first question was answered positively (de facto spouses were treated differently on the basis of the analogous ground of marital status), the second was not: the distinction was not motivated by prejudice or stereotyping but was instead aimed at maximising autonomy by providing couples with a diverse range of relationship arrangements with differing legal consequences.⁴⁰³

The dissenting judgment of Abella J reached a different conclusion on the basis of a different test which did not require proving that the disadvantage was a result of prejudice or stereotyping. She held that the correct test was for the claimant

to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1.⁴⁰⁴

Following *Taypotat*, it is now clear that this was the better test. Accordingly, Abella J was able to find that de facto couple were subject to a disadvantage, i.e. exclusion from statutorily implied protections which outweighed the couple's freedom of choice.⁴⁰⁵ Proceeding to the Oakes Test, while she held that the exclusion furthered the legitimate purpose of maximising couple's choices, it failed the minimal impairment stage as that objective could be obtained by a presumptively protective scheme with a right on the part of de facto spouses to opt out.⁴⁰⁶

The next section applies both *Vriend* and *Droit de la famille* to the exclusion of conscience in anti-discrimination legislation.

Protecting Conscience in Anti-Discrimination Legislation: Is Conscience a Non-Enumerated Analogous Ground?

As Abella J has made clear both in *Taypotat* and *Droit de la famille*, the first step in a finding that s 15(1) has been violated is to show that a distinction has been made on the basis of an enumerated or analogous ground. It is clear that anti-discrimination legislation makes a distinction on the basis of conscience by excluding it from its scope of protection. As table 2 shows, conscience is not a

⁴⁰² *Droit de la famille* (n 394) [187].

⁴⁰³ *ibid* 267, 272.

⁴⁰⁴ *ibid* 323.

⁴⁰⁵ *ibid* 349.

⁴⁰⁶ *ibid* 360.

protected characteristic under any of the statutes. The statutes protect religion, religious creed, political belief and sometimes creed. There is some basis to argue that those jurisdictions that protect creed may be held to protect religious and non-religious conscientious beliefs. The new guidance by the Ontario Human Rights Commission, for example, seems to suggest so.⁴⁰⁷ However, no authoritative legally binding ruling has been issued on that as the decision in *Kentenci*, for example, illustrates.

So while it is relatively apparent that there is a distinction on the basis of conscience, it remains to be determined whether conscience is an enumerated or analogous ground. It is clearly not an enumerated ground as s 15(1) mentions only 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. This section, however, argues that conscience is an analogous ground.

The SCC has found that s 15(1) protects several analogous grounds. In *Andrews*, involving a statute that restricted the eligibility to practise law to Canadian citizens, McIntyre J (dissenting but this part of his reasoning confirmed by the majority) held that 'the enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition'.⁴⁰⁸ In that case, the first SCC case on s 15(1), the SCC held that citizenship was an analogous ground. Other cases have recognised new analogous grounds: *Egan* recognised sexual orientation⁴⁰⁹; *Miron* recognised marital status⁴¹⁰; and *Corbiere* recognised off-reserve band membership.⁴¹¹ Some proposed new analogous grounds, such as employment and occupational status, have been rejected by the SCC in *Baier*⁴¹² and in *Fraser*.⁴¹³ Different tests have been proposed in the SCC's jurisprudence on what criteria are to be satisfied for a certain characteristic to be recognised as an analogous ground. The most authoritative criteria, according to *Baier* (which is the most recent SCC to deal with the issue⁴¹⁴) seem to have been set out in *Corbiere*. In that case, McLachlin J and Bastarache J (writing for the majority), said as follows:

⁴⁰⁷ See text at n 387 above.

⁴⁰⁸ *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 [20].

⁴⁰⁹ *Egan v Canada* (1995) 2 SCR 513.

⁴¹⁰ *Miron v Trudel* (1995) 2 SCR 418.

⁴¹¹ *Corbiere v Canada (Minister of Indian and Northern Affairs)* (1999) 2 SCR 203.

⁴¹² *Baier v Alberta* (2007) 2 SCR 673.

⁴¹³ *Ontario (Attorney General) v Fraser* (2011) 2 SCR 3.

⁴¹⁴ *Baier v. Alberta* (n 412) [64]. See also *Taypotat* (n 395) [19].

the thrust of identification of analogous grounds (...) is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.⁴¹⁵

The above suggests that the central criterion to identify whether a personal characteristic is analogous to those enumerated is whether it is an 'immutable or constructively immutable' characteristic. It is argued that conscience is a constructively immutable characteristic just like religion. What makes religion constructively immutable is not that people cannot change religion or particular religious beliefs. Rather, it is that it is 'changeable only at unacceptable cost to personal identity' and 'that the government has no legitimate interest in expecting us to change to receive equal treatment under the law'.⁴¹⁶ In fact it is clear from the analysis of the case law on s 2(a) that religious beliefs are a subset of the wider ground of conscientious beliefs. Conscientious beliefs, whether or not grounded in religion, are deeply held beliefs which are not easily changeable without costs. This is made clear in judicial interpretation of s 2(a) of the Canadian Charter (and the Quebec Charter) which protects freedom of conscience and religion. Remember that the FCA in *Roach*, in the partially dissenting judgment of Linden JA (but to which all concurred on the s 2(a) issue), had said:

It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience.⁴¹⁷

Similarly, Wilson J said in his concurring judgment in *Morgentaler*:

[I]n a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.⁴¹⁸

⁴¹⁵ *Corbiere* (n 411) [13].

⁴¹⁶ *ibid.*

⁴¹⁷ *Roach (1994)* (n 353) [25].

⁴¹⁸ *Morgentaler* (n 330) [313].

Importantly for present purposes, there is already some judicial dicta in the SCC, although in a dissenting judgment, that s 15(1) protects conscientious beliefs, whether religious or not. In *Chamberlain*, Gonthier J in his dissenting judgment held:

To permit the courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s. 2(a) protection of the freedom of religion and conscience, as well as s. 15 protection against discrimination based on conscience, religious or otherwise.⁴¹⁹

The argument advanced here then is that conscience is a constructively immutable characteristic like religion because Canadian case law has recognised conscientious beliefs, whether religious or not, to be strongly held beliefs. This entails that such beliefs are ‘changeable only at unacceptable cost to personal identity’.⁴²⁰ Furthermore, as the analysis of *Roach* and other cases on freedom of conscience reveal, it is clear that individuals have a general right to conscientious exemption on the basis of a non-religious conscientious belief as well as for religious beliefs. Government can only violate this right if it can satisfy the Oakes Test. This entails that for both conscientious and religious beliefs, ‘government has no legitimate interest in expecting us to change to receive equal treatment under the law’ other than those interests which may be successfully adduced in an Oakes Test analysis. Accordingly, conscience is a ground analogous to religion and is therefore protected by s 15(1).

Does the Exclusion of Conscience from Anti-Discrimination Legislation Perpetuate a Discriminatory Disadvantage?

For a successful s 15(1) claim it is not sufficient to show that there has been a distinction on the basis of an analogous ground. As Abella J said:

The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage (...).⁴²¹

It is clear that anti-discrimination legislation imposes a disadvantage on those with non-religious conscientious beliefs as such legislation protects religious conscientious beliefs while apparently not

⁴¹⁹ *Chamberlain* (n 373) [150].

⁴²⁰ *Corbiere* (n 411) [13].

⁴²¹ *Taypotat* (n 395) [20].

protecting non-religious conscientious beliefs. People like Kentenci who hold a non-religious conscientious belief can in fact be discriminated against by private and public persons. While that disadvantage may be alleviated by a freedom of conscience claim under s 2(1) of the Canadian Charter against public persons, no alternative remedy is available against private persons as the Charter does not apply to them. Indeed, anti-discrimination legislation, which does apply to private persons, does not appear to prohibit discrimination on the basis of conscience. The disadvantage is clear: individuals with conscientious beliefs may be discriminated against by private persons on the basis of the conscientious belief they hold.

Is this disadvantage arbitrary and hence discriminatory? To determine this we need to ask 'whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage'.⁴²² Abella J has indicated that in answering this question there needs to be a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage. (...) the contextual factors will vary from case to case'.⁴²³ The relevant factor in this case is that there seems to be no valid reason why the law protects conscientious beliefs, whether or not religious, from interference from public persons but then only protects religious conscientious beliefs from interference from private persons. Religious and non-religious conscience may both suffer from private interference. A student registered in a private institution may be discriminated against on the basis of her beliefs, whether or not those beliefs are religious. A student registered in a public institution may be equally discriminated against. Similar obstacles to free conscience, whether religious or not, may be imposed by public or private employers and by providers of goods and services to the public.

Refusal to combat discrimination by private persons against non-religious conscience is even more arbitrary in the context where the Canadian state is committed, through the duty of state neutrality, to the fostering of different forms of beliefs and non-beliefs. The fostering of a pluralism of beliefs was asserted by the SCC when it stated in *NS*:

The religious neutrality of the state and of its institutions, including the courts and the justice system, protects the life and the growth of a public space open to all regardless of

⁴²² *ibid.*

⁴²³ *Droit de la famille* (n 394) [331].

their beliefs, disbeliefs and unbeliefs. Religions are voices among others in the public space, which includes the courts.⁴²⁴

Similarly, in *Saguenay*, the SCC opined:

the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief.⁴²⁵

It is not here asserted that the duty of state neutrality prohibits, in a similar fashion to the Establishment Clause of the US Constitution, giving special protection to religion over non-religion or irreligion.⁴²⁶ In *Renaud* the SCC explicitly warned about the inappropriateness of comparisons with the US Establishment Clause in a Canadian context.⁴²⁷ What is here argued is that, in a context where the Canadian state is committed to the fostering of a plurality of beliefs, it is arbitrary to protect religious beliefs from private discrimination while refusing to protect non-religious conscientious beliefs, especially when both forms of beliefs are protected by s 2(a) of the Canadian Charter. The anti-discrimination statutes do not ‘respond to needs of the members of the group’ of people who hold non-religious conscientious beliefs. These people, just like people who hold religious beliefs, may be discriminated against by private and public persons. Not extending statutory protection to those who hold non-religious conscientious beliefs therefore creates an arbitrary, hence discriminatory, disadvantage.

Protecting Conscience in Anti-Discrimination Legislation: Can the Oakes Test Justify the Violation?

This section argues that the exclusion of conscience from anti-discrimination legislation does not survive the s 1/Oakes Test analysis. As discussed in the previous chapter, the requirements of the Test are as follows. First, the measure infringing a constitutional right must be of sufficient importance to warrant overriding a constitutionally protected right. Second, the proportionality test must be satisfied. The proportionality test has three parts. First, the measures adopted must be carefully designed to achieve the objective in question (rational connection stage). Second, the measures should impair as little as possible the right or freedom in question (minimal impairment

⁴²⁴ *NS* (n 307).

⁴²⁵ *Simoneau* (n 4) [72].

⁴²⁶ *Grumet* (n 163) 703–705.

⁴²⁷ *Renaud* (n 255) [25].

stage). Finally, the deleterious effects of the measure must not outweigh its salutary effects (balancing stage).⁴²⁸

Given that there have been no cases testing the constitutionality of the exclusion of conscience from anti-discrimination legislation it is not straightforward to identify the objectives for this state of affairs. Nevertheless, the public debate preceding the OHRC policy on creed outlined several reasons why non-religious conscientious beliefs should not be protected by anti-discrimination statutes. These reasons were considered in the OHRC's Creed Consultation Report.⁴²⁹ This section identifies five eligible reasons from the Report and a further two reasons of a constitutional character and argues that none of them survive the Oakes Test. In fact it is argued that all but one survive the very first stage of the Oakes Test (i.e. they are not of sufficient importance to override a constitutional right). The surviving reason, i.e. the floodgate argument, fails the minimal impairment stage.

The identified arguments are that the exclusion of non-religious conscience from anti-discrimination legislation is justified because including conscience:

1. would dilute the level of protection for the existing protected characteristics, in particular religion (the dilution argument)⁴³⁰;
2. fails to take into account the different purposes between anti-discrimination legislation and the rights guaranteed under the Charter (the non-mirror argument)⁴³¹;
3. fails to take into account the uniqueness of religion which is grounded in its communal aspect (the communal uniqueness argument)⁴³²;
4. fails to take into account the uniqueness of religion which is grounded in the special depth and comprehensiveness of religious commitments, and in the absolute and transcendent nature of its truth claims (the metaphysical uniqueness argument)⁴³³;
5. would be constitutionally illegitimate (the constitutional objection argument); and
6. would open a floodgate of conscience claims (the floodgate argument).⁴³⁴

Each argument is considered in turn.

⁴²⁸ *Oakes* (n 277) [73–75].

⁴²⁹ Ontario Human Rights Commission, 'Human Rights and Creed Research and Consultation Report' (2013) 57–63 <<http://www.deslibris.ca/ID/241297>> accessed 26 March 2017.

⁴³⁰ *ibid* 57–58.

⁴³¹ *ibid* 58–59.

⁴³² *ibid* 59–60.

⁴³³ *ibid* 60.

⁴³⁴ *ibid* 61–62.

The Dilution Argument

It is not clear how extending the protection of anti-discrimination law to include conscience would water down the existing protection for other protected characteristics. The dilution argument was advanced in the Creed Consultation Report in the following terms:

We want to be open, but not to the extent that we take the prohibited grounds to apply to everyone and anyone. If you water down the policy [so that it includes non-religious conscientious beliefs], you put yourself on a slippery slope of having to deal with issues for which Human Rights Codes were not intended. Then, you will no longer have a vehicle to protect and promote the rights of marginalized, vulnerable identifiable groups.⁴³⁵

This argument does not follow: adding a new protected characteristic does nothing to undermine the protection afforded to existing protected characteristics. It simply adds a new layer of protection to guarantee that another vulnerable group does not suffer discrimination. It is granted that this new layer may entail more workload for anti-discrimination bodies (including courts and tribunals) which would now have to consider the new ground as well as the existing ones. However, this seems more of an administrative issue best considered under the floodgate argument. In *Maurice*, when the Canadian Federal Court ordered that the CSC provide a vegetarian meal to an ethical vegetarian, this did not entail taking away vegetarian meals from religious vegetarians. In fact the CSC simply updated its existing policy which catered exclusively for religious diets to cater also for dietary requirements which were induced by conscientiously held beliefs.⁴³⁶ The dilution argument does not appear convincing and, consequently, cannot be considered of sufficient importance to warrant overriding a constitutionally protected right.

The Non-Mirror Argument

The non-mirror argument says that the purpose of anti-discrimination statutes is distinct from the purpose of the rights in the Charter. In particular, the rights in s 2(a) are for the most part focused on the liberty of the individual while the purpose of anti-discrimination statutes is to prohibit and remedy discrimination. This entails, it is said, that the scope of protection of the statutes may well be different from the scope of s 2(a).⁴³⁷ While this may generally be true when the purpose(s) of freedom of conscience and religion is compared to the purpose of anti-discrimination legislation, the statement cannot be sustained when the purpose(s) of s 15(1) is compared to the statutes.

⁴³⁵ *ibid* 58.

⁴³⁶ Correctional Services of Canada (n 365) 10–11, 18–19.

⁴³⁷ Ontario Human Rights Commission (n 429) 58–59.

In *Droit de la famille*, Abella J summarised the case law on the common purpose of s 15(1) and anti-discrimination statutes generally when she said that McIntyre J in *Andrews* ‘identified the purpose of the equality provision [i.e. s 15(1)] and anti-discrimination law in general, as being to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available’.⁴³⁸ Because the main argument proposed in this chapter is that the exclusion of conscience violates art 15(1), the argument that Charter rights and anti-discrimination law have different purposes cannot be considered of sufficient importance to warrant overriding a constitutionally protected right. This is because the particular Charter right relied on has the same purpose of the anti-discrimination law statutes.

It should be noted that a different version of the non-mirror argument was rejected by the SCC in *Vriend*. In that case Alberta argued that if the appellants were successful, the result would be that anti-discrimination legislation will always have to mirror the Charter by including all of the enumerated and analogous grounds of the Charter. This, it was argued, would have the undesirable result of unduly constraining legislative choice and allowing the Charter to indirectly regulate private conduct, which should be left to the legislatures.⁴³⁹ Cory J, while agreeing that the omission of enumerated or analogous grounds from anti-discrimination legislation would open up a Charter challenge, gave this argument very little weight. He stated that ‘the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted’. He continued by saying that ‘[i]f a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the Charter, deference may be shown to this choice, so long as the tests for justification under s.1, including rational connection, are satisfied’.⁴⁴⁰ The SCC however did not go on to consider this version of the non-mirror argument in its s 1 analysis, suggesting that this version of the argument cannot be considered of sufficient importance to warrant overriding a constitutionally protected right.

The Communal Uniqueness Argument and the Metaphysical Uniqueness Argument

The two uniqueness arguments (i.e. the communal and metaphysical) are considered and rejected together. It is not disputed that religion has unique dimensions which non-religious conscience might not have. The SCC in *Amselem* said:

⁴³⁸ *Droit de la famille* (n 394) [319].

⁴³⁹ *Vriend* (n 376) [105].

⁴⁴⁰ *ibid* 106.

religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.⁴⁴¹

Of course, the Charter and all anti-discrimination legislation protect this faith and spirituality based form of belief so it is apparent that this form of belief is regarded as sufficiently important to merit legal protection. This, however, does not entail that only this form of belief is to be considered worthy of legal protection. This is because s 2(a) protects religious beliefs and non-religious conscientious beliefs and also because the duty of state neutrality commits the legal system to valuing different types of deeply held beliefs. Furthermore, even though there were early suggestions in the case law that religion uniquely had a communal aspect,⁴⁴² following *Amselem*, this can be strongly doubted as the SCC has decided to focus on the subjective experience of the person asserting that a particular belief is religious even when the person's religious community is not committed or even disavows that particular belief.⁴⁴³ This suggests that, at least for the purposes of Canadian law, the communal aspect of religion does not have a central place.

Finally, it is clear from *Ross* and *Simoneau*⁴⁴⁴ that freedom of religion protects anti-religion acts and beliefs and also disbelief in religion. So it is not the case that religion is legally worthy of protection based on the uniqueness of religion which is grounded in the special depth and comprehensiveness of religious commitments, and in the absolute and transcendent nature of its truth claims. Freedom of religion also protects individuals who scorn these alleged unique aspects of religion. So the legal protection of religion must be based on something other than answering these truth claims of religion in one way or another. In any event, whatever reasons for protecting religion other than the fact that the framers of the Charter and of anti-discrimination legislation have wished to do so, it is clear that the case law on freedom of conscience and religion does not find religion uniquely valuable, although of course it finds it of sufficient value to legally protect it. Hence, any assertion that religion is indeed uniquely valuable must be rejected in a Canadian legal context and, consequently, this assertion cannot be considered of sufficient importance to warrant overriding a constitutionally protected right.

⁴⁴¹ *Amselem* (n 338) [39].

⁴⁴² See text at n 326.

⁴⁴³ See text at n 345.

⁴⁴⁴ See discussion from page 124.

The Constitutional Objection Arguments

There are two objections of a constitutional character. The first says that it would be inappropriate for courts to find a Charter violation for the failure of legislatures to legislate so that non-religious conscience is protected in anti-discrimination legislation. Constitutionally, courts should not tell legislatures what they should legislate on. The second constitutional objection says that unelected courts must defer to the decision of democratically elected legislatures not to enact a particular provision, and that the scope of Charter review should be restricted so that such decisions will be unchallenged. Both objections are rejected.

Concerning the first constitutional objection, under s 32(1), the Charter applies to the Federal and provincial legislatures 'in respect of all matters within' their respective authority. Although, there is no mention in this section that the Charter applies to legislative omissions, legislatures do in fact have a positive duty under s 2(a) to protect freedom of conscience. As the Canadian Federal Court makes clear in *Maurice* bodies subject to the Charter 'cannot incorporate s.2(a) of the Charter in a piecemeal manner; both freedoms [i.e. conscience and religion] are to be recognized'.⁴⁴⁵ As table 2 shows, legislatures have positively protected religious beliefs in all anti-discrimination statutes; they cannot evade their Charter duty to protect conscience in a piecemeal manner: both conscience and religion ought to be protected from discrimination.

Furthermore, as *Vriend* makes explicitly clear, non-legislating is justiciable under the Charter. An identical argument made to Cory J in relation to the failure to protect sexual orientation in Alberta's IRPA was rejected:

The IRPA is being challenged as unconstitutional because of its failure to protect Charter rights, that is to say its underinclusiveness. The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the Charter inapplicable. If an omission were not subject to the Charter, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from Charter challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter.⁴⁴⁶

⁴⁴⁵ *Maurice* (n 364) [8].

⁴⁴⁶ *Vriend* (n 376) [61].

Similarly in *Droit de la famille*, the finding by Abella J of unconstitutionality under s 15(1) was not barred by the fact that the relevant legislation had omitted de facto couples. In fact the unconstitutionality was found on the basis of a discriminatory omission.

The second constitutional objection is also dismissed based on *Vriend*. The objection says that unelected courts must defer to a decision of democratically elected legislatures not to enact a particular provision, and that the scope of Charter review should be restricted so that such decisions will be unchallenged. However, the opposition of elected legislatures and unelected judges is an inappropriate bar to a Charter challenge. In fact both courts and legislatures in the Canadian context are subject to obligations under the Charter: the latter has a duty to interpret and apply Charter rights while the latter has a duty not to disproportionately infringe Charter rights in its acts and omissions. Cory J said accordingly:

Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge.⁴⁴⁷

This is not to say that legislatures should not be accorded any measure of deference in their legislative work. If, as discussed when considering *Doré*⁴⁴⁸ and *Loyola*⁴⁴⁹ in the previous chapter, deference may be owed by courts to administrative decision-makers in their assessment of the requirements of a Charter right, there is even more reason to afford deference to legislatures given their democratic pedigree. Such deference, however, ought to be paid only when considering whether the legislature's violation is proportionate under the Oakes Test Analysis and, if not proportionate, what remedies ought to be afforded by courts. Cory J said accordingly '[t]he deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a Charter breach'.⁴⁵⁰ He carried on by saying that '[t]he notion of judicial deference to legislative

⁴⁴⁷ *ibid* 56.

⁴⁴⁸ *Doré* (n 273).

⁴⁴⁹ *Loyola* (n 293).

⁴⁵⁰ *Vriend* (n 376) [53].

choices should not, however, be used to completely immunize certain kinds of legislative decisions from Charter scrutiny'.⁴⁵¹

Given the above, the two constitutional objections outlined cannot be found to be of sufficient importance to warrant overriding a constitutionally protected right.

The Floodgate Argument

The floodgate argument was put forward in the OHRC's Creed Consultation Report thus:

if the policy widens the definition of creed, organizations governed by the Code will be flooded and overcome with demands to accommodate all manner of sincerely held beliefs, compromising their ability to function and fulfill [sic] their essential purpose.⁴⁵²

It is conceded that the worry of creating undue administrative burdens on anti-discrimination bodies (including courts and tribunals) and on private persons who would now have to not discriminate against individuals with non-religious conscientious beliefs may be an important consideration. It is not altogether clear that this consideration would be of sufficient importance to override a constitutionally protected right. If this were so, such administrative burden would have been considered in *Vriend* when the SCC incorporated sexual orientation in the Alberta IRPA. Such consideration was only analysed at the remedial stage, not under the Oakes Test analysis, and was found wanting because no submission was advanced on the issue.⁴⁵³

Nevertheless, even if this consideration could survive the first part of the Oakes Test, it is argued that it cannot survive the minimal impairment stage. The exclusion of conscience as a protected characteristic from anti-discrimination statutes may survive the rational connection stage as the exclusion serves to avoid administrative burdens on anti-discrimination bodies and on private persons who would be assuming new responsibilities under anti-discrimination legislation. However, two reasons militate against the exclusion in the minimal impairment stage.

The first reason is that institutions and private persons are routinely required to assume some responsibilities, sometimes even substantial, in order to guarantee constitutionally protected rights. We have seen in the previous chapter, for example, that several public and private persons have responsibilities when religion-related conscience is at issue. Public and private employers, for example, have a duty to accommodate requests of their employees which are related to their

⁴⁵¹ *ibid* 54.

⁴⁵² Ontario Human Rights Commission (n 429) 61–62.

⁴⁵³ *Vriend* (n 376) [160].

religious beliefs. Importantly, however, there is solid evidence to indicate that requiring them to assume responsibilities for the protection of non-religious conscientious beliefs would not impose undue burdens. In fact, remember that conscience is already protected under s 2(a) of the Canadian Charter. Admittedly, this provision imposes duties on public persons only. However, in the entirety of the Canadian case law on this section only a handful of non-religious conscience cases have been decided, all of them analysed above. Furthermore, only *Maurice* was successful on the basis of freedom of conscience. In contrast, there is an abundance of case law at all levels on religious beliefs under the Charters. This strongly suggests that expanding the reach of anti-discrimination legislation to protect non-religious conscientious beliefs would only create a slight administrative burden which public and private persons can reasonably be expected to bear in order to guarantee a constitutionally protected right.

The second reason which militates against the exclusion in the minimal impairment stage is that there are several mechanisms to reduce administrative burdens most of which are internal to the legal test of freedom of conscience. First of all, vexatious and fictional conscience claims can be quickly dismissed given that, as the Federal Court stated in *Maurice*, cogent evidence must be provided by a person seeking to benefit from freedom of conscience to prove, to a balance of probabilities, that he holds a sincere conscientious belief.⁴⁵⁴ Secondly, just as in the case of freedom of religion, trivial or insubstantial interferences with a person's conscience do not violate a person's freedom of conscience.⁴⁵⁵ Thirdly, in relation to the duty of reasonable accommodation, the duty would be to accommodate conscience only to the point of undue hardship on the duty-bearer. Unreasonable requests which would impose undue administrative hardships can therefore be dismissed. Finally, fraudulent and vexatious conscience claims which reach courts and tribunals can be dealt with under the usual accelerated procedures to deal with spurious claims, including summary judgments and punitive costs orders.

In conclusion the floodgate argument cannot survive the Oakes Test as the exclusion of conscience from anti-discrimination statutes is not minimally impairing of the constitutionally protected right to free conscience. It follows that the exclusion of conscience cannot be justified under the s 1/Oakes Test analysis. The exclusion unjustifiably violates s 2 and s 15(1) of the Canadian Charter.

