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Religion, Diversity, and Conscientious Exemptions: Reply to Contributors

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I. Introduction

The highest form of praise an academic can receive is considered and deep engagement with their work from other scholars. This praise is amplified when, as is the case here, the engagement is from scholars who I have long admired and on whose work, I have built mine. I am very grateful for the opportunity to refine the ideas presented in *A General Right to Conscientious Exemption*,[1] in conversation with such a wonderful cohort of scholars. In that book, I made three main claims. First, is that a general 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.[2] Second, the general right is in fact recognized in the law of the US, Canada and the UK.[3] Finally, I claimed that the general right is, and should be, equally available to those who object on the basis of religious and non-religious conscientious beliefs.[4] In retrospect, although I did not frame it in this way in the book, I also made another claim. I claimed that the general right should, in general, not be prioritised over the possible conflicting right of lesbian, gay, and bisexual people ('LGB') not to be discriminated against in the receipt of goods and services generally available to the public.

My four main claims have been met with a mixed bag of acceptance and resistance. None of the contributors take exception to the arguments in support of the view that there is, or should be, such a thing as a general right to conscientiously object to any legal obligation whatsoever (the first two claims). When writing the book, I thought that these would be the claims that would prove most controversial. The view, in essence, is that a person has (in the examined jurisdictions) and should have (in liberal states), a legal entitlement to protest any legal duty that conflicts with their moral views and that judges are empowered to exempt the individual from such legal duty. In the contemporary era of various pandemic-related legal restrictions, claiming that there is such a legal right should have provoked more resistance, especially if the right can be used to undermine global health. I am glad that no such resistance was forthcoming. Perhaps§ this is largely due to the fact that the general right is a limited legal right. Exemptions can be denied if doing so would protect the right of others or uphold significant public interests, such as public health.[5]

The third and fourth claims have proven to be the most controversial. Let me start with the third. The subtitle of the book is *Beyond Religious Privilege* so it is clear that it is central to the book that religious and non-religious objectors should be equally entitled to the general right. In the book, I adduce doctrinal and normative arguments to show

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[1] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press 2020).
[2] ibid 1.
[3] ibid 2.
[4] ibid 2–3.
[5] ibid 1.

that the privileging of religion, at least in the context of conscientious exemptions, is morally and doctrinally unsound. Professor Greenawalt and Professor Moon resist my arguments, seemingly as a matter of both legal doctrine and more general principle. Although I believe that their pushback is not very convincing, I concede that much more should have been said in the book about the identity and value of religion. In the book, I mainly work with the existing legal doctrine which tells us what counts as religious and non-religious. I also work with the existing legal doctrine which categorises religion as something inherently valuable' and deserves legal protection. I think that in the book I should have problematised more the legal doctrine which tells us what religion is and that it is something valuable. My more deliberated view is that, all things considered, it would be better if the law did not take much notice of things that are commonly classified as religious. Those things would very probably still receive legal protection, say under freedom of conscience, association, or speech. But the law that governs or protects them would not be triggered by the fact that courts classify them as a religion. I say more about this in Part I.

The fourth claim, that the general right should not be prioritised over LGB people's right to be free from discriminatory treatment, has also received some pushback. Dr Coyle argues that liberal law is theonormative and heteronormative. Whenever the law prioritises exemptions for religious people who have anti-LGB views, which would consolidate the existing theonormativity and heteronormativity of the existing liberal order. She wants us, building on her previous work with Professor Nehushtan,[6] to leave the liberal framework and use a queer framework. Professor Nehushtan is equally resistant to the neutral liberal framework which I employ in the book. Although he does not advocate for an alternative queer framework, he is aligned with Dr Coyle and would advocate for a perfectionist liberal framework which punishes anti-LGB individuals for their morally erroneous views.

Professor Wilson's framework is more aligned with mine. She, like myself, wants pro and anti-LGB people to co-exist under a framework of mutual dignity secured by law. She is optimistic about legislative schemes which can bypass tensions between competing groups. Although I did not express this in the book, I am in favour of legislative schemes which can bypass the culture wars,[7] but I am not so optimistic that all or even many culture wars can be bypassed. This is because the point of a liberal order, as I see it, is to simply ensure co-existence, not mutual friendship or even toleration between parties. Conflicts that end up in court are, I think, inevitable in a pluralistic liberal order. When such conflicts arise, judges need to apply a framework of mutual dignity. That will often mean that, in a social context where theological and heterosexual norms have received undue privilege, LGB people's dignity would need to be secured. However, there will be some occasions in which LGB people will lose under a scheme of mutual dignity. I discuss this in Part II.

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[6] Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019).

[7] I did express this view 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 2019) 218–220.

II. The Identity and Value of Religion: Reply to Professor Greenawalt and Professor Moon

1. The Identity of Religion in Law

What is religion? Why do people that object on the basis of their religious beliefs deserve exemptions, if at all? Do they have a better claim to be exempted than others that object to the same laws on the basis of non-religious beliefs? Professor Greenawalt and Professor Moon press me on these issues. Professor Greenawalt offers a theistic account of religion. He says that 'religion has typically been conceived as involving conceptions and practices of a relation with God and/or spiritual forces that reach beyond ordinary human relations.' Exemptions should be granted on the basis that they allow individuals to carry out 'what they see as higher obligations'. Because secular claims do not presumably involve these higher obligations, they do not automatically require exemptions. Professor Moon, drawing from the Canadian case law, similarly understands religion as a spiritual belief system. Unlike Professor Greenawalt, he does not think that a secular state can place value on the theological or spiritual nature of objectors' beliefs. Rather, religious objectors should be protected because religion is a matter of group identity which gives rise to vulnerability. So religious exemptions are warranted as a way to protect certain vulnerable groups. Professor Moon is not convinced that non-religious ideological groups are similarly vulnerable. On this basis, he explains that certain exemptions for non-religious objectors may have been granted in the Canadian case law only because they resembled common religious claims.

In the book, I answer the questions about the nature and value of religion without a deep critical discussion of the categorisation of religion employed by US, Canadian, and UK courts. I am glad to now have the occasion to set out here a more critical view of the case law. Let me focus on the US doctrine. In chapter 3, I set out three approaches that courts have been employing to identify religion, favouring the first. This is the one employed by the US Supreme Court ('USSC') in *Seeger* and *Welsh* when it interpreted the meaning of 'religious training and belief' in Federal legislation, exempting individuals from military service. In those cases, the USSC adopted a functional view of religion. Under that view, a person counts as religious if their beliefs about what is right or wrong are held 'with the strength of traditional religious convictions'[8] and if those beliefs 'occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons'.[9] I favoured this view, not only because it was the one held by the highest court of the land, but also because it supported my view that non-religious conscientious objectors, as a matter of US law, are equally entitled to the general right to exemptions because their beliefs are functionally religious.

I rejected two other judicial approaches to defining religion. The first one I rejected, call it the Criteria Approach, sets out a list of criteria, the satisfaction of which are required for something to be classified as a religion. This is exemplified by *Meyers* where the United States Court of Appeals for the Tenth Circuit endorsed the following criteria of what counts as religious:

> 1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death…

[8] *United States v Seeger* (1965) 380 US 163 (USSC) 165–166.
[9] *Welsh v United States* (1970) 398 US 333 (USSC) 339–340. Quotation marks omitted.

> 2. Metaphysical Beliefs: Religious beliefs often are 'metaphysical'…
>
> 3. Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is 'moral' or 'ethical'…
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> 4. Comprehensiveness of Beliefs: Another hallmark of 'religious' ideas is that they are comprehensive…
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> 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.[10]

While none of the criteria are exhaustive, they are instead cumulative (the more criteria are satisfied the more likely a thing will be classified as a religion). The essence is that a certain thing has to look like what courts assume to be paradigmatically religious (e.g. Christianity or Islam). In the book, I rejected this approach chiefly because it seemed to be too prescriptive in a way in which the USSC was not in *Seeger* and *Welsh*. However, on reflection, both the USSC approach and the Criteria Approach seem to reduce to the view that something is a religion if it looks or functions like a traditional religion. The main difference is that the Criteria Approach sets out, perhaps even helpfully, what looking and functioning like a traditional religion consists of. This contrasts with the third approach, which I called the No Definition Approach. This approach does not offer any criteria or function for identifying religion. Instead, whenever a person claims that their practice is religious, the court assumes the correctness of the assertion and then goes on to assess the other legal merits of the claim. This was the approach advocated by the dissenting opinion penned by Judge Brorby in *Meyers*.[11]

I now think that the No Definition Approach is the best of the three approaches (but not the best approach all things considered) because it does not assume a paradigm of religiosity (e.g., Christianity or Islam) to which other movements have to be measured against. I criticised the No Definition Approach in the book on the doctrinal ground that it still required a claimant to assert the religiosity of their claims.[12] This conflicted with the approach in *Welsh* where a self-declared non-religious claimant was nevertheless classified as religious by the USSC because his beliefs functioned, in the USSC's view, as a religion in his life. I remain uncomfortable with the idea that a court can tell someone that their beliefs are religious despite their protestation to the contrary. But I have become, since the publication of the book, even more uncomfortable with the idea of courts putting legal significance on something being categorised as religious. Let me explain why.

Social practices do not come neatly labelled as religious or non-religious. Identifying a particular tradition as religious, inside, and outside of the law, relies on certain social, political, and ideological assumptions. Nowadays, in the cultural West, we commonly identify religion as a belief system, usually one that has to do with divinities, or that in any event has to do with (to take the first criteria in *Meyers* as paradigmatic)

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[10] *US v Meyers* (1996) 95 F 3d 1475 (Court of Appeals, 10th Circuit) 1484.
[11] ibid 1491–1492.
[12] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (n 1) 66–67.

'fundamental questions about life, purpose and death'.[13] But this understanding of religion as a belief system that has something to do with divinities, spirituality, and existential questions, is a contingent understanding in terms of both time and space. In the cultural West, for example, religion used to be understood not as a belief system, but instead as a virtue related to justice. Thomas Aquinas famously argued that religion is the virtue of giving to God what was due to him, i.e. worship.[14] Because religion was a virtue, and was within the competence of the state to inculcate virtue in its subjects, according to Aquinas it was proper for the state to compel its subjects to worship the Christian deity.[15]