⁴⁵⁴ *Maurice* (n 364) [14].

⁴⁵⁵ See discussion at page 121.

Protecting Conscience in Anti-Discrimination Legislation: What Remedy For the Violation?

It has been argued at length that the exclusion of conscience from anti-discrimination legislation in Canada violates equality rights guaranteed under s 15(1) of the Canadian Charter. The exclusion cannot be saved under the s 1/Oakes Test analysis. This section argues that, for the most part, the appropriate remedy to be given for this Charter violation is reading conscience into the anti-discrimination statutes as a protected characteristic. This remedy may not be necessary in those jurisdictions, such as Ontario, where the statutes protect creed. In these jurisdictions there is already an ongoing debate as to whether creed should be interpreted as applying to only religious creed or whether certain non-religious conscientious beliefs may be regarded as a creed. In these jurisdictions, given the ambiguity of the term, avoiding a Charter violation is a sufficient reason to interpret creed to include non-religious beliefs.⁴⁵⁶ However, in several jurisdictions the statutes only protect religion or religious creed. Given that the SCC has provided, in *Amselem*, a definition of religion which clearly cannot include non-religious conscientious beliefs, that term, given the lack of ambiguity, cannot be interpreted so that a constitutional violation is not found. An alternative remedy is required.

Schachter remains the leading authority on appropriate remedies for statutes which violate the Charter. In that case the SCC had to determine what remedy was required given the concession by the respondent that the Unemployment Insurance Act had violated s 15(1) by not providing to natural parents the same parental leave benefits as were granted to adoptive parents. After providing an authoritative guidance on constitutional remedies, the SCC decided that, given that the statute had been appropriately amended by the legislature by the time the case came to be decided, no remedy ought to be given.⁴⁵⁷

Usefully for present purposes, Lamer CJ, delivering the judgment of the Court, stated that '[s]ection 52 [of the Constitution Act] is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it'.⁴⁵⁸ Section 52(1) provides that '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'. Lamer CJ clarified that this section does not mandate striking down unconstitutional legislation. Different courses of action

⁴⁵⁶ *Bell ExpressVu Limited Partnership v Rex* (2002) 2 SCR 559 [61].

⁴⁵⁷ *Schachter v Canada* (1992) 2 SCR 679 [104].

⁴⁵⁸ *ibid* 85.

could be undertaken, including by severing the inconsistent provisions or reading in words into the statute to cure the inconsistency.⁴⁵⁹

It is here suggested that the appropriate remedy for the unconstitutional exclusion of conscience from the anti-discrimination statutes is reading into the statutes conscience as an additional protected characteristic. It should be noted that the same remedy was afforded in *Vriend* where the court read in sexual orientation as a protected characteristic in the Alberta anti-discrimination statute.⁴⁶⁰ Given that *Vriend* remains, as was shown throughout the constitutional analysis, the most useful case on point, the precedential authority of that SCC case is good enough reason to conclude that the same remedy should be afforded in relation to conscience. However, *Schachter* set out various criteria for when a reading in remedy should be granted and this section applies them to the exclusion of conscience.

Lamer CJ summarised his lengthy discussion of the appropriateness of a severance or reading in remedy thus:

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria are met:

- A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
- B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
- C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.⁴⁶¹

Each of the criteria is considered in turn. It should be pointed out, however, that these criteria are, in Lamer CJ's own words, 'intended as guidelines to assist courts in determining what action under s.

⁴⁵⁹ *ibid* 25.

⁴⁶⁰ *Vriend* (n 376) [179].

⁴⁶¹ *Schachter v. Canada* (n 457) [87].

s 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context'.⁴⁶²

Legislative Objective

As non-controversially noted in *Simpson-Sears*, the purpose of anti-discrimination legislation is 'the removal of discrimination'.⁴⁶³ Reading conscience as a protected characteristic into the anti-discrimination legislation would further this anti-discrimination purpose. The reverse, i.e. striking down the entirety of the legislation, would undermine it by taking away the protection from discrimination from various vulnerable groups. It follows that reading in would be an appropriate remedy under this criterion.

Intrusion into Legislative Domain

In *Schachter* the SCC held that '[w]here the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain'.⁴⁶⁴ It is not clear that there are various options to remedy the unconstitutional exclusion of conscience. As stated, in some of the anti-discrimination statutes, a constitutional violation may be avoided by interpreting creed to include non-religious conscientious beliefs. However, this is not a remedy under s 52 but an interpretative technique to avoid a finding of unconstitutionality. Hence, it appears that the only constitutional remedy available, which complies with the statutory purpose of removing discrimination, is to read in conscience as an additional protected characteristic.

Intrusion into Legislative Budgetary Decisions

The SCC said in *Schachter*:

[i]n determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.⁴⁶⁵

It is not disputed that reading in conscience into anti-discrimination legislation will have an impact on budgetary policy. However, as analysed above, given that conscience claims under s 2(a) of the Charter have been minimal, it can reasonably be predicted that budgetary implications of the new

⁴⁶² *ibid* 89.

⁴⁶³ *Simpsons-Sears* (n 237) [12].

⁴⁶⁴ *Schachter v. Canada* (n 457) [62].

⁴⁶⁵ *ibid* 64.

ground would also be minimal. However, without any solid economic analysis evidence on the issue, a firm conclusion cannot be reached. Nevertheless, it may be instructive that in *Vriend* the SCC did not find that any budgetary implications of reading in sexual orientation as a new protected characteristic were a sufficient reason not to provide that remedy.⁴⁶⁶

Conclusion on Remedy

The criteria considered above for the appropriateness of reading in as a remedy are non-exhaustive. Nevertheless, they appear to militate in favour of granting such remedy. Consequently, Canadian anti-discrimination statutes would now explicitly protect non-religious conscientious beliefs. From this it would follow that the duty of reasonable accommodation applies also to non-religious conscientious beliefs. Accordingly, individuals with religious or non-religious conscientious beliefs would both be entitled to exemption from private law duties from the application of the duty of reasonable accommodation.

5. Conclusion: Conscientious Exemptions beyond Religious Privilege

The detailed analysis undertaken reveals that the general right to conscientious exemption in Canada should not be interpreted to be available only to religious people. This is for several reasons. First, freedom of religion does not only protect those with religious beliefs. It protects those with non-belief in religion, including atheists, agnostic and anti-religion individuals. They too may conscientiously object on the basis of their beliefs to complying with legal rules, including anti-discrimination norms. Whether or not their claim is successful will depend on the limitations which may legitimately be imposed on their freedom (e.g. satisfying the Oakes Test). Secondly, the right to conscientious exemption is available under the right to freedom of conscience under s 2(a) of the Canadian Charter and s 3 of the Quebec Charter. Albeit there are only a handful of cases on this right and even though the SCC has not unequivocally delivered a judgment on this, it is clear that the existing cases hold that such a right exists. Finally, even though the general right to conscientious exemption arising under anti-discrimination statutes appears to be a privilege of only those with religious beliefs and non-belief in religion, it has been argued that this would violate the Canadian Charter guarantee of equality rights under s 15. The appropriate remedy, for most of the anti-discrimination statutes, would be to read in conscience as a protected characteristic. This would entail that, in relation to all the rules of law which guarantee the general right to conscientious exemption, the right is not a privilege of those that object on the basis of a religious belief.

⁴⁶⁶ *Vriend* (n 376) [160].

CHAPTER 6: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN UK LAW

1. Introduction

This chapter investigates whether there is a general right to conscientious exemption in UK law. The chapter concludes that there is. There are at least two rules of law which ground the right. These are (a) the requirement that public authorities and legislation (both primary and subordinate) comply with the right to freedom of thought, conscience and religion under the Human Rights Act 1998 (HRA); and (b) the prohibition of indirect discrimination on the basis of religion or belief in employment and provision of goods and services arising under anti-discrimination legislation. Both grounds are investigated respectively in part 2 and 3 of this chapter.

Part 4 tentatively sets out another rule of law which may ground the general right. This is the prohibition of discrimination on the ground of religion in the enjoyment of Convention Rights arising under Art 14 of the European Convention of Human Rights ('ECHR'). The reason this third ground is tentative is that it has not been relied on in UK courts although it has been successfully relied on in the European Court of Human Rights ('ECtHR') to receive an exemption from a legislative rule. As is explained in more detail in part 2 below, while many ECHR rights form part of UK domestic law and while the jurisprudence of the ECHR is usually followed in UK courts, it is always wise to await explicit reliance by UK courts on ECtHR jurisprudence before declaring that this is binding in the UK. So without explicit UK case law on Art 14 ECHR in the context of conscientious exemptions, and despite some persuasive ECtHR case law, it is unwise to declare that this rule of law is a third ground of the general right in UK law.

It is also worth noting that this chapter does not put forward a positive case that another independent ground of the general right is to be found in EU law. This may appear surprising based on the two following EU law provisions. Art 10 of the EU Charter of Fundamental Rights ('EU Charter') provides:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others

and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Furthermore, Art 21 of the EU Charter provides that '[a]ny discrimination based on any ground such as (...) religion or belief (...) shall be prohibited'.

Given the obvious overlap between Art 10 EU Charter and Art 9 ECHR, it might be expected that the general right may be independently grounded in Art 10 EU Charter just as Art 9 is the first ground of the general right. This is especially so given that Art 10(2) EU Charter seems to protect a right to conscientious objection without, at least in the text, limiting it to any particular context, e.g. military service. Similarly, to the extent that Art 21 EU Charter overlaps with UK anti-discrimination legislation, which it will be argued constitutes the second ground of the general right, it might be argued that Art 21 EU Charter independently grounds the general right. This train of thought is not pursued in this chapter for the pragmatic reason that these two provisions have not been litigated enough and so there is no relevant authoritative ruling of the Court of Justice of the European Union ('CJEU') on which to base an argument.

Some relevant CJEU rulings, *Achbita* and *Bougnanoui*,⁴⁶⁷ on EU Directive 2000/78, which prohibits discrimination in employment, are briefly analysed in part 3 below. A third possibly relevant, but much older, judgment is that of *Prais* where a candidate for employment with the Council of the European Communities was unable to attend a written test because it coincided with the Jewish feast of Shavuot on which she could neither travel nor write.⁴⁶⁸ The candidate claimed that the Council should have rearranged the date of the exam to accommodate her religious festivity. Crucially, her claim was made under Article 27 of the Council's Staff Regulations which provided that officials would be selected without reference to race, creed or sex. Although the candidate asked for the Staff Regulations to be interpreted in light of the EU general principle of non-discrimination and in light of Art 9 ECHR, she could not rely on Art 10 or 21 EU Charter as the Charter would have been drafted only about 25 years later. In any event, the Court held that 'neither the Staff Regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority has not been

⁴⁶⁷ *Achbita v G4S Secure Solutions NV* [2017] IRLR 466 (CJEU (Grand Chamber)); *Bougnanoui v Micropole SA* [2017] IRLR 447 (CJEU (Grand Chamber)).

⁴⁶⁸ *Prais v Council of Ministers of the European Communities* [1976] ECR 1589 (ECJ (First Chamber)).

informed'.⁴⁶⁹ However, had the Council been informed in good time by the candidate, it would have been obliged to take 'reasonable steps' to avoid the conflict between the religious festivity and the exam date([19]).⁴⁷⁰ While this points towards the direction of a right to exemption, the legal basis (i.e. the Staff Regulations) is too narrow to ground a general right. Furthermore, no sufficient analysis of the invoked fundamental rights (the general principle of non-discrimination and Art 9 ECHR) was undertaken by the Court so it is not possible to use the case for an argument in favour (or against) the general right. It is for this reason that, for the most part, EU law is ignored in the following analysis.

2. The First Ground of the General Right: Freedom of Thought, Conscience and Religion in Art 9 ECHR

The HRA incorporates into UK law some of the rights protected by the ECHR. The relevant ECHR right is Art 9 which reads

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

It is useful to first illustrate the general mechanisms of the HRA as those affect the grounds of, and possible remedies under, the general right to conscientious exemption as it arises under the HRA. The chapter will then illustrate how the Art 9 right has been interpreted as conferring a general right to exemption in the UK case law.

The Mechanisms of the HRA

Section 3(1) HRA provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.

⁴⁶⁹ *ibid* 18.

⁴⁷⁰ *ibid* 19.

When assessing the content of a Convention right, UK courts are mandated by s 2 to 'take into account', inter alia, the judgments of the European Court of Human Rights (ECtHR). There have been some UK judicial pronouncements suggesting that s 2 requires UK courts to mirror the interpretation of a Convention right given by the ECtHR: UK courts cannot depart from an ECtHR's ruling by interpreting a right either more restrictively or more generously.⁴⁷¹ More recent rulings, however, have now qualified this. While UK courts will normally follow any clear and constant jurisprudence of the ECtHR, they cannot treat ECtHR jurisprudence as binding and may, if appropriate circumstances demand it, decline to follow a judgment of the ECtHR.⁴⁷² Furthermore, the House of Lords (now UK Supreme Court) has held that lower courts are not authorised to depart from the binding precedent of higher UK courts even when the binding precedent appears to be inconsistent with a decision of the ECtHR.⁴⁷³ This is important for the purposes of Art 9 as there have been various ECtHR rulings which inform the general right to conscientious exemption, *Eweida*⁴⁷⁴ (which will be considered in due course) being the most important. However, for a proper understanding of UK law in relation to Art 9, ECtHR judgments are only the starting point and it is imperative to always consider whether and how ECtHR judgments have been followed by UK courts.

Section 4 HRA provides that a court may issue a declaration of incompatibility where it is not possible to interpret primary legislation in a way compatible with Convention rights or where primary legislation mandates an interpretation of subordinate legislation which is not compatible with Convention rights. Importantly, under s 4(6), the declaration does not affect the validity, continuing operation or enforcement of the incompatible legislation and is not binding on the

⁴⁷¹ *Ullah, R (on the Application of) v Special Adjudicator* [2004] UKHL 26 (UKHL). In which Lord Bingham, at [20], said that '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less'. See also *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (UKHL). In that case Lord Rodger, at [98], stated that '[e]ven though we are dealing with rights under a United Kingdom statute, in reality we have no choice. *Argentoratium locutum, iudicium finitum* - Strasbourg has spoken, the case is closed'.

⁴⁷² See *Horncastle & Ors v R* [2009] EWCA Crim 964 (EWCA (Crim)). In that case the unanimous UKSC held, at [20] that '[t]he obligation under [s 2] to take such a judgment into account means that this court is not bound by a judgment of the ECtHR as a matter of precedent and must accept the responsibility of deciding the effect of Convention rights when the question arises'. More recently the UKSC decided not to follow a decision of the Fourth Section of the ECtHR, *Fazia Ali v United Kingdom - 40378/10* [2015] ECHR 924 (ECHR (Fourth Section)), in *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36 (UKSC).

⁴⁷³ *Kay and others v Lambeth London Borough Council* [2006] UKHL 10 (UKHL) [43] A very minor exception was set to this rule at [45].

⁴⁷⁴ *Eweida v United Kingdom* [2013] IRLR 231 (ECtHR (Grand Chamber)).

parties to the proceedings in which it is made. However, under s 10 and Schedule 2, a declaration makes it possible for a Minister to make a 'remedial order' whereby the incompatible legislation may be amended by the executive; each House of Parliament is actively engaged in the process at several stages.

Under s 6 it is unlawful for a public authority (which does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament) to act in a way incompatible with Convention rights unless doing so is mandated by legislation which cannot be read compatibly with Convention rights. Courts are empowered by s 8 to grant any remedy they consider just and appropriate whenever they find that a public authority has acted incompatibly with a Convention right. This includes, in some cases, mandating that an exemption be granted by the public authority to the conscientious objector.⁴⁷⁵

Note, however, that the remedies which are available in respect of infringement of a Convention right by public authorities are not available in respect of primary legislation and subordinate legislation which cannot be interpreted in a way compatible with a Convention right due to its parent primary legislation. The HRA does not empower UK courts to strike down or disapply primary legislation which courts cannot interpret in a way compatible with Convention rights. The only mechanism available under the HRA is to issue a declaration of incompatibility which initiates a political mechanism of rights review. This entails that the right to conscientious exemption which exists in UK law under the HRA has different available remedies. The most that those who object to legal obligations mandated (either directly or indirectly) by primary legislation can get from courts is to signal to the political branches that those obligations conflict with their right to conscientious exemption. The political process will then have to determine whether or not an exemption is granted. In any event, as will be illustrated, despite the existence of the right to conscientious exemption under the HRA, there have been less than a handful of instances where individuals have been successful in their claims and none where the legal duty objected to arose under primary legislation. Remedial issues, so far, have remained largely academic in the case law.

⁴⁷⁵ *Blackburn & Anor v Revenue & Customs* [2013] UKFTT 525 [69–71]. It is important to stress that in this case the relevant legislation had itself created an exemption and all the court did was to interpret the text of the legislation in a more generous way so that the claimant could benefit from it. The exemption was not of judicial creation. This case is analysed in some detail below from p 178.

Williamson and Begum: Art 9 and the General Right to Conscientious Exemption

This part considers the seminal House of Lords cases of *Williamson* and *Begum* and shows that the cases establish that Art 9 grounds the general right, albeit one which is subject to a wide array of conditions and limitations. To be sure *Williamson* and *Begum* were not the first cases to discuss whether that Art 9 grounds the general right. Several cases at the High Court and the Court of Appeal had undertaken that enquiry.⁴⁷⁶ However, this section focuses on these later cases, especially *Williamson*, as they are the most authoritative sources of the general right.

Williamson

*Williamson*⁴⁷⁷ arose as a consequence of s 548(1) Education Act 1996 which prohibits all school teachers from administering corporal punishment to pupils. The claimants objected to the statutory ban as they argued that it violated their right to manifest their religious beliefs under Art 9. Lord Nicholls painted their beliefs as follows

The claimants (...) say the use of 'loving corporal correction' in the upbringing of children is an essential of their faith. They believe these biblical sources justify, and require, their practices. Religious liberty, they say, requires that parents should be able to delegate to schools the ability to train children according to biblical principles.⁴⁷⁸

The House of Lords rejected the claimants' case on the basis that even though the statutory ban interfered with the manifestation of their religious beliefs, the interference was nonetheless justified under Art 9(2) mainly on the basis that the Court ought to defer to the considered view of Parliament which had found that an exceptionless ban on corporal punishment was a suitable way to protect the right to physical integrity of children.⁴⁷⁹ The leading judgment was delivered by Lord Nicholls with whom all agreed. Lady Hale and Lord Walker each also delivered concurring opinions, references to which will be made as relevant.

⁴⁷⁶ *R v Taylor (Paul Simon)* [2001] EWCA Crim 2263 (EWCA (Crim)); *R v Rueben Phillip Andrews* [2004] EWCA Crim 947 (EWCA Crim); *R (on the application of Pattison) v Social Security and Child Support Commissioners* [2004] EWHC 2370 (EWHC (Admin)); *Khan v Royal Air Force Summary Appeal Court* [2004] EWHC 2230 (EWHC (Admin)).

⁴⁷⁷ *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 (UKHL).

⁴⁷⁸ *ibid* 10.

⁴⁷⁹ *ibid* 48–52.

Lord Nicholls's judgment provides a useful synopsis of all the major principles that apply under Art 9. First he pointed out the distinction, inherent in Art 9, between holding a belief and manifesting it. He said that 'under article 9 there is a difference between freedom to hold a belief and freedom to express or "manifest" a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified'.⁴⁸⁰ Even though there was no dispute that the claimants genuinely held the beliefs they did, Lord Nicholls nevertheless offered guidance on how courts should determine whether a particular individual held certain religious beliefs. He said:

When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith (...) But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual (...) Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.⁴⁸¹

Albeit only *obiter* in the proceedings, these reflections would prove to be significant in future cases, especially in *Eweida*, when individuals sought to manifest religious beliefs which were not widely accepted as central in their religious communities (such as wearing a crucifix necklace for Christians).

Lord Nicholls then proceeded, given that the Secretary of State had challenged the view that the claimants' beliefs were protected by Art 9, to illustrate the conditions under which the manifestation of a belief will be protected under Art 9. Given the importance for the development of the case law it is useful to quote his opinion at length. He said:

[W]hen questions of 'manifestation' arise [...] a belief must satisfy some modest, objective minimum requirements. (...) The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental

⁴⁸⁰ *ibid* 16.

⁴⁸¹ *ibid* 22.

problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention (...).⁴⁸²

From the above it is possible to extract the requirements for when the manifestation of a belief is protected under Art 9 thus

1. The belief must be consistent with basic standards of human dignity or integrity [Dignity Requirement];
2. The belief must, as judged by courts, relate to matters more than merely trivial and possess an adequate degree of seriousness and importance [Importance Requirement]; and
3. The belief must also be coherent in the sense of being intelligible and capable of being understood [Intelligibility Requirement].

Reference will be made to these requirements collectively as the Williamson Requirements. The Importance Requirement is, as Lord Nicholls himself says, readily satisfied by religious beliefs. The Intelligibility Requirement is also readily met, especially when one combines it with the idea that religious beliefs which are idiosyncratically personal, i.e. are not even shared by one's own religious community, are nevertheless protected. However, the Dignity Requirement is problematic for the coherence of the Art 9 right. This is because it seems to perform the same function of the limitation clause of Art 9(2) which justifies interferences with the right to manifest a religious belief on the basis that, inter alia, it interferes with the rights of others. The manifestation of a belief given by way of example by Lord Nicholls, i.e. a religious belief that required torture or inhuman punishment, would be easily excluded by the limitation clause under Art 9(2). Nevertheless, despite some of these conceptual problems being raised also by Lord Walker,⁴⁸³ all three opinions in *Williamson* concurred that these requirements ought to be imposed for the manifestation of a belief to be

⁴⁸² ibid 23.

⁴⁸³ ibid 57–63.

protected by Art 9(1).⁴⁸⁴ Perhaps this is because these threshold requirements should not be applied, as Lord Nicholls said, in a way ‘which would deprive minority beliefs of the protection they are intended to have under the Convention’.⁴⁸⁵

Indeed, despite the fact that the claimants’ views required some measure of impingement on the personal integrity of minors, they were held to have satisfied the Dignity Requirement. This was mainly because ‘corporal punishment need not be administered with such severity or in such circumstances that it will significantly impair a child’s physical or moral integrity’.⁴⁸⁶

Lord Nicholls added a fourth requirement to the three already considered. He said that under ECtHR jurisprudence Art 9 does not protect every act motivated or inspired by a religion or belief. In order to fall within the scope of Art 9 the manifestation of a belief must be ‘intimately linked’ to the belief itself. The example given by Lord Nicholls was a decision of the EComHR in *Arrowsmith*. In that case the applicant, a pacifist, distributed leaflets to soldiers being posted to Northern Ireland urging them to desert. The leaflets themselves, in the EComHR’s view, did not advocate for pacifism generally but only advocated soldiers to go absent without leave, or openly to refuse to be posted to Northern Ireland. Therefore the EComHR rejected the applicant’s claim that by distributing the leaflets she was manifesting a belief protected by Art 9. This was because, even though pacifism was protected by Art 9, the distribution of those leaflets could not be a manifestation of pacifism.⁴⁸⁷

In *Williamson*, Lord Nicholls held that this fourth requirement was satisfied by the objecting parents as their objection to the statutory ban was motivated by a perceived religious obligation to administer corporal punishment. While he held that a perceived obligation is not a prerequisite to the manifestation of a belief in practice, he nevertheless found that if a belief takes the form of a perceived obligation to act in a specific way, then doing that act pursuant to that belief is itself a manifestation of that belief in practice.⁴⁸⁸

From the above, the Williamson Requirements need to be amended to incorporate the additional requirement and can be catered for a conscientious exemption thus:

Art 9 grants a right to conscientious exemption if a person objects to a legal requirement on the basis of a sincerely held belief which he can satisfy a court that

⁴⁸⁴ *ibid* 64 (Lord Walker); *ibid* 76 (Lady Hale).

⁴⁸⁵ *Williamson* (n 477) [23].

⁴⁸⁶ *ibid* 26.

⁴⁸⁷ *Arrowsmith v United Kingdom* (1981) 3 EHRR 218 (EComHR) [67–76].

⁴⁸⁸ *Williamson* (n 477) [30–37].

1. is consistent with basic standards of human dignity or integrity [Dignity Requirement];
2. relates to matters more than merely trivial and possesses an adequate degree of seriousness and importance [Importance Requirement]; and
3. is coherent in the sense of being intelligible and capable of being understood [Intelligibility Requirement].

Furthermore the objector must satisfy a court that the act of objecting

4. is intimately linked to the belief itself [Intimate Link Requirement];

Refusing to grant an exemption may constitute an interference with the right. The interference may nonetheless be justified under Art 9(2) if the person requested to grant the exemption can show that the interference

1. is prescribed by law;
2. pursues a legitimate aim; and
3. if the means chosen to achieve the aim are necessary and not disproportionate in their adverse impact on the conscientious objector [1-3 being the Justification Requirement].

The Williamson Requirements need to be further amended to take into account what the House of Lords decided in the subsequent case of *Begum*. That case suggests that there is no interference with the right to conscientious exemption when the obligations objected to are attached to a benefit or role which the objector voluntarily sought or accepted.

Begum

Denbigh High School, a non-faith school with pupils from a variety of cultures and religions, had a school uniform policy which permitted girls to wear a shalwar kameeze. This was described by the House of Lords as ‘a sleeveless smock-like dress with a square neckline, revealing the wearer's collar and tie [with] loose trousers, tapering at the ankles’. This could also be worn accompanied by a headscarf of a specified colour and quality.⁴⁸⁹ The respondent, Begum, a practising Muslim, had been a pupil at the school for two years and had worn the shalwar kameeze without complaints. However, she eventually insisted (perhaps on instigation of her older brother) on being allowed to wear a long coat-like garment known as a jilbab. She claimed that the jilbab was required by her religion because it concealed, to a greater extent than the shalwar kameeze, the contours of the female body and

⁴⁸⁹ *Begum, R (on the application of) v Denbigh High School* [2006] UKHL 15 (UKHL) [6].

was said to be appropriate for maturing girls. The school authorities refused her request. She therefore stopped attending the school and claimed to have been constructively excluded by not being allowed to attend school in a jilbab.