The idea of religion as a virtue that is proper for the state to cultivate in its citizens is lost to Western courts and scholars (we do not see it mentioned in the case law or in the scholarly contributions to this issue). And so it should be. This is because the political and ideological assumptions that lead to endorsing this virtue-based understanding of religion are contrary to the dominant Western ideology which is liberalism. Liberalism says, among other things, that individuals should be free to develop their own conception of the good life, that individuals have certain rights against the state, and that the legitimacy of the state depends on individual consent and/or respect for individual rights.[16] Understanding religion in the same way as Aquinas violates several of these ideological commitments. Most explicitly, it violates the liberal commitment that individuals can choose their own way of life and have rights against being forced to worship a deity. On the other hand, understanding religion as a belief system already puts it somewhat out of the reach of the state. The state does not yet have the technological means to compel beliefs. Sure, it can coerce the manifestation of certain beliefs by, for example, criminalising them. Doing this incentivises the holding of certain beliefs. It can also mount concerted campaigns to inculcate certain beliefs through state-controlled media or, more relevant to contemporary times, through social media. In either scenario, however, there is still the live possibility that individuals think for themselves and maintain the beliefs to which they are committed.

The main point of the previous paragraph is that it is the ideology of liberalism that leads Western courts and scholars to categorise religion as a belief system which has to do with deities, spirituality, or existential questions. Religion is therefore not something with a fixed identity which does not change across time and space. Rather, religion, or better our conceptualisation of religion, is dependent on the social, political, and ideological commitments of our times. States not committed to liberalism will understand religion differently. For example, the Egyptian constitutional tradition, which is not committed to liberalism, understands religion as a matter of fixed personal identity. There are only three fixed identities (i.e. Islam, Christianity, and Judaism).[17] A person is born into these identities and cannot normally change them. It is not possible for most members of the Muslim majority population to legally escape this categorisation.[18] If, as the argument indicates, religion is an unstable concept lacking a fixed identity across space and time, then it follows

[13] *Meyers* (n 10) 1484.
[14] ST II-II, q. 81, a. 7.
[15] ST II-II, q. 10.
[16] Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press 1993) 37, 50.
[17] See articles 2 and 3 of the Egyptian Constitution.
[18] Egyptian courts have categorised apostasy from Islam as against public order. See Court of Administrative Justice No. 35647, Judicial Year 61, 29 January 2008.

that we should not really encourage Western courts to place much emphasis on it. In fact, we would be better off without such an unstable concept.

2. Law without Religion

What would be the implication of doing without religion in law? My book offers a compelling answer at least in the context of conscientious exemptions. As the Canadian and UK chapters show, not much would change if exemptions were not granted on the basis of an objection being categorised as religious. Objectors whose beliefs are not categorised as religious are, as a matter of legal doctrine and general principles, entitled to legal protection. Both Canadian and UK law in fact recognise the category of conscience. If courts in these jurisdictions stopped granting exemptions on the basis of religion, they would be able to grant exemptions on the basis of conscience. To be sure, and this is not discussed in the book, historically conscience used to be understood as a synonym for theistic beliefs. For example, Roger Williams, the person responsible for one of the earliest constitutional protections of religious freedom in what would become the US, used conscience and theistic beliefs almost interchangeably. For Williams, conscience was

> a persuasion fixed in the mind and heart of a man, which forces him to judge (as Paul said of himself, a persecutor) and to do so and so, with respect to God [and] his worship. This conscience is found in all mankind, more or less, in Jews, Turks, Papists, Protestants, and Pagans.[19]

However, as chapters 5 and 7 of the book show, conscience in contemporary courts is no longer understood along these theistic lines, and rightly so. The ability to judge right and wrong is separable from theistic assumptions.

It follows that in Canada and the UK the legal recognition of religion is superfluous for the purposes of conscientious exemptions. However, in the US, the situation is a little more complicated. There is no constitutional category of conscience, unlike in Canada or in the UK. In the book, I sought to get around this obstacle by arguing that the most compelling understanding of the concept of religion was that in *Welsh,* which defines religion as religious even non-religious worldviews as long as they fulfil the same function of traditional religion in the life of the individual. This enabled me to argue that the general right to conscientious exemption is equally available to those that object on the basis of religious and non-religious beliefs. But I now see that this is hugely problematic if, as I now think, we ought to expunge the category of religion from the law. If US judges no longer gave legal significance to 'religion' then the general right would no longer have a protected class. This is because almost all of the rules of law that ground the general right in the US work on the basis of 'religion.' Even the exceptional ground that does not use the term religion, the doctrine of Church Autonomy, uses the term 'church' which is intimately bound with religion (especially of a Christian kind).

I, therefore, at least for now, think that we are stuck with religion in US law. The cost of doing without it is too high. It is better to work with the unstable concept of religion which can, and should, be understood expansively to protect conscientious objectors of all sorts, rather than not protect anyone. However, it may be that there is a way out. Some of it was already sketched out in the discussion of Church Autonomy in chapter

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[19] James Calvin Davis (ed), *On Religious Liberty: Selections from the Works of Roger Williams: 96* (Annotated edition, Harvard University Press 2008) 275.