The issue to be decided by the House of Lords was whether the decision by the school not to allow her to wear the jilbab violated Begum's rights under Art 9. In essence, Begum claimed that she had an Art 9 right to be exempt from the school uniform policy on the basis of her religious belief that she should wear the jilbab. The House of Lords unanimously held that her claim should fail. However, the House was divided over why the claim should fail. One possibility was that there was no interference with her Art 9 right (Lord Bingham, Lord Hoffman and Lord Scott)⁴⁹⁰ given that she was free to attend another school which allowed her to wear the jilbab. Another was that the claim should fail because, even though there had been an interference (Lord Nicholls and Lady Hale),⁴⁹¹ it was justified in deference to the school authorities' view that granting the exemption would jeopardise the harmonious cultural and religious pluralism of the school.

It is important to note, however, that the House was not divided on whether Begum did have the Art 9 right she claimed. As Lord Bingham put it:

It is common ground in these proceedings that at all material times the respondent sincerely held the religious belief which she professed to hold. It was not the less a religious belief because her belief may have changed, as it probably did, or because it was a belief shared by a small minority of people. Thus it is accepted, obviously rightly, that article 9(1) is engaged or applicable. That in itself makes this a significant case, since any sincere religious belief must command respect, particularly when derived from an ancient and respected religion.⁴⁹²

This is significant because, inter alia, it seems to invalidate the claim made earlier by the High Court in *Pattison* (where a jobseeker conscientiously objected to being compelled to accept work in the private sector) that Art 9 is not engaged when a person objects to an obligation which is attached to a benefit or role which he voluntarily sought or accepted.⁴⁹³ The better view is that, as affirmed by the unanimous House of Lords, Art 9 is engaged but, as held by the majority, has not been interfered with. The majority reached the decision on interference on the basis that this rationale had been endorsed by the ECtHR. Lord Bingham said

⁴⁹⁰ *ibid* 25, 50, 89.

⁴⁹¹ *ibid* 41, 93.

⁴⁹² *ibid* 21.

⁴⁹³ *Pattison* (n 476) [10–11].

The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.⁴⁹⁴

In the present case the school had not interfered with Begum's right because she had chosen to attend the school with the full knowledge of the uniform policy and despite there being other schools in her vicinity which permitted the wearing of the jilbab.⁴⁹⁵ Lady Hale, dissenting on this point, did not dispute the majority's reasoning per se but rather its application to the facts. She contended that, given that the respondent was not an adult, it could not be assumed that her choice as to which school to attend and what religious garment to wear was the product of 'a fully developed individual autonomy'.⁴⁹⁶ Lord Nicholls, similarly not disputing the majority's rationale, was of the view that the majority over-estimated the ease with which Begum could have moved to another school and under-estimated the adverse impact of the school's decision on her education.⁴⁹⁷

From the above it seems then that *Begum* qualifies the right to conscientious exemption under Art 9 thus:

There is no interference with the Art 9 to conscientious exemption if the person requested to grant the exemption can show that:

1. the objector has voluntarily accepted a role or benefit which gives rise to an obligation which conflicts with his beliefs; and
2. there are other means open to the objector to manifest his beliefs outside of the role or without receiving the benefit without undue hardship or inconvenience [the Autonomy Requirement].

The Restrictive Art 9 Right to Conscientious Exemption

The combined reading of *Williamson* and *Begum* paints a very restrictive picture of the right to conscientious exemption. Given the number of hurdles imposed by both *Williamson* and *Begum*, it is no surprise that no conscientious objector succeeded prior to the liberalisation of the Williamson Requirements initiated in the ECtHR in *Bayatyan* and *Eweida* (both considered in detail below). Prior

⁴⁹⁴ *Begum* (n 489) [23].

⁴⁹⁵ *ibid* 25.

⁴⁹⁶ *ibid* 93.

⁴⁹⁷ *ibid* 41.

to these ECtHR cases, various objectors who brought Art 9 cases in UK courts inevitably failed to pass all of the numerous requirements. These unsuccessful cases are briefly analysed in turn.

In *Boughton*, the applicants, pacifists who objected to being required to pay taxation into a general Treasury account from which funds would be used to pay for military intervention, failed because they did not meet the Intimate Link Requirement. The Court of Appeal followed ECHR doctrine which had held that the obligation to pay taxes is a general one which has no specific conscientious implications in itself. It followed that there was no link between their pacifism and their desire not to pay tax into a general treasury account.⁴⁹⁸

In *Connolly*, the prosecution was able to show that granting an exemption to the defendant, a pro-life Catholic woman, would not survive the Justification Requirement. Connolly had argued that she should not be criminalised for sending pictures of an aborted foetus to three pharmacists who sold morning-after pills with the purpose of causing distress or anxiety to them. Even though the High Court accepted that she was manifesting her religious beliefs, it held that the successful prosecution was necessary in order to protect the right of the pharmacists not to receive grossly offensive material. Furthermore, the prosecution was not disproportionate given that the primary aim for the defendant in sending the photographs was to protest the existing permissive abortion regime. Sending the offensive photographs to pharmacists, who had no influence in the abortion public debate, could not help achieve that aim.⁴⁹⁹

In *Playfoot*, the claimant, a schoolgirl, failed, among other things, the Intimate Link Requirement when she expressed her wish to wear at school a purity ring as a symbol of her commitment to celibacy before marriage. She sought judicial review of the decision of the Defendant, the Governors of her school, not to exempt her from the school's uniform policy which prohibited wearing jewellery. The High Court made the factual finding that the claimant's religious belief did not require her to wear the ring given that the claimant herself did not suggest that it did. Hence, the court was not persuaded that she met the Intimate Link Requirement.⁵⁰⁰

Finally, in *Surayanda*, the Welsh Government showed that granting an exemption to the claimant, a Krishna charity, would not satisfy the Justification Requirement. The charity had objected to the Welsh Government's decision to order the slaughter of the claimant's ceremonial bullock. The Court of Appeal held that the ceremonial bullock could not be exempted from the rule which required

⁴⁹⁸ *R (Boughton & Ors) v HM Treasury* [2006] EWCA Civ 504 (EWCA).

⁴⁹⁹ *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (EWHC (Admin)).

⁵⁰⁰ *R (on the application of Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (EWHC (Admin)).

slaughter of animals suspected to be infected by bovine tuberculosis, an infectious disease potentially harmful to humans and non-human animals. Albeit the Court recognised the grave effect on the claimant's right to religious freedom, it nonetheless held that the exemption could not be granted because the slaughter was necessary and proportionate in order 'to reduce the economic impact of [bovine tuberculosis] and to maintain public health protection and animal health welfare, and to slow down and prevent the geographic spread of [bovine tuberculosis] to areas currently free of the disease, and to achieve a sustained reduction of the disease incidence in cattle in high incident areas'.⁵⁰¹

The brief review of these post-*Williamson/Begum* cases highlights the very restrictive picture of the right to conscientious exemption. The following period was to be one of limited liberalisation chiefly due to *Bayatyan* and *Eweida*. Nevertheless, as we shall see, despite the loosening of the Williamson Requirements introduced post-*Eweida*, to date there has only been one case in the UK courts where the right to conscientious exemption under Art 9 has been successfully invoked.

Eweida and Beyond: Liberalising the Williamson Requirements

The ECtHR delivered its ground-breaking judgment in *Eweida* in January 2013.⁵⁰² That case, having been followed by the UKSC in *Bull v Hall*, has substantially affected the current content of the right to conscientious exemption under UK law by loosening some of the Williamson Requirements. The case was, however, preceded by another important case, *Bayatyan*, which helped lay the ground for a more robust understanding of the scope of Art 9. The two ECtHR decisions are considered in chronological order before reflecting on their reception into UK law.

Bayatyan v Armenia

Bayatyan was a member of the Jehovah's Witnesses, a religious group whose beliefs include the conviction that military service, even unarmed, is to be opposed. Bayatyan was convicted by the Armenian authorities for refusing to serve. He claimed in the ECtHR that the refusal of the Armenian authorities to exempt him from service on the basis of his conscientious objection violated Art 9. The Grand Chamber of the ECtHR accepted his claim.

The Court refused to follow the constant jurisprudence of the European Commission on Human Rights (a semi-judicial ECHR body that has now been abolished) (EComHR) which since the 1966 case

⁵⁰¹ *Surayanda v The Welsh Ministers* [2007] EWCA Civ 893 (EWCA) [71].

⁵⁰² *Eweida (ECtHR)* (n 474).

of *Grandrath*⁵⁰³ and the 1973 case of *GZ v Austria*⁵⁰⁴ had consistently held that the right to conscientious objection in the military context is not protected by the ECHR. This is because, even though Art 9 protects freedom of conscience and religion, Art 4, which prohibits forced or compulsory labour, explicitly states in Art 4(3) that forced or compulsory labour does not include '(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service'. The Commission's consistent view was therefore that, given the specific terms of Art 4(3), member states were left free to decide whether or not to recognise conscientious objection and were free to impose civilian service on conscientious objectors. The UK House of Lords in *Sepet*, in deciding whether it would be lawful to deport Turkish refugees to a country where they would, contrary to their conscience, be forced to serve in the military, analysed the Commission's jurisprudence and reaffirmed the view that the Commission's jurisprudence did not recognise a right to conscientious objection in the military context.⁵⁰⁵ The UK Divisional Court in *Khan*, despite some reservations as to whether there had been some shift in the Commission's recent jurisprudence, could not depart from the binding precedent of *Sepet* and held that a Muslim soldier who objected to participating in the Iraq war as that would involve killing fellow Muslims had no right to conscientious objection under Art 9.⁵⁰⁶

The departure from the well settled jurisprudence of the EComHR was justified by the Grand Chamber in *Bayatyan* on the basis that, *inter alia*, 'the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today'.⁵⁰⁷ After reviewing many European and international authorities, it found that almost all member states, including Armenia, and several international instruments, including the International Covenant of Civil and Political Rights (ICCPR) and the EU Charter of Fundamental Rights, recognised the right to conscientious objection in the military context.⁵⁰⁸ Hence, in line with the living instrument doctrine, it recognised an Art 9 right to conscientious objection in the military context which *Bayatyan* could rely on. Incidentally, however, the Court confirmed the EComHR's

⁵⁰³ *Grandrath v Germany* (no 2299/64, Commission's report of 12 December 1966, Yearbook 10, p 626) (European Commission of Human Rights).

⁵⁰⁴ *GZ v Austria* (no 5591/72, Commission decision of 2 April 1973, Collection 43, p 161) (European Commission of Human Rights).

⁵⁰⁵ *Sepet v Secretary of State for the Home Department* [2003] UKHL 15 (UKHL) [17].

⁵⁰⁶ *Khan* (n 476).

⁵⁰⁷ *Bayatyan v Armenia* (2012) 54 EHRR 15 (ECtHR) [102].

⁵⁰⁸ *ibid* 108–109.

jurisprudence, followed in the UK in *Boughton*,⁵⁰⁹ that Art 9 does not apply to an objection to general taxation because general taxation ‘has no specific conscientious implications in itself’.⁵¹⁰

The significance of *Bayatyan* cannot be overstated. It brought ECHR jurisprudence in line with the many domestic and international instruments, such as the ICCPR,⁵¹¹ which had explicitly recognised the right to conscientious objection in the paradigmatic military context. Furthermore, it was a significant decision from a UK law perspective, as it signalled the liberalisation of the right to conscientious exemption which early HRA cases such as *Boughton*, in the context of military objections,⁵¹² had interpreted very narrowly. With *Eweida*, the liberalisation was to continue outside the military-objection context.

Eweida

The ECtHR judgement in *Eweida* was a consolidated case originating from four UK discrimination law cases. The first applicant, Ms Eweida, was an air hostess who had claimed to have been discriminated against on the basis of her religious beliefs. Her employer, British Airways, refused to allow her to deviate from its staff uniform policy by wearing a crucifix. The second applicant, Ms Chaplin, was a nurse who also claimed to have been discriminated against by her employer, the National Health Service, when she was instructed not to wear a crucifix, in accordance with the employer’s policy that no necklaces were allowed when in contact with patients. The third applicant, Ms Ladele, was a registrar of births, deaths and marriages who claimed to have been discriminated against by her employer, Islington Council, when she was dismissed for refusing to celebrate civil partnerships for same-sex couples on the basis of her religious belief that same-sex unions are sinful. The last applicant, Mr McFarlene, was a couples’ counsellor who had also claimed to have been discriminated against by his employer, Relate Avon Limited, when he was dismissed for refusing to provide sexual counsel for same-sex couples on the basis of his religious belief that homosexual relations are sinful.

While none of the applicants had succeeded in their UK discrimination law cases, for reasons to be explored later,⁵¹³ one applicant, Eweida, succeeded in the ECtHR on the basis of her Art 9 claim. It was held that BA’s refusal to allow her to wear the crucifix was disproportionate, especially given

⁵⁰⁹ *Boughton* (n 498).

⁵¹⁰ *Bayatyan* (n 507) [111].

⁵¹¹ UN Human Rights Committee, ‘CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)’.

⁵¹² *Pattison* (n 476).

⁵¹³ See discussion from p 181.

that BA had eventually changed its stance and allowed Eweida to wear the crucifix a few months after her initial complaint.⁵¹⁴ Importantly, Eweida's success in the ECtHR would not have been possible had the ECtHR not reversed its own jurisprudence, followed by the House of Lords in *Begum*, that there would be no interference with Art 9 if a person objects to an obligation attached to a benefit or role which he voluntarily sought or accepted. The Court acknowledged the well-established jurisprudence by saying that

It is true, as the Government point out and as Lord Bingham observed in *R (Begum) v. Governors of Denbigh High School* case (...), that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2.⁵¹⁵

However, the Court then went on to reverse this well settled case law in a fundamental paragraph which reads:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.⁵¹⁶

The reason for this change was that the Court had not taken the same approach in similar employment cases when employees had tried to exercise other ECHR rights, such as freedom of expression under Art 10 or freedom not to join a trade union under Art 11.⁵¹⁷

The significance of this change for UK jurisprudence on conscientious exemptions is that one of the Williamson Requirements can no longer find a footing in ECtHR jurisprudence. The Autonomy Requirement, introduced in *Begum*, has been dispensed with. It is important to note, however, that the Autonomy Requirement, following *Eweida*, has not disappeared altogether from an Art 9 analysis. It has instead been made one of the many factors to be taken into account in the

⁵¹⁴ *Eweida (ECtHR)* (n 474) [94].

⁵¹⁵ *ibid* 83.

⁵¹⁶ *ibid*.

⁵¹⁷ *ibid*.

justification stage. The Court took it into account in deciding whether the decision by Relate to dismiss McFarlene was justified. The Court said that

the applicant voluntarily enrolled on Relate's post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible (...). While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck (...).

The Court then went on to find that the UK had not exceeded its margin of appreciation by allowing Relate to dismiss McFarlene in order to ensure the provision of a public service without discrimination on the basis of sexual orientation.⁵¹⁸

The *Eweida* decision, and the change of the ECtHR's jurisprudence, has been applied by the UKSC in *Bull v Hall*. In that case the UKSC unanimously agreed that Art 9 did not afford relief from a finding of unlawful discrimination to the owners of a B&B who refused, on the basis of their religious beliefs that homosexual sex is sinful, to rent a double bedroom to a same-sex couple. Lady Hale, with whom all agreed on the Art 9 point, summarised the finding in *Eweida* and acknowledged that the ECtHR's jurisprudence had changed.⁵¹⁹ She then went on to decide against the B&B owners on the basis that it was not disproportionate to require them not to discriminate against homosexuals given the history of persecution and prejudice against homosexuals over the centuries.⁵²⁰ The decision in *Bull v Hall* can therefore be used as a basis by lower courts to depart from the decision in *Begum*, which was itself based on the old ECtHR jurisprudence, and to follow *Eweida*. The First-Tier Tribunal Tax Chamber case of *Blackburn*, considered next, did just that. However, it was decided in October 2013, a month before the UKSC handed down its decision in *Bull v Hall*. There might be therefore some basis to argue that the First-Tier Tribunal was too precocious in following *Eweida* without having had the benefit of the UKSC, although it did have the benefit of the Court of Appeal's decision. Nevertheless, *Blackburn* has not been appealed and, given the UKSC's decision to follow *Eweida* in *Bull v Hall*, it is likely to remain good law.

⁵¹⁸ *ibid* 109–110.

⁵¹⁹ *Bull v Hall* (n 9) [47].

⁵²⁰ *ibid* 53–55.

A Successful Case under the Art 9 Right to Conscientious Exemption: Blackburn

Even though, as might be apparent from the analysis above, a general right to conscientious exemption exists under Art 9, it is possible to argue that it is a right without any bite, given that all the cases considered have been unsuccessful. This assessment is not totally unfair. However, there has in fact been one known successful case where the right was successfully invoked. This was *Blackburn*, a decision of the First-Tier Tribunal Tax Chamber, a lower UK judicial body.⁵²¹

Judge Mosedale, deciding for the Tribunal, had to determine whether the appellants, two members of the Seventh-Day Adventist Church in a partnership running a beekeeping business, were entitled to the statutory exemption from online filing of value added tax (VAT) on the basis of an objection to electronic communication. A paraphrasing of the relevant exemption provision says that a person who the HMRC is satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications is not required to make a return by an electronic return system.⁵²²

The Tribunal found that the statutory exemption, on its natural reading, excluded the appellants because it required them to belong to a religious order which objected to electronic communication. However, the Seventh-day Adventist Church did not oppose electronic communications. Nevertheless, in line with *Williamson* and *Eweida*, the Tribunal held that Art 9 was engaged. This was because the appellants did have a sincere belief that the Bible impliedly prohibits the use of electronic communications, as they considered that computers and mobile phones have become a modern form of idolatry which the Bible explicitly prohibits.⁵²³ The Tribunal found that there was a sufficient link between the appellants' beliefs (i.e. a religious obligation to shun electronic communications) and their desire to manifest them by objecting to file their VAT through electronic means.⁵²⁴ The Tribunal also relied on *Eweida* to show that the appellants no longer needed to fulfil the Autonomy Requirement.⁵²⁵ The HMRC did not make any submissions on the Justification Requirement so the Tribunal concluded that the Art 9 claim had succeeded.⁵²⁶ The Tribunal then applied s 3 HRA, reading and giving effect to the statutory exemption in a manner compatible with the appellants' Art 9 right.

⁵²¹ *Blackburn* (n 475).

⁵²² Regulation 25A of the Value Added Tax Regulations 1995/2518

⁵²³ *Blackburn* (n 475) [12–13, 47].

⁵²⁴ *ibid* 48–52.

⁵²⁵ *ibid* 53–59.

⁵²⁶ *ibid* 60–62.

The post-Eweida decision of *Blackburn* has provided the only known example of when the Art 9 right to conscientious exemption has been successfully invoked.

Conclusion

The analysis above shows that individuals that have a conscientious objection to legislation, either primary or subordinate, or to rules and policies of public authorities may claim a right to exemption under Art 9 incorporated in UK law through the HRA. In order to succeed, an objector must be able to satisfy all the Williamson Requirements. The analysis has shown the complexity of the task and has shown that no UK case, prior to *Eweida*, succeeded in UK courts. *Bayatyan* and *Eweida* led to a degree of liberalisation of the stringent hurdles of the Williamson Requirements. *Bayatyan* now recognises that Art 9 is engaged in the paradigmatic case of conscientious objection to military service. *Eweida* softened the Williamson Requirements by transforming the Autonomy Requirement into just one of several considerations at the justification stage. Partially because of these liberalisations, *Blackburn* was successfully litigated but remains to date the only known case where a conscientious exemption claim was successful under Art 9.

3. The Second Ground of the General Right: The Prohibition of Indirect Discrimination on the Basis of Religion or Belief in Employment and the Provision of Goods and Services under Anti-Discrimination Legislation

The Equality Act 2010 prohibits direct and indirect discrimination on the basis of various protected characteristics, including religion or belief. The right to exemption may arise if a requirement would otherwise be indirectly discriminatory. S 19 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are (...) religion or belief (...).

Under section 10 religion or belief is defined as follows:

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

The prohibition of indirect discrimination arising under the Equality Act only applies to England, Wales and Scotland. Similar legislation exists in Northern Ireland under the Fair Employment and Treatment (Northern Ireland) Order 1998/3162 ('NI Order'). The prohibition of discrimination in both pieces of legislation applies to public and private employers and to providers of goods and services open to the general public, among others.

The mechanics of indirect discrimination are complex and are best illustrated by reference to decided cases. The following sections will be dedicated to that task together with showing how this prohibition gives rise to a general right to conscientious exemption.

However, prior to proceeding to that task, it is first useful to mention that the Equality Act (and its predecessors) and the NI Order incorporate European Union law prohibiting discrimination into domestic law, in particular the EU Directive 2000/78 ('Dir 2000/78'). Unlike other forms of EU law, EU directives are, generally speaking, binding on EU member states only as to the result to be achieved.⁵²⁷ Member states are left the choice of form and methods to implement directives.⁵²⁸ The

⁵²⁷ The chapter leaves to the side the fact that under jurisprudence of the Court of Justice of the European Union, the text of directives may be binding on Member States when the Member States have failed to implement the directives by the deadline of implementation and when other conditions are satisfied. The chapter also leaves to the side the fact that the text of directives may be binding when they crystallise the general principles of EU law (e.g. the prohibition of discrimination on the basis of gender).

⁵²⁸ Article 288 of the Treaty on the Functioning of the European Union ('TFEU').

Equality Act and the NI Order effect the transposition into domestic law of Dir 2000/78. Art 2(b)(1) of the Directive prohibits indirect discrimination on the basis of religion or belief. The scope of this prohibition has been recently interpreted for the first time by the CJEU in *Achbita* and *Bougnanoui*.⁵²⁹ In *Achbita*, the CJEU held that an employee was indirectly discriminated against when she was dismissed for insisting on wearing an Islamic headscarf despite her employer's policy prohibiting the wearing at work of any religious, philosophical or political symbols. The CJEU held that the indirect discrimination could not be justified if it was possible to offer the employee a non-client facing role without thereby causing undue burden on the employer. This authoritative ruling of the CJEU seems to confirm that the prohibition of indirect discrimination gives rise to a limited right to conscientious exemption as a matter of EU law, and hence, also as a matter of UK law.

The following section analyses the UK cases that illustrate the right to exemption under the statutory prohibitions of indirect discrimination. Some of those cases are decided under statutes that preceded the Equality Act 2010. However, the predecessors to that statute are not materially different.

The Prohibition of Indirect Discrimination and a Right to Conscientious Exemption

Watkins-Singh

The case of *Watkins-Singh* usefully illustrates how the general right to exemption operates under anti-discrimination legislation.⁵³⁰ In that case a Sikh school girl sought, and was refused, an exemption from her school uniform policy which prohibited the wearing of jewellery. The policy only allowed the wearing of one pair of plain stud earrings and a wrist watch. The claimant wished to wear a Kara, a narrow bangle worn by followers of the Sikh religion, at school. Given the precedent of *Begum* (*Eweida* had not been decided at the time), it was unlikely that a HRA claim would have succeeded, mainly on the basis of the Autonomy Requirement. Instead, she brought a claim of indirect discrimination against her school. Silber J, in the High Court, accepted her discrimination claim and held that the school had discriminated against her by not granting her the exemption. The judgment is worth considering in detail because it explains the mechanism of indirect discrimination and how a general right to exemption arises from it.

The judge explained the requirements of a successful indirect discrimination case thus:

⁵²⁹ *Achbita* (n 467); *Bougnanoui* (n 467).

⁵³⁰ *R (on the application of Watkins-Singh) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin) (EWHC (Admin)).

It is common ground that in considering the claimant's case on grounds of indirect discrimination (...) it is necessary to go through the following steps, which are:

- (a) to identify the relevant 'provision, criterion or practice [PCP]' which is applicable;
- (b) to determine the issue of disparate impact, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
- (c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and
- (d) whether this policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim.⁵³¹

The first step requires identifying the relevant PCP which in this case was the school policy which applied to all pupils and which prohibited them from wearing jewellery. The next step is to identify a comparator group against which the claimant can be compared in order to establish whether there had been a disadvantage. The judge identified the comparator group as 'those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery'.⁵³² The third step is to identify whether the claimant suffers a 'particular disadvantage' compared to the comparator group in complying with the PCP. The judge was quick to conclude that the claimant suffered a disadvantage when compared to the comparator group, i.e. 'those comparators do not suffer any disadvantage or detriment by the refusal of the defendant to grant an exemption from the uniform policy'.⁵³³ However, he opined that showing disadvantage was not enough. That disadvantage had to be 'particular'. In this regard the judge said:

On the facts of this case, I believe that there would be a 'a particular disadvantage' (...) if a pupil is forbidden from wearing an item when: (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to (...) her religious belief; and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion (...), even if the wearing of the article is not an actual requirement of that person's religion (...).⁵³⁴

⁵³¹ *ibid* 38.

⁵³² *ibid* 46.

⁵³³ *ibid* 48.

⁵³⁴ *ibid* 56B.

The judge accepted as true the claimant's assertion that wearing the Kara was of extreme importance to her as she felt a sense of religious duty to do so. The judge also concluded, on the basis of expert evidence, that Sikh generally do wear the Kara as a manifestation of their religious beliefs, albeit wearing it is not a strict religious duty.⁵³⁵

The final step is to undertake the justification analysis. In this case, the judge found that the refusal to grant the exemption was disproportionate, despite precedent, such as *Begum*, suggesting the opposite. The main reasons for this conclusion were, first, that the Kara was not a very visible religious symbol such as the niqab and the jilbab, and as such would not attract much attention from other school pupils. Secondly, the judge found that the school was under a legal obligation to educate other school students to tolerate religious and cultural differences and, most importantly, to appreciate the importance of certain symbols to certain religions. Finally, the court rejected the submission that allowing the exemption would amount to discriminating against other pupils who were not allowed to wear jewellery. This was because the other students were not similarly placed to the claimant and did not suffer a particular religious disadvantage by not being allowed to wear jewellery.⁵³⁶

The analysis provided by the Court provides really good evidence that a right to conscientious exemption exists under UK anti-discrimination provisions. The evidence is reinforced by the fact that the same claim was made in the cases that form the *Eweida* saga and the same analytical structure, with some added complexities, was followed in those cases. The next section briefly considers those cases which have the added importance of being considered in the private and public employment context.