3 of the book.[20] There I argued that the doctrine of Church Autonomy is not special. Remember that the Doctrine of Church Autonomy exempts churches from a wide array of legal duties which would interfere with the autonomy of the institution. I showed that a similar doctrine exists under the doctrine of freedom of expressive associations. Institutions with expressive purposes which are constitutionally protected, such as the Boy Scouts or commercial organisations such as the Rotary Club, are also exempt from certain interferences with their autonomy. Why does this matter? It opens up the possibility that we can ground a general right to a conscientious exemption in categories other than religion and in the category of conscience which is not recognised in the text of the Federal Constitution. Perhaps we have to look more creatively at other legal categories, such as the constitutionally protected rights to free speech, association, due process, etc. It may be that these categories already protect a right to dissent from the law. We already know that freedom of expressive association exempts organisations from certain legal duties. Free speech may also exempt individuals from legal duties. For example, the constitutional right to free speech exempted the children of Jehovah's Witnesses from having to salute the flag in *Barnette*.[21] Perhaps free speech, coupled with other rights, is sufficient to ground a general right to conscientious exemption. We would need to look deep into the law of the US to find an answer to this query. I leave that project for another day.

3. The Value of Religion

From the foregoing, it should not be surprising that I do not think that religion qua religion has any value deserving of legal protection. This is because the category of religion is unstable and contingent. How can there be value in something which we cannot categorise on a principled basis? For example, we commonly define Christianity as a religion whereas we do not categorise the practice of human rights as a religion. Both involve forms of worship: the former directed to a man believed to be also divine; the latter directed to humanity as such in the belief that it is inherently valuable. Both involve institutions dedicated to propagating this form of worship. The former has different sets of churches, priests, and pastors; the latter has NGOs, domestic, international, and regional courts, and human rights lawyers. Both have sacred texts: the former has the Bible; the latter has domestic, international, and international bills of rights. What, other than their content, sets Christianity and human rights law apart? Why are both not categorised as religions? Perhaps the fact that one is theistic, and the other is not? But, if we go back and look at the criteria the courts have set out for religiosity, e.g., in *Meyers* or *Welsh*, they do not require that a belief system be theistic in order to be religious. In fact, courts have consistently held that theism is not a necessary ingredient for religiosity because that would exclude, e.g., traditions within Buddhism and Confucianism.[22]

I do not wish to argue that courts categorise things as religious on an arbitrary basis. There are often non-capricious reasons to categorise things such as Christianity as a religion and things like human rights law as non-religious. I have argued in another venue that the category of religion in Western courts serves the political function of keeping certain things that look like Christianity out of the jurisdiction of the state

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[20] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (n 1) 92–99.

[21] *West Virginia State Board of Education v Barnette* 63 SCt 1178.

[22] *Regina (Hodkin and another) v Registrar General of Births, Deaths and Marriages* (2013) UKSC 77 (UK Supreme Court) [51]. *Malnak v Yogi* (1978) 592 F 2d 197 (Court of Appeals, 3rd Circuit) 206.

because doing otherwise would threaten civil peace.[23] Religion, in this view, is an individual choice and not something which the state is in the business of enforcing. This is a reaction to Western history where Christianity, and things that looked like it, posed a threat to civil peace when states had jurisdiction to coerce adherence to them. People were persecuted because of their differing conceptions of e.g., the three-part personhood of the Christian deity or because of differing views on transubstantiation. Again, Roger Williams was adamant that religion was a matter of conscience best left to the individual rather than the state because he had experienced first-hand persecution for his political and theistic views.[24] In this approach, Christianity is a religion because historically it created a threat to civil peace when it was a matter for the state to enforce. On the other hand, human rights law does not have the same history of being an excuse for persecution (hopefully the contrary is true) so the state has no reason for categorising it as a thing that is outside of its jurisdiction.[25]

While it is true that definitions of religion are not arbitrary, they are nevertheless contingent. For example, while Christianity and things like it were historically a threat to civil peace when in the hands of the state, they were and are not uniquely so. Nationalism, fascism, communism, totalitarianism, Nazism, and many other isms were and remain live threats to civil peace. This does not mean that they now need to be categorised as religions. This suggests that the non-arbitrary and contingent reason for categorising things like Christianity as religions in Western law is, after all, not very convincing at all. So, I can legitimately remain sceptical of the role and value that religion plays in law.

The alternatives provided by Professor Greenawalt and by Professor Moon are equally not convincing. Professor Greenawalt argues that religious obligations involve obligations which are perceived to be of a higher order than that of the state. This is his reason for granting religious exemptions. But this is not a very persuasive reason. First of all, given the instability of the category of religion, his theocentric understanding of religiosity has been universally rejected by the contemporary Western courts. The liberal commitment to pluralism, as I have argued elsewhere, has led them to understand religion in not exclusively theistic terms.[26] Judge Adams, another US judicial exponent of the Criteria Approach, for example, refused to include theism within his criteria simply because he did not want to exclude Buddhism, Confucianism, and other non-theistic belief systems within the legal category of religion.[27] On this view, if religion need not involve divinities, why would religious obligations be accepted as being of a higher order than non-religious obligations? In fact, it would follow that the obligations of a non-theistic Buddhist should be treated the same as those of a non-theistic and non-religious moral objector. But then it would also follow that the state is allowed to treat certain religions better (e.g., by granting them exemptions) because they are theistic rather than non-theistic. Most versions of Christianity would be allowed exemptions, but the non-theistic versions of Buddhism would not be. This would be the kind of ideological discrimination that contemporary

[23] John Adenitire, 'Religion as Liberal Politics' (unpublished manuscript).
[24] For a helpful and concise biography of Roger Williams see Charlotte Carrington-Farmer, 'Roger Williams and the Architecture of Religious Liberty' in Md Jahid Hossain Bhuiyan and Darryn Jensen (eds), *Law and Religion in the Liberal State* (Hart Publishing 2020).
[25] Although note that the protection of human rights and democracy have, at least since the illegal invasion of Iraq by the US and UK, been used as false pretexts to justify wars of aggression.
[26] John Adenitire, 'Religion as Liberal Politics' (n 23).
[27] *Malnak v. Yogi* (n 22) 206.