The Eweida Cases

The relevant facts of the cases that jointly form the *Eweida* saga were considered above and will not be repeated here.⁵³⁷ In *Ladele*, the first of the four cases, the claimant claimed, *inter alia*, to have been indirectly discriminated against by her public sector employer by not exempting her from the obligation to officiate same-sex civil partnerships. The Court of Appeal accepted that she had been indirectly discriminated against. It said:

There is no doubt but that Islington's policy decisions to designate all their registrars civil partnership registrars, and then to require all registrars to perform civil partnerships, put a

⁵³⁵ *ibid* 58–71.

⁵³⁶ *ibid* 72–91.

⁵³⁷ See text just above *supra* n 513.

person such as Ms Ladele, who believed that civil partnerships were contrary to the will of God, “at a particular disadvantage when compared with other persons”, namely those who did not have that belief.⁵³⁸

However, the Court of Appeal found that the indirect discrimination was justified on the basis of protecting homosexual people, including the claimant’s colleagues, from the harm of discrimination. The same structure and reasoning was followed by the Court of Appeal in *McFarlane* which had very similar facts.⁵³⁹

The Court of Appeal in *Eweida* followed the same structure as the above cases in considering whether Ms Eweida should have been exempt from her employer’s uniform policy banning the wearing of visible neck adornment, thereby allowing her to wear her crucifix necklace. The employment tribunal in *Chaplin* followed the same structure and reasoning of the Court of Appeal.⁵⁴⁰ Both cases did however raise a complicating factor which is yet to have conclusive judicial resolution. Remember that indirect discrimination requires that a PCP ‘puts, or would put, *persons* with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it’ (emphasis added).⁵⁴¹ It seems then that a literal reading of the provision requires that the claimant belong to a group of people, i.e. ‘persons’, who would suffer a particular disadvantage by reason of the application of the PCP. In *Eweida*, the Court of Appeal did not think that the requirement of group disadvantage was satisfied given that it could not find evidence that Christians, including the claimant, consider visible display of the cross to be a requirement of the Christian faith.⁵⁴² Similarly, in *Chaplin*, the Employment tribunal did not think that the claimant suffered indirect discrimination because she was the only Christian to be particularly disadvantaged by her employer’s policy which prohibited wearing a crucifix necklace.⁵⁴³ Some scholars have persuasively argued that the group disadvantage requirement is incompatible with Art 9,⁵⁴⁴ in particular since the House of Lords in *Williamson* and the ECtHR in *Eweida* have held that religious beliefs need not be shared by others to be protected under Art 9.⁵⁴⁵ In any event, both the Court of

⁵³⁸ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [43].

⁵³⁹ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 (EWCA (Civ)).

⁵⁴⁰ *Chaplin v Royal Devon and Exeter NHS Foundation Trust ET No 1702886/09* [2010] (unreported).

⁵⁴¹ S 19 Equality Act.

⁵⁴² *Eweida v British Airways Plc* [2010] EWCA Civ 80 (EWCA (Civ)) [4].

⁵⁴³ *Chaplin* (n 83) [28].

⁵⁴⁴ G Pitt, ‘Taking Religion Seriously’ (2013) 42 *Industrial Law Journal* 398, 403–404; Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd Revised edition, Hart Publishing 2016) 167–169.

⁵⁴⁵ *Williamson* (n 477) [22]; *Eweida (ECtHR)* (n 474) [81–82].

Appeal and the tribunal proceeded to the justification analysis finding in both cases that even if there had been indirect discrimination this would have been justified. In *Eweida* the Court of Appeal said that

On the footing on which the indirect discrimination claim is now advanced, namely disadvantage to a single individual arising out of her wish to manifest her faith in a particular way, everything in the tribunal's findings of fact shows the rule, both during the years when it operated without objection and while it was being reconsidered on Ms Eweida's instigation, to have been a proportionate means of achieving a legitimate aim. The contrary is not in my view arguable.⁵⁴⁶

In *Chaplin*, the Employment Tribunal held that the discrimination was justified mainly on health and safety grounds, given that the crucifix necklace might come into contact with open wounds or could cause injury if pulled on by a patient.⁵⁴⁷

Conclusion

The analysis above shows that there is sufficient evidence to conclude that a general right to exemption exists under the prohibition of indirect discrimination in UK anti-discrimination law. The most straightforward case analysed was that of *Watkins-Singh* in the High Court. However, the four cases of the Eweida saga, three of which were decided in the Court of Appeal, should dispel any lingering doubts as to whether such a right exists under anti-discrimination law.

To summarise, in order for a conscientious exemption claim to be successful under this route, an objector must:

- (a) identify the relevant PCP which conflicts with his beliefs;
- (b) show that the PCP causes particular group disadvantage when compared with another group which does not share the belief of his group;
- (c) show that the PCP also particularly disadvantages the objector personally.

The author of the PCP may be able to show that, none withstanding the particular disadvantage caused to the objector, that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

⁵⁴⁶ *Eweida (EWCA)* (n 542) [37–38].

⁵⁴⁷ *Chaplin* (n 540) [29].

4. A Third Ground for the General Right? The Prohibition of Discrimination on the Basis of Religion in Art 14 ECHR

This part tentatively sets out another rule of law which may ground the general right. This is the prohibition of discrimination on the ground of religion in the enjoyment of Convention Rights arising under Art 14 of the ECHR. Art 14 reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The reason this third ground is tentative is that it has not been explicitly relied upon in UK courts although it has been successfully relied on in the ECtHR, including in *Ladele*, to receive an exemption from a legislative rule. As has been explained, it is always wise to await explicit reliance by UK courts on ECtHR jurisprudence before declaring that this is binding in UK courts.⁵⁴⁸ So without explicit UK case law on Art 14 ECHR in the context of conscientious exemptions it is unwise to declare that this rule of law is a third ground for the general right in UK law. This part looks at the ECtHR cases that suggest that Art 14 is a third ground for the general right, i.e. *Thlimmenos*⁵⁴⁹ and *Ladele*, before looking at those UK cases that have considered that ground in passing. Unfortunately, no firm conclusion can yet be drawn on whether or not Art 14 should be considered in UK law as a third ground for the general right to conscientious exemption.

Thlimmenos

Thlimmenos was a pacifist Jehovah Witness who had conscientiously objected to wearing the military uniform at a time of general mobilisation. The Greek authorities had prosecuted him for his objection and imprisoned him for two years. On release, the Greek Institute of Chartered Accountants refused to appoint him as a chartered accountant, a regulated profession, despite the fact that he had come second among sixty candidates in a public examination for the appointment of twelve chartered accountants. The Institute's motivated its decision on the basis that Thlimmenos had been incarcerated for a serious crime and was thereby barred from becoming an accountant by Greek legislation. In the ECtHR Thlimmenos argued the Greek law which excluded him from

⁵⁴⁸ See text supra at n 471.

⁵⁴⁹ *Thlimmenos v Greece* (2001) 31 EHRR 31 (ECtHR (Grand Chamber)).

becoming a chartered accountant violated Art 14 in conjunction with Art 9. He argued that 'the law excluding persons convicted of a serious crime from appointment to a chartered accountant's post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds'.⁵⁵⁰ He was essentially arguing that he ought to have been exempted from the requirement of having no criminal conviction because the conviction was due to a religious conscientious objection. The ECtHR accepted his claim and found a violation of Art 14 read in conjunction with Art 9.

In reaching its decision the ECtHR reiterated various important principles as to how Art 14 operates. The Court stated that applicants cannot rely on Art 14 on its own but always have to invoke it in conjunction with another ECHR right (including the rights in the protocols to the Convention). This is because the text of Art 14 prohibits discrimination only in the 'enjoyment of the rights and freedoms set forth in this Convention'. The need to invoke another ECHR right, e.g. Art 9, did not mean that applicants had to prove that the other right had been breached. It is sufficient that the facts of a case fall within the ambit of the other right.⁵⁵¹ The Court held that this requirement was satisfied because of the fact that the criminal conviction was imposed due to Thlimmenos manifesting his religious beliefs under Art 9, i.e. conscientiously objecting to wearing the military uniform on the basis of his religious pacifism. This finding alone makes *Thlimmenos* a significant case as the time of the judgment ECHR jurisprudence had not yet recognised that conscientious objection to military service infringed, or was even protected by, Art 9.⁵⁵² It is thereby arguable that this case had initiated a shift in ECHR jurisprudence signalling that conscientious objection to military service could potentially fall within the scope of Art 9. As discussed, it was not until *Bayatyan*, decided after a decade, that the Court held that failure to provide for conscientious objection to military service violated Art 9.

The Court then went on to state that Art 14 does not only prohibit states from treating differently persons in analogous situations without providing an objective and reasonable justification. It also prohibits states from failing to treat differently persons whose situations are significantly different without providing an objective and reasonable justification. The Court found that Greece had failed to treat Thlimmenos differently from other people that had a criminal offence. Unlike other convicted persons, his conviction was due to him manifesting his religious beliefs. Also, there was no

⁵⁵⁰ *ibid* 33.

⁵⁵¹ *ibid* 40.

⁵⁵² See text *supra* at n 503. The change in jurisprudence came by with *Bayatyan*, discussed in the text *supra* at n 507.

justification for the discriminatory treatment suffered by Thlimmenos. While the Court was open to the principle that states have a legitimate interest to exclude certain offenders from a regulated profession, it held that 'a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession'.⁵⁵³ The treatment suffered by Thlimmenos was also disproportionate because he had already served a prison sentence for his conscientious objection and exclusion from being an accountant would amount to another sanction for the same offence. The Court concluded its reasoning by stating that Art 14 in conjunction with Art 9 had been breached by the Greek legislature's failure 'to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants'.⁵⁵⁴ This is the closest the Court came to stating that Article 14 in conjunction with Art 9 may require an exemption from a legal rule on the basis of a conscientious objection.

Ladele

Another conscientious exemption on the basis of Art 14 was considered by the ECtHR in *Ladele*, the third applicant of the conjoined case in *Eweida v UK*. Ms Ladele was a registrar of births, deaths and marriages who was dismissed by her employer, Islington Council, for refusing to celebrate civil partnerships for same-sex couples on the basis of her religious belief that same-sex unions are sinful. While the *Ladele* litigation in the UK was centred on UK anti-discrimination legislation, and while the other applicants in *Eweida* in the ECtHR based their claim on Art 9 alone, Ladele's ECtHR claim was based on Art 14 read in conjunction with Art 9. The Court accepted that her religious objection fell within the scope of Art 9 and thereby Art 14 was potentially engaged. The Court also accepted that when Ladele was compared to registrars with no religious objection to same-sex unions, the decision by the Council that all registrars be designated also as civil partnership registrars had a particularly detrimental impact on Ladele because of her religious beliefs. The Court held that 'the local authority's decision not to make an exception for the applicant and others in her situation' could amount to indirect discrimination prohibited by Art 14 unless justified by a legitimate aim and proportionate.⁵⁵⁵ This is very significant for the view that Art 14 is a possible ground for the general right to conscientious exemption. Just as in *Thlimmenos*, the Court was of the view that the failure to grant a conscientious exemption could breach Art 14 read in conjunction with Art 9. However, in the particular case, the Court accepted that the UK authorities had not exceeded the margin of

⁵⁵³ *Thlimmenos* (n 108) [44] – [47].

⁵⁵⁴ *ibid* 48.

⁵⁵⁵ *Eweida (ECtHR)* (n 474) [104].

appreciation afforded to them by not exempting *Ladele*. This was because the refusal to grant an exemption was motivated by the legitimate aim of providing a service to the public free from discrimination towards homosexuals. The balancing act between two conflicting Convention rights, no discrimination on the basis of religion (for *Ladele*) and no discrimination on the basis of sexual orientation (for same-sex couples seeking a civil partnership), required affording a wide margin of appreciation to the UK authorities.⁵⁵⁶

Conscientious Exemptions under Art 14 in the UK Case Law

Both *Thlimmenos* and *Ladele* suggest that Art 14, in conjunction with Art 9, is another ground for the general right to conscientious exemption. A refusal to grant an exemption from a legal rule (a legislative rule in *Thlimmenos* or an employment policy in *Ladele*) may violate Art 14 in conjunction with Art 9 if the refusal cannot be justified by a legitimate aim and proportionate. It should not be surprising that Art 14 may be another ground for the general right. This is because it is in essence an anti-discrimination provision that tackles, just like UK anti-discrimination legislation, indirect discrimination on the basis of belief. Part 3 of this chapter has shown how the prohibition of indirect discrimination in UK anti-discrimination legislation is a ground of the general right. However, the conceptual overlap between Art 14 and UK anti-discrimination legislation may be one of the reasons for why Art 14 has almost never been considered by UK courts.⁵⁵⁷ Given this failure, it is imprudent to state that Art 14 is a ground for the general right in UK law. Rather, it would be more accurate to state that conscientious objectors seeking an exemption in UK courts may wish to rely on Art 14 and on the two ECtHR cases considered in addition to ground 1 and ground 2. However, given the lack of domestic cases on exemptions based on Art 14, it is likely that UK courts will continue to ignore that alternative ground and rely on the copious case law under Art 9 and under UK anti-discrimination law.

5. Conclusion: A General Right but who bears the Obligation and what Rules can be objected to?

The analysis so far shows that there exists a general right to conscientious exemption in UK law. Two rules of law definitely ground the right. The first is the jurisprudence developed on the basis of Art 9 and the second is the prohibition of indirect discrimination in UK anti-discrimination legislation. A

⁵⁵⁶ *ibid* 105–106.

⁵⁵⁷ Brief references have been made in *Playfoot* (n 500) [41]; *Blackburn* (n 475) [63].

third possible, but by no means definitive, ground is based on Art 14 read in conjunction with Art 9. The chapter has also set out, especially in relation to the first and second ground, the various requirements that a potential conscientious objector has to satisfy in order to successfully claim the right. In relation to the first ground, the demanding Williamson Requirements have to be all satisfied. In relation to the second ground, all the requirements illustrated by *Watkins-Singh*⁵⁵⁸ and set out in the conclusion to part 2 of this chapter also have to be satisfied. No comprehensive list of requirements was set out in relation to the possible third ground given that the ground has not been relied on in domestic litigation. Before concluding this chapter it is useful to highlight the scope of the wide scope of the general right by specifying exactly who it imposes obligations upon and what legal rules it allows individuals to object to. Both issues are considered in turn.

Who bears the Obligation?

The general right imposes obligations to justify refusals to grant an exemption on both public bodies and private persons. Public bodies are bound under the all three grounds. Art 9 and Art 14 (in conjunction with Art 9) have domestic effect via the HRA. As set out when discussing the mechanisms of the HRA, under s 6 HRA a public authority (which does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament) cannot act in a way which is incompatible with a Convention right. Cases where a public authority was asked to justify refusing to grant an exemption under Art 9 were *Begum*⁵⁵⁹ (a public school) and *Blackburn*⁵⁶⁰ (the HMRC). Courts have also considered in passing the possibility that a public authority may need to justify the refusal to grant an exemption under Art 14 in conjunction with Art 9 in *Playfoot*⁵⁶¹ (a public school) and in *Blackburn* (the HMRC).

While s 6 HRA does not bind the UK legislature, s 3 and s 4 HRA impose on courts the obligation to, respectively, interpret legislation (both primary and subordinate) in a way compatible with Convention rights or, when it is not possible to do so, to issue a declaration of incompatibility. So courts are obliged to consider whether an exemption ought to be granted from legislation either through an interpretative technique under s 3 or by considering whether to issue a declaration of incompatibility. We have seen that the First-Tier Tribunal Tax Chamber in *Blackburn* was able to avail itself of s 3 to interpret subordinate legislation in a way compatible with the right to exemption

⁵⁵⁸ *Watkins-Singh* (n 530).

⁵⁵⁹ *Begum* (n 489).

⁵⁶⁰ *Blackburn* (n 475).

⁵⁶¹ *Playfoot* (n 500).

arising under Art 9. By contrast, in *Williamson*,⁵⁶² the House of Lords, faced with a request for exemption from general legislation (the ban of corporal punishment of school pupils), refused to employ either sec 3 or 4 HRA because it held that granting an exemption was not justified, especially given the deference that courts owe the legislature on morally and socially sensitive issues such as the permissibility of corporal punishment of minors. *Williamson* seems to be good authority for the view that exemptions from primary legislation will be a very rare occurrence. This is because, under the UK constitution, courts will likely be deferential to Parliament's views on moral and socially sensitive matters which, almost by definition, requests for exemptions will involve. The same level of deference courts owe to Parliament is not owed to public authorities and private persons.

The Crown and other public bodies are also bound by the right to exemption that arises under anti-discrimination legislation.⁵⁶³ An example was provided in *Watkins-Singh*⁵⁶⁴ where a public school was held to be obliged to grant an exemption from its school uniform policy so that a Sikh girl could wear the Kara. However, this ground for the right also imposes obligations on private persons, such as private employers, to grant exemptions when all the necessary requirements are met. An example of this was provided in the domestic litigation of *Eweida*⁵⁶⁵ where British Airways, a private company, was able to justify not granting an exemption to its employer from its staff uniform policy so that she could wear a crucifix necklace. It is important to note that the anti-discrimination statutes not only bind employers but also providers of services open to the general public and to those that manage or dispose of premises.⁵⁶⁶

It bears noting that the right to exemption under Art 9 and potentially also under Art 14 may have an effect on litigation between private parties. This is because private parties may invoke the right to exemption to escape obligations which they owe other private parties by relying on s 3 HRA. Consider, for example, the case of *Bull v Hall*.⁵⁶⁷ In that case private providers of B&B services were seeking to escape the obligations imposed on them by anti-discrimination subordinate legislation which obliged them not to refuse a same-sex couple a double-bedroom on the basis of the potential guests' sexuality. The B&B providers objected to the anti-discrimination provision and sought to rely

⁵⁶² *Williamson* (n 477).

⁵⁶³ S 83 and s 205 of the Equality Act 2010. S 91 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

⁵⁶⁴ *Watkins-Singh* (n 530).

⁵⁶⁵ *Eweida (EWCA)* (n 542).

⁵⁶⁶ Part 3 and 4 of the Equality Act 2010. S 28 and 29 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

⁵⁶⁷ *Bull v Hall* (n 9).

on the right to exemption arising under Art 9. The UKSC had to consider whether, by applying s 3 HRA, the subordinate legislation could be read in a way to afford the B&B providers an exemption. While the main issue concerned a challenge to subordinate anti-discrimination legislation, the potential effect of the legal challenge would have been to exempt a private person from a statutory duty owed to another private person (i.e. the same-sex couple). The claim for exemption eventually failed as the UKSC held that homosexual individuals ought to be protected from the harm of discriminatory treatment. However, the case still exemplifies the potential reach of the right to exemption under Art 9 and potentially under Art 14 to disputes between private individuals.

What Rules can be objected to?

The case law under the general right shows that individuals can object to a variety of legal obligations. In relation to the general right as it arises under Art 9, rules objected to can arise under primary legislation such as the Education Act 1996 in *Williamson*. Rules under subordinate legislation can also be objected to as was the case in *Bull v Hall*, where the B&B hoteliers objected to the prohibition of discrimination on the basis of sexual orientation arising under the Equality Act (Sexual Orientation) Regulations 2007 (which would now arise under primary legislation in the Equality Act 2010). Individuals may also object to rules arising under policies adopted by public authorities. This was the case in *Begum* where the objection was to a policy on school uniforms adopted by the school. One issue that remains silent in the case law is whether individuals can object to rules arising under the common law. Even though no cases have been identified on that specific issue, it is very likely that the answer is positive. Under the HRA courts are considered public authorities and are subject to, under s 6 HRA, exercising their duties, including the development of the common law, in a manner that is compatible with Convention rights. It is therefore likely that, should a court have to address the question, it would conclude that exemptions can be granted from common law rules if the Williamson Requirements are satisfied.

It is likely that the range of rules which can be objected to under the general right to exemption arising under Art 9 is the same as that arising under the possible general right under Art 14 read in conjunction with Art 9. The two UK cases that considered that possible ground in passing concerned a school policy (in *Playfoot*) and subordinate legislation (in *Blackburn*). There is no reason to think that primary legislation and common law rules would be immune from the reach of the general right arising under Art 14 in conjunction with Art 9 should this ground become established under UK case law.

Finally, the rules which may be objected to under the general right as it arises under the prohibition of indirect discrimination are what the Equality Act 2010 calls 'provision, criterion or practice' ('PCP')

adopted by employers, providers of services to the public and other persons subject to anti-discrimination legislation (both public and private persons). Usually, a PCP will be an explicit term in a contract of employment, e.g. a contractual duty to provide sex counselling services without discrimination, including to same-sex couples, in *McFarlane*.⁵⁶⁸ It may also be an employer's policy, such as in *Eweida*, which employees are obliged to comply with under the common law rule that employees should obey employer's lawful and reasonable orders.⁵⁶⁹ A PCP cannot be primary or subordinate legislation as UK anti-discrimination legislation does not bite against primary or subordinate legislation.

Conclusion

This chapter has shown that there exists a general right to conscientious exemption in UK law. Two rules of law definitely ground the right. The first is the jurisprudence developed on the basis of Art 9 and the second is the prohibition of indirect discrimination in UK anti-discrimination legislation. A third possible, but by no means definitive, ground is based on Art 14 read in conjunction with Art 9. The general right binds both public and private persons and affords conscientious objectors the right to object to a wide variety of legal rules.

The next chapter shows that this broad general right is not a privilege of persons who object on the basis of a religious belief. Indeed, the general argument advanced in the next chapter is that the religiosity of the belief that grounds a conscientious objection is largely irrelevant.

⁵⁶⁸ *McFarlane* (n 539).

⁵⁶⁹ *Gregory v Ford* (1951) 1 AllER 121 (Assizes).

CHAPTER 7: THE GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION IN UK LAW: BEYOND RELIGIOUS PRIVILEGE?

1. Introduction

This chapter proceeds on the assumption that the argument developed in chapter 6 is accepted. Given the deep uncertainties surrounding a general right arising under Art 14, this chapter does not consider that ground. On that basis this chapter argues that the general right to exemption arising both under Art 9 and anti-discrimination legislation is available for those that object to a legal obligation on the basis of religious and non-religious beliefs. The paradigmatic non-religious belief protected is a secular conscientious one, i.e. one that is based on a moral belief. This suggests, as will be argued, that the religious nature of the belief of a conscientious objector is, largely speaking, irrelevant to whether or not the exemption will be granted. As will be analysed in detail, the criteria for a protected belief were set out in *Williamson* and clearly applied to non-religious beliefs in *Grainger* by the Employment Appeal Tribunal.⁵⁷⁰

We shall see that beliefs, to be protected, ought to meet, *inter alia*, the Dignity, Importance and Intelligibility Requirements set out in *Williamson*. This entails that a potentially limitless array of secular conscientious beliefs may be invoked to seek a conscientious exemption. It follows that the general right to exemption, in making the religious nature of the belief largely irrelevant, has a potentially wide scope and hence the right may become unmanageable. This chapter allays such fears in three ways. First, it shows that despite the wide range of protected beliefs, only a very limited number of claims have been made by non-religious claimants and fewer have succeeded in the case law. Second, it shows that courts, especially in *McClintock* and *Grainger*, have set some limits as to which non-religious beliefs will be protected. Finally, the chapter shows that, irrespective of the religious or non-religious nature of the beliefs in question, showing that a belief is in principle protected far from guarantees that a claim for exemption will be successful. Many other requirements, such as several components of the Williamson Requirements, ought to be satisfied

⁵⁷⁰ *Grainger plc v Nicholson* [2009] ICR 360 (EAT).

before a successful claim for conscientious exemption is made. The chapter analyses these issues as they arise chronologically in the case law.

2. The Irrelevance of Religion for the General Right to Conscientious Exemption

Williamson: The Irrelevance of Religion in Art 9 Claims

Williamson was considered in some detail in the last chapter.⁵⁷¹ This part focuses on what that case says about the relevance of the religious nature of a belief which is the basis of a claim to conscientious exemption under Art 9. It may be recalled that the case concerned the objection of parents to the statutory prohibition of corporal punishment of pupils by their teachers at school. The parents claimed that the prohibition violated their right to freedom of religion under Art 9. The Court of Appeal had questioned whether the beliefs of the parents, albeit based on the bible-based view ‘spare the rod, spoil the child’,⁵⁷² were indeed religious beliefs. The House of Lords rejected the relevance of the religiosity of parents’ beliefs. Lords Nicholls put it squarely when he said:

In the present case it does not matter whether the claimants’ beliefs regarding the corporal punishment of children are categorised as religious. Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs.⁵⁷³

Lord Nicholls then went on to analyse what those ‘modest threshold requirements’ must be. They were the Dignity, Importance and Intelligibility Requirements which have already been discussed.

⁵⁷¹ See text at n 477.

⁵⁷² Proverbs 13:24.

⁵⁷³ *Williamson* (n 477) [24].

Lord Nicholls's view on the irrelevance of religion to an Art 9 claim was affirmed also by Lord Walker⁵⁷⁴ and Lady Hale⁵⁷⁵ who were the only other two judges to deliver an opinion.

It is clear then that the entirety of the House of Lords was of the view that Art 9 protects not only religious beliefs but a diversity of non-religious beliefs. It follows that to the extent that Art 9 protects a general right to conscientious exemption, that right is available to non-religious objectors such as (to use the examples from Lord Walker's opinion) non-religious pacifists, vegetarians and teetotallers. This convergence of views on the irrelevance of religion in *Williamson* was however, strictly speaking, obiter as all the justices agreed that the parents' views were religious in nature because they derived from a particular Christian interpretation of the Bible. Also, the claim was an Art 9 claim and could not be necessarily extended to a claim for conscientious exemption under anti-discrimination legislation. We will have to await the case of *Grainger*, analysed in the section after next, to have good and clear authority in the context of a secular claim for exemption under anti-discrimination legislation. However, the cases of *McClintock* and *Whaley*, considered next, provide some useful hints on both issues.

McClintock and Whaley: Limits on Protected Beliefs

McClintock and *Whaley* show that not all beliefs or opinions can benefit from the general right to conscientious exemption. *McClintock* sets some limits in the context of anti-discrimination law; *Whaley* sets different limits in the context of Art 9. Both are considered in turn.