Western courts have warned against. For example, it would go against the approach taken by the USSC in *Welsh* and *Seeger*.

More fundamentally, the approach of Professor Greenawalt is not only doctrinally suspect, it conflicts with the liberal commitment to ethical pluralism. I made the case for ethical pluralism in the book, and will not repeat it here (in part 4 of chapter 1 and in chapter 8). But the argument about the instability of the concept of religion actually reinforces the argument I made there. I have been arguing here, in essence, that there is ultimately no compelling reason to distinguish religion from non-religion. If that is so, what courts and ordinary people commonly label as religions are just lifestyles, or to use the liberal vocabulary, conceptions of the good. The liberal project, as I will go on to outline in more detail in part II, is to enable the co-existence of different conceptions of the good without giving preference to any of them. The liberal project is committed to neutrality (a much-misunderstood concept as I will explain in part II) between conceptions of the good, irrespective of whether they are theistic, atheistic, non-theistic, agnostic, spiritual, metaphysically non-naturalist, metaphysically naturalist, etc. Professor Greenawalt would abandon that liberal commitment without a compelling reason.

Professor Moon would not abandon that liberal commitment lightly but is wedded to the view that there is something about religious group identity which warrants special protection: they are historically vulnerable. But he falls prey to a similar critique to that which undermined Professor Greenawalt. Professor Moon cannot tell us what is distinctive about religion so that we are able to identify what constitutes a religious group as opposed to a non-religious group. It does not help his case to rely on the Canadian judicial notion of religiosity as a spiritual belief system. The judicial construction of religiosity, I have been arguing, is contingent and, more importantly, not compelling. In any event, the worry about group vulnerability is not distinctive to traditions which have been traditionally classified as religious in the liberal West. Sure, Christians have been and continue to be persecuted. But so are atheists, Humanists, secularists, LGBT people, ethnic and racial minorities, and many more groups. If, as I have argued, there is no compelling basis to distinguish the religious from the non-religious, then our concern should be to protect all vulnerable individuals and groups. Liberalism, as I have said, is committed to ethical pluralism. The vulnerability of one group is not more worrying that the vulnerability of another group. The persecution of Christians should worry us as much as the persecution of e.g. non-theistic vegans.

III. Liberalism as Inclusivity: Reply to Dr Coyle, Professor Nehushtan, and Professor Wilson

4. Diversity and Freedom

The fundamental problem to which contemporary liberalism seeks a solution is the possibility of a legitimate polity which is characterised by deep disagreements between its members. How can we design a legitimate political order in which people with different and opposing ideological commitments can co-exist without violence? This is a question prominently raised by Rawls in *Political Liberalism*[28] but others following his work, have also seen this as the chief problem to be addressed by liberal politics.[29] To be sure, the framing of this question is doubly partial. First, it is partial to the liberal tradition because deep disagreements between members of a polity are

[28] John Rawls, *Political Liberalism* (Expanded Edition, Columbia University Press 2005).
[29] Jonathan Quong, *Liberalism without Perfection* (Oxford University Press 2010) 5.

made possible by the fact of political freedom to pursue different and conflicting ideological commitments. Without political freedom and associated rights to think and be different, citizens are more likely to be homogeneous in their ideologies. Illiberal states that require uniformity, such as Egypt which does not allow Muslims to renounce Islam, are not likely to host much ideological diversity. The question is also partial in a second way. It assumes that ideological pluralism is not only a necessary feature of a liberal order, but also a valuable one. The question assumes that it is good that there are Christians, atheists, Muslims, secularists, Hindus, vegans, LGBT supporters, LGBT detractors, etc. Diversity is good not because these different ideologies are all morally correct or are all equally valuable. Rather, because it is the result of freedom and results in more options which citizens can choose, and because freedom is assumed to be the chief value within liberalism. Diversity is also considered valuable.

But even if diversity is valuable as the outcome of freedom and because it enhances freedom, it does create a problem. The problem is the threat of social and political disunity and civic discord. Diversity results in conflicting and incompatible ideologies. In a liberal society, I can be a Christian who believes that homosexuality is a sin which will result in social degradation and eternal damnation. Equally, in a liberal society, I can be a gay person who believes that theology has been, and continues to be, the source of extreme social injustice. When these viewpoints collide, civil peace may be disturbed when each attempts to gain an advantage over the other. Liberalism is thus confronted with the problem of maintaining pluralism, which is valuable, but also of constraining its side-effect which is civil discord. How is this to be done?