In *McClintock* a Justice of the Peace in the Family Panel claimed to have been indirectly discriminated against when he was dismissed following his objection to placing children with same sex couples for adoption. Crucially for his claim, he put the belief that animated his objection thus

I find myself in this position: since, not just in the Christian West but throughout the world, children have always been brought up in two-sex households, I believe that to send a child to a same sex household is to make him/her the subject of an experiment in social science. That disposal I see as in conflict with our statutory obligation to provide for the welfare of the child. Accordingly I am unwilling to officiate in a case where such an order is in prospect.⁵⁷⁶

⁵⁷⁴ *ibid* 55.

⁵⁷⁵ *ibid* 75.

⁵⁷⁶ *Mr A McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT) [9].

The Employment Appeal Tribunal held that his belief could not be considered a protected ‘religion or belief’ for the purposes of anti-discrimination law. Religion or belief was defined in the relevant anti-discrimination provision, now repealed, as ‘any religion, religious belief, or similar philosophical belief’.⁵⁷⁷ The claimant did not however present his objection to his employer or to the employment tribunal as a religious or philosophical one. Instead, as the EAT accepted, he presented his belief as an opinion based on the availability or lack thereof of information concerning the welfare of children placed with same-sex couples. His opinion could have well changed once he had been presented with sufficient evidence countering his present opinion.⁵⁷⁸ So it seems then that *McClintock* is authority for the proposition that for a belief to be protected under anti-discrimination legislation ‘it is not enough “to have an opinion based on some real or perceived logic or based on information or lack of information available.”’⁵⁷⁹ The belief has to be presented as, and be, a religious or philosophical belief, not just an opinion based on logic or factual information.

The claimant in *McClintock* argued that his belief should be protected under Art 9. However, given that the case preceded *Eweida*, his human rights claim was simply dismissed on the now outdated rationale advanced in *Begum*, i.e. the Autonomy Requirement.⁵⁸⁰ The approach taken by the EAT took away the opportunity to examine whether the claimant’s beliefs would have been protected under Art 9. As will be shown when *Grainger* is examined, it is now clear that Art 9 and anti-discrimination legislation protect the same category of beliefs, i.e. those beliefs that satisfy the Dignity, Importance and Intelligibility Requirements. So it is unlikely that if *McClintock* should be heard today under Art 9 his belief would be regarded as a protected one.

Whaley provides a further limitation on the category of protected beliefs in an Art 9 context. The case concerned the prohibition of hunting with hounds in Scotland and England and Wales. The claimants argued, inter alia, that the prohibition interfered with their non-religious conscientious belief that hunting with hounds was morally permitted.⁵⁸¹ The House of Lords, applying the Williamson Requirements, rejected the claim that there was an issue of conscience worthy of Art 9 protection. Lord Hope, delivering the court’s leading judgment with whom all agreed, said

⁵⁷⁷ The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg 2. The current definition of religion or belief in the Equality Act is provided in s 10. See text at p 20.

⁵⁷⁸ *McClintock* (n 576) [45].

⁵⁷⁹ *ibid.*

⁵⁸⁰ *ibid* 60–61.

⁵⁸¹ *Whaley v Lord Advocate* [2007] UKHL 53 (UKHL) [17].

Looked at objectively, hunting with hounds is carried on mainly for pleasure and relaxation by those who take part in it. So I doubt whether the threshold that Lord Nicholls identified in *Williamson* has been crossed [(i.e. the Importance Requirement)]. (...) The current [ECtHR] jurisprudence does not support the proposition that a person's belief in his right to engage in an activity which he carries on for pleasure or recreation, however fervent or passionate, can be equated with beliefs of the kind that are protected by Art 9. It would be surprising if it did so, as it would be hard in that event to set any limits to the range of beliefs that would be opened up for protection.⁵⁸²

Whaley is important for a number of reasons. First, it reconfirms the idea that non-religious beliefs can be protected under Art 9 so long as they satisfy the Dignity, Importance and Intelligibility Requirements set out in *Williamson*. Second, and importantly for present purposes, it excludes from the protection of Art 9 passionately held beliefs which are linked to activities which can objectively be viewed as recreational activities. This included hunting in the case but is highly likely to extend to beliefs linked to common sporting activities such as support of a football club. So it is important to note that holding passionately a belief is not a sufficient requirement for Art 9 protection. The underlying importance of the activity to which that belief relates matters a great deal. As Lord Nicholls said in *Williamson*, beliefs linked with religious activities will readily be considered sufficiently important, perhaps because judicial opinion takes in high esteem religion as such.⁵⁸³ Non-religious beliefs cannot benefit from this readily awarded judicial esteem so non-religious objectors will have to provide evidence that their beliefs are related to activities which judges can confidently affirm to be of sufficient importance. As the discussion in the following paragraphs show, a wide variety of non-religious beliefs of a conscientious nature have been able to pass this threshold. This indicates that it is not a criterion which automatically disadvantages non-religious beliefs.

Taken together *McClintock* and *Whaley* suggest that not all beliefs can be the basis of a claim to a general right to conscientious exemption. In the context of the right as it arises under anti-discrimination legislation, protected beliefs cannot simply be opinions based on logic or factual information. In the context of the right as it arises under Art 9, protected beliefs cannot be linked to activities carried out simply for pleasure or recreation. As shown by *Grainger*, considered in the next section, the cross-contamination between Art 9 and the prohibition of indirect discrimination on the basis of religion and belief is such that the limits set out for one will most likely apply to the other. If

⁵⁸² *ibid* 18.

⁵⁸³ *Williamson* (n 477) [23].

this is true, the general right to exemption as it arises under UK law is not a licence given to any sincerely and passionately held belief. It appears that the paradigmatic protected belief is a religious or non-religious conscientious one.

3. Grainger: What Non-Religious Beliefs are protected under Anti-Discrimination Legislation?

The only issue in *Grainger* for the EAT to determine was whether a particular belief could amount to a protected belief for the purposes of anti-discrimination law. The relevant anti-discrimination legislation⁵⁸⁴ defined belief in all relevant aspects similarly to s 10 of the Equality Act, i.e. a philosophical belief or lack thereof. The belief in question was presented as follows

The philosophical belief is that mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations, and to persuade others to do the same.⁵⁸⁵

The now widely cited judgment was delivered by Burton J. He set himself the task of defining what constitutes a philosophical belief under anti-discrimination law. In so doing, he explicitly drew from the ECtHR and UK jurisprudence on the beliefs protected under Art 9, despite the Article not being restricted to philosophical beliefs. He was partially motivated to do so by the fact that s 3 HRA requires legislation to be read compatibly with the Convention.⁵⁸⁶ He said that a belief will be protected by anti-discrimination legislation if it satisfies the following requirements.

i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental

⁵⁸⁴ Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg 2(1) (as amended by Equality Act 2006 (c 3), s 77(1)).

⁵⁸⁵ *McClintock* (n 576) [12].

⁵⁸⁶ *Grainger* (n 570) [19–20].

rights of others (para 36 of *Campbell v United Kingdom* 4 EHRR 293 and para 23 of *Williamson's case* [2005] 2 AC 246).⁵⁸⁷

All these requirements, call them the Grainger Requirements, are familiar from the cases already considered. In particular, *Williamson* already encapsulated requirements (i) and (iii-v). Understandably, *Grainger* also incorporates, in (ii), the limitation set out in *McClintock*. However, no mention was made in that case of *Whaley*, perhaps because the Art 9 point in *Whaley* was of marginal importance to its outcome and thus not relied on by the parties in their submissions in *Grainger*.

One should not think that Burton J only transposed *Williamson* into the anti-discrimination context. His opinion provided further clarifications on three points which *Williamson* did not deal with. First he found that, relying on the Court of Appeal in *Eweida*,

it is not a bar to a philosophical belief being protected by [anti-discrimination law] if it is a one-off belief and not shared by others, a fortiori where it is likely that others do share the belief. Pacifism and vegetarianism can both be described as one-off beliefs in the sense in which I understand it to be being used by [the employer], namely a belief that does not govern the entirety of a person's life. (...) the philosophical belief in question does not need to constitute or "allude to a fully-fledged system of thought" (...). As it was put in argument, such philosophical belief does not need to amount to an '-ism'.⁵⁸⁸

This passage deserves careful study. It is clearly stating that a belief need not form part of a comprehensive belief-system on every or most aspects of human life (as some religions aim to be) in order to deserve protection. However wide-ranging implications secular ethical vegetarianism may have for a person's life (e.g. food, clothing, relationship with non-human animals, etc.) it will often have nothing specifically to say about some human existential questions (e.g. where do we come from? What is life's purpose?) which various religions typically address. This does not entail that such belief does not deserve protection.

Less clear is Burton J's view that beliefs need not be shared by others to merit protection. The examples provided, vegetarianism and pacifism, have many adherents worldwide. However, as will become clear when we consider *Maistry*, it is clear that the Court of Appeal has now clarified that beliefs not shared by others may be protected under anti-discrimination law. As discussed, however, the current understanding of group disadvantage in indirect discrimination law may automatically

⁵⁸⁷ *ibid* 24.

⁵⁸⁸ *ibid* 27.

exclude individuals' beliefs which are not shared with others from protection at a subsequent stage of analysis.

The second innovation of *Grainger* was to widen the scope of protected beliefs to include some forms, but not all, of political beliefs. He held that party-political beliefs were 'surely' not protected but that beliefs based on a political philosophy, such as Socialism, Marxism, Communism or free-market Capitalism, were protected.⁵⁸⁹ This is particularly important given that the Equality Act does not recognise political opinion or membership as a protected characteristic. This is not to say that political opinion or membership is not protected from discrimination in UK law. Dismissing an employee may in fact constitute a prohibited unfair dismissal if motivated by reason of an employee's political opinion or membership.⁵⁹⁰ However, given that the Equality Act applies well beyond employment law, individuals who hold certain political opinions or memberships may be left without adequate legal protection against discrimination outside the employment context.⁵⁹¹

In any event, Burton J's recognition of the protection of certain forms of political beliefs was crucial for the outcome of the case as he held that the asserted belief of anthropogenic climate change was capable of being considered a protected political belief.⁵⁹² It is debatable, however, whether this classification holds water as anthropogenic climate change is not based on any known political philosophy (e.g. a philosophy about the nature or value of the state) even though, if accepted, it has several and wide-ranging public policy implications. Indeed, as submitted by the claimant, his belief was animated in a self-standing philosophical enquiry commonly known as environmental ethics which is independent from, but related to, party politics and political philosophy.⁵⁹³ The dubious classification was influenced, on Burton J's own admission, by his decision in *Dimmock*.⁵⁹⁴ There he had held that the view advocated by the US ex-Vice-President, Al Gore, in a documentary about the dangers of climate change was a political view.⁵⁹⁵

⁵⁸⁹ *ibid* 25.

⁵⁹⁰ Employment Rights Act 1996, ss. 94 and 108(4). S 108(4) was added as a result of the ECtHR judgment in *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR). There the ECtHR held that the absence in UK anti-discrimination law of protecting individuals from discrimination on the basis of their political opinions or membership infringed Art 11 which protects freedom of association.

⁵⁹¹ This would appear problematic after *Redfearn*, *ibid*.

⁵⁹² *Grainger* (n 120) [28].

⁵⁹³ *ibid* 13.

⁵⁹⁴ *R (Dimmock) v Secretary of State for Education and Skills* [2007] EWHC 2288 (EWHC).

⁵⁹⁵ *ibid* 3.

The final innovation introduced by *Grainger*, perhaps as a qualification to *McClintock*, was to hold that a belief may be a philosophical belief even if it is based entirely on scientific conclusions. The example given by Burton J was belief in Darwinism when contrasted to the belief in Creationism and the struggle between them for the school curriculum. It is doubtful however that this rationale properly identifies the belief-system singled out by the judge as Darwinism and whether it can be reconciled with *McClintock*. Remember that *McClintock* disqualifies from protection beliefs based on the present stage of scientific knowledge or lack thereof. Belief in Darwinian evolution seems to be a paradigmatic case of the *McClintock* category of unprotected beliefs as such belief is subject to the changes in the present stage of scientific knowledge. To reconcile *Grainger* with *McClintock* on this point, Darwinism should not be understood as reference to belief in Darwinian evolution. Rather it should be understood as the belief that Creationism, because inherently a religious belief-system, should not be taught in the school curriculum, especially in public schools. This belief, held for example by some Secular Humanists, does not depend on the present stage of scientific knowledge but on a normative evaluation of the role of religion in education and public life generally.⁵⁹⁶

The discussion shows how important *Grainger* is for the protection of non-religious beliefs in UK anti-discrimination law and, consequently, for the general right to conscientious exemption. Even though several aspects of that decision have been criticised, it remains to this day the best authority for how to determine whether a non-religious belief will be protected under anti-discrimination legislation. This may be summarised as follows as updated Grainger Requirements.

A non-religious belief will be protected under the general right arising under anti-discrimination legislation

- a) If it meets the Dignity, Importance and Intelligibility Requirements;
- b) If it is not an opinion or viewpoint based on the present state of information available [the 'McClintock Limitation'] (it may however be a moral position informed by current scientific consensus (e.g. belief that Creationism should not be taught as science in schools)); and
- c) If it is not a party-political opinion (but it may be based on a political philosophy).

The belief

- d) need not be a comprehensive belief-system; and
- e) need not be shared by others.

⁵⁹⁶ For relevant discussion, albeit in a US context, see the USSC decision of *Edwards v Aguillard* (1986) 482 US 578 (USSC).

4. A Variety of Protected Non-Religious Beliefs, Few Non-Religious Claimants, and Fewer Successful Claimants

The previous part highlighted the requirements set out in *Grainger* as to what non-religious beliefs will be protected under the general right arising under anti-discrimination law. Part 2 illustrated what non-religious beliefs will be protected under the general right as it arises under Art 9. This part draws the threads together to show that, despite a wide variety of non-religious beliefs potentially qualifying for protection under the general right, only a few claims have actually been reported and fewer have been successful. The aim of this part then is to show that allowing claimants to benefit from the general right on non-religious grounds does not automatically render that right unmanageable. This is for three reasons. First, as the analysis in *McClintock*, *Whaley* and *Grainger* has already showed, there are limits to which non-religious beliefs will qualify for protection. Second, the UK reported case law shows that only two reported cases exist where a claimant invoked the right on account of non-religious belief. Finally, allowing claimants to benefit from the general right in relation to non-religious belief is by no means a guarantee that exemptions from legal duties will be generously given out. The internal conditions for a successful claim, e.g. the Williamson Requirements, guarantee that unmeritorious claims can be dismissed. This section supports the last two assertions by reference to some of the cases already considered and by briefly analysing the handful of cases which have been decided subsequently to *Grainger*.

Three cases on non-religious beliefs have already been considered. The first was *Pattison* where the belief involved was the perceived unethical nature of employment in the private sector. The case was unsuccessful largely because of the now outdate Autonomy Requirement.⁵⁹⁷ The further two cases already considered were *Whaley* and *Grainger*. The outcome of the cases was only positive for the objector in *Grainger*. Only seven more reported cases were identified where a non-religious belief was invoked.⁵⁹⁸ Out of those six, five dealt with the beliefs substantively, whereas one,

⁵⁹⁷ See text from p 176.

⁵⁹⁸ *Greater Manchester Police Authority v Mr A Power* [2009] WL 6765190 (EAT) ('Psychics', which includes a belief in life after death and the capacity to communicate with spirits 'on the other side' held to be a philosophical belief). *R (on the application of National Secular Society and Bone) v Bideford Town Council* [2012] EWCA 175 (EWCA) (Secularism and humanism held to be philosophical beliefs). *Maistry v BBC* [2014] EWCA Civ 1116 (EWCA) ('BBC Values' held to be a philosophical belief. This consisted in the belief 'that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion'). *Mr M Harron v Chief Constable of Dorset Police* [2016] WL 01745184 (The EAT held that more reasons were needed

Bideford, made only passing reference to a non-religious belief protected under Art 9. Out of the five substantive cases, only two, *Power* and *Harron*, could be said to have a positive outcome for the belief-holder. Only two cases, *Pattison* and *Exmoor*, involved invoking the general right to conscientious exemption and neither was successful. Reference has already been made to *Pattison* so this section briefly analyses *Exmoor*.

Exmoor concerned the request by a company to be exempt from the requirement on businesses to file VAT online. Similarly to *Blackburn*,⁵⁹⁹ the company director allegedly had a conscientious objection to the use of electronic communication on the basis of the belief

that it is morally wrong for humans to damage the earth by inducing climate change: he sees this as genocide of future generations. He believes that consumption of fossil fuels induces climate change by increasing CO2 in the atmosphere, and that internet usage puts more CO2 in the atmosphere than aviation. He objects to 'paperless' communications on the grounds that he considers paper communications create 'carbon sinks' to reduce CO2 in the atmosphere whereas electronic data centres burn massive amounts of carbon fuels thus increasing CO2 in the atmosphere.⁶⁰⁰

It was not in dispute that a belief about anthropogenic climate change could amount to a belief protected by Art 9. However, the Tribunal dismissed the Art 9 claim on the basis that there was no interference with the actual beliefs of the company director who, on the evidence, did occasionally use the internet when economically expedient despite his strong disinclinations in that regard.⁶⁰¹

The review of the limited number of cases involving non-religious beliefs shows that the availability of the general right to conscientious exemption to non-religious objectors has not so far made the right unmanageable. Only ten cases involving a non-religious belief have been reported in the UK case law. Indeed, only two of them, *Pattison* and *Exmoor*, both unsuccessful, involved a direct conscientious exemption claim. Furthermore, only *Grainger*, *Power* and *Harron* had an outcome which was positive for the belief-holder. Notice, however, that none of these successful cases

to justify the ET's finding that the belief of the claimant, a police officer, that he was 'genuinely motivated by a desire to save money in the public sector' could not amount to a philosophical belief). *Henderson v The General Municipal and Boilermakers Union* [2016] EWCA Civ 1049 (EWCA) (left wing democratic socialism held to be a philosophical belief). *Mr S T Uncles v National Health Service Commissioning Board and others* [2017] UKET 1800958/2016. The seventh case is *Exmoor* which is analysed below.

⁵⁹⁹ *Blackburn* (n 475).

⁶⁰⁰ *Exmoor Coast Boat Cruises Ltd v Revenue & Customs* [2014] UKFTT 1103 [27].

⁶⁰¹ *ibid* 81–82.

actually involved a claim for conscientious exemption. The reasons for an unsuccessful outcome varied among the various decisions. However, as *Exmoor* and *Pattison* show, one crucial reason is that having a protected belief is only one of the many requirements that a conscientious objector has to satisfy. The rigours of the Williamson Requirements, for example, pose a real barrier for conscientious objectors. It cannot be said then that the irrelevance of the religious nature of a belief to qualify for protection under the general right is on its own sufficient to transform the general right into an unmanageable one which allows objectors to easily escape their legal obligations.

5. Conclusion: Conscientious Exemptions beyond Religious Privilege

The detailed analysis undertaken reveals that the general right to conscientious exemption in UK law should not be interpreted to be available only to religious people. Either under Art 9 or anti-discrimination legislation the relevant statutory materials and case law explicitly make the right available to religious and non-religious individuals. As the Grainger Requirements and the first three prongs of the Williamson Requirements make clear, what is important is not the religious nature of the beliefs at hand but whether those sincerely held beliefs satisfy the Dignity, Importance and Intelligibility Requirements. It has been argued that allowing non-religious belief-holders to invoke the general right to conscientious exemption has not made that right unmanageable. This is because, as the review of the cases on non-religious beliefs reveals, few holders of non-religious beliefs have so far actually invoked the right: only in *Pattison* and *Exmoor* was the right invoked by a holder of a non-religious belief in the entirety of the reported UK case law. Finally, as the analysis of both *Pattison* and *Exmoor* showed, the further criteria necessary for the successful enjoyment of the right, e.g. the other prongs of the Williamson Requirements, ensure that unmeritorious claims can be dismissed. It follows that the fact that the general right to conscientious exemption under UK law is not a privilege of religious individuals does not undermine the manageability of the general right.

CHAPTER 8: THE LIBERAL MODEL OF CONSCIENTIOUS EXEMPTIONS

1. Introduction

This thesis has analysed the law of the US, Canada and UK to determine whether there is a general legal right to conscientious exemption. The conclusion to that enquiry is that such a legal right exists, although it is a limited or *prima facie* right. Various constitutional, statutory and common law sources ground that right in the respective jurisdictions analysed. A second enquiry has been to determine whether the general right is a privilege of only those that conscientiously object on the basis of religious beliefs. The conclusion to this second enquiry is that there are strong legal reasons in each jurisdiction to view the right not as a privilege of religious objectors only.

This chapter asks a third and more theoretical question. The question is whether the existence of a general right to conscientious exemption which is not a privilege of religious objectors alone can be morally defensible. The conclusion in this chapter is that a persuasive moral defence can be provided. This is because the legal right under analysis conforms to an attractive interpretative theory of how conscientious exemptions should be regulated in a liberal state. A liberal state is here understood to be one committed to individual freedom and state neutrality between different conceptions of the good life. This thesis calls the interpretative theory the Liberal Model of Conscientious Exemptions. This theory has the following four defining propositions:

- A. The liberal state should grant a general right to conscientious exemption;
- B. The liberal state should refrain from passing moral judgement on the content of the beliefs which give rise to a claim for conscientious exemption;
- C. The liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant a conscientious exemption; and
- D. The liberal state should grant conscientious exemptions to claimants who sincerely hold a conscientious objection which would not disproportionately impact on the rights of others or the public interest.

The Liberal Model is distinctively both liberal and interpretive. It is liberal because values which are constitutive of the liberal tradition, such as liberty, autonomy, and so on, mandate that a liberal

state conforms to the Model. The Liberal Model does not claim to be acceptable to autocracies, theocracies, or systems which always prioritise the general interest over individual wellbeing.

It is interpretative in the sense defended by Ronald Dworkin.⁶⁰² The core features of the legal doctrines which have been analysed in the preceding chapters need to fit with the propositions of the Liberal Model. This is because, the Liberal Model being a compelling moral theory of conscientious exemptions, it can lend its moral force to those core doctrines and show them to be true propositions of law which deserve allegiance in a liberal democracy. To be sure, in line with Dworkinian interpretivism, the Liberal Model need not embrace all the aspects of the legal doctrines analysed in the preceding chapters. It can say that some of these doctrines are mistaken. In this sense the Liberal Model is a critical model, however, and importantly, it is *legally* critical. The aspects of legal doctrine which it rejects as mistakes are rejected as legal mistakes: they are mistakes because they do not fit with the underlying moral principles which animate the core of the legal practice. As shall be shown, however, the Liberal Model will not single out many of the analysed doctrines as mistaken. Rather, it will show that the existence of a general right to conscientious exemption which is not a privilege of religious objectors alone is well supported by a plurality of compelling moral values constitutive of the liberal tradition.⁶⁰³

This chapter analyses each of the four defining propositions of the Liberal Model in turn. It shows that the core of the practice of the three jurisdictions under analysis fits with the propositions. It then provides a compelling moral justification for the propositions and defends them from criticisms advanced by some judges and academics. It also identifies particular aspects of the legal doctrine on the general right to conscientious exemptions in the jurisdictions under analysis which are to be considered mistakes and shows how they ought to be rectified.

⁶⁰² Dworkin, *Law's Empire* (n 3). Although the Liberal Model is interpretive, it is not Dworkinian as Dworkin has explicitly rejected a right to conscientious exemption in Dworkin, *Religion Without God* (n 13) ch 3.

⁶⁰³ As will be shown in part 2, the Liberal Model is sympathetic to a value-pluralist moral theory. This further shows that the Liberal Model is interpretive but not Dworkinian, as Dworkin professed his sympathies to a moral theory closer to value-monism in Ronald Dworkin, *Justice for Hedgehogs* (Reprint edition, Harvard University Press 2013).

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

The first proposition of the Liberal Model is that liberal states should grant a general right to conscientious exemption. Not much space will be dedicated here to the issue of whether the practice of US, Canadian and UK law fits with this proposition. As chapters 2, 4 and 6 have shown, the three jurisdictions recognise a general legal right to conscientious exemption. In each of the jurisdictions, the right may be invoked in a court of law to seek an exemption from any legal obligation imposed by general law (statutory or common law) and, especially in the employment context, obligations imposed by private persons (e.g. employers) or private institutions (e.g. private schools). As will be further analysed in part 5 of this chapter, the general right to exemption is a limited or *prima facie* right which entails that exemptions may be refused when doing otherwise would undermine the rights of other individuals or important public interests. It follows that the practice fits the first proposition.

It is however very contentious whether the first proposition can be justified by reference to morally compelling values. Furthermore, several judges and eminent scholars have put forward important critiques of conscientious exemptions many of which apply forcefully to the general right. Two kinds will be considered here. The first, call it the Rule of Law Objection, is sometimes inimical to exemptions generally and not only to the general right. It can be summarised as saying that the availability of conscientious exemptions undermines the rule of law by allowing citizens to pick and choose their legal obligations on the basis of their own private judgement as to the desirability of the obligations. The second, call it the Institutional Objection, may not be opposed to exemptions in principle but argues that exemptions should be the product of context-specific statutes. This is mainly on the basis that a general right gives too much discretion to judges who may grant exemptions which are politically or socially contentious. Such exemptions, the argument goes, should be left to the political process.

Various forms of these two objections are addressed before a positive argument is advanced in favour of the first proposition. This can be summarised as follows: a general right which is judicially enforceable is justified by the defining commitment in liberal states to upholding against majority bias the legal and moral right of politically less powerful minorities to live according to their own beliefs.