A possible strategy, suggested by both Dr Coyle and Professor Nehushtan, is for the liberal state to take sides between these conflicting ideologies. It will prioritise those ideologies which are morally correct and will penalise those that are not. The homophobe Christian will be penalised by liberal law. But the LGBT activist will be put at an advantage. They have argued for this position in previous joint work, in individual work, and in the contribution to this volume.[30] But this is not a solution which, in my view, is open to liberals. Liberals cannot take sides because they are committed to freedom and to diversity. Taking sides reduces diversity and with it reduces freedom. Is there another way? In chapter 9 of the book, I suggested an alternative way. I argued that in the context of conflict between service providers who object to LGB sexual mores and LGB patrons, the general right should not be prioritised over the right to be free from sexual orientation discrimination in the provision of services. Importantly, that argument did not rest on the view that the latter right is more important than the former right. The core argument of that chapter is that the law should protect the equal social standing of both opposing parties, i.e. it should apply a framework of equal dignity. As it happens, allowing LGB individuals to be legally denied particular services (wedding cakes, flowers, etc.) would result in LGB people being treated by the law as second-class citizens. This is not consistent with the version of liberalism which I defended in the book and which I have been reiterating here. The law of a liberal state cannot allow certain citizens to be denied goods and services available to every other person simply because of their personal identity or because of their sexual orientation. Doing so would be contrary to the commitment to diversity which is the hallmark of liberalism which I have been defending. This concern for diversity extends both to LGB individuals and to their detractors. They too should

[30] Yossi Nehushtan and Stella Coyle (n 6); Yossi Nehushtan, 'Conscientious Objection and Equality Laws: Why the Content of the Conscience Matters' [2019] Law and Philosophy.

be able to live according to their beliefs and should not be denied legal benefits (including exemptions) simply because of a judgement that their way of life or theology is morally unworthy. In sum, a liberal state should not take sides as to whether LGB mores or anti-LGB mores are more valuable. Rather, its main consideration should be how to enable both to live together while their rights and social standing are adequately protected.

5. On the Supposed Impossibility of Liberal Neutrality

The upshot of the discussion of the previous section is that liberal law should be neutral between the merits and demerits of support for or opposition against LGB mores or, for that matter, theological doctrines which preach the moral inferiority of LGB relationships. Of course, a liberal state cannot be neutral about the equal moral standing of LGB persons or, in the cases discussed in chapter 9, Christians opposed to LGB sexual relationships. Liberalism is not value-neutral. Liberalism, even the so-called neutral liberalism championed by Rawls and others, is not value-neutral. And pace the contribution of Professor Nehushtan, it has never claimed to be. Liberalism is committed to the value of freedom, and with it, to the value of diversity. It takes a neutral stance towards conflicting ideologies, not because it is value-neutral, but because it seeks to include as many ideologies (or comprehensive doctrines to use Rawls' terminology) within a peaceful and legitimate political order characterised by diversity. Rawls himself said as much in *Political Liberalism*:

> Political liberalism does not question that many political and moral judgments of certain specified kinds are correct, and it views many of them as reasonable. Nor does it question the possible truth of affirmations of faith. Above all, it does not argue that we should be hesitant, much less sceptical, about our own beliefs. Rather, we are to recognise the practical impossibility of reaching a reasonable and workable political agreement in judgment on the truth of comprehensive doctrines, especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences.[31]

This stance of inclusive neutrality, or neutral pluralism (the term which I use in the book), also extends to conflicts between the general right to conscientious exemption and the prohibition of sexual orientation discrimination.

Professor Nehushtan claims that exemptions from such anti-discrimination legislation is incoherent because the legislation is enacted in the first place to combat homophobes and religious conservatives who would unjustly discriminate against LGB people. Why, goes Professor Nehushtan, would a state exempt the very same people (i.e. homophobes and religious conservatives) for whom the prohibition of sexual orientation was put in place? But this charge of incoherence is only valid if the purpose of legislation prohibiting sexual orientation discrimination is to punish those that oppose LGB mores. I doubt that this is a legitimate purpose. A more attractive view is to characterise the purpose of such legislation as securing the equal social standing of LGB people in the public marketplace. This is because liberal law cannot and should not punish those that oppose LGB mores because they too are, and should be, equal members of a society characterised by intractable ideological differences. Furthermore, as I show in chapter 9 of the book, detractors of LGB mores are free in liberal societies to live according to their anti-LGB ideology. Several principles of anti-

[31] Rawls (n 27) 63.

discrimination law, free association, and free speech protect their ability to live according to their ideology. Consequently, analytically rather than morally, it is not attractive to say that the purpose of anti-discrimination law is to punish anti-LGB people (e.g., homophobes and religious conservatives). This is because the same anti-discrimination laws and legal principles that protect LGB people also protect anti-LGB people. Accordingly, the purpose of such legislation is better viewed as securing the equal social standing of different groups of people rather than punishing some of them.[32]

6. On Theonormativity and Heteronormativity

In her contribution, Dr Coyle pushes me to embrace a queer lens to determine how the conflict between the general right and anti-discrimination legislation should be resolved. She says that the liberal framework to which I am committed betrays the underlying theonormativity and heteronormativity of existing law. By this, she means that the law of the jurisdictions under consideration have been built on norms which provide an advantage to theological worldviews, especially of a Christian kind, and to worldviews which advantage heterosexuals while disadvantaging those who are not committed to theological views and those who are not heterosexual. She says that recourse to certain liberal rights, including notions of freedom of religion, conscience, etc., is often just a pretext to reinforce the theonormativity and heteronormativity of the law. I do not doubt that the default position of the law in liberal states is theonormative, especially if we equate theonormativity with an undue privilege to traditions commonly labelled as religious. After all, the subtitle of my book is *Against Religious Privilege*. The book would not have had to be written if there was not a concern that theological traditions, such as Christianity and Islam, were being given an undue advantage in the law on conscientious exemptions. Nevertheless, and this is the outcome of the third claim of the book, liberal law has sufficient doctrinal and normative resources to push back against this undue privilege. In the context of the general right to conscientious exemption, at least, the book shows that the undue privileging of what is commonly referred to as religion is being consistently undermined. And this is a good thing: essentially, the things that people call religions are simply versions of the good. Within the liberal framework which I have been defending, and which Dr Coyle wants to push back against, there should not be any undue privilege given to any version of the good. So, contrary to what Dr Coyle argues for, it is the liberal framework which is undermining theonormativity.