The Rule of Law Objections

Justice Scalia articulated in *Smith* (analysed in chapter 2) a powerful version of the Rule of Law Objection against a general right to conscientious exemption. It may be recalled that in *Smith* the US Supreme Court ('USSC') held that the Free Exercise Clause of the US Constitution should no longer be interpreted, as it had been for the preceding thirty years, to afford a general right to conscientious exemption.⁶⁰⁴ Under this right, government could not enforce a generally applicable law which substantially burdened the free exercise of religion of an objector unless the government could show that it did so in pursuit of a compelling state interest.⁶⁰⁵ Justice Scalia rejected this right on the following basis:

Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs (...) we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind (...).⁶⁰⁶

The courtship of anarchy inherent in a general right that held presumptively invalid as applied to a conscientious objector any legal obligation that conflicted with the objector's beliefs is even more troubling when, as argued throughout the thesis, the beliefs protected by this right are available to religious and non-religious objectors alike. This means that a wide variety of legally valid obligations may be held presumptively invalid as applied to a conscientious objector on the basis of a variety of unpredictable moral or religious beliefs. Scalia's argument was reinforced by him illustrating the wide variety of legal obligations that had been held presumptively invalid in US jurisprudence on the basis of that right: compulsory military service, payment of taxes, health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, traffic laws, social welfare legislation such as minimum wage laws, child labour laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races, etc.⁶⁰⁷ No doubt this list can be made even longer.

How can the Liberal Model respond to the courtship of anarchy objection? The response is twofold. The first is to admit that the availability of a general right to conscientious exemption would indeed

⁶⁰⁴ *Smith* (n 14).

⁶⁰⁵ *Verner* (n 16) 403.

⁶⁰⁶ *Smith* (n 14) 888.

⁶⁰⁷ *ibid* 889.

render presumptively invalid as applied to a conscientious objector an unpredictably wide variety of legally valid obligations, including obligations imposed by private persons (e.g. in contracts of employments). This is indeed a potentially startling consequence of the general right which the Liberal Model wholeheartedly embraces. However, such presumption of invalidity can be rebutted in several circumstances on the basis that such invalidity would undermine important public interests or the rights of others (the fourth proposition of the Liberal Model). So the Liberal Model does not in fact court anarchy. There is an appropriate legal mechanism, i.e. proportionality reasoning, under which judges can determine whether or not certain legal obligations are valid as applied to the objector. More will be said about this mechanism in part 5 of this chapter.

The second response is that this courtship of anarchy is fundamentally misconstrued as a rule of law objection. Conscientious objectors, by contrast to non-conscientious law breakers and some instances of civil disobedience, do not seek to escape their legal obligations simply on the basis of their beliefs; they claim instead that they have a legal right not to comply with particular legal obligations.⁶⁰⁸ Chapters 2, 4 and 6 have set out in detail the various legal grounds under which objectors may turn to a court of law to substantiate their claims. In those chapters we have seen that objectors typically pitch the legal duty they object to against other legal rights, such as statutory and constitutional provisions protecting freedom of conscience and religion, or statutory and constitutional provisions protecting individuals from discriminatory treatment on the basis of their beliefs. In *Smith* itself, for example, the objectors, members of the Native American Church who were denied unemployment benefits because they had lost their jobs as a result of their sacramental use of the criminally prohibited drug peyote, invoked a constitutional right (i.e. the Sherbert Test) which had been recognised by the USSC for the preceding thirty years. A conscientious objector cannot violate the rule of law by invoking a well-established legal right. This is especially so when, as will be argued later in this part, the legal right institutionalises a compelling moral right.

Note, then, that conscientious objectors do not argue that it is their conscience that relieves them from a particular legal duty. While it is their conscience that leads them to object to a particular legal duty, they claim that it is the law, properly understood, that relieves them from that legal duty. In sum, they ask courts to resolve a conflict between two legal norms, one imposing a particular legal obligation they object to, and the other granting them a legal right to exemption. Conscientious

⁶⁰⁸ This argument was put forward in John Adenitire, 'Conscientious Exemptions: From Toleration to Neutrality; From Neutrality to Respect' (2017) 6 Oxford Journal of Law and Religion 268, 18–20. It was borrowed from Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) ch 8.

objectors do not undermine the rule of law by making that request because judges resolve conflicts between legal rules as a routine matter.

This response also undermines another rule of law type objection sometimes made against a general right to conscientious exemption. Jean Cohen, for example, has argued that conscientious exemptions undermine the sovereignty of the liberal democratic state by requiring it to bow down to the assertion of a citizen's commitment to other sources of moral sovereignty, including religious sovereignty.⁶⁰⁹ One can see how, if this argument was accepted, it would count against the general right. In so far as the right is an excuse to privilege some people's private commitments over that enshrined in liberal democratic law, the general right undermines the sovereignty of the liberal democratic state. However, the argument does not stick if it is the liberal democratic state itself which enshrines in its law a general legal right to exemption. We have seen in chapters 2, 4, and 6 that it is the liberal state itself which enshrines the right. Even when the USSC in *Smith* rejected the view that the Free Exercise Clause grounded the general right, we saw that Congress and various state legislatures passed statutes, such as the Religious Freedom Restoration Act, which grounded the general right. This legislative response was not only desirable but indeed morally demanded. This is because, as will be argued in detail when a positive case is set forth in favour of the general right, the legal recognition of the general right is to be correctly understood as a defining feature of a liberal state because it reflects an underlying moral right. It follows that, rather than undermining the sovereignty of liberal democratic states, the general right is a defining feature of a liberal democratic state.

A final version of the Rule of Law Objection against the general right has been put forward by an eminent group of liberal egalitarians. Their worry is that exemptions undermine the idea that citizens should have equal rights under the law and that no one should have special privileges in and above the law. Brian Barry and Richard Arneson have separately argued that if there is a sufficiently strong reason to grant an exemption from an obligation that reason should ordinarily be strong enough to motivate abolishing the obligation altogether so that it no longer encroaches on the objector or on other citizens.⁶¹⁰ They argue that an alternative approach of maintaining the obligation while granting the exemption (which Barry calls the 'rule and exemption' approach), betrays the egalitarian commitment that members of a political society should all be ruled by the

⁶⁰⁹ Jean L Cohen, 'Freedom of Religion, Inc.: Whose Sovereignty?' (2015) 44 *Netherlands Journal of Legal Philosophy* 169.

⁶¹⁰ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press 2002) ch 2; Richard J Arneson, 'Against Freedom of Conscience' (2010) 47 *San Diego Law Review* 1015.

same standards.⁶¹¹ This is especially so, as Eisgruber and Sager argue jointly, when the rule and exemption approach entails privileging individuals on the basis of the religiosity of their beliefs.⁶¹²

The Liberal Model cannot simply reply, as it could in relation to Cohen's objection, that liberal states have always traditionally embraced the rule and exemption approach (and should do so), for example in providing specific exemptions in the military and abortion context. The egalitarian objection goes much deeper. It insists, in its starkest form, that liberal law violates equality, and hence is not justified, when equal citizens are ruled by different standards which may result in privileges for some citizens which are denied to others. A citizen should not be able to escape e.g. the military draft on the basis of his beliefs while another citizen is obliged to enlist despite e.g. strong family commitments to his new born babies. The egalitarian objection, in its starkest form, would insist that either both citizens should be compelled to enlist and pay the consequences for desertion or that neither should be obliged to enlist (e.g. there should not be a compulsory draft).

It may well be that the Liberal Model is incompatible with the starkest form of the egalitarian objection. That objection seems to be motivated by an idea of equality, i.e. equality of treatment or equality of legal standards, which is not morally attractive. A more attractive idea of equality is equality of concern and respect for individuals' interests which may indeed lead to differential treatment and different legal standards for different groups of individuals. The assumption of this more attractive idea of equality is that different individuals have different interests with different moral weights. Consequently, a liberal state equally committed to the wellbeing of all of its subjects will take into account the different weights of its subjects' interests when it is setting legal standards which may interfere with those interests. It follows on this view that a liberal state may exempt people from particular legal standards which may interfere with some of their weighty interests while not making exempt other individuals when the legal standards interfere with less weighty interests.

To see that this view is plausible consider the exemption granted in *Watkins-Singh* (considered in part 3 of chapter 5).⁶¹³ In that case the English High Court held that it was discriminatory to refuse an exemption to a Sikh school girl from her school uniform policy which prohibited the wearing of jewellery. The policy only allowed the wearing of one pair of plain stud earrings and a wrist watch. The claimant wished to wear a Kara, a narrow bangle worn by followers of the Sikh religion, at school. No doubt the finding that the Sikh girl was entitled to an exemption on the basis of her

⁶¹¹ Barry (n 610) generally chapter 2.

⁶¹² Eisgruber and Sager (n 13) ch 3.

⁶¹³ *Watkins-Singh* (n 530).

religious beliefs afforded her a privileged treatment over other school mates who would have wished to depart from the policy for aesthetic reasons. But this differential or privileged treatment is justified by the fact that the interest in manifesting a religious belief is generally considered to be weightier than an interest in manifesting an aesthetic preference. As will be seen when a positive case is made in favour of the general right, various interests and liberal values (such as freedom of conscience, respect for personal autonomy, and the demands of state neutrality) are engaged whenever a person makes a claim for a conscientious exemption. It is doubtful that equally weighty interests and values are engaged when a person seeks to escape a legal standard for purely aesthetic reasons. A liberal state that granted or denied an exemption to both a conscientious objector and an aesthetic objector would be, under disguise of equality of treatment, disregarding unequally weighty interests and values.

The previous argument should not be taken as a complete rejection of the egalitarian objection. Indeed, much of the Liberal Model is animated by egalitarian concerns. As chapters 3, 5, and 7 have shown, the general right to exemption should not be construed as a privilege of religious objectors alone. Individuals with secular and conscientious objections should also be able to benefit from that right. So the Liberal Model is egalitarian in this regard: neither religious nor secular conscientious convictions should be privileged or disadvantaged over each other in accessing the right. That is indeed the crux of the third proposition of the Liberal Model.

There are two further ways in which the Liberal Model is not opposed to egalitarian concerns. The first is shown by the fourth proposition of the Liberal Model which says that the liberal state should grant conscientious exemptions to claimants who sincerely hold a conscientious objection which would not disproportionately impact on the rights of others or the public interest. The fact that the general right can lose out to the rights of others or to the public interest shows that the right does not afford a privilege which trumps all other considerations. Individuals whose legal rights conflict with the general right can persuade courts that their rights should take precedence. Much will be said about this in part 5, especially in the context of the clash between conscientious exemptions and the right to be free from discriminatory treatment, especially sexual orientation discrimination. There it will be argued that cases like *Bull v Hall*⁶¹⁴ (where the UKSC held that B&B hoteliers could not be lawfully exempt from the ban of sexual orientation discrimination when they refused to rent out a room to a same sex couple) are fully justified: all things being equal, the general right should not be used to justify discrimination which results in humiliation of protected groups.

⁶¹⁴ *Bull v Hall* (n 9).

The second way in which the Liberal Model is not opposed to egalitarian concerns is that it is not committed to the view that a sincere conscientious objection is the only basis for a state to exempt individuals from their legal obligations. Consider the scenario alluded to above. A pacifist Quaker is made exempt from the duty to join the army on the basis of her religious objection to military service. However, a single parent who cannot find long term care for her new born child is denied the opportunity to stay at home from the draft with the consequence that the child cannot be properly looked after. As Eisgruber and Sager would point out, it seems that the conscientious beliefs of Quaker are given an unfair advantage over the family commitments of the second parent.⁶¹⁵ The Liberal Model is not committed to the view that only the Quaker should be exempted. The Model is only committed to the view that the Quaker should be exempted so long as that would not disproportionately impact on the rights of others or on the public interest. One would need to analyse the moral reasons that underlie parental responsibility to see whether they are weighty enough to warrant, in the case of the single parent, an exemption from the military draft. The thesis has not undertaken that enquiry. It is however plausible that interests other than conscientious objections are weighty enough so that they may ground accommodations from legal standards in a liberal state.

The Institutional Objections

One version of the Institutional Objection to the general right to conscientious exemption says that a general right is not desirable because it would give judges the power to solve the thorny moral and political issues raised by conscientious objectors. Those thorny moral and social issues, goes the objection, are best left to the political process which, in the context of a liberal democracy, is better legitimated by its democratic pedigree to resolve those issues. Justice Scalia in *Smith* was a proponent of this objection. When he rejected the Sherbert Test he still held:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. (...) a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation (...).⁶¹⁶

He was however aware of the most obvious counter-argument to this position, that is that the political process often leaves behind unpopular and minority dissenting views. He was however

⁶¹⁵ Eisgruber and Sager (n 13) 86.

⁶¹⁶ *Smith* (n 14) 890.

happy to bite the bullet, especially because of the view that a general right undermines the rule of law. He accordingly said:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁶¹⁷

How does the Liberal Model respond to this version of the Institutional Objection? One path is to insist on the obvious counter-argument to it, i.e. the political process unfairly leaves behind unpopular and minority dissenting views. This path will not be pursued here as it will form part of the positive argument in favour of the general right. An alternative path is to show that the general right may be mediated by democratic considerations.

To see this, consider the general right as it arises in UK law under Art 9 ECHR and the HRA. We saw how this was operationalised in *Williamson* in chapter 6.⁶¹⁸ In that case Christian parents objected to the statutory ban of corporal punishment of school pupils on the basis that such punishment was mandated by their religious beliefs. The House of Lords rejected the view that the statutory ban impermissibly breached the parents' Art 9 right. In reaching that conclusion, the Court, when undertaking the proportionality analysis, took into consideration the fact that courts owe deference to the legislature on morally and socially sensitive issues such as the permissibility of corporal punishment of minors. Lord Nicholls, delivering the Court's main opinion, stated:

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

⁶¹⁷ *ibid.*

⁶¹⁸ *Williamson* (n 477).

overriding parental choice was a matter mentioned in the course of debate in both Houses of Parliament.⁶¹⁹

This exemplifies one of the ways in which the Liberal Model can respond to the version of the Institutional Objection considered so far. The worry raised by this objection can be taken on board by requiring that courts should take into account the availability (or non-availability) of an alternative political remedy when considering whether a particular exemption should be granted based on the general right. Indeed the fourth proposition of the Liberal Model says that an exemption should not be granted if doing so would disproportionately impact on the public interest. In a liberal democracy, respect for democratic institutions is part and parcel of the public interest. If granting an exemption would run counter to a well-reasoned finding by a democratic institution, then that is in itself a strong reason for an exemption not to be granted. It is not, however, a reason against a general right to exemption which is administered by courts. Furthermore, it cannot be a dispositive reason. In a liberal democracy committed to individual wellbeing individuals have legal rights which they can enforce against wider public interests, even when those interests have been crystallised in democratic legislation. It would not conform to the liberal commitment to individual wellbeing if deference to the legislative process was a conclusive factor rather than a weighty factor when courts are considering whether an exemption is warranted.

There is a more radical version of this Institutional Objection which draws on a constitutional rights theory which would deny judges, rather than the democratic political process, the power to have the final say on any rights issue,⁶²⁰ not just the general right to conscientious exemption. This radical Institutional Objection will not be satisfied with the fact that deference to the legislative process can be a weighty judicial consideration in administering the general right. Not much will be said here against this more radical Institutional Objection other than it is incompatible with the positive case to be made in favour of the general right.⁶²¹ It will be argued that the general right gives members of

⁶¹⁹ *ibid* 51.

⁶²⁰ Jeremy Waldron, 'The Core of the Case against Judicial Review' (2005) 115 *Yale Law Journal* 1346; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010); Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012).

⁶²¹ A more principled answer to this constitutional theory has been given in John Adenitire, 'Who Should Give Effect to Conscientious Exemptions? The Case for Institutional Synergy' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing Forthcoming).

a moral minority, who are often left behind in the political process, a forum, the judicial one, where they may seek to enforce their moral and legal right to obtain an exemption if doing so would not disproportionately impact the right of others or the public interest. It will be argued that even the most well intentioned legislature cannot consider all moral beliefs and explicitly cater for them in legislation by granting or refusing to grant conscientious exemptions. Therefore, this justifies the availability of another complementary institution, i.e. a court of law, which can consider on a case by case basis the issues raised by members of objecting moral minorities who have been left behind in the political process.

The Positive Case for a General Right to Conscientious Exemption⁶²²

In making a positive case in favour of the general right to conscientious exemption the Liberal Model has to show both that conscientious exemptions generally are justified and that a general right, as opposed to context-specific exemptions, is justified. It is important to stress that the Liberal Model does not seek to justify an absolute right to exemption. Conscientious exemptions should not be simply available on request under a general right. Courts should scrutinise that the beliefs that motivate objectors are sincerely held and that granting an exemption would not disproportionately undermine the rights of others or the public interest. More will be said about this part of the Liberal Model in part 5 of this chapter. A positive case is made for exemptions generally drawing on a plurality of values well-established in a liberal democracy. After this a positive case is made for a general right on the basis of protecting minority moral views.

The Moral Case for Conscientious Exemptions Generally

One of the arguments in favour of exemptions generally derives from the liberal commitment to what will here be called the duty of neutral pluralism of the state. This duty arises in the face of the fact of moral pluralism. This is not just the obvious fact that different people hold different views about what moral values require. Rather, it should also be understood as a positive normative statement grounded on the value of individual moral responsibility. Call this ethical pluralism. This normative position holds that there are various ways to live a good life and that, by implication, there are various legitimate conceptions of what the good life is. A person may legitimately devote his life to religious contemplation or to the study of the intricacies of astrophysics. He may choose a life centred on family values or refuse to commit to a romantic relationship so as to focus on his career as an investment banker. No doubt there will be drawbacks in any of these conceptions of a good life. A life of religious contemplation as a monk, while benefitting from high spirituality, is incompatible with the joys of family life. Studying the intricacies of astrophysics, while contributing

⁶²² This section draws extensively on Adenitire, 'Conscientious Exemptions' (n 608) 15–16, 20–24.

to knowledge, is unlikely to yield the pecuniary rewards of the life of an investment banker. However, the point of moral individual responsibility is that various incompatible conceptions of a good life each exhibit something worthwhile, even while exhibiting several drawbacks, and it is up to each individual to weight for himself what is more worthwhile for him. Importantly, given that it is the individual that will benefit or suffer the consequences of a conception of a good life, the choice of which conception to follow is his and not the state's.

Note that ethical pluralism is not to be equated with moral relativism or nihilism, respectively the views that the moral worth of different conceptions of a good life is entirely a relative matter or that different conceptions cannot be better or worse than each other because morality does not exist. Rather the main thrust of this view is that different conceptions of a good life are objectively valuable in different ways and that the individual is the best judge of what is most valuable for him. The state should stay away from dictating what conception is more valuable. Note also that this view does not lead to undermining the legitimacy of state regulation of the interaction between different conceptions of a good life. While individuals are free to choose what lives to live, they cannot impose their choices on others (they too have the right to choose what life to live). The role of the state then, as guardian of the common good, is to ensure that different conceptions of a good life are compatible. The state can therefore limit acts that would undermine the common good and that would infringe others' right to choose which conception is for them.

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

whether it would disproportionately undermine those interests and rights. This is however a reason to make the right to exemption non-absolute rather than rejecting the right altogether.

The argument above is essentially one that derives a non-absolute right to exemption from the state's duty of neutral pluralism. It is an argument calling for the state to respect ethical pluralism. But notice that there are other values at play here that reinforce this argument. The most obvious is perhaps the insistence that personal autonomy should be respected by the state. The idea of personal autonomy 'is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives'.⁶²³ It is possible to argue that committing oneself to a particular way of life (e.g. one committed to a particular religion) is an expression of personal autonomy. The person that is committed to a particular religion will make a variety of choices which will have a myriad of implications for his life. A portion of those implications would have been different had he committed himself to another religion or to non-religion. By being allowed to be committed to any religion or non-religion the individual is thereby being allowed to lead a more autonomous life and to shape the course of his life. The state that values and respects personal autonomy will thereby allow the freedom for individuals to pursue whichever conception of the good life they identify with. Of course, as discussed multiple times, the state cannot permit all expressions of every way of life. Some will collide with fundamental public interests and/or the rights of others. However, the state's respect for personal autonomy leads to respecting various manifestations of different ways of life, although not of all.

Respect for personal autonomy does not directly lead to justifying a right to be exempt from various legal duties. However, respect for autonomy leads to reinforcing the case for that right: if the state grants exemptions (perhaps on the basis of the state's duty of neutral pluralism sketched above) that promotes personal autonomy and that is virtuous. In fact, as stated, an exemption from a legal duty incompatible with a way of life diminishes the costs of accessing or continuing to identify with a particular way of life; it increases options for individuals. Personal autonomy is about, among other things, access to an adequate range of options.⁶²⁴ By granting an exemption the state increases the range of conceptions of a good life which an individual may identify with and live according to. It thereby promotes personal autonomy.

⁶²³ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 369.

⁶²⁴ *ibid* 372. Raz says that 'The conditions of autonomy are complex and consist of three distinct components: appropriate mental abilities, an adequate range of options, and independence.'

Respect for personal autonomy reinforces the case for granting conscientious exemptions. However, respecting autonomy also usually involves, at least in the context of conscientious objection, respect for liberty of conscience. We may understand conscience as a person's faculty 'for searching for life's ethical basis and its ultimate meaning'.⁶²⁵ Consequently, we may understand liberty of conscience as the liberty to live one's life according to the normative imperatives imposed by conscience. These normative imperatives may originate from religious directives or from non-religious ones. Commitment to a particular way of life, whether religious or not, will normally include a judgement that that way of living is compatible and/or required by one's conscientious convictions. Otherwise the individual would find himself living in a pathological bipolar situation whereby he considers a way of life valuable but completely at odds with his convictions about what is right or wrong. No doubt such pathological cases exist. A professional killer may be committed to his way of life because of its luxurious rewards while fully appreciating its moral wrongness. However, in non-pathological cases, individuals subscribe to a particular conception of a good life, among other things, because they believe it to be right or morally required. This is usually the case for some religious believers. Individuals commit to living according to the edicts of a particular religion because they believe, for example, that living that way is required by God, the main source of their moral imperatives. It is their belief in a deity that leads them to commit to a particular way of life. In other words, it is liberty of conscience which influences the way they exercise their right to personal autonomy. It follows that when the state respects personal autonomy by granting an exemption, it normally also respects freedom of conscience.

When the state refuses to grant an exemption this may not only encroach on personal autonomy or freedom of conscience; it may occasion harm to the objector, i.e. undermine her wellbeing. Remember that when an exemption is denied the objector may be coerced to perform an act which she believes to be wrong. Being compelled to performing an act believed to be morally wrong goes against a person's conscience and that might undermine her well-being. In fact when an individual makes a claim of conscience she is normally so committed to her beliefs that acting against them would result in a loss of personal and moral integrity with consequences, such as profound guilt and remorse, which would have an adverse effect on the person's self-conception and self-respect.⁶²⁶ This, in turn, would affect the person's well-being. Of course the individual may refuse to yield to legal coercion and pay the consequences, e.g. be imprisoned for failing to perform her legal duties.

⁶²⁵ Martha C Nussbaum, 'Liberty of Conscience: The Attack on Equal Respect' (2007) 8 *Journal of Human Development* 337, 342.

⁶²⁶ John Adenitire, 'SAS v France: Fidelity to Law and Conscience' [2015] *European Human Rights Law Review* 78, 82.

However, succumbing to legal punishment rather than acting against one's conscience also undermines one's well-being. It follows that when the state grants a conscientious exemption it is usually also paying respect to an aspect of the objector's well-being.

The Moral Case for a General Right to Conscientious Exemption

If the arguments adduced so far are correct, then a non-absolute right to conscientious exemption is justified by reference to a cluster of moral values, including the demands of the state's duty of neutral pluralism (the duty being grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. No doubt other arguments could be made to show that other values are involved.⁶²⁷ However, these suffice to temporarily ground the practice of granting conscientious exemptions in recognisable moral values. Remember however that the Liberal Model cannot merely show that conscientious exemptions generally are justified by reference to compelling values. It also has to show that a general right to conscientious exemption is justified.⁶²⁸

In order to provide a justification for a general right to exemption it is important to notice a feature of claims for conscientious exemptions. It should be expected that there will be an undefined number of legal obligations individuals may object to. Many are very familiar: objection to military service, to abortion, to be involved in officiating same-sex marriages, to providing emergency contraception. As the varied cases analysed throughout this thesis show, these familiar forms of conscientious objection do not exhaust all possible claims. It may be possible that legal obligations which are thought uncontroversial might actually contravene some deeply held beliefs. For example, one might well be surprised by the Peculiar People's belief that parents have a religious duty not to allow their children (and themselves) to receive any medical treatment because that would otherwise contravene their interpretation of some passages in the Bible exhorting believers to pray for the sick.⁶²⁹

It cannot be expected of even the most diligent of legislatures to predict and cater for in specific legislative exemptions all instances in which a legal obligation may conflict with the beliefs of a conscientious objector. Of course it is open to legislatures to work in a reactive fashion whenever new instances of conscientious objections come to light. After the decision in *Smith*, for example, the Oregon legislature became aware of the need to exempt sacramental use of peyote from the

⁶²⁷ A further argument based on the state's ambition not to govern through coercion but mainly through the idea of fidelity to law was made in Adenitire, 'SAS v France: Fidelity to Law and Conscience' (n 626).

⁶²⁸ The following discussion relies heavily on the discussion in John Adenitire (n 616).

⁶²⁹ As illustrated in *R v Senior* [1899] 1 QB 283.

prohibition of drug use and enacted a statutory exemption accordingly.⁶³⁰ To the extent that the exemption was justified, the legislature ought to be applauded for its fast reaction to a genuine issue of conscience. Not all conscientious objectors, however, are as fortunate as the Oregon members of the Native American Church. Some minority groups are unlikely to be able to have sufficient social or political power to lobby for a discussion in the legislature about their conscientious beliefs to enable the legislature to deliberate properly about them. To be sure this is not always the case. Sikhs in England and Wales, while only constituting 0.8% of the population,⁶³¹ benefit from a generous statutory exemption from the obligation to wear safety headgear in the workplace and in other circumstances in favour of them wearing the turban.⁶³² Yet, as the example of the Peculiar People testify,⁶³³ unusual views that belong to a minority group are unlikely to be well-known and therefore unlikely to be considered in the legislative process.

The case for a general right to conscientious exemption is therefore based on the inability of the legislature to predict all instances of conscientious objection and on the worry that minority views will be left behind in the political process when such minorities do not have enough political power to lobby the legislature for a context-specific exemption. The institution of a general right provides minority views with an alternative forum, i.e. a court of law, where they may be able to bring a claim and ask for exemptions from legal obligations which impinge on their consciences. To be sure, the existence of this alternative forum may not result in an exemption being granted. It may be that the exemption is not warranted because granting it would result in a disproportionate impact on the right of others (e.g. granting an exemption to the Peculiar People from the criminalisation of child neglect would endanger the lives of their children). It may also be that, even if the exemption is warranted, courts may fail to reach a proper outcome through poor legal reasoning.

Independently of whether an exemption is granted in this alternative forum, the general right to conscientious exemption guarantees that minority views have a right to equal treatment under the law. Indeed the thesis has shown that the grounds of the general right are typically to be found in statutory or constitutional provisions which protect freedom of conscience and religion and which

⁶³⁰ The current statutory exemption is s 4(a) 2015 ORS 475.752.

⁶³¹ Office for National Statistics, 'The Percentage of the Population with No Religion Has Increased in England and Wales' (4 April 2013) <<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/sty-religion.html>> accessed 21 April 2016.

⁶³² Employment Act 1989, s 11.

⁶³³ See text at n 629.

prohibit discriminatory treatment on the basis of beliefs. Majority conscientious views that are well known (e.g. the established Anglican Church in England) usually have these legal rights considered in the legislative process and statutory exemptions are sometimes granted (e.g. the UK Parliament enabled the Anglican and Welsh clergy and religious organisations to be exempt from officiating same sex marriages).⁶³⁴ In a liberal democracy committed to the rule of law, these legal rights are not a prerogative of only majority conscientious views. Minority views are entitled to these legal rights and, consequently, to a forum where these rights can be adequately considered by a state authority whenever they conflict with legal obligations. A general right to conscientious exemption makes this equal consideration of legal rights possible.

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

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

The second proposition of the Liberal Model says that the liberal state should generally refrain from passing moral judgement on the content of the beliefs which give rise to a claim for conscientious exemption. The core of the idea is that the state should not judge the reasonableness, merit, truth, attractiveness, etc. of the beliefs of a conscientious objector. Consistent with the fourth proposition of the Liberal Model, a liberal state may only question whether the belief is sincerely held and should grant the exemption only if doing so would not disproportionately affect the right of others

⁶³⁴ Marriage (Same Sex Couples) Act 2013 (UK), 1(3)-(5).

or the public interest. This part of this chapter shows both that the practice of conscientious exemptions in all the jurisdictions under analysis largely (but not perfectly) fits with the second proposition. It then provides a moral justification for the proposition and rejects the challenge to it made by liberal perfectionists, such as Raz and Nehushtan,⁶³⁵ who want the state to take into consideration the moral merits of conscientious objectors' beliefs when deciding whether an exemption is to be granted.

The Fit of the Second Proposition⁶³⁶

It is well established that US courts are prohibited by the First Amendment from questioning the truth or reasonableness of religious doctrine. This doctrine has been recently reaffirmed by the USSC in *Hobby Lobby*.⁶³⁷ In that case the Secretary of Health and Human Services (HHS) argued that 'providing the [mandatory contraceptive] coverage would not itself result in the destruction of an embryo [which the claimant regarded as deeply sinful]; that would occur only if an employee chose to take advantage of the coverage'.⁶³⁸ The USSC refused to be involved in having to assess the merits of the religious beliefs of Hobby Lobby's owners. It said that HHS's argument

addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable) (...) [HHS's argument] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.⁶³⁹

The USSC then went on to list a series of authorities, including *Thomas* and *Smith*,⁶⁴⁰ which had affirmed that doctrine. The Court stated that 'repeatedly and in many different contexts, we have warned that courts must not presume to determine (...) the plausibility of a religious claim'; 'our "narrow function (...) in this context is to determine" whether the line drawn reflects "an honest conviction"'.⁶⁴¹

⁶³⁵ Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing 2015).

⁶³⁶ Some of the discussion in this section draws from Adenitire, 'Conscientious Exemptions' (n 608) 10–14.

⁶³⁷ *Hobby Lobby* (n 31).

⁶³⁸ *ibid* 35.

⁶³⁹ *ibid* 36.

⁶⁴⁰ *Smith* (n 14).

⁶⁴¹ *Hobby Lobby* (n 31) 37–38. Citing *Thomas* (n 85) 716.

This same doctrine seems to have been applied by the USSC to a non-religious institution in *Boy Scouts*.⁶⁴² In that case the Boy Scouts argued that ‘homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms “morally straight” and “clean”’.⁶⁴³ Despite acknowledging that ‘morally straight’ and ‘clean’ do not self-evidently exclude homosexual conduct, the Court held that it was not a court’s role to inquire into the asserted beliefs of a group or ‘to reject a group’s expressed values because they disagree with those values or find them internally inconsistent’.⁶⁴⁴ In reliance for this proposition it quoted the portion in *Thomas* which said ‘[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection’.⁶⁴⁵

The same doctrine is a cornerstone of Canadian law. Take the case of *Amselem* where the Supreme Court of Canada (SCC) held that Jewish property owners could be exempt from bye-laws which prohibited them from building religious huts (succot) on their property in a condominium. The condominium managers had offered to make available communal succot as an alternative. They argued that the insistence of the Jewish property owners to build their private succot on their own property was not a requirement of the official teachings of their religion. The SCC refused to be involved in having to assess the orthodoxy of the claimants’ beliefs. The Court stated that

the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation”, precept, “commandment”, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.⁶⁴⁶

The SCC then went on to state that, similarly to the USSC, despite refusing to assess the content of the belief that gave rise to a conscientious objection, it had the power to assess the sincerity of the claimant. It said that ‘while a court is not qualified to rule on the validity or veracity of any given

⁶⁴² *Dale* (n 100).

⁶⁴³ *ibid* 650.

⁶⁴⁴ *ibid* 651.

⁶⁴⁵ *ibid*.

⁶⁴⁶ *Amselem* (n 338) [50].

religious practice or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief'.⁶⁴⁷

As discussed in chapter 5, the principles which apply to freedom of religion in Canadian law should be held to be applicable also to freedom of conscience. That is because, according to the SCC in *Big M Drug Mart*, freedom of religion falls within the larger category of freedom of conscience.⁶⁴⁸ If there are certain principles which apply to the narrower freedom of religion it is likely that all or most of those same principles apply to the broader freedom of conscience. There may of course be other principles which are exclusive to freedom of conscience. However, as analysed in chapter 5, it cannot conclusively be known which principles these are as the jurisprudence on freedom of conscience is not very extensive. Hence, until doctrinal development to the contrary, it is safe to assume that just as Canadian courts cannot question the truth, reasonableness, etc. of religious beliefs, they equally cannot assess the merits of conscientious beliefs. To reinforce that conclusion, in none of the few cases, reviewed in part 3 of chapter 5 involving freedom of non-religious conscience, did courts assess the merits of the beliefs involved. The sole inquiry, consistent with the second proposition of the liberal model, was whether those conscientious beliefs were sincerely held.

The fit of the general right arising under UK law with the second proposition of the Liberal Model is a little more complex. In chapter 6 and chapter 7 we saw that religious and non-religious beliefs are protected under the general right as long as they satisfy the Williamson and Grainger Requirements (the first in the HRA context; the second in the anti-discrimination context). Both sets of requirements incorporate the following:

4. The belief must be consistent with basic standards of human dignity or integrity [Dignity Requirement];
5. The belief must, as judged by courts, relate to matters more than merely trivial and possess an adequate degree of seriousness and importance [Importance Requirement]; and
6. The belief must also be coherent in the sense of being intelligible and capable of being understood [Intelligibility Requirement].

It seems then that UK courts will assess the merits of the beliefs in question before considering whether an exemption is warranted. There are however strong reasons to think that UK courts are

⁶⁴⁷ *ibid* 51.

⁶⁴⁸ *Big M Drug Mart* (n 315).

not arbiters of the moral (or otherwise) soundness of conscientious objectors' beliefs. First, the UK Supreme Court (UKSC) in *Williamson*, the case where the Dignity, Importance and Intelligibility Requirements were recognised at the highest UK judicial level, explicitly held:

too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention (...).⁶⁴⁹

This admonition has been followed in the UK case law on conscientious exemptions as no case has failed on the basis of the Dignity, Importance and Intelligibility Requirements.⁶⁵⁰ Furthermore, and importantly, the Dignity, Importance and Intelligibility Requirements are pre-conditions for the protection of a manifestation through action of a belief not pre-conditions for the protection of holding a particular belief. This is because the right to hold beliefs under Art 9 is absolute. The UKSC in *Williamson*, in the paragraph preceding the one quoted above made that point clear. It said

It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith (...). But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views

⁶⁴⁹ *Williamson* (n 477) [23].

⁶⁵⁰ Note however that belief in English Nationalism which entailed belief in using violence against illegal immigrants and Islamophobia was held incompatible with the Dignity Requirement in *Mr S T Uncles v National Health Service Commissioning Board and others* (n 598). The case did not however concern a conscientious exemption claim. It concerned a direct discrimination case when the belief holder's professional services were terminated by the NHS. The tribunal held that there had been no discrimination because the termination of the belief holder's services was not due to his beliefs. Rather it was due to the fact that he had not disclosed a pending prosecution for electoral fraud.

of others professing the same religion. Freedom of religion protects the subjective belief of an individual. (...) Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.

Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements.⁶⁵¹

If the Dignity, Importance and Intelligibility Requirements (either under Art 9 or anti-discrimination law) are understood, as they should, as limits on acting out a belief rather than on holding a belief, then the UK jurisprudence conforms to the second proposition of the Liberal Model: judges do not question the validity of conscientious objectors' beliefs but only the impact of their actions on others or on the public interest. To be sure, as already indicated in part 2 of chapter 6, the Dignity Requirement seems redundant. The manifestation a belief which is incompatible with human dignity (e.g. ceremonial human sacrifice or torture) would be readily caught by the limitation clause of Art 9(2) or under the proportionality step of indirect discrimination legislation. Nevertheless, despite the redundancy of the Dignity Requirement, it conforms to the second proposition of the Liberal Model.

The Justification for the Second Proposition of the Liberal Model

As the previous section has shown, the doctrine of the jurisdictions under analysis fits the second proposition. However, the Liberal Model, being an interpretive model, also has to show that the practice is justified. Therefore, the Model has to show that the moral criticisms levelled against the second proposition from certain liberal scholars are misguided. Take the powerful objection to the second proposition which is mounted by those committed to liberal perfectionism. Raz, for example, has forcefully argued that a liberal state which values autonomy highly should promote a range of valuable options for its citizens while discouraging the pursuit of immoral options. He argues:

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

⁶⁵¹ *Williamson* (n 477) 22–23.

pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options.⁶⁵²

Consistent with being a liberal theory, Razian perfectionism is tempered by the fact that state coercion may only be utilised against immoral acts which harm others. Nevertheless, consistent with being a perfectionist theory, the state may use non-coercive means to dissuade individuals from subscribing to immoral views even when those views are not acted upon.⁶⁵³

If Razian liberal perfectionism is applied to the context of conscientious exemptions, it follows, as some have argued,⁶⁵⁴ that the state should take into consideration the moral quality of a belief of a conscientious objector when considering whether an exemption is to be granted. If the belief is immoral, that should provide the state with a weighty reason for discouraging it and, hence, a reason not to grant the exemption. Notice that Razian perfectionism does not collapse into the view that, consistent with the fourth proposition of the Liberal Model, a liberal state should refuse to grant exemptions if doing so would disproportionately affect the right of others or the public interest. The fourth proposition is a specific form of the harm principle and is not perfectionist. Instead Razian perfectionism urges the state not to grant an exemption on the basis that it considers that the belief of the conscientious objector is immoral. In opposition to the second proposition of the Liberal Model, Razian perfectionism requires the state to assess and discourage immoral views of conscientious objectors even when granting an exemption based on an immoral view would not disproportionately impact on the rights of others or on the public interest.

How can the Liberal Model defend itself from Razian liberal perfectionism? It may show that that version of liberal perfectionism is not morally attractive. Or it may show that Razian perfectionism misfires against the Liberal Model. The latter path will be undertaken here. Consider that in part 2 of this chapter the moral justification for a right to conscientious exemption was based on a multiplicity of moral values. There it was argued that a non-absolute right to conscientious exemption is justified by reference to a cluster of moral values, including the demands of the state's duty of neutral pluralism (grounded in the value of individual moral responsibility and respect for ethical pluralism), respect for personal autonomy, freedom of conscience and concern for individual well-being. The value of personal autonomy was only one part of the cluster of values invoked to justify the right. Indeed, it was argued that valuing personal autonomy does not lead to asserting a right to conscientious exemption. Rather, it was argued that respect for personal autonomy only leads to

⁶⁵² Raz (n 623) 380–381.

⁶⁵³ *ibid* 418–419.

⁶⁵⁴ Nehushtan (n 635).

reinforcing the case for that right: if the state grants exemptions (perhaps on the basis of the state's duty of neutral pluralism) that promotes personal autonomy. By granting an exemption the state increases the range of conceptions of a good life which an individual may identify with and live according to. It thereby promotes personal autonomy.

In contrast to the cluster of values justification for the right to exemption of the Liberal Model, the Razian approach to conscientious exemptions is based entirely on the value of personal autonomy.⁶⁵⁵ This is the reason why Razian perfectionism misfires against the Liberal Model: even if Raz is right that autonomy has no value when it is used in the pursuit of immoral options or views, the Liberal Model is able to point to other values which may be invoked when a conscientious objector holds immoral views. For example, an objector's well-being will be negatively affected when an exemption is denied, irrespective of whether the objection is motivated by immoral beliefs. A liberal state that values individual well-being will have a strong reason to promote the wellbeing of its subjects, irrespective of whether or not they hold morally acceptable views.

The availability of other values to justify the right to conscientious exemption when the value of personal autonomy is unavailable allows the second proposition of the Liberal Model to be immune from the Razian liberal perfectionist challenge. There is however also a positive case in favour of second proposition. This is the argument from futility.⁶⁵⁶ This says that it is futile for the state to express a view on the merits of the content of the beliefs of the objector for two reasons. First, such moral judgement is unlikely to lead the objector to change his beliefs. Second, the moral judgement is totally unnecessary for the more important task of safeguarding the public interest or the rights of others which the acts of the objector may undermine.

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

[F]aith exists as a form of rival to reason. When we say that we believe in something as a matter of faith, or to put it the other way round, when we say that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that

⁶⁵⁵ This is consistent with the moral justification provided by Raz for a right to conscientious objection in Raz (n 5) ch 15.

⁶⁵⁶ This was first advanced in Adenitire, 'Conscientious Exemptions' (n 608) 16–17.

which can be established by reason, but not for that reason (...) faith treats itself as a reason to believe, and to act in accordance with belief, without submitting to the conditions of reason.⁶⁵⁷

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

Even if the belief is non-faith based and is instead reason-based, it might be equally futile to engage the objector in conversations about the merits of his beliefs. This is mainly because, in the context of a liberal democracy with free speech, the objector is likely to have already been exposed to all sorts of arguments that contradict his beliefs. Take for example the claimant in *Exmoor* who objected to filing his VAT returns online based on the belief that 'that internet usage puts more CO2 in the atmosphere than aviation'.⁶⁵⁸ Why would a state official expressing a competitive view to his make any difference? E.g. that farming of non-human animals is a more serious concern for climate change because it emits more CO2 than all transportation combined. If the objector has gone through the trouble of litigation to secure an exemption in order to accommodate his beliefs, that alone should give an indication of how deeply held and immovable those beliefs are. This is not to say that deeply held beliefs are not changeable. However, we may be sceptical that the lengthy process that is necessary to revise one's deeply held beliefs can be successfully affected by state disapproval.

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

One may object to this second argument as Nehushtan has done. He says that expressing a view about the content of the objector's belief may make a practical difference to the outcome. He gives the example of a prospective non-white employee who seeks employment from an employer who, for religious reasons, holds that white people should not mix with non-whites and therefore refuses to employ the prospective non-white employee. Nehushtan assumes in this scenario that there is no serious problem of racism in the employment market and that the prospective employee immediately finds employment with another employer. Nehushtan argues that given that the

⁶⁵⁷ Timothy Macklem, *Independence of Mind* (Oxford University Press 2008) 133–134.

⁶⁵⁸ *Exmoor* (n 600) [27].

employee will not have suffered any meaningful harm, except perhaps a slight offence having found alternative employment, it would not be possible to condemn the employer's behaviour unless the state takes into account the religiously motivated racist quality of his beliefs and denies the exemption on that basis.⁶⁵⁹

Nehushtan's example is not a good one against the second proposition because there is in fact a strong reason for prohibiting the act of the employer without having to judge the quality of his beliefs: his refusal to employ the non-white prospective employee for the reason of his race is seriously humiliating and hence harmful. Not only does the humiliation provide reasons for offence and may occasion psychological harm, it also sends the signal that the non-white employee is a lesser member of society because a lesser human being. In a society where such acts are allowed, victims of such humiliation are likely to suffer loss of self-respect and self-worth, in short their wellbeing is seriously harmed.⁶⁶⁰ This alone is a sufficient reason for not allowing such acts; it is unnecessary to have to judge the content of the employer's beliefs.

4. The Liberal State Should neither Privilege nor Disadvantage Religious Beliefs Over Non-Religious Ones when Considering Whether to Grant a Conscientious Exemption

The third proposition of the Liberal Model says that the liberal state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant a conscientious exemption. Chapters 3, 5, and 7 have been dedicated to showing that the general right to conscientious exemption in the law of the US, Canada and the UK embrace this proposition. The general right, it was argued in those chapters, is available to religious and non-religious conscientious objectors alike. Therefore this part of this chapter will not show the fit between the law of the jurisdictions under analysis and the third proposition. Rather, this chapter will be dedicated to showing that the proposition is morally attractive.

However, not much will be said about the positive case for the third proposition. This is because the clear implication of the positive argument made in part 2 of this chapter (the cluster of values

⁶⁵⁹ Nehushtan (n 635) 146–147.

⁶⁶⁰ This is an argument borrowed from Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2014) ch 5. Waldron refers to dignitary harm while the present argument refers to humiliation, mainly because of the sometimes open-textured meaning of dignity in the literature.

argument) for the right to exemption is that such a right is insensitive to the religious or non-religious nature of the belief of the objector. In fact, the state's duty of neutral pluralism is specifically against unequal treatment depending on the nature of the beliefs. Also, respect for autonomy, conscience and well-being are insensitive to the particular content of the beliefs of the objectors. Equality of treatment between religious and non-religious beliefs is also a clear implication of the second proposition of the Liberal Model. That proposition calls for the liberal state to be blind to the validity of the belief of the objector. It follows that the liberal state should also be blind to the validity of claims that religious beliefs are more or less deserving of accommodation than non-religious beliefs. The only criterion allowed, consistent with the fourth proposition, is that exemptions should not be granted if it would have a disproportionately adverse impact on the public interest or on the rights of others. That criterion is neutral as to the religious or non-religious nature of the belief involved.

This part of this chapter therefore focuses on a series of objections to the third proposition. To do so, it investigates the work of Kathleen Brady who, in the US context, has recently defended a model of exemptions that would privilege individuals objecting on the basis of religious beliefs over individuals objecting on the basis of non-religious beliefs.⁶⁶¹ She makes a series of principled objections to the third proposition and a series of pragmatic objections. By showing the strengths and weaknesses of her approach, this part shows that the third proposition is immune from both principled and pragmatic objections.

Principled Attacks on the Third Proposition⁶⁶²

Brady seeks to justify a pro-religion model of conscientious exemptions by pointing out what is special about religion and how its distinctiveness confers on it a dignity which non-religious claims only indirectly possess. She says that religious beliefs, unlike secular commitments, involve the relationship of persons with the divine. 'Religious meaning is derived from the source and origin of all meaning. Religious identity is grounded in the ground of all being'.⁶⁶³ She claims that all individuals, even atheists, can understand what is at stake in religious claims and it is reasonable for them to remain 'open to the possibility that the divine can be encountered in a way that is real,

⁶⁶¹ Kathleen A Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (Cambridge University Press 2015).

⁶⁶² This part of this chapter draws extensively from John Adenitire, 'The Irrelevance of Religion' (2017) 8 *Jurisprudence* 405, 408–410.

⁶⁶³ Brady (n 661) 302.

meaningful, and salvific'.⁶⁶⁴ Given the overwhelming importance of a relationship with the divine for believers and the reasonableness for non-believers to be open to encounter such a relationship, Brady argues that the state, even a secular one, has a strong reason to grant religious conscientious exemptions in a wide range of circumstances. Secular commitments, while they may be interpreted to engage indirectly with the divine through enquiry with what is right and wrong, cannot be given the same level of protection as religious commitments because they are not an express manifestation of a relationship with the divine.

Brady's attack on the Liberal Model rests on the overwhelming importance she places on the value of religion which, in her view, is the special relationship of persons with the divine. That justification, however, does not hold for two reasons. First, if her claim is understood to be interpretive, it calls for an implausible level of reconstruction of US doctrine which is the focus of her work. Part 3 of chapter 3 showed that despite early cases in which the USSC equated religion with theism, more recent cases have clearly moved on from that understanding of religion. In *Torcaso v Watkins*, the USSC held, in an oft-cited footnote, that '[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others'.⁶⁶⁵ In *Seeger*, the USSC interpreted a statutory exemption which required theistic 'religious training and belief' to include a non-theistic belief 'that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption'.⁶⁶⁶ In *Welsh*, an avowedly non-religious conscientious objector was held to satisfy the requirement that an exemption should be granted only if a conscientious objection was by reason of 'religious training and belief'.⁶⁶⁷ More controversially, in *Kaufmann*, the Seventh Circuit held that atheism is a religion because it functioned as a religion in the life of a prisoner seeking to establish an atheist reading group in prison.⁶⁶⁸ Brady's equation of religion with theism would, if her theory is understood to be interpretive, implausibly categorise as legal mistakes these well-settled corpus of judicial findings.

The second reason why Brady's view is not compelling is that the justification she provides for a pro-religion approach (i.e. the special relationship of persons with the divine) is incompatible with the liberal state's duty of neutral pluralism and hence is not morally attractive. That value would require

⁶⁶⁴ *ibid.*

⁶⁶⁵ *Torcaso v. Watkins* (n 121) footnote 11.

⁶⁶⁶ *Seeger* (n 102) 165–166.

⁶⁶⁷ *Welsh* (n 96).

⁶⁶⁸ *Kaufman* (n 133).

the state to affirm the truth or reasonableness of theism. But that would require the state to affirm a proposition which is not only contentious between religious individuals, atheist, and agnostic but also between different religions. If the USSC in *Torcaso* was right, there are several atheist or agnostic religions and these may consider the belief in theism false or even unreasonable. In a liberal democracy committed to neutral pluralism, it is best for the law not to take sides on such a contentious issue.

While Brady's pro-religion approach is misguided as an interpretive theory, her work does retain a significant merit. She is able to canvass some of the common arguments for a pro-religion approach and reject them. To the argument that religious objectors deserve privileged protection because of the suffering involved in violating religious precepts, she replies that 'for the secular individual, violation of deeply held moral beliefs may involve just as much suffering and emotional distress as the violation of religious conviction does, and it is just as destructive to human dignity'.⁶⁶⁹ She continues by recognising that 'secular beliefs, especially secular moral beliefs, can have the same ultimate importance in the lives of those who hold them. (...) Indeed, [those beliefs] can themselves be ultimate in the way that God is for the believer'.⁶⁷⁰ Again, she states that 'it is difficult to argue that freedom of religious conscience is more vital to human liberty than freedom for secular moral conscience. Whether conscience is secular or religious, obeying it is important to human dignity and autonomy'.⁶⁷¹

Brady's work helps to clear the way to some common pro-religion arguments. However, as indicated, her own positive argument has to be rejected as well.

Pragmatic Attacks on the Third Proposition

The previous section has canvassed some principled arguments in favour of a pro-religion approach in conscientious exemptions. They all seem to fail. However, Brady has put forward some pragmatic arguments as to why the third proposition, even if correct in principle, would be practically unworkable for a variety of reasons: (1) too many claims for exemptions will be made⁶⁷²; (2) it would be more difficult for judges to assess the sincerity of secular beliefs without reference, as in religious practices, to comprehensive belief systems which have a communal dimension⁶⁷³; (3) secular claims

⁶⁶⁹ Brady (n 661) 58.

⁶⁷⁰ *ibid* 59.

⁶⁷¹ *ibid* 60.

⁶⁷² *ibid* 305–306.

⁶⁷³ *ibid* 307.

would also be much easier to fabricate⁶⁷⁴; and (4) allowing secular claims to be considered alongside religious ones would inevitably lead to much weaker protection of conscientious objectors overall.⁶⁷⁵

There is a very good reason to be sceptical about Brady's pragmatic objections to the third proposition: they are mostly unsubstantiated claims. Some of them can be explicitly rejected by reference to the practice of conscientious exemption in the UK and, in some instances, in Canada where there is a more perfect fit between the judicial practice on conscientious exemptions and the third proposition. In chapter 7 we saw that the grounds of the general right in UK law are without controversy equally available to objectors with religious and non-religious beliefs. In chapter 5 we saw that the ground of the general right in Canadian law based on the Canadian Charter's guarantee of freedom of conscience and religion is also equally available to religious and non-religious objections alike without much controversy. So these two jurisdictions, especially the UK, are useful case studies to test the unsubstantiated pragmatic objections advanced by Brady.

Take the objection that too many claims for exemptions will be made if the general right is not reserved for religious objections alone. That claim is clearly false based on the UK and Canadian experience. In part 4 of chapter 7 we saw that only ten cases on non-religious beliefs have been decided in the UK case law. Of those ten, only two, *Pattison* and *Exmoor*,⁶⁷⁶ both unsuccessful, involved a conscientious exemption claim. In part 3 of chapter 5 we saw that in Canadian law, only five cases, *Roach*,⁶⁷⁷ *Maurice*,⁶⁷⁸ *Chainnigh*,⁶⁷⁹ *McAteer*,⁶⁸⁰ and *Hughes*,⁶⁸¹ involved a claim for exemption based on a non-religious belief relying on the Canadian Charter's protection of freedom of conscience. Of those five cases, only *Maurice* was successful. Five other cases in Canadian law, *Hughes*,⁶⁸² *Duperreault*,⁶⁸³ *Chamberlain*,⁶⁸⁴ *Zundel*,⁶⁸⁵ and *Morgentaler*,⁶⁸⁶ have considered freedom

⁶⁷⁴ *ibid* 307–308.