But what about heteronormativity? Is the liberal framework unduly privileging heterosexual norms while othering LGB people? No doubt the law of self-labelled liberal jurisdictions has traditionally undermined the equal social standing of LGB people. In chapter 9, I highlight how in several US states, for example, people can still be denied employment and housing simply because they are LGB. We must however distinguish between self-proclamations to be liberal and actually being liberal. For example, John Stuart Mill is often referred to as the father of modern liberalism, mainly because of his defence of the harm principle which prohibits the use of legal

[32] This protection rather than punishment purpose of anti-discrimination law also better aligns with indirect discrimination law and certain aspects of direct discrimination law where an intention to discriminate is not a requirement for liability. If we take criminal liability as the paradigm of legal punishment, then anti-discrimination liability substantially differs from it. In criminal law it is standard, although not universal, that the offender has an intention to commit a particular offence before incurring liability. This is not the case with anti-discrimination law given that an intention to discriminate is not a requirement for liability.

coercion for paternalistic and moralistic reasons.[33] Yet, we should remember that his liberalism was at best partial, given that his harm principle did not extend to people who he considered uncivilised, e.g. the subjects of European colonisation in India and Africa, and was himself a practising colonialist. But liberalism requires upholding the liberty of legal subjects, whether or not they are of European, Indian, or African descent. Similarly, claims by the jurisdictions analysed in the book to be liberal have to be measured against liberal principles. Liberalism, I have been arguing, requires that the law upholds the equal social standing of LGB people (as well as anti-LGB people).

How does the above relate to Dr Coyle's claim that liberal law is heteronormative? I think Dr Coyle rightly targets the law of jurisdictions which wants to use the liberal label. But those jurisdictions can use a label without living up to the demands of that label. The law of the US, for example, to the extent that it denies protection to LGB people falls short of liberal demands. Its use of the liberal label is misplaced at least in that regard. So, US law can be heteronormative without that fact undermining liberalism. This reply to Dr Coyle should not be construed as making liberalism a moving target. That is a common tactic in popular discourse. For example, when certain theological frameworks are criticised as being used to justify violence (e.g., crusades, terrorist attacks, etc.) it is common to hear the retort that those committing those acts of violence are not really committed to the framework (e.g., 'they are not true Christians, Muslims, Jews, Hindus, etc.'). We should be wary of making ideologies too immune from critiques of how they are practised. After all, ideologies, like everything else, are bound up with a certain history and practice. If certain ideologies are consistently being used to justify immoral or unjust practices, their malleability to be used for ill and good is a serious enough reason to be sceptical of their coherence.

In the context in which I am writing, however, I do not think that liberalism can be accused of being such a malleable ideology that can be used with a straight face to justify heteronormativity. After all, Dr Coyle consistently approves of my discussion in chapter 9 of the various cases in which Christian vendors refuse to serve LGB people. Her only objection is to my approval of the case of *Elane Photography*.[34] In the book, I argued that anti-LGB wedding photographers as well as other service providers similarly situated should be exempt from being compelled to participate in a rite with moral significance to which they object (i.e. LGB weddings). My reason for this conclusion had nothing to do with being pro or anti-LGB or with heteronormativity. My reason was squarely centred on the negative right to freedom of conscience. Individuals should not be compelled by the state to participate in ceremonies to which they object, whether they be church ceremonies, marriage ceremonies, Ku Klux Klan gatherings, gay parades, conservative party conferences, etc. This is not a pretext for heteronormativity. Instead, it is a generally applicable principle which says that you should not be forced to spend time with those you detest when they are doing things you detest. Of course, I think it should apply to anti-LGB people who do not want to participate in weddings between lesbians. I also think it applies to lesbians who do not want to participate in heterosexual weddings, say because they think that heterosexual marriage is inherently patriarchal.[35] I do not see how this principle which applies

[33] John Stuart Mill, *On Liberty, Utilitarianism and Other Essays* (Mark Philp and Frederick Rosen eds, 2 edn, OUP Oxford 2015).
[34] *Elane Photography, LLC v Willock* (2013) 309 P 3d 53 (Supreme Court of New Mexico).
[35] Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (OUP Oxford 2017).

impartially between LGB people and anti-LGB people is a pretext for heteronormativity.

7. On Mutual Contempt

I have been defending a version of liberalism which values diversity because diversity is a product of freedom and also enhances freedom. Liberalism seeks a legitimate political order in which several versions of the good, sometimes incompatible ones, live together in civil peace. We should not, however, think of this view as a rosy one where citizens pay respect to each other. When I say civil peace, I only mean to describe a state of affairs where citizens live with each other in 'unmurderous coexistence'[36]. I use the phrase literally: liberalism, in my view, is compatible with a political order where citizens hate each other but refrain from killing each other. When they fight against each other they do so through legal means. When they go beyond the law, the state refrains from their actions. There need be no social harmony, no mutual appraisal respect, no mutual toleration, no civility. Our culture wars are compatible with the version of liberalism I have been defending. Anti-LGB people may try their best to undermine the legal entitlements of LGB people, for example by campaigning to rescind gay marriage or not to extend anti-discrimination norms. LGB advocates may campaign to restrict religious exemptions or use hate speech laws to pursue those that cite anti-LGB biblical passages.