⁶⁷⁵ *ibid* 309–310.

⁶⁷⁶ *Pattison* (n 476); *Exmoor* (n 600).

⁶⁷⁷ *Roach* (1994) (n 353).

⁶⁷⁸ *Maurice* (n 364).

⁶⁷⁹ *Chainnigh* (n 379).

⁶⁸⁰ *McAteer v. Canada (Attorney General)* (n 380).

⁶⁸¹ *Hughes* (n 381).

⁶⁸² *ibid*.

⁶⁸³ *In the Matter of a claim by Guy Duperreault* (n 378) [19].

⁶⁸⁴ *Chamberlain* (n 373) [56–72].

⁶⁸⁵ *Citron and Toronto Mayor's Committee v. Zundel* (n 361).

⁶⁸⁶ *Morgentaler* (n 330).

of conscience in contexts other than conscientious objections. So the UK and Canadian experiences show that the objection that too many claims for exemptions will be made if the third proposition is respected is clearly false. Two cases in the UK and five cases in Canada can hardly be labelled as an avalanche of secular conscientious claims. Even accounting for the popular perception that individuals in the US are more litigious than in the UK and Canada, the experience of the latter jurisdictions provide evidence for the view that if the third proposition is respected the vast majority of conscientious exemption claims will continue to be made on the basis of religious objections.

Take the second pragmatic objection that it would be more difficult for judges to assess the sincerity of secular beliefs without reference, as in religious practices, to comprehensive belief systems which have a communal dimension.⁶⁸⁷ Again the UK and Canadian experience can be helpful in this regard. In none of the five Canadian non-religious conscientious exemption claims was the sincerity of the claimants an issue. In the UK, of the two cases on non-religious conscientious exemption, only in *Exmoor* was sincerity an issue. That issue was resolved, as in any other case, on the basis of evidence in front of the tribunal. In that case the objector did not want to file his VAT returns online based on his belief that electronic communications greatly contributes to climate change. There was however evidence that he was not being totally sincere. He in fact did occasionally use the internet when economically expedient despite his strong disinclinations in that regard.⁶⁸⁸ It seems then that the non-religiosity of a claim for conscientious exemption does not raise particular sincerity problems which courts cannot deal with. Just as in the case of religious objections courts do not need to look at what the objector's community believes in order to determine the sincerity of the particular objector. In fact, that query is altogether unhelpful because a person, even if religious, is not required to hold the same beliefs as his religious or moral community. This is because that would require the court to investigate whether a person adheres to a particular religious orthodoxy. As examined in part 3 of this chapter, courts cannot assess the validity, including the orthodoxy, of a particular religious belief.

Another pragmatic objection to the third proposition is that secular claims would be much easier than their secular counterpart to fabricate. The worry is that non-religious individuals can make up idiosyncratic belief systems without reference to beliefs typically shared by a wider community. This worry is partially legitimate as, for example, the UK case of *Maistry* exemplifies.⁶⁸⁹ *Maistry* concerned a claim of discriminatory dismissal of a BBC journalist allegedly for upholding what the

⁶⁸⁷ Brady (n 661) 307.

⁶⁸⁸ *Exmoor* (n 600) [81–82].

⁶⁸⁹ *Maistry* (n 598).

employment tribunals and the Court of Appeal referred to as 'BBC Values'. This consisted in the belief 'that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion'.⁶⁹⁰ However, despite the idiosyncratic nature of his beliefs, the sincerity of the claimant was not at issue. The only issue was whether the claimant had been dismissed because of the beliefs he held. There was no suspicion that he had fabricated his belief. The problem with this pragmatic objection then is not that secular individuals cannot make up false beliefs as they certainly can. The issue is that this is not a prerogative of secular objectors only. This is especially true because religious believers are also entitled to idiosyncratic and unorthodox religious beliefs.

Furthermore, individuals may decide to abuse the general right by purposefully mimicking beliefs shared by other religious communities. Take the US case of *Quaintance*⁶⁹¹ as an example where individuals mimicked the beliefs of Rastafarians in order to benefit from exemptions granted to them from the prohibition of sacramental use of cannabis.⁶⁹² In that case, a group of related individuals who were the founding members of the Church of Cognizance were charged with being in possession of 50kg of marijuana. The alleged core belief of the members of this church was that 'marijuana is a sacrament and deity and that the consumption of marijuana is a means of worship'.⁶⁹³ They maintained that the criminal prohibition of narcotics substantially burdened their religious beliefs and was in violation of the RFRA. The trial judge was faced with the challenge to determine whether their claim was sincere or whether 'the Quaintances were acting for the sake of convenience, i.e. because they believed the church would cloak [them] with the protection of the law'.⁶⁹⁴ Having determined that they were drug traffickers who made use of and sold other drugs, the judge found for the latter option. This case shows that individuals can mimic well-known religions to abuse the right to conscientious exemption. Well-established religions can provide a perfect template on which to build fraudulent claims.

Consider the final pragmatic objection to the third proposition that allowing secular claims to be considered alongside religious ones would inevitably lead to much weaker protection of conscientious objectors overall. In Brady's formulation, the worry here is that the standard commonly used to adjudicate conscientious exemptions claims, i.e. a proportionality/balancing

⁶⁹⁰ *ibid* 3.

⁶⁹¹ *Quaintance* (n 156). The first instance judgment is *US v Quaintance* (2006) 471 F Supp 2d 1153 (Dist Court).

⁶⁹² Successful claims have been brought under the RFRA for personal use of marijuana for religious reasons by Rastafarians. See *United States v Valrey* 2000 WL 692647 (Washington District Court).

⁶⁹³ *Quaintance* (2006) (n 691) 1155.

⁶⁹⁴ *ibid* 1174.

standard, is subject to much judicial discretion. That may indeed be a legitimate worry and, when discussing the fourth proposition of the Liberal Model, some guidance will be given as to how that discretion should be exercised. Nevertheless, Brady's worry is misplaced. The UK and Canadian experience show that only an insignificant number of conscientious exemption claims are typically made on the basis of non-religious objections. It remains unexplained how this insignificant number of claims can impact the greater number of religious claims under a proportionality/balancing standard.

5. The Liberal State Should Grant Conscientious Exemptions to Claimants Who are Sincere and if the Exemptions Would Not Disproportionately Impact the Rights of Others or the Public Interest.

The final proposition of the Liberal Model says that the liberal state should grant conscientious exemptions to claimants who are sincere and only if the exemptions would not disproportionately adversely impact the rights of others or the public interest. Not much will be said in this part either to show that the doctrine of the jurisdictions under analysis fits with this proposition or even to show that there is a moral justification for the fourth proposition. Much of the analysis here will be reserved to providing criteria to courts as to how the right to exemption should be balanced against countervailing considerations. Unfortunately, the criteria will be very general in nature and no conclusive views will be expressed as to how particular cases should be resolved. However, particular emphasis will be placed on cases in which the general right conflicts with the principle of non-discrimination. It will be argued that, except in associational settings where individuals should be held to have acquiesced to discriminatory treatment, the general right should not trump the right to equal treatment for individuals belonging to traditionally disadvantaged social groups.

The Two Pillars of the Fourth Proposition

The fourth proposition has two pillars. The first is that only sincere conscientious objectors should benefit from the right. Much has already been said about this requirement in part 3, when discussing the fit of the second proposition. It may be recalled that in that part it was shown that courts do not judge the validity, truth, reasonableness, etc. of the beliefs of the objectors. Rather they focus on whether the belief is sincerely held. As to the justification of first pillar of the fourth proposition, much has already been said in part 4 when discussing the pragmatic attacks on the third proposition. It will be recalled that there it was argued that a sincerity test is not necessarily easier to apply to

religious beliefs over non-religious beliefs. So a sincerity condition does not privilege one group of objectors over the other. To that discussion one should add the self-evident proposition that individuals, whether holding religious or non-religious beliefs, who feign having a conscientious objection to a legal obligation do not deserve benefiting from the right because there is in fact no conflict between their conscientious beliefs and the law.

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

Refusing to grant a conscientious exemption will be disproportionate unless

- (a) the refusal pursues an objective having substantial moral weight (countervailing reason stage);
- (b) the refusal is suitable for the achievement of that legitimate objective (suitability stage);
- (c) the refusal is the most practicable way to achieve that objective (necessity stage); and
- (d) the overall reasons supporting a refusal outweigh the reasons to grant an exemption (balancing stage).⁶⁹⁵

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

The analysis undertaken in chapter 2, 4 and 6 shows that the practice of the jurisdictions under analysis fits this second pillar of the fourth proposition. This is clearly the case with the UK where the

⁶⁹⁵ This is a way to make specific to the context of conscientious exemptions the more general proportionality test. This says that

- ‘1. Does the legislation (or other government action) establishing the right’s limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
2. Are the means in service of the objective rationally connected (suitable) to the objective?
3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?’

See Grant Huscroft, Bradley W Miller and Gregoire Webber, ‘Introduction’, *Proportionality and the Rule of Law* (Cambridge University Press 2014) 2.

grounds of the general right, either under the HRA or anti-discrimination legislation, explicitly incorporate a proportionality analysis. The same goes for the Canadian second and third grounds of the general right which refer to the Canadian Charter's freedom of conscience and religion. The same principle is applicable to the first ground, i.e. the duty of reasonable accommodation short of undue hardship, especially as formulated in *Meiorin* and *Grismer* (analysed in detail in part 2 of chapter 4).⁶⁹⁶ A proportionality analysis is undertaken also, in essence if not in name, under the grounds of the general right arising under US law in RFRA (and its state counter-parts), RLUIPA, and those state constitutions which continue to apply the test set out in *Sherbert*.⁶⁹⁷ Those grounds essentially apply the same test, i.e. the compelling interest test, when considering whether an exemption should be granted. While the test is not explicitly framed as a proportionality or balancing analysis, it is clear that the test requires such balancing. That was indeed one of the reasons why Justice Scalia decided *Smith* as he did. He said 'it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice'.⁶⁹⁸ The proportionality analysis also fits the part of the doctrine of Church Autonomy which requires courts not to apply a private law doctrine if doing so would require judges to question church doctrine. However, that part of the doctrine of Church Autonomy is also subject to a balancing test as the exemption it confers may be outweighed if, as *Paul* suggests, it would otherwise threaten 'the peace, safety, or morality of the community'.⁶⁹⁹

No proportionality test is used in the ministerial exception which is part of the doctrine of Church Autonomy. As the USSC made clear in *Hosanna-Tabor* (analysed in part 6 of chapter 2), once a person is recognised as a church minister, the church may hire or fire her for whatever discriminatory reason.⁷⁰⁰ Notice, however, that the secular counter-part of the ministerial exception, the freedom to expressive association (analysed in part 6 of chapter 3), is indeed subject to a balancing analysis. The USSC has in fact held:

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests,

⁶⁹⁶ *Meiorin* (n 261); *Grismer* (n 263).

⁶⁹⁷ *Verner* (n 16).

⁶⁹⁸ *Smith* (n 14) 891.

⁶⁹⁹ *Paul v Watchtower* (n 86) 883.

⁷⁰⁰ *Hosanna-Tabor* (n 74).

unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.⁷⁰¹

The incongruence of the ministerial exception with its secular counterpart is reason enough to label as a legal mistake an understanding of it as an absolute right. Rather, in line with its secular counterpart and the other grounds of the general right in US law, it too should be understood as a limited right which can be outweighed by other considerations. More will be said about this when discussing conflicts between the general right and the right to be free from discriminatory treatment.

Finally, the duty of reasonable accommodation short of undue hardship as it arises in US law does not use a proportionality assessment. Rather, as analysed in part 5 of chapter 2, it requires that employers grant conscientious exemptions to their employees only if doing so would not impose more than a 'de minimis cost'.⁷⁰² This too should be understood as a legal mistake because it does not fit with the underlying idea that the right to conscientious exemption is a weighty one which cannot be outweighed by the fact that the duty bearer (i.e. an employer) will have to bear more than minimal costs to grant it. Again, more will be said about this below.

What Factors Should Influence the Proportionality Analysis?

Given the near fit in the practice of the three jurisdictions under analysis with the fourth proposition of the Liberal Model, no attempt is made here to make a full defence of the use of proportionality analysis against its most assiduous critics. Proportionality as a method of legal reasoning in human rights law generally has been criticised by various theorists for, among other things, being irrational, too formal, being incapable of providing actual guidance to adjudicators employing it, and undermining democratic legislative decisions about rights.⁷⁰³ No other model of legal reasoning, given the near fit of actual judicial practice with the fourth proposition, can however compete with proportionality within the context of an interpretive enterprise. Given that it is a core part of the practice, it is very implausible that proportionality analysis should be regarded as a legal mistake, as interpretivist opponents of its use would be committed to.

⁷⁰¹ *Jaycees* (n 100) 623.

⁷⁰² *Hardison* (n 66) 84.

⁷⁰³ The literature on this is vast. Various critiques are set out by different authors in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012). See also Webber (n 620); Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014).

Nevertheless, a response ought to be given to critics of proportionality/balancing reasoning within the context of conscientious exemptions, such as Kathleen Brady, who claims that it gives rise to ‘manipulation, unprincipled or arbitrary decision making, and inconsistent and potentially discriminatory application’.⁷⁰⁴ The response is not to say that proportionality analysis can give rise to unequivocal legal outcomes in all situations. The adequate response is that the Liberal Model can point out factors which adjudicators should weight more heavily when considering whether a particular exemption should be given under the general right. This part catalogues them while analysing each stage of the proportionality analysis.

The Countervailing Reasons Stage

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

Consider the case of *Pack* (analysed in part 6 of chapter 2) where members of the Holiness Church of God in Jesus Name sought to be exempt from the tort of public nuisance so that they could handle poisonous serpents and consume poisonous substances in accordance with their beliefs that doing so was a biblical injunction. The Court explicitly rejected the possibility of allowing the practice between members only on the basis that ‘the state has a right to protect a person from himself and to demand that he protect his own life’.⁷⁰⁵ This is a clear case of a countervailing paternalistic reason incompatible with the Liberal Model’s insistence that given that it is the individual that will benefit or suffer the consequences of a particular way of life, the choice of which life to follow is his and not the state’s. In *Pack*, at least two alternative permissible countervailing reasons were available. The first, and weightier reason, was to protect the right to personal safety of the children of the members of the Church who, as the court recorded, were ‘roaming about unattended’ during services with poisonous snake handling.⁷⁰⁶ The second, perhaps less weighty, reason was to safeguard the public interest in reducing or preventing the costs (if any) that would be incurred by

⁷⁰⁴ Brady (n 661) 195.

⁷⁰⁵ *Pack* (n 90) 114 and 113.

⁷⁰⁶ *ibid* 113.

public healthcare in dealing with cases of poisoned members or other individuals attending the services.

Consider also the case of *Lukumi Babalu Aye*.⁷⁰⁷ The case involved the effective prohibition by the city of Hialeah of the practice of animal sacrifice by individuals of the Santeria religion. The USSC found that the prohibition of Santeria ceremonial animal sacrifice was motivated by legislative animus against the religion and was therefore unconstitutional under the Free Exercise Clause. Similar religious practices of killing animals without stunning them, such as Kosher or Halal, were explicitly exempted by the city's ordinances. Furthermore, various city officials expressed similar views to the one that 'Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons"'.⁷⁰⁸ Such rationale, i.e. legislative animus against a particular religion, is incompatible with the second proposition of the Liberal Model which prohibits the state from passing moral judgement on the content of conscientious objector's beliefs. Such rationale would therefore also be impermissible at the countervailing reasons stage of the proportionality analysis.

Lukumi is also useful to reflect on another constraint of the Liberal Model: if no valid countervailing reasons can be identified for a legal obligation which is being objected to, the optimal result is not to grant an exemption but is instead to dispense with the obligation altogether. In *Lukumi*, exempting the members of the Santeria religion from the legal obligation which was specifically enacted to target them would have made the obligation meaningless. There are no good reasons why such meaningless and discriminatory legislation should remain on the statute book. Compatibly with the Liberal Model, the USSC voided the entire legislation rather than holding that it was unconstitutional as applied to the church members.⁷⁰⁹

The Suitability and Necessity Stage

In considering the suitability stage the relevant question is whether the granting of an exemption would undermine the countervailing reasons which have been identified in the first stage. The rationale here is to ensure that the countervailing reason is in fact having a role to play in the decision whether or not to grant the exemption and is not only being used as a façade. Consider the countervailing reason in *Hobby Lobby* for an exemption from the contraceptive mandate to be granted. This was identified by the majority opinion as providing to women cost-free access to contraception.⁷¹⁰ In principle, granting the exemption would not have undermined the

⁷⁰⁷ *Church of Lukumi Babalu Aye, Inc v Hialeah* (1992) 508 US 520 (USSC).

⁷⁰⁸ *ibid* 541.

⁷⁰⁹ *ibid* 547.

⁷¹⁰ *Hobby Lobby* (n 31) 39–40.

countervailing reason. This was because the USSC had argued that the exemption already provided to religious non-profit organizations could be extended to for-profit objecting employers such as Hobby Lobby. Under that accommodation arrangement, Hobby Lobby would self-certify that it objected to providing the coverage. Upon receipt of the certification, Hobby Lobby's insurers would then be required to provide the contraceptive coverage.⁷¹¹ Accordingly, despite granting the exemption, women would still continue to have cost-free access to contraception. Admittedly, however, as already discussed in part 3 of chapter 2, it was not clear that this accommodation would have been possible given that, as other religious employers have done, Hobby Lobby may also have objected to self-certifying its conscientious objection to its insurer.

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

The Balancing Stage

The balancing stage requires deciding whether the overall reasons supporting a refusal outweigh the reasons to grant an exemption. This is a context and fact specific enquiry. However, a few general factors can be taken into account. First, as already indicated, if granting an exemption would run counter to a well-reasoned finding by a democratic institution, then that is in itself a strong but not dispositive reason for an exemption not to be granted. In a liberal democracy, respect for democratic institutions is part and parcel of the public interest and this ought to carry some considerable weight in the balancing stage. Second, the nature of the duty-bearer ought to weigh

⁷¹¹ *ibid* 40–45.

heavily in the moral equation. As shown in chapter 2, 4 and 6, the general right imposes a duty to grant an exemption upon legislatures, other public bodies (including courts) and private institutions. The ability of a small family run business to grant an exemption from the duty to work on weekends to a Sabbatarian will substantially differ from the ability of a governmental department or a publicly traded company. The more costly granting an exemption would be for a duty-bearer, the less weighty would be the case for granting an exemption.

Finally, all things being equal, an exemption should not be granted if doing so would result in discriminatory treatment of protected groups, such as women, racial minorities and homosexuals. This is especially important in the contemporary flurry of litigation on whether providers of goods and services to the general public, such as florists, hoteliers and bakers, can refuse their services to those in a same-sex relationship or marriage.⁷¹² As indicated above,⁷¹³ being subject to discriminatory treatment on the basis of a protected characteristic (e.g. gender, sexual orientation, religion or belief) is seriously humiliating and hence harmful. Not only does the humiliation provide reasons for offence and may occasion psychological harm, it also sends the signal that the person being discriminated is a lesser member of society because of his protected characteristic. In a society where such acts are allowed, victims of such humiliation are likely to suffer loss of self-respect and self-worth, in short their wellbeing is seriously harmed.

Furthermore, in a liberal democracy with strong free speech and free expression guarantees, service providers, while not free to engage in discriminatory conduct, retain their ability to publicly express their conscientious convictions regarding the immorality of various conducts. They may, for example, express their views that inter-racial marriages or same-sex marriages are immoral or contrary to their religious beliefs. Finally, individuals who seek exemptions from anti-discrimination legislation will also benefit from the prohibition of discriminatory treatment in the same legislation. It has been argued in chapter 3, 5 and 7 that both religious and non-religious conscientious beliefs are protected under anti-discrimination legislation. It follows that those that hold the belief that the conduct of certain protected groups is immoral or sinful (e.g. homosexual intercourse is sinful) are therefore protected from discriminatory treatment on the basis of that belief: they too may not be refused employment, accommodation or services generally available to the public on the basis of that belief alone. It follows that it is charitable to interpret the general right in a way that is consistent with the principle of reciprocity. Just as those belief-holders should not be subject to discriminatory

⁷¹² *Elane Photography* (n 9) (Photographer); *Bull v Hall* (n 9) (B&B hoteliers); *Masterpiece* (n 9); *Ashers Baking* (n 9) (Bakery).

⁷¹³ See text above supra n 660.

treatment on the basis of their beliefs, they also should not subject individuals holding other protected characteristics to discriminatory treatment.

There is a caveat to this last argument. It should not apply within associational settings where group members can be held, simply by reason of their membership, to have accepted to be subject to discriminatory treatment motivated by their group's constitutive beliefs. Consider the issue how it arose in *Boy Scouts*. Dale's membership as a member of the Boy Scouts was terminated for the discriminatory reason that he was homosexual and was vocal about his homosexuality, including by campaigning for equal rights for homosexuals. The Liberal Model would condone the USSC's decision to exempt the group from the application of anti-discriminatory legislation. As the USSC found, it was a constitutive belief of the Boy Scouts that homosexual conduct is immoral. In a liberal democracy with robust protection for freedom of association, individuals should have the liberty to form groups to express constitutive beliefs, even discriminatory beliefs. Consistent with the second proposition of the Liberal Model, it is not for the state to question the truth, reasonableness, morality, etc. of these groups. Furthermore, consistent with the anti-paternalistic arguments advanced above,⁷¹⁴ individuals with protected characteristics should be able to join groups that actively engage in discriminatory treatment of their members consistent with their constitutive beliefs (e.g. women should be able to join the Catholic Church despite its insistence that women cannot be ordained as priests). Such individuals are to be regarded as having sacrificed an aspect of their well-being, i.e. the right to non-discriminatory treatment, in favour of another, i.e. their right to association. The waiver of their right to non-discriminatory treatment should not however be considered to be permanent. It can be withdrawn through the exercise of the right to leave the group. Such a right of exit should be upheld by the liberal state to ensure that individuals can join groups with which they continue to identify.⁷¹⁵

The caveat has an implication: it does not cover discriminatory treatment which is not dictated by a group's constitutive belief. That may have indeed been the case in *Hosanna-Tabor*.⁷¹⁶ In that case a church minister was dismissed for taking disability leave after being diagnosed as narcoleptic. It was not argued that it was part of the Lutheran Church religious doctrine that individuals with disabilities ought to be treated in a discriminatory fashion by reason of their disability. Hence, such

⁷¹⁴ See page 237.

⁷¹⁵ These views were inspired by Peter Jones, 'Conscientious Claims, Ill-Founded Belief, and Religious Exemption' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing Forthcoming).

⁷¹⁶ *Hosanna-Tabor* (n 74).

discriminatory treatment was not constitutive of the group's beliefs and the church minister should not be held to have accepted to be subject to such treatment. No exemption should have been granted to the Church from the prohibition of discrimination on the basis of disability. It follows that the reasoning of the USSC in *Hosanna-Tabor* is inconsistent with the Liberal Model.

6. Conclusion

This chapter has asked whether the existence of a general right to conscientious exemption which is not a privilege of religious objectors alone can be morally defensible. It has shown that such a legal right is not only defensible but that it conforms to an attractive interpretive model, the Liberal Model, of the practice of conscientious exemptions in the US, Canada and the UK. That model has shown that liberal states that grant a general right are not only justified in doing so. They are in fact so compelled by the very principles of liberalism to which they are committed. Furthermore, the idea of the right as being a privilege of only those objecting on the basis of religious beliefs is pariah to liberalism as understood by the Liberal Model. It has been argued that whether or not the general right requires an exemption should not depend on the moral soundness, orthodoxy, reasonableness, etc. of the beliefs of the objectors. Rather, the only question which courts should ask is whether granting an exemption would disproportionately affect the rights of others or the public interest. The proportionality analysis is a structured enquiry which is however fact and context specific. Therefore the Liberal Model cannot dictate the outcome of any case without a full analysis of the facts and contexts. Nevertheless, the Liberal Model is not altogether silent. It labels paternalistic and perfectionist reasons as inadmissible to deny granting an exemption. It also demands that exemptions should not be granted from the legal prohibition of discriminatory treatment unless such treatment is directed to members of a group whose constitutive beliefs compel such discrimination.

CHAPTER 9: CONCLUSION

This thesis has made and defended three main claims. The first, a normative claim, is that a general legal right to conscientious exemption is a defining feature of a liberal democracy. This has been defended in chapter 8. It was argued that the practice of conscientious exemptions in liberal states fits with and is justified by the Liberal Model of Conscientious Exemptions. The first proposition of the Liberal Model is that a liberal state should grant a general right to conscientious exemption. It was shown that the existence of a general right is a defining commitment of a liberal democracy. A plurality of liberal values, including the state's duty of neutral pluralism, the value of autonomy, conscience, individual well-being, justifies the right. Furthermore, the general right ensures that moral minorities can enforce these moral right in a state forum, i.e. the judicial one, given that it is likely that their moral views will not be considered in the political process.

The second claim, a doctrinal one, is that the general legal right is in fact recognised in the law of three well-established liberal democracies, i.e. the USA, Canada and the UK. This second claim was defended in chapter 2, 4, and 6. It was shown that the general right is not to be found in a single rule of law in any of the jurisdictions. Rather it is grounded on different but conceptually related rules of law which are usually statutory or constitutional provisions protecting freedom of conscience and religion or prohibiting discriminatory treatment on the basis of beliefs.

The third and final claim is that the general right is equally available to those who object on the basis of religious and non-religious conscientious beliefs. This was defended doctrinally in chapter 3, 5, and 7. While in some respect this claim is contentious, especially in the US, there is good ground to believe that the law in all three jurisdictions, properly understood, does not privilege conscientious objectors whose beliefs are religious over those whose beliefs are non-religious. This third claim was also defended theoretically in part 4 of chapter 8. It was shown that the values that ground the general right are insensitive to the religiosity or non-religiosity of the objector's beliefs. No principled or pragmatic arguments were acceptable to show that religious beliefs should be privileged over secular ones. So a liberal state, at least in the context of the general right to conscientious exemption, has to move beyond the category of religion.

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