Does this not show that the view of liberalism which I have been defending is not an attractive one? Should we not aim instead for a liberal polity where 'through dialogue and negotiation, these communities can reach mutually acceptable laws'?[37] This is, in essence, the message of Professor Wilson's contribution. She wants the state to avoid, as much as possible, conflicts between ideologically opposed groups, focusing on the culture wars between conservative Christians and LGBT advocates. She believes, drawing from her own experience of helping to achieve the Utah Compromise, that it is possible for lawmakers to avoid such conflicts. I share her view that we should try to avoid as much as possible such conflicts. I have argued, for example, that it may be legitimate to accommodate wedding state officials that object to officiating same-sex weddings through a scheme that requires all prospective spouses (independent of their sexual orientation) to pre-register. The relevant wedding office can then assign non-objecting marriage registrars to LGB weddings. In this way, LGB people receive the service they want, and objecting registrars do not violate their conscience.[38]

While I share Professor Wilson's view that we should try to avoid as many conflicts as possible and that a little bit of goodwill and ingenuity would produce that outcome, I do not share her optimism that many, or even most, conflicts of rights can be avoided through legislative and or administrative schemes. Perhaps this sceptical view is just a reflection of having read too many cases where pro and anti-LGB rights advocates clash in a court of law. However, I do not think that it is just that. On both sides of the Atlantic there are organisations and individuals whose chief mission is to ensure that these conflicts play out in court. We can see them aligned, for example, in the latest

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[36] Teresa M Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (Harvard University Press 2017) 20.

[37] William N Eskridge Jr and Robin Fretwell Wilson (eds), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge University Press 2019) 1.

[38] I did express this view in John Adenitire, 'Who Should Give Effect to Conscientious Exemptions? The Case for Institutional Synergy' (n 7) 218–220.

reiteration of the UK gay cake case, *Asher's Baking*,[39] now in the European Court of Human Rights ('ECHR').[40] The ECHR declared inadmissible Mr Lee's complaint that the UK Supreme Court violated his Conventions rights under Arts 8-10 and 14 when it rejected his claim that he had been discriminated against by Asher's Baking's refusal to provide a cake with the logo 'Support Gay Marriage'.

The judgment is impressive not because of the technical grounds on which the ECHR relied – the Court found that Mr Lee should have raised a possible violation of his Convention rights domestically. It was impressive because it showcased several prominent individuals, governments, and organisations who have an active interest in litigating these conflicts of rights. Interventions were made or applied for by the McArthur's and Asher's Baking; the Polish Government; Alliance Defending Freedom; The Christian Institute; Mr Jonathan Cooper OBE and Professor Paul Johnson; the European Centre for Law & Justice; the Observatory on Intolerance and Discrimination Against Christians in Europe; Ordo Iuris and Professor Robert Wintemute on behalf of Fédération Internationale pour les Droits Humains; the Committee on the Administration of Justice; the AIRE Centre; the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association; the Network of European LGBTIQ Families Association; and the European Commission on Sexual Orientation Law. Given this showcase of interested parties who have a long-lasting interest in seeing these disputes play out in court – some of them have built their livelihoods on these sorts of cases – I am sceptical that legislative or administrative interventions will be sufficient any time soon.

Besides my scepticism, I am less wedded to Professor Wilson's view that conflicting parties should seek to resolve their conflicts through dialogue and negotiation. I think it is fine for warring parties to seek to resolve their disputes through recourse to vilification, insults, and ultimately through courts of law. It is not that I think that vilification, insults, and judicial litigation are wonderful things. They are not. However, I think that they are better than the alternative offered in non-liberal states: deadly persecution because of one's beliefs or sexual orientation.[41] Liberalism allows individuals to be intolerant toward each other, although it does not encourage them to be. It only requires that opposing parties fight through lawful means. That may not be a lofty ideal, but it is better than the non-liberal alternative of persecution.

8. Conclusion

I am extremely grateful to the contributors for their engagement with my work. They have pushed me to rethink some of the views I held when writing *A General Right to Conscientious Exemption*. The scholarship is at its best not necessary when it sheds light on the truth; although that would be a great and welcomed achievement. Rather, scholarship is at its best when it inspires others to search for the truth. I do not think that all the views, claims, or arguments in the book are true. In fact, I have spent much of this reply to contributors acknowledging what I would have done differently and exploring ideas which I had not developed when writing the book. I am grateful that the contributors have inspired me to continue my search for the truth in my

[39] *Lee (Respondent) v Asher's Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49.
[40] *Lee v United Kingdom (Application no 18860/19)* [2022] unreported (ECtHR).
[41] John Olusegun Adenitire, 'Conflicts Between Religious Freedom and Sexual Orientation Non-Discrimination: Should "Mere Civility" Suffice?' (2020) 9 Oxford Journal of Law and Religion 229, 234–235.

scholarship. I take it, from the depth of their engagement with my work, that I have also inspired their own search. I am eternally grateful to have the privilege of shedding at least a dim and weak light on each other's journey to the truth.